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**OVERSIGHT HEARING BEFORE THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
ON THE
LIKELY EFFECTS OF PENDING PROPOSALS
TO LEGISLATIVELY REDEFINE THE CONSTITUTIONAL RIGHT
TO JUST COMPENSATION FOR PROPERTY OWNERS
(H.R. 925, S. 605)**

JULY 12, 1995

Mr. Chairman, and Members of the Committee: I appreciate this opportunity to testify today on proposals to provide compensation to owners for reductions in value of their property over a specified percentage resulting from federal regulation.

I testify today in my personal capacity as a law professor who teaches and writes in the area of real property law and constitutional law. It is my hope that these views may be of use to the Committee in clarifying the vexing legal and policy issues before it.

The compensation bills now before this Committee, S. 605 and H.R. 925, in my opinion represent a salutary effort to correct the present imbalance between governmental powers and private rights. While these bills are not perfect, I expect that their enactment would provide fair treatment to individuals while at the same time encouraging the development of more socially efficient and fair environmental regulations.

The importance of property rights

At the outset, I would like to say a few words about the importance of property rights. This may seem curious, since there is little sentiment articulated in the United States against private property as such. There has been, however, a tendency among opinion leaders, government officials, and judges in the United States to think of “property rights” as a useful notion when it does no great inconvenience, but yet not quite on par with more “fundamental” rights, such as the right of free association. I’m not sure why this is so,¹ but I want to set the record straight on this point.

Property rights was the “great focus” of the Framers.² Indeed, during the great debate in the Federal Convention of 1787 which gave birth to the Constitution, Alexander Hamilton declared that the “[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property.”³ James Madison declared that “Government is instituted to protect property of every sort; . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever

¹ Judge Easterbrook of the U. S. Court of Appeals for the Seventh Circuit has commented: “Intellectuals feel free to regulate the economic lives of others but resist the regulation of the most important elements of their own lives.” Frank Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J. L. & PUB. POL. 91, 98 (1987).

² JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 92 (1990) (“The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.”) *Id.*

³ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 302 (Max Farrand ed. 1911).

is his *own*.”⁴ These views echo the admonition of John Locke, who was perhaps the greatest intellectual influence on the Framers, that “the preservation of Property” is the “end of Government.”⁵

The Constitution, of course, does not create private property, but rather presupposes its existence. Otherwise there would be no need for the Takings Clause of the Fifth Amendment,⁶ nor for provisions against the taking of “life, liberty, or property, without due process of law” in Fifth and Fourteenth Amendments.

Least one think that this Eighteenth Century wisdom is no longer relevant, in the 1930s Walter Lipmann wrote that “the only dependable foundation of personal liberty is the personal economic security of private property.”⁷ Even Charles Reich, the Yale law professor who authored that paean to the counter-culture of the 1960s, *The Greening of America*, has written:

Property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and antisocial activities are given the protection of law.... Indeed in the final analysis the Bill of Rights depends on the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must largely be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.⁸

It is important to note that writing for the Court in case of *Dolan v. City of Tigard*,⁹ Chief Justice Rehnquist declared: “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.” This may indicate a breaking away from

⁴ JAMES MADISON, PROPERTY (1972), reprinted in 14 PAPERS OF JAMES MADISON 266-268 (emphasis in original).

⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT, BOOK II, ¶ 138 (“The Supreme Power cannot take from any Man any Part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property.” *Id.*

⁶ “[N]or shall private property be taken for public use, without just compensation.”

⁷ WALTER LIPMANN, THE METHOD OF FREEDOM 100-102 (1934).

⁸ Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

⁹ 114 S.Ct. 2309, 2320 (1994).

the Court's long-standing treatment of property rights as less important than more "fundamental" rights.¹⁰

No doubt it is tempting to say that enhancement of the environment is an unmitigated good, and that the interests of individuals that make this goal impracticable must yield. No one was more aware of the inclination than Justice Oliver Wendell Holmes. In *Pennsylvania Coal Co. v. Mahon*,¹¹ the first case in which the Supreme Court found that a regulation might constitute a compensable taking, he declared: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹²

To the extent that environmental regulation is desirable (a theme to which I will return), respect for individual property rights does not stand in the way. To be sure, for government to have to appropriate funds to obtain any needed private property is a burden—just as is making payments of interest and principal on the national debt.

The case for compensation

While I believe that the Supreme Court's regulatory takings jurisprudence is evolving towards increasing recognition of a broad constitutional requirement for compensation, I will discuss that point when addressing reasons advanced against compensation. Here I will discuss only reasons why I believe that the Congress ought to enact compensation as a matter of legislative discretion.

Fairness

First and foremost, compensation ought to be enacted as a matter of fairness. In spite of a smattering of case law¹³ and some academic commentary to the contrary,¹⁴ the right to make productive use of one's land has always been an integral component of private property. While one cannot use private land to commit a nuisance affecting another (a topic to which I will return), owners never have been regarded as obligated to keep their lands in a pristine state for the enjoyment and benefit of others. Even those opposed to this state of affairs acknowledge that, whatever else it might lead to, the Supreme

¹⁰ See, *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹¹ 260 U.S. 393 (1922).

¹² *Id.* at 416.

¹³ Most notably, *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (declaring that private owners have only limited right to modify essential natural character of land).

¹⁴ For a recent example, see Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

Court's landmark decision in *Lucas v. South Carolina Coastal Commission*¹⁵ stands for this proposition.¹⁶

Without rehearsing the numerous stories of individual abuse that in large measure have led to the bills which this Committee is considering, I would note that in a significant number of cases, farmers, ranchers, and small business people have lost most of the value of their lands, which in many instances represented the bulk of their life savings, because of sweeping and often vague statutes. These often are given what might charitably be termed "expansive" interpretations by executive departments and agencies, and these, in turn, receive great deference from the courts.¹⁷ Farmers, for instance, have been forbidden to use what to every appearance is normal farmland because occasional dampness has led the land to be classified as "navigable waters of the United States."¹⁸ Small landowners, logging companies, and families dependent on the forest products industries have lost much of their livelihood in some locations because the Interior Department has interpreted a provision of the Endangered Species Act prohibiting forbidding individuals to "take" certain species, including the red-cockaded woodpecker,¹⁹ as to precluding even normal use of the land that might cause "significant habitat modification."²⁰ Two weeks ago, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²¹ the Supreme Court reversed a well-reasoned Circuit Court opinion, declaring that the habitat modification regulation was reasonable under the *Chevron* doctrine, and noting that the "plain intent" of Congress "was to halt and reverse the trend toward species extinction, *whatever the cost*."²²

Another element of fairness is introduced by the fact that Justice Scalia's opinion in *Lucas* treats as an automatic taking almost any "deprivation of all economically feasible use," but concedes that this

¹⁵ 112 S.Ct. 2886 (1992).

¹⁶ See Sax, n. 14, at 1438 ("I believe Justice Scalia felt that the case presented a new, fundamental issue in property law, and that he had a clear message which he sought to convey: States may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem.").

¹⁷ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 844 (1984) (requiring that federal courts defer to administrative agency rulings that are clearly authorized by Congress or a "reasonable interpretation" of the statute).

¹⁸ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (observing that, "[o]n a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters.").

¹⁹ 16 U.S.C. § 1538(a)(1).

²⁰ 50 CFR s 17.3 (1994).

²¹ 115 S.Ct. at ____, 1995 WL 382088, 63 U.S.L.W. 4665 (Jun 29, 1995).

²² *Id.* (Slip Op. at 6) (quoting *TVA v. Hill*, 437 U.S. at 153, 184) (the "snail darter" case) (emphasis added).

rule does “not make clear” how a similar 90% deprivation is to be evaluated.²³ While it is objectively easiest to award the latter owner nothing, such a course of conduct is inherently unfair, and erodes the public’s sense that governmental regulations are legitimate.

It should not be forgotten as well that even “just compensation” almost never is full compensation. “Just compensation” really means market value, but most property not “for sale” precisely because sentimental attachment, particularly suitability for their needs, or the difficulty and expense of moving make the value of the property to them higher than a buyer might offer. While the government doesn’t “take” this personal value or compensate for it, the owner surely has valid grounds to deem it confiscated.²⁴ (It should be noted that S. 605 defines “just compensation” as including “business losses” as well as “fair market value.”)

Restraining undue expansion of regulations

The second reason why I favor the proposed legislation is that the requirement that agencies pay for their commandeering of private property is the only way to keep their demands from expanding perpetually. When one is imposing costs on others, and perceives that it is for a good cause, there is literally no limit to that might be deemed “desirable,” and then quickly deemed “necessary.”

There is no better evidence of this than the aftermath of the *Lucas* case itself. After the United States Supreme Court ruled that the complete extinguishment of an owner’s beneficial economic enjoyment of his land generally constitutes a taking,²⁵ it remanded the case back to the South Carolina Supreme Court, which found that there was no background principles in the state’s law of property or nuisance that would forbid Lucas from building his two beachfront homes.²⁶ The rest of the story was well told by the *Washington Post*:

The conclusion of the *Lucas* case was the state’s formal acquisition of Lucas’ two lots for \$425,000 each, interest, costs (\$1.5 million settlement) in July, 1993. While it had been willing to allow him only a 144-square-foot viewing platform and landscaping, the state’s attorney indicated that it planned to sell the lots for residential development. “The state also considered keeping the lots open, ‘but with a house to either side and in between the lots, it is reasonable and prudent to allow houses to be built,’ [the state’s attorney] said.”²⁷

²³ 112 S.Ct. 2886, 2894 n. 7 (1992).

²⁴ *See*, *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988).

²⁵ *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

²⁶ *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992).

²⁷ H. Jane Lehman, *Accord Ends Fight Over Use of Land*, WASH. POST, July 17, 1993, at E-1 (Real Estate) (quoting Bachman S. Smith, III, attorney for the Coastal Council and the State of South Carolina).

John Echeverria, chief counsel for the National Audubon Society, said the decision to sell the property “opens the state to charges of hypocrisy when it is willing to have an economic burden fall on an individual but not when the funds have to come out of an agency’s budget.”²⁸

The need for policy correction

One striking change in recent years is the formation of grass-roots “private property rights” groups across the United States, and the willingness of ordinary citizens, judges, and legislators to criticize the carte blanche to regulate property that government has enjoyed since the Supreme Court’s sweeping approval of land use regulation under the police power in *Village of Euclid v. Ambler Realty Co.*²⁹

As Professor Carol Rose has noted, during this period *Euclid* increasingly became a “lightning rod for those who contest what they perceive as unwarranted governmental intrusion on private property rights.”³⁰ And this resentment became increasingly warranted.

The key point is that regulatory regimes have an evolution, too. *In many ways, the evolution of regulatory regimes replicates, at a meta-level, the evolution of private property regimes.* Just as we used to say, “anything goes” about private land uses, and just as private landowners became accustomed to uncontrolled use of their land, we have also gone through a period when we said “anything goes” for the *regulation* of private land uses. During this time, land use regulators became accustomed to believing that they were entitled to regulate anything that they pleased under the auspices of *Euclidean* zoning....³¹

In short, just as an individual regulation becomes a taking if, in Justice Holmes words, it goes “too far,”³² Professor Rose has accurately put her finger on the popular reaction that now is taking place because the regulatory apparatus has gone “too far” as a whole.

Grounds for objection to compensation

²⁸ Id.

²⁹ 272 U.S. 365 (1926).

³⁰ Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 577 (1990).

³¹ Id. at 589 (emphasis in original) (citing illustrations).

³² *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”)

Those who object to the notion that compensation should be paid when federal regulations cause a substantial diminution in the value of private property articulate two principal reasons for their opposition. The first is that such compensation exceeds anything like what the Constitution (*i.e.*, the Supreme Court) requires. The second is that such compensation is bad public policy.

Current regulatory takings law

I believe that it is incorrect to say that the Supreme Court has enunciated a settled and fair doctrine of regulatory takings such that legislative enactments would be unwarranted. Current regulatory takings law, in which the principal case, *Penn Central Transportation Co. v City of New York*,³³ is known for its multifactor and ad hoc analysis, is anything but clear.³⁴ Indeed, clarity is “sorely needed.”³⁵ The law also is anything but settled.

Penn Central holds that courts should balance (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent that the regulation interferes with distinct investment-backed expectations of the property owner in order to determine if there is a taking.³⁶

To this we must add, at a minimum, that even the smallest permanent physical occupation of land constitutes a taking,³⁷ and, under *Lucas*, that regulations that prohibit all economically beneficial use of land constitute a taking unless the restriction enforces a limitation that “must inhere in the title it-

³³ 438 U.S. 104 (1978).

³⁴ Professor Haar has suggested that the quest for the appropriate formula to distinguish police power regulations from regulatory takings “may be the lawyer’s equivalent of the physicist’s hunt for the quark.” CHARLES HAAR, *LAND USE PLANNING* 766 (3d ed 1977). The title of a well-known article termed regulatory takings a “muddle.” Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984). Professor Sax referred to the takings cases as constituting “a welter of confusing and apparently incompatible results.” Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 37 (1964). Others have been even more colorful. See, e.g., Jean H. Shuttleworth, Note, “Property” in the Fifth Amendment: A Quest for Common Ground in the Maze of Regulatory Takings,” 46 VANDERBILT L. REV. 1283, 1285 n. 12 (collecting examples, including: John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 244 (1982 (calling the cases “a farrago of fumbings which have suffered too long from a surfeit of deficient theories;” *Mid Gulf, Inc., v. Bishop* (792 F.Supp. 1205, 1211 (D. Kan. 1992) (noting “this entire area of the law is somewhat murky”)).

³⁵ Susan Rose-Ackerman, *Against Ad Hocery*, 88 COLUM. L. REV. 1697, 1711 (1988).

³⁶ 438 U.S. at 124. Professor Epstein observes: “Neither he [Justice Brennan in *Penn Central*] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words “private property” (which are, after all, not mere gloss, but actual constitutional text).” Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

³⁷ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

self, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.”³⁸

In yet another set of limitations, The Court enunciated in *Nollan v. California Coastal Commission*³⁹ the requirement that there be an “essential nexus” between the agency’s lawful goals and the regulations that it imposes. In *Dolan v. City of Tigard*,⁴⁰ the Court continued the process of refining the “essential nexus” test, now requiring that there be “rough proportionality” between a burden imposed upon society by a landowner and the regulation countering that burden, with an individualized determination and a shifting of some of the burden of proof from the landowner to the government. As governmental bodies respond to *Lucas* by carefully leaving landowners some modicum of rights so that they do not suffer a complete loss, and as agencies attempt to individualize exactions decisions in light of *Dolan*, the courts will have to decide how much deference to give their actions.

Thus, in *Penn Central* Supreme Court deference to land use regulators reached its apogee with the Court’s refusal to bind them by *any* fixed rule of law. Yet by 1992, in *Lucas*, the adoption of the inherent principal⁴¹ was a conscious departure from the principal of generality. The demand in 1994 for an “individualized determination” and “rough proportionality” in *Dolan v. City of Tigard*⁴² carried this process one step further.

Objections to compensation on policy grounds

I believe that the two principal objections to compensation to landowners on policy grounds are (1) that society will be forced to buy out those who commit nuisances, and (2) that landowners will “segment” their property so as to meet the percentage thresholds.

Nuisance

On the first issue, the principal argument against compensation for landowners is the assertion that the market price, against which the proposals would measure declines in value caused by regulation, is not the “correct” price. That is, the market price does not take into account (“internalize”) the negative effects upon neighbors (“externalities”) that are caused by polluters and others who use their lands in ways deemed undesirable. The bills do have clear exceptions for nuisance, but it is sometimes claimed that comprehensive and detailed environmental regulations must be imposed because nuisance law is

³⁸ *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2900 (1992).

³⁹ 483 U.S. 825, 837 (1987).

⁴⁰ 114 S.Ct. 2309 (1994).

⁴¹ *Lucas*, 112 S.Ct. at 2923.

⁴² 114 S.Ct. 2309 (1994).

incapable of dealing with many externalities. In short, the charge goes, we will be compensating people precisely because they engage in anti-social conduct.

I agree that the common law of nuisance is not perfect, and that there may be instances in which this may happen. On the other hand, the common law is constructed through an accretion of cases reflecting the felt exigencies of the times, and it is the genius of the common law that through hundreds of small-scale trials and errors fair solutions to problems are worked out. There is no reason to expect that the common law could not work this way in the environmental area, once the stifling blanket of command-and-control regulations is alleviated. The emergence of a substantial body of “toxic tort” law is an example of this.⁴³ Once again, there will be instances in which externalities are not dealt with promptly, but the lurches of statutory law that engenders unanticipated consequences often present far more problems in the long run. In addition, of course, the “externality” within the current system where regulators can expand their domains and impose most of the costs on landowners makes those externalities that might escape through the cracks of a nuisance regime pale by comparison.

Segmentation

Undoubtedly some will contend that a system of compensation for large percentage diminutions in value will cause property owners to engage in unfair “conceptual severance,”⁴⁴ or “entitlement chopping,”⁴⁵ by carefully tailoring the claimed “property” affected by the regulation so as to concentrate its effects in order to maximize the percentage of value diminution.

The Supreme Court warned against this in *Penn Central*:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”⁴⁶

⁴³ See, e.g., Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1 (1993).

⁴⁴ Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (“[E]very regulation of any portion of an owners ‘bundle of sticks’ is a taking of that particular portion considered separately, price regulations ‘take’ that particular servitude curtailing free alienability, building restrictions ‘take’ a particular negative easement curtailing control over development and so on.”) *Id.*

⁴⁵ Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1601 (1988).

⁴⁶ *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-131 (1978).

Yet this is a game that government can play as well as landowners. An excellent example of what I call “conceptual agglomeration” may be found in the decision of the New York Court of Appeals in *Penn Central* itself.⁴⁷

[T]he property may be capable of producing a reasonable return for its owners even if it can never operate at a profit. For it should be evident that plaintiffs’ heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income, were the terminal not in operation. Some of this income must, realistically, be imputed to the terminal.⁴⁸

I believe that Justice Scalia warned against just this approach in the *Lucas* case,⁴⁹ and this concern probably contributed to Chief Justice Rehnquist’s view that a taking occurs whenever “the government by regulation extinguishes the whole bundle of rights in an *identifiable segment* of property.”⁵⁰

The fact is that the segmentation/agglomeration problem is not introduced by the possibility of statutory compensation. Rather it is the same whether we consider statutory or constitutional compensation, and whether we are concerned about overreaching by the property owner or overreaching by the government.

I should note that the United States Court of Appeals for the Federal Circuit, in cases with varied outcomes such as *Deltona Corp. v. United States*,⁵¹ *Florida Rock Industries, Inc. v. United States*,⁵² and *Loveladies Harbor v. United States*,⁵³ has shown unusual sensitivity towards the segmentation/agglomeration problem.

Conclusion

⁴⁷ *Penn Central Transportation Company v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977).

⁴⁸ *Id.* at 1276-77.

⁴⁹ One suspects that “conceptual agglomeration” is what Justice Scalia may have had in mind in *Lucas* when he condemned as an “extreme—and we think, unsupportable—view of the relevant calculus” the taking into account in *Penn Central* the “total value of the taking claimant’s other holdings in the vicinity. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894 n. 7 (citing *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d 1271, 1276-1277 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978).

⁵⁰ *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) (emphasis added).

⁵¹ 657 F.2d 1184, 228 Ct.Cl. 476 (1981), *cert. denied* 455 U.S. 1017 (1982).

⁵² 18 F.3d 1560 (Fed.Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995) (Florida Rock IV).

⁵³ 28 F.3d 1171 (Fed.Cir. 1994).

I would like to conclude by expressing my confidence that the bills before Committee represent meaningful and constructive property rights reform. It might be, of course, that much of the need for such legislation would dissipate if regulations were more carefully tailored to those problems which both are important and which could not be dealt with in a satisfactory way by common law tort and contract principles.

In the short term, however, meaningful relief for property owners and enhanced responsiveness by governmental agencies is more apt to be accomplished by the fair provision of compensation for significant deprivations of value.