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ARTICLES

A SKEPTICAL VIEW OF "PROPERTY RIGHTS" LEGISLATION

FRANK I. MICHELMAN*

Speaking of contracts with America, I have two of them on my mind: one touted by the new congressional Republican majority, and the other described a few years ago by Justice Antonin Scalia as an "historical compact" embedded in American "constitutional culture."¹ Item eight of the Republicans' Contract calls for a "Jobs Creation and Wage Enhancement Act." This call contains, in the fine print, the promise of what is these days styled a "property rights" law.² The current vehicles for this promise are H.R. 925 (the "Private Property Protection Act of 1995"), a bill approved by the House of Representatives on March 3, 1995, and S. 605 (the "Omnibus Property Rights Act of 1995"), a bill introduced by the Senate leadership on March 23, 1995.³ Both of these bills contain proposals to compensate owners monetarily for regulatory restrictions on the use of property. H.R. 925 is completely taken up by such a proposal. S. 605, a much more wide-ranging legislative package, contains proposals of this kind in two of its four substantive titles.⁴ Title V of the bill is, as we'll see,

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

2. See House Republican Conference, *Legislative Digest*, "Contract With America," Sept. 27, 1994, at 33, 36 ("H.R. — allows property owners to receive compensation . . . for any reduction in the value of their property.").

3. H.R. 925, 104th Cong., 1st Sess., 141 CONG. REC. 2607 (1995); S. 605, 104th Cong., 1st Sess., 141 CONG. REC. 4497 (1995).

The House-approved version of H.R. 925 differs in some material respects from the bill as it stood when I first offered these remarks on February 27, 1995. In what follows, therefore, I have conformed my remarks to the text of the bill as subsequently amended and approved on the House floor. The Senate leadership bill was introduced very shortly before these remarks were due to the editors of this Journal on their way to the printer. I have tried, in what follows, to take due account of the Senate bill as introduced on March 23. Of necessity, however, the main focus here is on the House bill that I've had before me for a longer time.

By the time this appears in print, the terms of either H.R. 925 or S. 605, or both, or of whatever Act either of these bills may by then have become, will almost certainly have undergone further material changes. Readers will have to judge whether any such changes will have blunted whatever force there is in the basic objections I direct below to the versions as they stand today, March 27, 1995.

4. In addition to titles II and V described below, title III would provide for alternative dispute resolution for taking and compensation controversies, and title IV would require agencies and the Office of Management and Budget to conduct "private property taking impact analyses" of proposed new regulations. See S. 605, *supra* note 3.

in pertinent respects quite similar to H.R. 925.⁵ Title II, on "Property Rights Litigation Relief," is quite differently constructed and will require its own separate discussion.⁶

H.R. 925 (and S. 605, Title V)

We begin with H.R. 925. Its core provision reads as follows:

[t]he Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law,⁷ that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action.⁸

I need to describe certain limitations in the coverage of H.R. 925. First, the bill stipulates that, for its purposes, the term "property" means specifically "land."⁹ The bill thus offers no protection for personal property holdings. It is anybody's guess, though, whether the bill would protect pre-regulation values of fixed improvements of land—manufacturing plants, for example—that lawyers would ordinarily class as real estate.¹⁰

5. Title V is styled a "Private Property Owners Administrative Bill of Rights." *Id.* The title would provide for sundry kinds of protection of private property values against regulatory diminution, in addition to its requirement, to which these remarks are specifically directed, of compensation for regulatory devaluations of property holdings.

In what follows, I will focus mainly on H.R. 925, using footnotes to point out the close parallels between the compensation scheme of the House-passed bill and that of title V of the Senate leadership bill as initially introduced.

6. See *infra* note 36.

7. For the meaning of "specified regulatory law," see *infra* notes 11-14 and accompanying text.

8. H.R. 925, *supra* note 3, § 3(a) (footnotes added). Cf. title V of S. 605, *supra* note 3. Its core compensation provision declares:

[a] private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 33 percent or more of the fair market value, or the economically viable use, of the affected portion of the property as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with the standards set forth in section 204 of this Act.

Id. § 508(a). Section 204 calls for compensation in the amount of the difference between "the fair market value[s] of the property or portion of property affected" before and after it became subject to the agency action in question. *Id.* § 204(d)(2)(A).

9. This includes "the right to use water." H.R. 925, *supra* note 3, § 10(1). Title V of S. 605 is similar but not identical. Section 502(2)(4)(A) defines "private property owner" as an owner or holder of "property," while § 502(2)(5) defines "property" as meaning "(A) land; (B) any interest in land; and (C) the right to use or the right to receive water." For the possible significance of "(B) any interest in land," see *infra* note 22.

10. Only a court could answer authoritatively. As matters stand right now, a court called on to answer would have little to go on. The Report of the House Committee on the Judiciary, H.R. Rep. No. 46, 104th Cong., 1st Sess. (1995), is totally silent about

Second, by its terms, the bill applies only to devaluations wrought by agency actions under three selected laws:¹¹ the Clean Water Act,¹² the Endangered Species Act,¹³ and provisions in the Food Security Act of 1985 that mandate withdrawal of agricultural price supports and other benefits from farmers who plant on statutorily defined wetlands or "highly erodible lands."¹⁴ Third, the bill withholds protection from uses that are defined as nuisances by state law or are already prohibited by local zoning ordinances, and it makes exceptions for regulatory actions that have as their "primary purpose" the prevention of either "an identifiable damage to specific [other] property" or "an identifiable hazard to public health or safety."¹⁵

H.R. 925 deals with occurrences that amount, in the eyes of the bill's supporters and defenders, to what are called regulatory takings. That term refers, of course, to the Fifth Amendment's command that the government not take private property for public use without paying for the property taken.¹⁶ Now, it's certainly understandable that some very severe regulatory restrictions on property use would excite

why, or to what intended effect, "property" has been restrictively defined as meaning only "land" (including water rights).

11. These three are the "specified regulatory laws" referred to in section 3(a) of the bill, quoted in the text. The bill would further apply to agency actions under three additional statutes, but only insofar as those actions restrict an owner's "right to use or receive water." See H.R. 925, *supra* note 3, § 10(5)(D).

12. *Id.* § 10(5)(A) (referring to section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1988 & Supp. V 1994)).

13. *Id.* § 10(5)(B) (referring to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1994)).

14. *Id.* § 10(5)(C) (referring to title XII of the Food Security Act of 1985, 16 U.S.C. § 3801 *et seq.* (1988 & Supp. V 1994)). See 16 U.S.C. §§ 3811, 3821.

Again, title V of S. 605 is similar, although a reader has to work a little harder to pick up the thread. The core compensation provision requires compensation for devaluations stemming from "a final . . . agency action of an agency head." S. 605, *supra* note 3, § 508(a); see *supra* note 8. Section 502(2) defines "agency head" as a person having "jurisdiction or authority to take a final agency action under the Endangered Species Act . . . or section 404 of the Federal Water Pollution Control Act"

The Republicans' Contract promises compensation to "private property owners" generally, not just to owners of land affected by the two specified statutes. See *supra* note 2. Similarly, Majority Leader Robert Dole, introducing S. 605 on the Senate floor, declared that the bill "would require the Federal Government to compensate property owners [not just landowners] if Government action [not just action under two statutes] reduces the value of property [not just land] by one-third." 141 CONG. REC. S4498. Title V does not, at least as initially drafted, fulfill these commitments. There are provisions in title II, as initially drafted, that might conceivably be read to extend the protection to all property and all regulation, but it's far from clear that such is their intended meaning. See *infra* note 36.

15. H.R. 925, *supra* note 3, §§ 4, 5(a). Somewhat comparably, § 508(a) of S. 605 requires compensation "in accordance with the standards set forth in section 204," and § 204(d) provides that compensation is not payable for any restriction on a use that is "a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated." See *supra* note 8.

16. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

concerns about constitutional rights to compensation for taken property. It's important, however, to notice that the reason for this is not that treating use-restrictions as compensable takings was any part of what the Framers of the Fifth Amendment had specifically in mind, which even Justice Scalia comes close to stipulating it was not.¹⁷ Nor can the direct force of constitutional verbiage explain the rise of the notion of taking-by-regulation, given that it's obviously *something* of a stretch to say that the government takes your land for public use when what it precisely does is forbid *you* certain uses of land to which you continue to hold an exclusive private title.¹⁸

The reason, then, for initially conceiving the possibility of "regulatory taking" has to be that we allow broad moral or other purposive considerations to enter into our determinations of the legal meanings of constitutional verbiage. A regulatory taking claim is a claim that a certain governmentally imposed restriction on the use of property *ought*, in all constitutional *reason*, to trigger a governmental duty to compensate. The claim is an appeal to some relatively lofty general principle of American constitutionalism.

Typically, in the past, claims of that kind have been addressed to courts, and the considered judicial response—the much maligned "balancing test" of *Penn Central Transportation Co. v. New York City*,¹⁹ *Keystone Bituminous Coal Ass'n v. DeBenedictis*,²⁰ and *Lucas*²¹—has been one that has left unrequited the large preponderance of complaining landowners. And that, of course, is the beginning—but not, as we'll soon see, the end—of what H.R. 925 is all about. H.R. 925 is precisely designed to enable property owners—or, rather, *some* property owners, those who own land affected by one of the three named laws—to bypass the perceived laxities of the protections that owners have so far been able to obtain from courts. The bill seeks to accomplish this by setting a sharp and categorical, hence judicially unevadable, line of compensability. Should the bill be enacted, then whenever that line is crossed, whenever a use-restriction reduces

17. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 n.15 (1992) (agreeing that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

18. This is not to say that one can't devise sense-making ways of talking about regulatory takings-away of "servitudes" or other non-possessory components of a full liberal title. See *infra* note 22. It is only to say that regulatory use restrictions are not "takings of property for public use" in the most straightforward sense of that phrase, and that the concept of "regulatory taking" depends, therefore, on some attribution of purpose, not already apparent in the words themselves, to the verbal text of the constitutional instrument.

19. 438 U.S. 104 (1978).

20. 480 U.S. 470 (1987).

21. 112 S. Ct. 2886 (1992). The *Lucas* decision, it must be remembered, retains the balancing test for all regulatory takings claims save those in which land under regulation is stripped of all economically viable use. Cf. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992) (discussing claims of "physical" takings).

by twenty percent or more the market value of any "portion" of a land parcel, compensation will be legally due, even if the case is one where a court would have concluded that the unbolstered Constitution does not require any compensation at all.²²

Now, it can hardly be denied that H.R. 925 means to confer a very palpable benefit on the favored segment of property owners who would enjoy its protections. Of course, I mean the benefit consisting of the compensation money to which H.R. 925 will on occasion entitle these owners (should the bill or something like it become law), to which they would not otherwise have had any legal claim. What is supposed to justify conferral of this benefit at taxpayer expense on these statutorily sculpted subsets of citizens?

The question is important, because one undoubted clause in the American constitutional compact is that Congress, like other legislative bodies, is supposed not to "waste" the taxpayers' money—a technical term meaning not to spend it on any non-public purpose. Many opponents of the kind of legislation represented by H.R. 925 say that to hand over public funds to particular landowners whose land-uses have been restricted by regulatory laws, when that's not required by the Constitution's own standard of fairness as judicially ascertained, violates this plain duty not to give away public money to political favorites.

How do supporters respond? They don't rest with ordinary political arguments. They don't say, for example: well, what H.R. 925 is really all about is our policy preference for curbing and shrinking the regulatory state, and particularly the regulatory state as manifest in certain laws protecting endangered species and wetlands, that we think especially repugnant either to public good sense or to certain private inter-

22. Note that this latter class of cases includes not only those in which wetlands regulations, for example, would modify the otherwise allowable uses of an entire landholding and thereby reduce its value by, say, 30%. It also includes cases in which the regulation would leave completely unrestricted 95 one-hundredths of a mostly dry holding, while substantially restricting the value of the wet five-percent "portion" on which the use-restriction impinges.

Should it turn out that either Title II or Title V of S. 605 is enacted in something like its current form, the effect could be even more drastic. Title V defines protected property as including both "land" and "any interest in land." See *supra* note 9. Title II contains the most sweeping imaginable definition of protected property, including "inchoate interests," "easements," "security interests," "rents, issues, and profits," "any interest defined as property under State law," and "any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest." S. 605, *supra* note 3, §§ 203(5)(A)(ii), (iv), (vii), (C), (E), (F). Under these definitions, any application whatsoever of any sort of land regulation could easily be held compensable, regardless of how marginal its effect on the market value of an affected land parcel, on the theory that it totally devalues a conceptually severed "interest" in land that common-law usage and lawyers' customary talk identifies as a servitude or negative easement. On conceptual severance, see Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

ests we happen to hold in high regard (and stand ready to argue have a special connection to broader public interests).

No, supporters claim a loftier, more peremptory ground: that of constitutional morality and obligation. They say the bill will carry out a constitutional and moral mandate that the government now honors too much in the breach, that is, to have a decent respect for constitutional rights, and, for that matter, natural rights, of private property.²³ And in fact, H.R. 925 proclaims itself an intervention on behalf of an uncompromising "general policy" to the effect that, and I quote, "no law or agency should limit the use of privately owned property so as to diminish its value."²⁴

One might well ask, as we shall below, how a law in defense of such a commanding policy as that—a law in defense of such allegedly exigent constitutional and moral rights of property—can in all decency reserve its protections to owners of *land* as distinguished from other property, and, what is considerably more egregious, not even to all landowners but only to those who chafe under three selected statutes. A prior question, though, is how much truth there is to the claim that current practice tramples on constitutional rights for which Americans have contracted but to which our courts have unfortunately failed to give full enforcement. I shall very briefly pursue that question taking Justice Scalia for my Virgil. Just what sort of a private property principle, I want to ask, really does form a part of what Scalia presents as the historical American constitutional compact?²⁵

Our text, of course, is Scalia's opinion for the Court in the 1992 case of *Lucas v. South Carolina Coastal Council*.²⁶ I assume readers roughly recall how this decision modified the Court's previously regnant balancing test for regulatory takings, by adding a categorical presumptive rule requiring compensation when regulation denies all economically beneficial or productive use of a parcel of land.²⁷ Why

23. See, e.g., Senator Orrin G. Hatch's statement on the Senate floor supporting the introduction of S. 605, 141 CONG. REC. S4497 (daily ed. Mar. 23, 1995); *Hearings on H.R. 925 Before the House Subcommittee on the Constitution*, 104th Cong., 1st Sess. (Feb. 10, 1995) (Statement of Roger Pilon).

According to § 102(1) of S. 605, the bill's "purpose" is to "encourage, support, and promote the private ownership of property" and ensure "the constitutional and legal protection" thereof by "the establishment of a new Federal judicial claim in which to vindicate and protect property rights." Section 101 of the bill contains seven "findings." Six of these (numbers 1-5 and 7) are all concerned solely with celebration and protection of fundamental rights of private property. According to finding number 6, "there is a need both to restrain the Federal Government in its overzealous regulation of the private sector and to protect private property, which is a fundamental right of the American people."

24. H.R. 925, *supra* note 3, § 2(a).

25. To be precise, the Justice wrote of the "historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas*, 112 S. Ct. at 2900.

26. 112 S. Ct. 2886 (1992).

27. *Id.* at 2901.

should the Court, though, have thus drawn the line of presumptive compensability at the seemingly arbitrary point of *total* extinguishment of beneficial use of a landholding? By Justice Scalia's own account, it did so out of a concern to keep constitutional law in tune with a public constituency's shared, tacit, cultural sense of limits to decency in government.

Here is what Scalia wrote:

our takings jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of . . . the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.²⁸

The clear implication is that thoughts of compensation are, by the prevalent understanding of Americans, simply out of place in most instances, if not quite all, of regulatory restrictions of land-use. The American way, as the Court describes it, is to treat the bulk of these events as belonging to the normal give-and-take of a progressive and democratic society; it is to treat regulation as an ordinary part of background risk and opportunity, against which we all take our chances in our roles as investors in property. But Scalia did, of course, have a bit more to say: "we think the notion . . . that title [to land] is . . . subject to the 'implied limitation' that the State may subsequently eliminate *all* economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."²⁹

Look again at that balky sentence. Why this un-Scalia-like orotundity? Only an unusually thorny or baffling problem, it would seem, could have called forth from this Justice such cloudy, approximative language.

What, exactly, is the opinion driving at? Here is how I have come to understand it: the Court accepts a responsibility to deal with taking-of-property claims in a way that will help sustain public confidence in the sincerity and reliability of what the opinion calls the historical compact—meaning, it would appear, historic professions of commitment to respect for common basic principles of constitutional government, including, of course, although not limited to, the institution of private property. The Court is concerned that there are some regulatory takings claims that can't be brushed off without undermining public confidence in the country's commitment to respect for that institution. And, from its observation of the country's actual constitutional culture, the Court draws the conclusion that tolerance for

28. *Id.* at 2899.

29. *Id.* at 2900 (emphasis added).

uncompensated *total* regulatory extinguishment of a land parcel's economic value would indeed tend to subvert public belief in sincere commitment to that part of the compact.

Here, though, is something the Court did not say: it did not say (rather, it implicitly gainsaid) that the compact includes no principles or commitments that limit or compete with private property. Certainly the constitutional compact includes a decent respect for the institution of private property as one of its terms. No less certainly, however, does it contain other terms that tend, whether this pleases us or not, to make regulatory takings claims hard to deal with reasonably by any kind of categorical rule.

Our constitutional culture includes a deep and ancient tradition of expected regard, when you make use of your property, for other people's and the public's interest and concerns.³⁰ It includes a deep and ancient strain that says this expectation of regard for public interest and concerns is subject, when the occasion requires, to legislative definition and regulatory enforcement, a strain that developed early under the rubric of public nuisance.³¹ The tradition, in sum, is one of a law of property that is functionally oriented to contemporary community goals, as well as to protection of private advantage, and that relies on the police powers of legislatures, alongside common law adjudication by courts, to negotiate and mediate between the two.

So, for example, in the view of currently prevalent constitutional culture in many parts of the United States, the seacoast and its natural terrain are, it would seem, precious assets of public life, assets that no private individual can fairly expect to engross completely, or can fairly expect to gain an irrevocable right to endanger, whether certainly or only probably, whether by building houses nearby or in any other way.³² It could well be that a great many Americans—maybe most—would repudiate any expectation on Mr. Lucas' part of having acquired an irrevocable freedom to build in such a place, regardless of any consequential endangerment of a public interest that political publics might from time to time come to perceive.

Considerations of this kind are, I believe, endemic in the American system and practice of government, and I want now to test for their presence and force by examining more closely the protective scopes of the "property rights" bills now pending before Congress. When we peer at H.R. 925 and title V of S. 605, the first burning question is why their protections are reserved for land value losses³³ stemming from

30. See, e.g., FORREST MACDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 9-36 (1985).

31. See, e.g., John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 *COLUM. J. ENVTL. L.* 1 (1993).

32. See MARGARET JANE RADIN, *REINTERPRETING PROPERTY* ch. 6 (1994).

33. It is true that Justice Scalia's *Lucas* opinion reads the historical compact (not implausibly) as differentiating the expectations of land ownership from those of ownership of personal property. On Scalia's reading of the compact, Americans accept

agency actions under two or three selected laws. On what remotely principled basis *can* the protection have been so reserved? My own answer is "none." That H.R. 925 as passed by the House is playing political favorites (or political opportunities) seems to me just plain undeniable.³⁴ But there is, I believe, a further answer to the question of why the bill's drafters have declined to extend its protection to all property as affected by all regulation, which is that they know such a broadly principled bill stands no chance of enactment. No American Congress would dare enact legislation that would openly, honestly, and consistently carry out H.R. 925's pretended high moral precept that government action should never—ever—limit the use of private property so as in the least to diminish its value,³⁵ because the American public is nowhere near accepting any such precept and it never has been.³⁶

the risk of *total* regulatory wipe-outs of personalty value, but not of realty value. See *Lucas*, 112 S. Ct. at 2900. But there is no comfort there for supporters of H.R. 925, for the obvious reason that 20% is a far cry from totality. Those who would appeal for support to Scalia's readings of the compact must take the bitter with the sweet.

34. I'm not contending that a court ought to hold the bill unconstitutional on that ground. I'm suggesting that the relatively favored constituencies here—owners of land burdened by the three selected regulatory programs—can't, in principle, even begin to be regarded as rescues from political oppression, because the alleged rescue net is too selectively cast for that. The beneficiaries must rather be seen as fortunate darlings of politics—some of them, I'm sure, exceptionally deserving of the public's consideration, but not nearly all of them and not, as a group, any more so than many who've been left out. This group of beneficiaries of public leniency are something like the gerrymandered subset of railroad retirees who were fortunately grandfathered into "dual benefits." See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

35. See *supra* note 24 and accompanying text.

36. *Digression on S. 605, title II*

It is possible, but far from certain, that title II of the Senate bill, as initially introduced, does truly intend to enact the broad precept—that it does truly mean to secure owners of property of all kinds against devaluations resulting from any and all forms of federal regulation—although using a 33% loss floor instead of the 20% floor used by H.R. 925. If so, however, this intention is not in the least clearly expressed. Because the title is virtually sure to be substantially revised and (let us hope) clarified, there's little point in trying the reader's patience by placing an analysis of its current, utterly confusing language in the main text. However, out of a sense of obligation to tell the full story as currently available to me, I devote this humongous footnote to that wearying task.

Title II of S. 605 is styled "Property Rights Litigation Relief." The title's "findings" and "purposes" sections make clear that its chief aim is to simplify and expedite the judicial and other procedures by which owners who have suffered takings of their property for public use can obtain the just compensation to which they are constitutionally entitled. See S. 605, *supra* note 3, §§ 201, 202. Accordingly and necessarily, "property" protected by title II is not limited to land but is sweepingly defined to mean "all property protected under the fifth amendment," whether realty or personalty. *Id.* § 203(5). By the same token, the scope of title II's protective sweep is not and cannot be restricted to agency actions under two or three selected laws; it extends, as it must, to any federal government action. See *id.* §§ 203(7), 204(a).

At this point, though, we encounter a head-spinning puzzle in the text of title II as initially introduced. *Id.* § 204(a) sets up a double-barrelled test for an owner's eligibility to seek compensation under its new-model procedures. First, it must be the case

Suppose H.R. 925 were redrafted so as to look like what title II of S. 605 may intend. The promise of compensation for market-value "losses" of twenty percent or more would, then, extend to all federal regulatory laws and to property holdings of all kinds. In palpable jeopardy, then, would be not just three laws of uncertain popularity that are especially disliked by loggers, builders, and farmers, but also

that "private property . . . has been physically invaded or taken for public use." *Id.* § 204(a)(1). Second—additionally—it must be the case that at least one of five further conditions is met. *See id.* § 204(a)(2). Three of these additional conditions are evidently meant to track criteria for compensable takings developed in decisions of the Supreme Court construing the Fifth Amendment. *See id.* § 204(a)(2)(A)-(C). A fourth, more compendious, is satisfied by "any . . . circumstance where a taking has occurred within the meaning of the fifth amendment of the United States Constitution." *Id.* § 204(a)(2)(E). The fifth additional condition is the one that concerns us here. It calls for compensation whenever, in addition to its being the case that property was "taken," it's furthermore the case that the agency action in question "diminishes the fair market value of the affected portions of the property . . . by 33 percent or more." *Id.* § 204(a)(2)(D).

Taken literally, this assemblage of provisions does not say that a 33%-or-larger diminution of value gives rise to a compensation entitlement (which would, of course, deviate markedly from the Supreme Court's holding in the *Lucas* case). The full assemblage says, rather, that such a diminution is compensable when resulting from an agency action that *also* has, as one of its consequences, that private property has been "taken." But what means "taken?"

Title II's definitions section, § 203(7), contains a definition of "taking of private property," so we had better now have a look at that. From it, we learn that this term encompasses "any action whereby private property is directly taken as to require compensation under the fifth amendment to the United States Constitution." *Id.* § 203(7). A court abiding by the *Lucas* decision would easily conclude that a diminution in value of more than 33% resulting from regulatory action does not meet this test. However, § 203(7)'s definition of "taking of private property" goes further. It also includes "any action whereby private property is directly taken as to require compensation . . . under this Act." *Id.*

There are two parts of "this Act" that might be read as requiring compensation for a more than 33% value diminution. One is § 204(a)(2)(D), which, as we've seen, requires compensation for such diminutions, but only when the agency action *also* results in a "taking of property." At this point, title II is talking in circles, and there's simply no telling whether the drafters meant, by title II, to require compensation for all such diminutions sustained by all sorts of property under all sorts of federal regulatory programs.

The other part of "this Act" that can be read as requiring compensation for a more than 33% value diminutions caused by federal regulatory action is, of course, title V. Title V, however, offers only highly circumscribed protection of this type, protection limited to landed property affected by one of two named regulatory programs. *See supra* note 14. Perhaps the most reasonable conclusion is that title II does not mean to set at naught title V's careful circumscription of "33-plus" protection (as we may call it).

All that can really be said with confidence, though, is that the two titles are apparently dissonant regarding the scope of 33-plus protection. As for what the drafters who packaged the two seemingly dissonant titles into one bill may actually have had in mind regarding this question, perhaps the safest conclusion is that they were undecided, and allowed the bill to be introduced with a view to working out an answer in committee and floor deliberations to come. My own view, as I've already indicated, is that the drafters would have had the most compelling of reasons for such indecision, namely, that neither choice is tenable.

the labor and workplace laws, the anti-discrimination laws, the anti-trust and regulated-industry laws, the banking and securities and trade-regulation laws, the food and drug and labelling laws, the air-pollution laws. None of these laws is primarily aimed at preventing "identifiable damages" to other property, and all of them have important applications that do not primarily aim, either, at preventing what H.R. 925 probably means by "identifiable hazards" to public health and safety.³⁷ And yet these applications can easily be seen as limiting the use of property in ways that can be considerably costly to property owners.

Take, for example, a case of property in the form of a manufacturing plant and an owner who makes a credible case that the market value of property holding at this location would be enhanced by, say, thirty percent if either of the following classes of regulation were lifted: wages and hours, or collective bargaining. Actually, it would probably take some pretty nifty economic analysis to work such matters out. You would have to know and show a lot about the competitive structure of the market in which the manufacturer was selling. But suppose he has unorganized competition, so that being subjected to collective bargaining laws does, in fact, seriously reduce the net revenue stream he could otherwise expect from his factory operation.³⁸ And suppose that he competes with products from abroad so that the imposition of wage and hour laws has a comparable effect.

Our owner, then, shows that there has been a more than twenty percent devaluation. Now, neither of these classes of regulation is going to be subsumed under H.R. 925's exemption for laws primarily aimed at preventing either identifiable damage to other property or identifiable hazards to public health or safety.³⁹ So does our owner in this case collect compensation for having to pay the minimum wage or for having to bargain in good faith with a labor board-certified union? What escape is there from that conclusion?

H.R. 925 contains a stipulation that an agency action "limits the use of property" (in the way that counts for purposes of the bill) only "if a particular legal right to use [the] property no longer exists because of the action."⁴⁰ Our owner, it seems, can easily bring his case within that stipulation. He says, "look, here is a particular right I used to have: the right to use this factory property for a fourteen-hour-per-day piece-work shop, at a monthly labor cost of \$xxx (here are my books for the past year to prove it), as long as I could find folks willing to work for that (which I still can). May it please the court, my former

37. See *supra* note 15 and accompanying text.

38. The assumption is that he can't raise prices to cover additional labor costs without unacceptable loss of market share, but also that his reduced net revenues still remain his most economically favorable use for the property with its standing factory.

39. See *supra* note 15 and accompanying text.

40. H.R. 925, *supra* note 3, § 10(2).

right to that effect no longer exists, now that the agency has cited me for violation of the wage law (or the bargaining law)." On what basis could a judge say him nay?⁴¹

Now I ask you: would the American public endorse *this*, or anything much like it, as their compact? If you carefully told the people that a bill carried implications as sweeping as what we have just described—all the while assuring them that it did so in the name of a higher-law mandate to respect property rights—would they understand?; agree?; approve?; or none of the above? Would such a redrafted bill have the least chance of becoming law?

Sponsors and supporters of H.R. 925 and S. 605 are faced with a serious dilemma. An across-the-board demand for compensation in every case in which federal government regulation (beyond the scope of "nuisance" law narrowly conceived) renders a property holding worth substantially less on the market than if unrestricted would have implications that Americans would not remotely accept as consonant with their full constitutional compact. That consequence may be avoidable by narrowing the protected class of property to land, and the offending regulatory schemes to three hand-picked ones, but not without leaving what pretends to be an act of high political conscience exposed as pork-barrel legislation, meaning legislation for a politically favored but not otherwise relatively deserving constituency.

No doubt the current congressional majority has it within its power to enact such a law. The courts will not interfere nor, probably, ought they to do so. The country isn't likely to rebel. Within the larger resulting unfairness—of waste and windfall—individual cases here and there will get fairer treatment. In short, politics as usual. So what, after all, is the problem?

In part, the problem is the cheapening of the rhetorics of property, conscience, and compact. It likely is not a long-run service to constitutional government to misuse them so flagrantly. In part, the problem is betrayal of the compact by pretense that the regulatory taking problem, recalcitrantly multi-dimensional as it is, can be handled at wholesale with a simple statutory formula. Long experience teaches otherwise: it can only be handled at retail, as pre-*Lucas* courts attempted with the balancing test.⁴² *Lucas* itself requires nothing differ-

41. The example is easily extendible to the other classes of federal regulation I mentioned above: anti-discrimination, antitrust and regulated industries, banking and securities and trade-regulation, food and drug and labelling, and air pollution. A moderately able judge would have little trouble reaching and defending a conclusion, for example, that a divestiture order in a monopolization case, or an order to cease and desist from discriminatory pricing or insufficient labeling of a product manufactured at or sold from a particular location, destroyed a previously existent "particular legal right" to use "property" in a certain way.

42. I don't mean to insist that only case-by-case, judicial "balancing" will do. I think it would make a great deal of sense for Congress to take up regulatory programs one by one to try to arrive at fair formulas for compensability and compensation that

ent except in the rare case of total extinguishment of the economic value of a landholding.

are tailored to these programs. The case of an owner of a family-sized building lot who unexpectedly discovers it to be the last remaining habitat for an animal species is not the same as that of an investor in 5,000 acres in a river valley who "unexpectedly" discovers that some of the land is a swamp-as-defined-by-law, even a newly enacted law. Any so-called "property rights" law will have to be responsive to such differences if it wants to claim resonance with the American historical compact.

