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Book Review: The Failure of Property Rights to Guard the Integrity of the Individual

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THE FAILURE OF PROPERTY RIGHTS TO GUARD THE INTEGRITY OF THE INDIVIDUAL

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A Review of PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION, by Nancie G. Marzulla & Roger J. Marzulla.

INTRODUCTION

From the moment I decided to write a book review of *Property Rights: Understanding Government Takings and Environmental Regulation*, I questioned how I could write it "objectively."[1] Admittedly, I have an agenda quite different from the Marzullas, and one of my purposes in writing this book review is to identify alternative sources of information on these issues for the purpose of generating creative thinking about how property rights are defined and valued. I also write to illustrate the necessity of regulating land use decisions to avoid disruption of the cycles that make life possible on this planet. This review is, of course, an incomplete exploration of the many significant issues raised by the Marzullas' book.

Over the past five years I have been watching the Property Rights Movement, and I have believed that it is about nothing more than greed, despite protests from its proponents on the importance of individual liberties and the presumed necessity to political independence of owning private property unburdened by governmental regulation. Reading *Property Rights* and crafting a review of it has led me to appreciate more fully the association between private property rights and freedom, a concept we seem to be struggling to

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1. I use quotes because being objective is an impossible task in any purist sense of the word. We are a product of our culture, and as such, we bring with us various assumptions to any analysis. Accordingly, I believe we each must be forthright about our own biases, which requires an honest and thorough examination of the premises from which we reason. I operate from a bias in favor of both the conservation as well as preservation of life, which I define broadly to include life forms otherwise known as "resources," balanced in relation to human health (physical, mental, emotional, and spiritual) needs. *See* Heather Fisher Lindsay, *Balancing Community Needs Against Individual Desires*, 10 J. LAND USE & ENVTL. L. 371 (1995). This may not be controversial in itself, but of course the standards to be applied to the balance become the source of much disagreement among those who call themselves environmentalists as well as between those persons and the persons who would not so identify themselves. Accordingly, what some may call "wise" development, I might call exploitative of people as well as other life forms.

define and understand even after over 200 years of what was supposed to be a system of government based in freedom. Different understandings of freedom and the limits of liberty seem to be at the heart of the disputes over how to define and protect property rights. To me it seems plain that "[i]ndividual liberty and interdependence are both essential for life in society,"[2] and therefore, we must have a tool for balancing interests[3] in property, even if that tool is an imperfect regulatory system for environmental and land use decision-making. Unfortunately, for property owners confronted with unwanted limitations on the use of property, this tool may represent the demolition of the barrier enjoyed by property owners against a government ruled by a tyrannical majority,[4] with compensation for governmental regulation as the required pay off.[5]

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2. RICHARD ATTENBOROUGH, WORDS OF GHANDI 20 (1982).

3. This includes the individual's interest in living in a healthy environment, regardless of whether the individual has ownership rights in real property. Appreciating this consideration requires that we recognize that such an interest cannot be protected by an individual alone because one would have to control all property for full protection of the interest. A community effort is necessary. Where the regulatory system fails, just as the Marzullas suggest, lobbying for legislative solutions may be appropriate. On the other hand, the answer may not be more rules. *See* Sam Smith, *How Not to Repair America*, UTNE READER, Sept.-Oct. 1997, at 65, 66 ("Laws and regulations should be handled like prescription drugs—they are useful, sometimes life-saving, treatments that should be administered sparingly because of numerous unforeseen side effects.").

4. This notion follows from the work of James Madison, whose plantation home is featured on the cover of PROPERTY RIGHTS. As summarized by one scholar, Madison emphasized the protection of property rights because he reasoned that:

> The free exercise of men's different and unequal faculties for acquiring property was a basic part of their liberty. From the right to exercise these faculties followed the right to unequal amounts of property acquired, and the "rules of justice" required the protection of these, as all, individual rights. The majority had the final power in a republic, but wise policy would be made according to the rules of justice and consideration of the public good, not according to the "interests" of the majority. . . . The majority must be prevented from misguided attempts to oppress the minority on the grounds of liberty as well as justice: a society which could not secure individual rights would destroy its own liberty. Finally, the rights the majority were most likely to attack, and which were central both to man's liberty and to the stability of society, were the rights of property. It followed that the first object of republican government was to protect the rights of property.

JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 38 (1990). Although "Madison did not use the term property to stand for all individual rights (as in the Lockean sense of life, liberty, and estate), . . . when Madison spoke of individual rights, it was property he had in mind." *Id.* at 23. The Marzullas are no doubt influenced by the Madisonian legacy of the concept of property: "Understandably, where the fruits of citizens' labors are owned by the state and not by individuals, nothing is safe from being taken by a majority or a tyrant." NANCIE & ROGER MARZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION 2 (1997). The Marzullas quote Noah Webster as stating: "Let the people have property and they will have power—a power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." *Id.* at 3. I question whether property, a limited power source, can effectively accomplish these admirable goals; if so, is it in fact used for these admirable ends; further, why

The freedom to exploit privately-owned property, however, should not be idealized as a critical source of individuality. Tension is spawned in that zone where government, acting as the voice of the majority, limits the liberties of those who wish to use property in a way that results in harm as the government has defined harm. Nevertheless, humans are incapable of survival without functioning in relation to other life forms, and this basic truth serves as a justification for rights and responsibilities to be balanced accordingly. Advocates for the position taken in *Property Rights* seem to have assumed that buying property means buying unlimited liberty to exploit that parcel for the sole gratification of the owner. If we were more isolated as a society, if it were possible for humans to live without depending on other life forms, then this assumption might be appropriate. *Property Rights* appears to rely on this faulty assumption because the analysis assumes that buying property secures rights to exploit resources for profit maximization.

If the interests of all humans and other life forms were more apparent to those advocating the position illustrated in *Property Rights*, perhaps we could think more about solutions rather than attacking the various positions that could be taken on these critical issues. The passionate desire for freedom characterizing the struggles of Patrick Henry during the American Revolution and Harriet Tubman during the Civil War is a desire I share, but if the property rights movement is simply about the desire of real estate developers and of corporations to secure more power to exploit for maximum profit our (and I emphasize "our") natural resources, then I feel no motivation to negotiate with them. On the other hand, as the

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do we not fashion another means to accomplish the protection necessary to the dream of freedom many of us have yet to see manifest.

5. Jennifer Nedelsky, commenting on the scholarly work on takings jurisprudence, has stated that:

> The literature is concerned not with limits to governmental power, but with the calculation and rationale for compensation. . . . The question "What is such a serious interference with property rights that it constitutes a taking?" (and thus requires compensation) becomes converted to "What sort of thing do we think should be compensated and hence called a taking?" This inversion reflects the fact that the sole issue has become compensation, not limits on governmental power.

NEDELSKY, *supra* note 4, at 233-34. This dynamic is apparent in the Marzullas' work: "[t]hrough its ability to regulate, government 'takes' these uses and benefits to property it needs, but because title to the property stays with the owner, the government often refuses to pay for it on the grounds that no taking has occurred." MARZULLA & MARZULLA, *supra* note 4, at 163. This frustration is a recurring theme in the book and indicates that no matter what regulation a government attempts to devise for the purpose of balancing many competing interests and needs, those who have purchased private property rights will have the right to compensation under the Marzullas' theory. Although concern over the lack of bright line rules is understandable, *see id.* at 24, employing such an extreme interpretation of the Takings Clause compromises the government's duty to protect the health and welfare of the citizens.

Marzullas illustrate, small property owners may legitimately feel exploited in their struggles to find solutions to the challenges presented by the regulatory systems on land use and environmental decisions.[6] *Property Rights* is a book that reflects zealous advocacy for small property owners faced with complex governmental regulation, and as a lawyer who has advocated for the less powerful in society, I admire that. Nevertheless, focusing the debate on these individuals, as *Property Rights* does, inappropriately detracts[7] from how the wealthy are served by increased protection of private property rights at the expense of public health and welfare, which translates into our parents, children, partners, friends, and the communities we call home.

A persuasively written book, PROPERTY RIGHTS appears to have been written to generate interest in developing solutions to the perceived lack of protection and undue burden that property owners currently experience. The authors are well experienced for this task. Nancie Marzulla is described as "the nationally recognized leader of the property rights movement."[8] She heads the organization Defenders of Property Rights, which she founded, and litigates on behalf of "small property owners who have been unfairly singled out to bear the cost of achieving public good."[9] Her foundation also assists wealthy property owners like Mr. Lucas, whose million dollar purchases of South Carolina barrier island property led ultimately to litigation because of South Carolina Coastal Council's regulation of that property.[10] Roger Marzulla, as Assistant Attorney General with the Justice Department, led the government's participation[11] in *Nollan v. California Coastal Commission*[12] and *First English Evangelical Lutheran Church v. County of Los Angeles*.[13] Currently a partner at Akin, Gump, Strauss, Hauer & Feld in Washington D.C., he represents real estate developers and "aerospace, chemical[], manufacturing, mining, timber, oil and gas" companies in his practice as head of the Environmental Law section of the firm.[14] In other words, he

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6. For example, the Marzullas present such a scenario with the story of Tuang Ming-Lin. *See* MARZULLA & MARZULLA, *supra* note 4, at 84.

7. I appreciate that small property owners suffer harsh effects when they are without sufficient funds to manage the complicated regulatory and litigation processes. Also important is addressing the actions of the frequently disguised moneyed interests that drive the public relations and lobbying on these issues.

8. MARZULLA & MARZULLA, *supra* note 4, at xvii.

9. *Id.*

10. *See id.*; Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

11. *See* MARZULLA & MARZULLA, *supra* note 4, at xvii.

12. 483 U.S. 825 (1987).

13. 482 U.S. 304 (1987).

14. MARZULLA & MARZULLA, *supra* note 4, at xviii.

represents virtually all of the polluting industries with the exception of the military.[15]

Property Rights addresses traditional understandings of the definition of property,[16] regulatory takings jurisprudence,[17] the specific regulations as to wetlands,[18] the Endangered Species Act,[19] Superfund,[20] mining regulations,[21] land use and zoning law,[22] due process issues and forfeiture,[23] the practical difficulties of litigating takings cases,[24] and developing solutions[25] to the problems they describe. As it is, *Property Rights* is only 177 pages not including the appendices. Accordingly, the discussion of the many issues cannot be considered complete because a more thorough analysis of all the issues touched on in this book would require numerous treatises. *Property Rights* may be read as a springboard towards getting more completely informed on specific issues because the breadth of the Marzullas' scope precluded a thorough treatment of the environmental and land use systems at work in our society today. The book is easy to read and includes a series of appendices that will aid lay persons as well as lawyers using this source.

Property Rights attempts to show, as Senator Orrin Hatch suggests in the Foreword, that "the America of the twentieth century has witnessed an explosion of federal regulation of society that has jeopardized the private ownership of property with the consequent loss of individual liberty."[26] Senator Hatch asserts that "[u]nder current federal regulations, thousands of Americans have been denied the right to the quiet use and enjoyment of their private property," without illustrating this bold statement.[27] He does acknowledge the "very real need for prudent ecological practices," but he suggests that such practices result in "forfeited" property

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15. A significant exception, the military's excesses have had a devastating effect world wide on civilian health, the health of the planet, and on the health of the very soldiers themselves, as seen in the Agent Orange litigation by Vietnam veterans and their families, for example. *See* JONI SEAGER, EARTH FOLLIES 14-69 (1993), for a number of examples nationwide and world wide in addition to Agent Orange effects; *see also* Lindsay, *supra* note 1, at 392-95.

16. *See* MARZULLA & MARZULLA, *supra* note 4, 1-21.

17. *See id.* at 23-41.

18. *See id.* at 43-69.

19. *See id.* at 71-91.

20. *See id.* at 94-98.

21. *See id.* at 99-102.

22. *See id.* at 111-24.

23. *See id.* at 125-41.

24. *See id.* at 143-55.

25. *See id.* at 163-77.

26. *See id.* at ix.

27. *Id.*

rights.[28] He also asserts that the government currently has a "practice" of "singling out private property owners to bear the costs of regulation."[29] *Property Rights* echoes[30] and supports with examples these assertions, although I for one am not convinced that regulatory action necessarily results in a taking or that members of the government are acting with specific intent to single people out to bear costs that should properly be borne by taxpayers generally.

In *Property Rights*, as Judge Loren Smith describes in the Introduction, the authors approach the "fundamental human right to property . . . as part of the fundamental integrity and dignity of the human being."[31] He states that the twentieth century has shown us that "totalitarian" ideologies, which include socialism in his opinion, have the "overriding objective of destroying the fundamental human rights of life, liberty, and property. Their reasoning was that only by destroying these fundamental rights in individuals could their utopias arise—giving all power to the mystical volk, proletariat, people, or masses."[32] Property, he states, is the "practical foundation" of life and liberty and has the function of restraining tyranny.[33] If this is true, however, how do the many people who do not own any interest in real property maintain "integrity and dignity" against the government or enjoy life and liberty without their "practical foundation" of property interests? If we as a society redefine property interests so that each person, regardless of property ownership, may be "independent" from government, would we have a society that successfully balances the interests of so many? Or must we reorient ourselves so that, rather than property, we have another symbol entirely for that barrier between the individual and majority rule?

PART I—THE HISTORICAL VALUE OF PROPERTY OWNERSHIP

The Marzullas begin with some theoretical discussion grounded in what the authors describe as "classical notions of legal rights and individual liberty."[34] So-called "classical notions," however, are a

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28. *Id.* at ix, x.

29. *Id.* at x. Perhaps this fear is shared by the fifty-two percent of Americans who responded affirmatively to a Gallup poll on whether the federal government is so "large and powerful that it poses a threat to the rights and freedoms of ordinary citizens." Smith, *supra* note 3, at 65.

30. *See* MARZULLA & MARZULLA, *supra* note 4, at 163.

31. *Id.* at xiii-xiv.

32. *Id.* at xiv.

33. *Id.*

34. *Id.* at 1.

reflection of the writers' adoption of European norms[35] that cannot entirely or even mostly account for democratic values.[36] The Marzullas attribute the source of our development of legal rights and liberties only to "the Justinian Code, Magna Carta, and the Two Treatises of John Locke,"[37] without mentioning, for example, the rich tradition of the political ideas of the Iroquois that influenced the founders.[38] The Marzullas also mention only James Madison's views on property,[39] but if one founder's view is significant, then we must examine other founders' views as well. Their narrow approach is consistent, however, with the neo-Lockean view that fuels the property rights movement. The inappropriate focus on John Locke as a source of the theoretical underpinnings of property is part of the inadequacy of the property rights movement's position in today's world.[40] Assuming that humans can own any aspect of the planet,[41] an inappropriate model for property ownership, drives our legal theory and practice: land.[42] Because property ownership no longer can be considered some sort of sacred right, no boundary exists at property lines between governmental authority and the individual.[43]

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35. *See* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L REV. 329, 335-40 (1996).

36. The United States was shaped by the cultural heritage of Indian Nations as well as those of England and Europe. *See, e.g.*, PAULA GUNN ALLEN, SACRED HOOP 216-17 (1992) (describing the American norms that are attributable in part if not in full to Indian influence, such as child-rearing practices, frequent bathing, sexual openness, sense of humor, and disdain of the authoritarian); *see also* BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS 4-6 (diet, medicine, clothing, water transport, vocabulary, music, bathing), 37 (war tactics), 43 (oratory) (1982).

37. MARZULLA & MARZULLA, *supra* note 4, at 1.

38. *See* JOHANSEN, *supra* note 36, at 11, 13, 23-29, 101-09, 116.

39. *See* MARZULLA & MARZULLA, *supra* note 4, at 11. The focus on Madison is also apparent in the cover of the Marzullas' book, which features an illustration of Madison's plantation.

40. *See* Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1100-01 (1996) (criticizing reliance on Locke's work in modern times because of its association with out-dated scientific thought).

41. This is a common assumption but not inevitable: "How can you buy or sell the sky, the warmth of the land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them?" ED MCGAA, EAGLE MAN, MOTHER EARTH SPIRITUALITY xi (1990) (quoting from Chief Seathl (Seattle) in response to President Franklin Pierce's desire to buy property of the Suwamish Tribe). We have a need to use land, water, and food sources, but the creation of property rights has no necessary relationship to these needs, which could be served by usufructory rights. Beyond survival needs, we interact with Earth's "resources," such as rivers and mountain ranges, for spiritual enlightenment and emotional pleasure. Again, having use rights rather than strictly private property ownership rights would serve and do serve these needs (for example, we visit National Parks for prayer and pleasure, owned by the government, not by private parties). Even industry could continue with use-based rights, but financial planning would involve more risk because the rights in the property would not weigh as heavily as under our current system.

42. *See* Rose, *supra* note 35, at 351.

43. *See* NEDELSKY, *supra* note 4, at 239.

A. An Overlooked Source of American Norms

Property Rights seems to follow from the principle that right holders should be able to "do with their land as they damn well please."[44] Actually, even if the sources relied on by the authors would support such a principle, the origins of our constitutional freedoms cannot be so simplistically categorized as growing only out of the documents named by the authors. This is in part because our system of government structurally reflects the federal system of the Iroquois.[45] Interestingly, property use regulation in England, the colonies, and the early United States[46] indicates the propriety of the very regulation the Marzullas claim effects takings. Colonial legislatures "routinely physically appropriated land, usually for road building, without paying compensation."[47] Additionally, in the first half of the nineteenth century, legal discourse drew from sources other than Locke and illustrated the individual's duties to the community.[48] This makes common sense: with every right comes a corresponding responsibility.

Benjamin Franklin greatly admired Indian society generally,[49] and being dissatisfied with European models of government, took heed of the political system of the League of the Iroquois,[50] which involved checks and balances on centralized power.[51] Thomas Jefferson also "freely acknowledged his debt to the conceptions of liberty held by American Indians . . . ."[52] Jefferson, in writing the Declaration of Independence, welcomed editorial input from Benjamin Franklin,[53] and the "self-evident truths" Jefferson listed reflected Indian culture,[54] though not perfectly.[55]

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44. Duncan, *supra* note 40, at 1096.
45. *See* ALLEN, *supra* note 36, at 218-19.
46. *See* Duncan, *supra* note 40, nn.217-73 and accompanying text.
47. *Id.* at 1136.
48. *See id.* at nn.274-338 and accompanying text.
49. *See* JOHANSEN, *supra* note 36, 77-97.
50. *See id.* at 11.
51. *See id.* at 11, 24.
52. *Id.* at 15.
53. *See id.* at 100.
54. *See id.* at 101.
55. The "self-evident truths" indicated that "men" are created equal; "if they are white" being so self evident as not to need mentioning. The female sex was excluded entirely from holding such rights, but in the Iroquois society, the checks and balances of political power included a balance between the sexes: the representatives were men, but they were nominated by their female relatives and could be removed by the female relatives for misconduct. *See id.* at 26-29; *see also* ALLEN, *supra* note 36, at 32-35. Allen also reports that in the Mohawk nation, a member tribe of the Iroquois confederacy, women made all political decisions although the chiefs (men) spoke for the women. *See id.* at 201-02.

As to property rights specifically, both Jefferson and Franklin identified property as a civil right,[56] not as a natural right:

> Private property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing, its contributors therefore to the public Exingencies are not to be considered a Benefit on the Public, entitling the Contributors to the Distinctions of Honor and Power, but as the Return of an Obligation previously received, or as payment for a just Debt.[57]

Jefferson wrote that "no one has, of natural right, a separate property in an acre of land. . . . Stable ownership is the gift of social law, and is given late in the progress of society."[58] This certainly cuts against the Marzullas' theory of property as "God-given,"[59] and well it should, because any theory springing from a premise in a particular religion must stand or fall without reliance on that religion unless we are willing to compromise the First Amendment freedom of religion.

Interestingly, if we are willing to acknowledge the Iroquois basis of our government, then egalitarian norms of property, as represented by government's protection of the public interest, would be less controversial. If egalitarian norms from Iroquois society were a part of our economic system, concentration of wealth in the few would be unacceptable.[60] Owning land itself would be unacceptable: "I never said the land was mine to do with as I chose. The one who has the right to dispose of it is the one who created it."[61]

B. The Misguided Neo-Lockean Perspective

Even if we solely consider John Locke's theories, they must be understood in the context of the mechanistic and atomistic thought of the seventeenth century that produced Locke,[62] who could not

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56. *See* JOHANSEN, *supra* note 36, at 108.

57. *Id.* at 104 (quoting Franklin).

58. *Id.* at 108.

59. MARZULLA & MARZULLA, *supra* note 4, at 1.

60. Egalitarian distribution of property was the system of the Iroquois in that the women of each family held title to all goods for the purpose of allocating those goods among everyone; additionally, those holding the political power gave possessions away to other members of the tribe to avoid concentration of power, which would void approval by the governed. *See* JOHANSEN, *supra* note 36, at 29, 39. The property distribution system was considered egalitarian by both Franklin and Jefferson, who believed that the distribution of wealth as well as power based in public opinion precluded oppressive government among Indian societies. *See id.* at 103.

61. Donald W. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1041 n.13 (1973) (quoting Heinmot Tooyalatket (Chief Joseph)); *see also id.* at n.15 ("one does not sell the earth on which the people walk," Tashunka Witko (Crazy Horse)).

62. *See* Duncan, *supra* note 40, at 1112-13.

help but be influenced by the scientific revolution engineered by Sir Isaac Newton, Francis Bacon, and Rene Descartes. This period promoted the exploitative relationship with Earth we have today[63] because of the paradigm shift in that period from an organic view of the universe to a view of nature as a machine and therefore inanimate. Without a view of the universe as living, domination of nature was not objectionable and was possible with an understanding of those mechanical rules explaining the operation of the universe.[64] This dominion perspective was rooted in Western religion, which was used by thinkers of the period who theorized the framework for dominating nature.[65]

This tradition continues though outdated by current science, which is based in the interdependence of all life forms.[66] Relying on Locke's theory of property feeds this destructive cycle because Locke himself theorized from the premise that:

> God, when he gave the world in common to all mankind, commanded man also to labor, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e., improve it for the benefit of life. . . . God, by commanding to subdue, gave authority so far to appropriate; and the condition of human life which requires labor and material to work on necessarily introduces private possessions.[67]

First of all, his theory assumes a creative, organizational force of the universe, an assumption agonistics and atheists would not make. His theory further assumes a monistic force, and not every religion assumes this either. This premise is important to examine because in

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63. *See* Lindsay, *supra* note 1, 378-81; *see also* Duncan, *supra* note 40, at 1118-1120 (Baconian influence on Locke's development of property theory).

64. *See* Duncan, *supra* note 40, at 1118.

65. *See* Lindsay, *supra* note 1, at 374-78 (discussing how the Judeo-Christian tradition encourages an ecologically unsound dominion perspective); *cf.* Rose, *supra* note 35, at 341 (the Enlightenment was characterized by hierarchical views placing human above other life forms on Earth); *cf.* Duncan, *supra* note 40, at 1095 (humans asserting dominion since "biblical" times).

66. *See* Lynda L. Butler, *Private Land Use, Changing Public Values, and Notions of Relativity*, 1992 BYU L. REV. 629 (1992):

> American society traditionally viewed land as an economic resource—a commodity to be exchanged in the marketplace. Current scientific understandings of our ecosystem clearly indicate that this view is myopic. . . . Proponents of economic theory generally recognize the need to consider costs and benefits in making resource allocation decisions. Yet, in applying this principle to private land use choices, many seem to focus only on traditional economic factors having an established exchange value in the marketplace. The ecological value of land is left out of the traditional land use equation.

Id. at 655-56.

67. Duncan, *supra* note 40, at 1120, 1120 n.141 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ¶¶ 32, 35 (Thomas I. Cook ed., Hafner Publishing Co. 1995)(1689)).

American society we should be wary of relying on theories that may stand or fall on a religious assumption.[68] Further, his understanding reflects a concept of Earth as a thing to be improved or as an uncooperative entity to be dominated for the benefit of humankind. Worse, failure to subdue nature was "waste": "[L]and that is left wholly to nature, that has no improvement of pasturage, tillage or planting, is called, as indeed it is, 'waste'; and we shall find the benefit of it amount to little more than nothing."[69] This notion has no validity in science and only makes sense from the perspective of our limited market that puts no price on ecological value, but instead values profit maximization.

Locke's analysis of sufficiency[70] and spoilage[71] was a property theory "based on exploitation that fit neatly into the seventeenth century's conception of nature."[72] Politically, as persons could not take away each other's property without consent, so too was the state limited from taking property without consent.[73] Aside from the value of a system that organizes property relationships and expectations, the paradigm fails in that its premise of "mastering" or "commanding" nature is as absurd as Locke characterized the loss of property as a price of gaining society to be.[74] In our efforts to control nature, we disrupt the very cycles that make continued life possible. The more we attempt to exploit Earth, the more we will experience the negative consequences, which impact our very survival. An obvious example is the use of the atomic bomb—we discovered how to manipulate the power of the atom, but the costs are extraordinary: the loss of lives and communities and ecological balance.[75]

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68. This is not to say that there is no place for spirituality in our theories, but the spiritual concept must have a social utility: for example, refraining from murder. Of course, the debate does not end there as we will not all agree on what has social utility.

69. *Id.* at 1120-21 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ¶ 42 (Thomas I. Cook ed., Hafner Publishing Co. 1995)(1689)).

70. "[O]ne obtains property in an object, or in land, by investing labor and removing the property from the state of nature, 'at least where there is enough and as good left in common for others.'" *Id.* at 1121 (quoting John Locke, Two Treatises of Government P 27).

71. The owner of a good must use it before it spoils. Hoarding of goods that were not durable led to spoilage and therefore would not be protected property accumulation, but accumulating wealth in the form of a durable good, such as money, does not offend the spoilage principle. *See id.* at 1122.

72. *Id.* at 1123.

73. *See id.* at 1124.

74. *See id.* at 1124. *See also id.* at 1127. (Locke reasoned that preservation of property rights is the incentive for "men" to enter society; accordingly, it is absurd for societal existence to require a loss of property rights.)

75. *See* SEAGER, *supra* note 15, at 43-69. One of the most tragic examples of the cost of "controlling" nature comes in the form of "jelly-fish babies." These deformed infants, having no shape recognizable as human and possessing no eyes, are born on the Marshall Islands,

Economically, regulations are appropriate corrective measures because the market does not account for the value of land lying idle.[76] Although wasteful to Locke, a parcel that is "unimproved" may be functioning to balance ecological needs that the market does not recognize in price terms. The Marzullas would argue that the use of a regulation to protect this public interest would still require compensation, but as Professor Butler explains:

> By imposing a legal obligation on private landowners to cooperate in preserving common resources, the law would be following some basic principles of economics. . . . [T]his obligation would require landowners to recognize the legitimacy and significance of the public interest in preserving common resources. . . . Recognition of the public interest would, in turn, mean accepting reasonable land use restrictions designed to internalize private land use costs, minimize inefficient land value discounting, and readjust land use practices to reflect present resource conditions and existence and other environmental values. As a general matter, landowners bearing this duty to cooperate should not be able to successfully raise takings challenges to well-tailored and broad-based restrictions when the restrictions leave the landowner with economically viable use and help to preserve common resources that are available for public use either because of the impracticality of recognizing private rights or because of the importance of the resources to the public's survival and well-being.[77]

These concepts are easier to integrate when we relinquish the dominion perspective on Earth and non-human species. This is ethically necessary because when humans attempt to "master" Earth, which is the source of our continued existence,[78] we reject life-honoring values.[79] Instead, we have to make a good faith effort to value land, water, and air for their life-sustaining characteristics, not just for their use in producing wealth in a capitalist economy.

PART II—USE AND ABUSE OF PROPERTY RIGHTS: ACCUMULATION OF WEALTH IN THE FEW

Although the Marzullas do not question that environmental regulation serves a useful purpose, they do not explain why. For their purposes, this is not necessary because the inquiry is only

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where nuclear testing by the United States poisoned the environment. The infants do not survive more than a few hours. *See id.* at 65-66.

76. *See* Butler, *supra* note 66, at 648-51.

77. *Id.* at 651.

78. *See* Duncan, *supra* note 40, at 1113-15; *see also* Lindsay, *supra* note 1, nn.49-60 and accompanying text.

79. *See* Duncan, *supra* note 40, at 1118; *see also* Lindsay, *supra* note 1, at 378-79.

whether the regulation impacts the economic use of the property, not how much the regulation benefits the property owner as a member of the public. The damage done to the planet as a result of supporting the use of resources to their highest economic use, however, is extraordinary. Also extraordinary are the lengths to which supporters of polluting industries will go to have us believe that people worried about environmental degradation are alarmists without sufficient information.[80]

The level of toxic waste in our land, water, and air is more astounding than one may think. The public relations campaign of polluting industries discredits valuable information and responsible activists.[81] Some newspapers, not coincidentally financially connected to polluting industries, have contributed to this attempt to discredit those who would speak against environmental degradation.[82] Unfortunately, this smoke screen distracts us from a problem as pervasive as "[c]arcinogenic PCBs [] detectable in mother's milk throughout the world."[83] This poisoning results from dioxin, produced through any processes that burn organic matter in the presence of chlorine or processes where chlorine or bromine are simultaneously present, notably pulp and paper mills so frequently discharging "effluents" (read dioxin) into the sources of our drinking water.[84]

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80. *See* LOIS MARIE GIBBS, DYING FROM DIOXIN 157 (1995) (describing the stereotypes used by industry to minimize the activists' efforts like Ms. Gibbs, a survivor of Love Canal and organizer for Citizens Clearinghouse for Hazardous Waste). Love Canal was a community in Niagara Falls that was a dumping site for Hooker Chemical and Plastics Corporation in 1947; the 20,000 tons of dumped carcinogens leaked and migrated in the 1970s, ultimately forcing the evacuation of the already poisoned residents. *See* RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE 267-76 (1988). "One woman living in the area had three successive miscarriages before giving birth to a child. The baby was born with three ears." *Id.* at 273.

81. As an example, before Rachel Carson's book SILENT SPRING was published, Velsicol chemical company pressured the publisher to change the work or refuse to publish it; publication led to a PR campaign to discredit Carson. *See* JOHN C. STAUBER & SHELDON RAMPTON, TOXIC SLUDGE IS GOOD FOR YOU 124 (1995). The authors also describe "greenwashing," an attempt by polluters to paint the false image of themselves as responsible to the environment. *See id.* at 125-26.

82. *See* GIBBS, *supra* note 80, at 281-83 (focusing on journalist Keith Schneider for the New York Times, who admitted to fabricating the comparison that dioxin is "no more risky than spending a week sunbathing," which he had attributed to "experts" in one of his articles). The information came from Vicki Monks' American Journalism Review article in 1993, which also identified the *Arizona Republic* and *Indianapolis Star*, owned by Dan Quayle's family; the Times Mirror Company, owning the *Los Angeles Times*; the *Chicago Tribune*; the *Washington Post*; and the *New York Times* as connected to paper and timber companies that have taken editorial positions supporting "relaxed dioxin standards." *Id.* at 283.

83. KENNY AUSUBEL, RESTORING THE EARTH 16 (1997).

84. GIBBS, *supra* note 80, at 35-36 (explaining the relationship between PCBs and dioxin). According to an EPA reassessment in 1994, dioxin is the leading cancer causing chemical for the general population; dioxin accumulates in biological tissues, with the average level of accumulation being "at or just below the levels that cause some adverse health effects," which

Of course, the regulatory system is not perfect,[85] and because of our dependence on a market economy, government does participate in the reductionist view that permits life to come with a price tag. Just as prices (heavily discounted) are attached to our rights to a healthy environment,[86] our very own DNA is considered fungible:[87] in the course of the Human Genome Project, designed to identify each gene and its function in humans, corporations have applied for patents on "cell lines in women who are genetically engineered to produce lucrative biochemicals in their mammary glands."[88] Attempting to patent the cells of living beings represents the ultimate arrogance of accumulation of what can be considered property, and this kind of exploitation of people is just another reflection of the same arrogance that characterizes fee holders who presume that their liberty to exploit for profit outweighs the interests of others to live in a healthy environment.

Those who wish to ignore the issues of pollution should remember Silicon Valley, number 23 on the Superfund list of sites to clean.[89] In Santa Clara, the groundwater is contaminated with trichloroethylene (TCE) as well as other toxic waste from the computer industry. Computer industry workers' experiences of miscarriages and birth defects as well as Silicon Valley "cancer clusters" cannot be coincidental.[90] Additionally, we should not ignore that we are reaping what we have sown in our excessive consumption of resources in the form of global warming and its far-reaching effects: "[e]ight of

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include "suppression of the immune system; reduced testosterone levels, which affects fertility; and reduced glucose tolerance, which increases the risk of diabetes;" and the principle sources of dioxin are "combustion and incineration, chemical manufacturing, pulp and paper mills, metal refining and smelting," and soils and sediments contaminated by dioxin. *Id.* at 31.

85. As one commentator has stated, "Our policy approach has also been fragmented through a focus on individual species rather than on the matrix of relationships among species within ecosystems. . . . These fragmented approaches to preserving biodiversity have been ineffective because they reflect too sharp a distinction between public and private property, and unrealistic distinctions among species." Evan van Hook, *The Ecocommons: A Plan for Common Property Management of Ecosystems*, 11 YALE L. & POL'Y REV. 561, 567-68 (1993). Additionally, despite President Clinton's characterization of our environmental laws as a "'tightly woven' web . . . to protect biodiversity," our regulatory system can be said to be a "patchwork of halfway measures, interstitial tinkering, and missed opportunities for conserving biodiversity." Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 6 (1997).

86. For example, a member of a class action against a polluting industry might receive a check for several thousand dollars after years of litigation that does not end the pollution (because that has no economic utility) but instead puts a price on that person's priceless right to live in an area uncontaminated by carcinogens.

87. Of course, this is just a new variation on an old theme. African slavery is an example of not only human beings, but a living culture, reduced into monetary terms. Prostitution and pornography are examples of how sexuality has a price tag.

88. AUSUBEL, *supra* note 83, at 209.

89. *See id.* at 14.

90. *See id.*

the hottest years ever recorded have come since 1980."[91] The undeniable ozone depletion has resulted in the loss of much plankton, for example, which is the "base of the entire marine food chain and a critical supplier of oxygen to the global atmosphere."[92] Furthermore, non-human species suffer for our excesses. The nation's symbol, the bald eagle, is not reproducing well along the coast of Maine, the Great Lakes area, and other shoreline areas because of pollutants present in the eagles' eggs, a result of the poisoned food the eagle consumes.[93] Similarly, here in Florida's third largest freshwater lake, Lake Apopka, chemical contamination from a Superfund site on the shoreline has led to hormonal dysfunction that threatens reproduction of alligators.[94] Since the 1970s, the alligator population in this lake has declined 90 percent.[95] Lake Apopka eggs produced twice as many females as males, which, combined with the evidence of abnormal sexual development and decreased testosterone levels in the males, is consistent with the EPA findings that DDE, a contaminant of Lake Apopka, blocks male hormones by binding to androgen receptors.[96]

Naturally, as all ecologically aware persons know, this is not just affecting reptiles in Lake Apopka. Humans should remember that these high concentrations of chemical contaminants, responsible for abnormal sexual development, are in our food chain, detectable in women's breast milk.[97] This is not simply a matter of protecting animals we humans have some affection for, such as dolphins and bald eagles. This is a matter of recognizing that each species benefits and harms other species, and we must all be educated on how to remain in a balanced and harmonious set of relationships for optimum health.

Another abuse often overlooked is the issue of who gets to make the land use decisions and whether they are the ones most affected by these decisions.[98] Considering the apparent interest of advocates in the property rights movement in protecting individual freedom,

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91. *Id.* at 179.

92. *Id.*

93. *See* GIBBS, *supra* note 80, at 130.

94. *See id.* at 128.

95. *See id.* After studies of alligator eggs and young, scientists found that 72% of the embryos from Lake Apopka died as compared with a 48% rate of embryo death in eggs from an uncontaminated lake. *See id.* at 129. More striking was the infant death rate: 41% for Lake Apopka alligators as compared to 1% for the control group. *See id.* The baby alligators were studied through the six month period after hatching.

96. *See id.* at 129. Turtles and other reptiles in the Lake Apopka also suffered abnormal sexual development compromising reproductive capacity. *See id.*

97. *See* AUSUBEL, *supra* note 83, at 16.

98. *See* SEAGER, *supra* note 15, at 159-61.

they must recognize the necessity of respecting the individual freedom of others. At the First National People of Color Environmental Leadership Summit in 1991, the participants adopted principles of individual freedom, including that "[e]nvironmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things," and that "[e]nvironmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care."[99] If members of the property rights movement do not recognize the freedom of individuals from environmental injustices, then it is fair to question whether hypocrisy marks their movement. Recognizing either of these principles of individual freedom would require fee holders to consider their freedom in relation to the freedom of others. If they want to be paid each time a regulation requires them to refrain from exploiting in particular ways the resources, then are they willing to pay victims of environmental injustice full compensation and reparations for damages as well as for quality health care? So far, the environmental and land use disputes in this nation indicate that the answer is no.[100]

The Marzullas are concerned about the burden on the small property owner to fight regulation, but what they do not examine is the difficulty of the average citizen to lobby for or against policies that denigrate the environment. The economic disparities in the United States are stark, an issue almost exclusively ignored in the balancing of burdens in land use and environmental regulation. American households of a net worth of $ 2.3 million or more have control of almost 40 percent of the nation's wealth; similarly, 20 percent of Americans hold 80 percent of the country's wealth.[101] These are higher percentages than in other industrial nations[102] and

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99. GIBBS, *supra* note 80, at 309-10.

100. *See generally* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard, ed. 1993). Unfortunately, these issues are not race or class neutral. *See id.* 16-18 (showing that both income disparities and racial identity of communities play roles in environmental and land use planning).

101. *See* STAUBER & RAMPTON, *supra* note 81, at 77-78. Illustrating this point is the fact that the title was a source of contention between the authors and representatives of the Water Environment Federation, which is dedicated to transforming the image of sewage sludge as nontoxic into the bland reality of mere "biosolids." *See id.* at 100. When the authors learned that Powell Tate, a "blue-chip" Washington-based PR/lobby firm that specializes in public relations around controversial high-tech, safety, and health issues, was managing the campaign for Water Environment Federation, the authors attempted to get some information from the taxpayer funded group. *See id.* at 101. Requested strategy documents, memos, and opinion surveys were unproduced despite the proper request under the Freedom of Information Act. *See id.*

102. *See id.* at 78.

point to the hypocrisy of our land of equal opportunity. For the majority of Americans, earning a living wage requires working longer and harder so that people "have less free time for community involvement and grassroots citizen action."[103] Unfortunately, although a majority of us are aware of human's degradation of the planet, industry public relations campaigns have been based in the false assumption that we are "disconnected" from environmental reality.[104] In other words, we are all hallucinating. Even if we have the resources to organize, then, we are distracted by public relations campaigns that minimize who is responsible (and therefore who should bear the financial burden) for environmental problems.

An entire "movement" is an example of one such tactic to distract the public from genuine environmental and land use problems. The so-called "Wise Use Movement" employs Hill & Knowlton public relations to object to environmental and land use regulation while also discrediting environmentalists.[105] To illustrate that this movement is by no means based in any wise use of resources, on the Wise Use agenda at its inception in 1988 were the following:

> rewriting the Endangered Species Act to remove protection from 'non-adaptive species' like the California Condor; immediate oil drilling in the Arctic National Wildlife Refuge; opening up all public lands to mineral and energy production, including national parks and wilderness areas; turning the development of national parks over to 'private firms with expertise in people moving, such as Walt Disney'; imposing civil penalties against anyone who legally challenges 'economic action or development on federal lands.'[106]

Of most concern should be the last item, which indicates a motive to punish legally-instituted objections to uses of land owned by the government—not privately owned property. The agenda of course represents a view that ignores the public interest in ecologically sound decision making and instead supports profit maximization.

Revealing as well are conference seminars such as those on "Suing Environmental Organizations," reflecting the intent to, according to Ron Arnold, a creator of the Wise Use agenda,[107] "sue environmental groups whenever there is a legal reason to do so,"

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103. *Id.*

104. *See id.* at 126. Part of this campaign is based on a good cop/bad cop strategy that attacks activists as the "latest incarnation of the communist menace." *Id.*

105. *See id.* at 127.

106. *Id.* at 141.

107. *Id.* at 142. Arnold is quoted as saying that "We intend to wipe out every environmental group, by replacing it with a Wise Use group." *Id.* at 141.

such as when an environmental group tells a "lie" causing "economic harm," which Arnold characterizes as a "civil tort."[108] If this is not enough to show how extreme the members of this movement are, at the Wise Use Leadership Conference of 1992, the winner of the "best newcomer" award characterized the Humane Society as a "radical animal rights cult . . . a front for a neo-pagan cult that is attacking science, health, and reason."[109] At the same time, the public relations strategy included fabricating a memorandum on Earth First! letterhead that called for acts of violence against the "mega machine."[110]

Corporate America claims that destruction is a cost of doing business to provide the public with the style of living to which we are accustomed.[111] I find this insulting. We simply have not used the creativity that makes this species special when we claim that the most cost efficient alternatives must involve environmental degradation. For example, instead of using nylon, we could develop a means to use spider's silk or to emulate a spider's silk, which is "stronger than steel and more durable than nylon" according to extensive studies.[112] Many other innovations in technology can mitigate destruction of resources, but unless the public demands that these changes be made, corporations will continue to profit at the expense of health and welfare. The property rights movement exacerbates this dilemma because obtaining compensation for any regulation bearing on economic uses of property discourages regulation that would otherwise promote the health and welfare of the public. Even if more regulation is not the answer, and it may not be, the property rights movement distracts the public debate from generating solutions to the underlying problem: how do we continue to support our economy and society without poisoning ourselves and

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108. *Id.* at 142. Perhaps law suits won't be enough: "Former Interior Secretary James Watt (who in 1996 pleaded guilty to trying to influence a Federal grand jury) told a gathering of cattlemen in June 1990, '[I]f the troubles of environmentalists cannot be solved in the jury box or at the ballot box, perhaps the cartridge box should be used.'" *Id.* Perhaps the PR executives like Frank Mankiewicz, vice-chair of Hill & Knowlton, are correct that no violence is necessary from wealthy interests impacted by environmental policy: "The big corporations, our clients, are scared shitless of the environmental movement. . . . The corporations are wrong about that. I think the companies will have to give in only at insignificant levels. Because the companies are too strong, they're the establishment. The environmentalists are going to have to be like the mob in the square in Rumania before they prevail." *Id.* at 123.

109. *Id.*

110. *See id.*

111. See Lindsay, *supra* note 1, at 388-92, for some examples of this claim in action. See generally MOKHIBER, *supra* note 80, for examples of corporate excesses that follow from the assumption that economic benefits from dangerous business practices outweigh the costs borne by our communities and families.

112. AUSUBEL, *supra* note 83, at 236.

destroying our habitat? Instead, we are caught up in a debate that simply attacks government and ecological values without acknowledging the valid public interests at issue.

PART III—HOW *PROPERTY RIGHTS* CHARACTERIZES THE PROBLEM

Many have attempted to explain takings law both as to the theoretical underpinnings as well as to the various approaches of the case law as it has developed.[113] Although the Marzullas seem to be arguing from the premise of equality of opportunity among fee holders, "norms of equality do not help solve increasing pressures on environmental resources; in fact, they can hurt very drastically when what is needed is not equal access but rationing, however rations may be allocated."[114] Additionally, not everyone is entitled under the norms of equality: equal opportunity to acquire rights in land ownership was theoretically achievable for United States' businesses, citizens, and immigrants through government-assisted theft of resources of Indian nations during the pioneer era,[115] but today equal opportunity translates to the wealthy having the opportunity to accumulate more wealth. Fairness must also incorporate consideration of what is fair to communities and the legislative solutions aimed at confronting "changing patterns of resource use."[116] The trouble is, for a norms based rationale, we have to decide what is a "normal" use.[117] Normal should be informed by ecologically sound science, regardless of the impact on profit margins, and the impact on profit margins should not be alleviated by compromising the job security of people of the United States.[118]

Property Rights addresses the struggle of the Supreme Court to define when regulatory action will effect a taking in Chapter 3,[119] beginning with the classic *Pennsylvania Coal Co. v. Mahon*,[120] where Justice Holmes stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[121] The Marzullas then survey the cases that have followed

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113. *See, e.g.*, Richard J. Lazarus, *Litigating* Suitum v. Tahoe Regional Planning Agency *in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179, 179 n.1 (1997) (providing a lengthy list of articles on regulatory takings in 1996 and early 1997).

114. Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1147-48 (1996) (reviewing WILLIAM A. FISCHEL'S REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)).

115. *See* Lindsay, *supra* note 1, at 387-88 and sources cited therein.

116. Rose, *supra* note 114, at 1149.

117. *See id.* at 1129-30 (discussing normative thesis).

118. I recognize that what I am suggesting is a redistribution of wealth, which is clearly contrary to James Madison's vision of the protection of property rights.

119. MARZULLA & MARZULLA, *supra* note 4, at 23-41.

120. 260 U.S. 393 (1922).

121. *Id.* at 415.

to show the various approaches the Court has taken over the years.[122] The authors emphasize the importance of the *Lucas* decision as clarifying a per se rule that "where regulation denies all economically beneficial or productive use of land," then that regulatory action "require[s] compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint."[123] The authors approve of the "tenor" of the decision, which indicated heavy reliance on the "roots of traditional Anglo-American property law and values,"[124] but the *Lucas* decision has been ably criticized,[125] which was not alluded to in *Property Rights*.

The Marzullas briefly describe in Chapter 10 several issues that they theorize amount to regulatory takings.[126] For example, unreasonable delay may cause economic harm and impact human health and welfare negatively.[127] Although several cases are cited,[128] no analysis is provided as to how unreasonable delay might effect a taking. *Property Rights* also touches on the ripeness hurdle[129] for property owners in attempting to prove a taking.

Partial takings are defined as "instances where the government takes less than the entire bundle of ownership rights."[130] The authors assert that "[n]o matter how the basic entitlements contained within the bundle of ownership rights are divided and no matter how many times the division takes place, if property rights are taken, then the duty to compensate the owner is triggered."[131] Another partial takings idea evolves from the focus on the question of the

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122. MARZULLA & MARZULLA, *supra* note 4, at 23-41 (discussing per se takings, *Penn Central's* equitable factors, and temporary takings).

123. *Id.* at 27 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)).

124. MARZULLA & MARZULLA, *supra* note 4, at 27.

125. *See, e.g.*, Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1103-06 (1997); *see also* Duncan, *supra* note 40, at 1154-57; Daniel R. Mandelker, *Of Mice and Missiles: A True Account of* Lucas v. South Carolina Coastal Council, 8 J. LAND USE & ENVTL L. 285 (1993); Michael C. Blumm, *A Colloquium on* Lucas*: Property Myths, Judicial Activism, and the* Lucas *Case*, 23 ENVTL. L. 907 (1993) (including a general critique of the Court's departure from precedent).

126. MARZULLA & MARZULLA, *supra* note 4, at 157-61.

127. *See id.* at 157.

128. *See* Sierra Club v. Thomas, 828 F.2d 783, 794 (D.C. Cir. 1987); Cutler v. Hayes, 818 F.2d 879, 898 (D.C. Cir 1987); Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 80-81 (D.C. Cir. 1984); Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 86 (D.C. Cir. 1984); Public Citizen Health Research Group v. FDA, 740 F.2d 21, 34 (D.C. Cir. 1984); Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975).

129. *See generally* Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL L. 91 (1994).

130. MARZULLA & MARZULLA, *supra* note 4, at 158.

131. *Id.*

"relevant"[132] parcel, which permits a more favorable takings analysis for the property owner since the owner's loss is not spread over the entire parcel owned but magnified with the microscope of the relevant parcel.

Loveladies Harbor[133] is an example of this, where the investors owned 250 acres of land in New Jersey for the purpose of developing residential property. After developing 199 acres, the state government, in the wake of the environmental regulations of the 1970s, denied permits to develop the remaining 51 acres. As a compromise, the state and the property owners agreed that 12.5 acres could be developed if the property owners "created"[134] 12.5 acres of wetland elsewhere. The United States Army Corps of Engineers rejected the plan, and the court later held that the government had deprived the owners of "all economically beneficial use" of the 12.5 acres so that compensation had to be paid. The court found that the 12.5 acres had a value of $2,658,000 as use for residential lots, but that the effect of the regulation and permit denial rendered the value to a mere $12,500 for recreation and conservation uses, so that the government had "virtually . . . eradicated" the value of the 12.5 acres[135]—to Loveladies.

No criticism of environmental regulation would be complete without a consideration of the much-maligned Endangered Species Act. In Chapter 5, the Marzullas question the wisdom of the Endangered Species Act[136] by illustrating some of the burdens placed on property owners by virtue of the regulations. Along with a brief discussion of the *Sweet Home*[137] decision, the authors characterize federal agencies as interpreting the ESA as an "ecosystem protection program," used by the Fish and Wildlife Service, for example, to

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132. *See* Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. LAND USE & ENVTL. L. 381, 398-410 (1993).

133. Loveladies Harbor Inc. v. United States, 21 Cl. Ct. 153 (1990); *see* MARZULLA & MARZULLA, *supra* note 4, at 60.

134. I put this word in quotes to call attention to human arrogance in assuming we have the capability to replicate what took Earth multiple human lifetimes to generate. *See* Lindsay, *supra* note 1, at 381 and sources cited therein on the fallacy of human's ability to create water sources.

135. *Loveladies Harbor*, 21 Cl. Ct. at 160.

136. 16 U.S.C. §§ 1532 *et seq.*

137. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995). The impact of the Supreme Court's decision in March 1997 of Bennett v. Spear, 550 U.S. 154 (1997) is not analyzed in PROPERTY RIGHTS. The *Spear* decision has been characterized as something of a victory for the property rights movement. *See* Robert S. Nix, Bennett v. Spear, *Justice Scalia Oversees the Latest "Battle" in the "War" Between Property Rights and Environmentalism*, 70 TEMP. L. REV. 745, 775 (1997). Nix characterizes the decision as "a necessary outcome achieved purely by balancing the political interests," and a result driven by the effect of *Sweet Home* reinforcing a regulatory scheme that "imposes an unfairly high proportion of the cost of species protection on private landowners." *Id.* at 772.

"impose[] upon property owners extensive duties to avoid habitat modification which might injure the 'population' of the species. . . . Just how far this federal power may reach—and how it inevitably conflicts with constitutionally guaranteed property rights—may be best understood through a few examples."[138] This language and the examples that follow contribute to what could be considered an alarmist picture of the use of governmental power in the United States because of the inherent assumptions that the property uses discussed are constitutionally guaranteed under the circumstances of each case illustrated. Our takings jurisprudence does not necessarily support these assumptions.[139]

The Marzullas implicitly criticize the criminal provision in the Endangered Species Act, which provides for a general intent requirement that does not require, for example, that a person recognize what he or she shoots, only that the person intended to shoot the animal. The Marzullas raise the example in *United States v. St. Onge*,[140] where the court rejected the defense of a man who claimed he thought he was shooting a non-endangered elk when in fact he shot a grizzly bear.[141] They then describe the results of 71 of the 86 criminal actions brought by the government between 1988 and 1993:

> [F]ines ranging from $25 to $50,000 were levied in fifty nine instances; in twenty one instances, fines were 1,000 or more; fines were suspended in two instances; jail sentences ranging from 10 days to 1,170 days were given in eighteen instances; jail sentences were suspended in two instances; probation ranging from 182 days to 1,825 days was given in thirty three instances.[142]

The Marzullas claim that "a substantial number [of actual prosecutions] arose from habitat modification without any injury to actual plants or animals."[143] This lacks persuasive power in part because of the failure to provide sufficient citation to their claims and because of the omission of contextual information. For example, the statistics on endangered wildlife are omitted. The statistics on the fines levied

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138. *Id.* at 81.

139. *See* Lindsay, *supra* note 1, at 397-99.

140. 676 F. Supp. 1044 (D. Mont. 1987).

141. *See* MARZULLA & MARZULLA, *supra* note 4, at 77. The tone of the passage indicates that the Marzullas view the result harsh, but they omit a full discussion of the case so it is difficult to judge whether the circumstances warranted conviction. Having grown up in a family of hunters, I gravely doubt the defendant could have honestly believed he was aiming at an elk, quite a different animal from the grizzly. In any case, if he was uncertain about his target, responsible hunters would have advised him to refrain from shooting.

142. *Id.* at 78. They do not provide citation to their source for this information.

143. *Id.*

and jail time imposed are inherently misleading because the reasons for the fines or jail sentences are markedly absent.

Nevertheless, the authors do use interesting examples to highlight their view that the government, by "verbal sleight of hand" is inappropriately restricting "habitat modification" that does not result in a "take" as defined by the statute.[144] In particular, the authors describe the plight of a Florida rancher who was clearing his land and was informed by the Fish and Wildlife Service that he must stop clearing the land because it could result in an incidental take of the Florida scrub jay, although the agency had apparently not indicated whether the scrub jay actually inhabited the rancher's property.[145] Also described is the plight of Chinese immigrant Tuang Ming-Lin, who plowed a field he bought for the purpose of growing Chinese vegetables and was criminally prosecuted under the ESA for destroying holes of the Tipton kangaroo rat, an endangered species. Unfortunately, this kangaroo rat is indistinguishable without DNA testing from the common kangaroo rat, characterized as a pest routinely exterminated. Ultimately, the government dropped its prosecution, but the process exhausted Tuang's funds.[146]

Rather than attack the regulatory scheme as entirely without merit, if we accept the interdependence of all species, working together to preserve diversity has value. Instead, *Property Rights* highlights the perceived danger of non-domesticated species on the property of humans: without any support, the authors assert that the introduction of timber and gray wolves into the wilderness areas in Idaho, Montana, and Wyoming is causing "a marked increase in predation upon cattle and sheep,"[147] but the favored prey of the wolf is deer. Typically, what remains unexamined is the burden on others imposed by ranchers, who the authors admit own land "equal to the size of twenty two states combined."[148]

Although the authors criticize the Fish and Wildlife Service for recognizing that encroaching urbanization may and does result in the killing or injuring of an individual belonging to an endangered species,[149] any development of real property, which involves usually the clearing of trees, shrubs, and other various plants, as well as the use of concrete, the residue from paint in the soil, and other impacts on the earth, most certainly affects many specific animals. Protecting

144. *Id.* at 81-82
145. *See id.* at 82.
146. *See id.* at 84.
147. *Id.* at 85.
148. *Id.*
149. *See id.* at 83-84.

species from extinction will require accountability from property owners, specifically, wealthy owners responsible for pollution and irresponsible development.

Also treated in *Property Rights* is a critique of wetlands protection.[150] The authors focus in part on the flexibility of the definition of wetlands, but "scientists and government agencies generally identify wetlands by reference to hydrology (inundated or saturated for at least part of the year), soil types (hydric, i.e. exhibiting anaerobic characteristics consistent with inundation or saturation), and vegetation (hydrophytic, i.e., characteristically growing in wet areas)."[151] Certainly we might assume that inland property is not a wetland, but that property could be within the group of lands that are critical to "flood control, erosion control, freshwater storage, groundwater recharge, nutrient cycling, and water filtering and cleansing functions," as well as supporting the life and reproduction of endangered plants and animals.[152] Yet, wetlands are a classic source of the debate of property protection because private property owners hold as much as seventy five percent of wetlands on the continent.[153] Water's propensity to seek its lowest level creates wetlands,[154] and accordingly the definition is not only flexible, but the area designated as wetland is subject to change.

For example, the authors take issue with the scope of the definition of "navigable waters"[155] as perhaps beyond constitutional limits[156] and rely on the Seventh Circuit's illogical statement that "isolated wetlands" have "no hydrological connection to any body of water."[157] The Marzullas demonstrate concern about the Army Corps of Engineers having too much power to "exert its authority over isolated wetlands which are both within private property

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150. *See id.* at 43-69.

151. Karkkainen, *supra* note 85, at 62 n.334.

152. *Id.* at 62-63 nn.334-39 (relying in part on Mark S. Dennison & James F. Berry, *Overview, in* WETLANDS: GUIDE TO SCIENCE, L. & TECH. (1993)); *see also* Duncan, *supra* note 40, at 1131 (relying on NATIONAL ACADEMY OF SCIENCES, WETLANDS: CHARACTERISTICS AND BOUNDARIES (1995)).

153. *See* Karkkainen, *supra* note 85, at 63; *see also* Lazarus, *supra* note 113, at 192-93.

154. *See* Duncan, *supra* note 40, at 1131.

155. MARZULLA & MARZULLA, *supra* note 4, at 45. The Marzullas give the definition as "all interstate waters, including interstate wetlands; all other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce; all impoundments of water that fit these definitions; tributaries of any defined waters; the territorial seas; and wetlands adjacent to waters, other than those adjacent to other wetlands." *Id.*

156. *See id.*

157. *Id.* at 46 (quoting Hoffman Homes Inc v. EPA, 961 F.2d 1310, 1314, *vacated* 975 F.2d 1554 (7th Cir. 1992)). I describe this as illogical because of the inherent interconnectedness of all water and the land and air through which it moves.

boundaries and have no discernible impact on interstate commerce."[158] The Marzullas also criticize the lack of a clear definition of wetland, which is partly a result of so many agencies having some kind of jurisdiction over protecting wetlands.[159] According to the authors, the lack of a precise definition has the added effect of "inconsistent wetland policies under the Clean Water Act" because "the different statutes seek varying ends and are not integrated to create a harmonious and cohesive wetlands policy."[160] They then go on to describe the difficulties the permitting process presents for individuals because of the "inexact science of defining a wetland and the many conflicting formulas created by the agencies."[161] The Marzullas contend that no justification exists for the Clean Water Act's regulatory burdens where "the activity and its impacts are confined to the boundary lines of the property itself, with no discharge of pollutants or fill material leaving that property."[162] The ecological evidence from scientists suggests that the interconnectedness of our resources would prevent the practical existence of such a hypothetical discharge.

The authors criticize placement of the "square peg of wetlands regulation into the round hole of pollution control,"[163] but the authors do not admit to the body of evidence for protecting wetlands and for the consequent importance of protecting all property that serves to clean the groundwater and preserve our potable water sources. Simply put, the wetlands issue illustrates the "Cleopatra's Bathwater" principle:[164] what you drink today could have been Cleopatra's bathwater centuries ago because water is always in motion and interacts with other water sources through rivers, oceans, aquifers, evaporation, and rainfall.

PART IV—FAILURE OF THE PROPERTY ARCHETYPE

The Marzullas state that because "a government could easily abuse these civil rights if a citizen's property and livelihood were not guaranteed, the United States Constitution also imposes a duty on government to protect private property rights."[165] I find interesting the lumping in of "livelihood," which enjoys no constitutional

158. *Id.*
159. *See id.* at 47-48
160. *Id.* at 48.
161. *Id.* at 50. The trials of a Pennsylvania dairy farmer attempting to complete the permitting process is discussed to illustrate the point. *See id.* at 50-53.
162. *Id.* at 55.
163. *Id.* at 43.
164. *See* AUSUBEL, *supra* note 83, at 11.
165. MARZULLA & MARZULLA, *supra* note 4, at 2.

protection. If it did, employment at will would be a foreign concept in our law. Of course, characterizing the protection of private property rights as a protection of one's livelihood is part of the claim that it is necessary to the independence of the individual. This kind of analysis can apply only to a small group in our society. Perhaps a concept of property that resonates for each of us, even those of us who do not own real property, can serve as an effective metaphor for the barrier that protects individuals from oppression by the majority.

In discussing what property is,[166] the authors begin with land[167] and mention trade secrets, intellectual property, contracts, money, pension plans, causes of action, business interests, and billboards, with new forms of property being security interests, mortgages, lottery tickets, derivatives, technological discoveries, software and applications, and professional practices. As to water rights, we may have the right to use the water rather than the outright ownership of water, which remains with the government.[168] Nevertheless, "if such rights to use water are condemned, physically appropriated, or destroyed through regulation, the owner of the water rights is protected by the Constitution just as any other property owner."[169]

The authors explain that property is "buildings, machines, retirement funds, savings accounts, and even ideas. In short, property is the fruit of one's labor."[170] Unfortunately, "where the fruits of citizens' labors are owned by the state and not individuals, nothing is safe from being taken by a majority or a tyrant."[171] The Marzullas are concerned that the state will own natural resources to the extent that individuals will not be able to oppose "any infringement on their rights."[172]

If the property rights argument is based in the notion that protection is necessary for the sake of individual autonomy from government, then history again is not necessarily supportive. The creation of property rights itself was not necessarily to serve the

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166. *See id.* at 11-21

167. *See id.* at 13.

168. *See id.* at 18.

169. *Id.*

170. *Id.* at 2. If this is so, then why are employees not accorded property rights concerning the fruit of their labor—the product or the wages? Employees have no guarantee they will be working the next day. With "corporate downsizing" and the concomitant layoffs, people all over the United States have suffered job loss through no fault of their own. Should we raise unemployment compensation, make it available in a lump sum that is the value of what the person could have earned had they worked through retirement (the full economic use of their labor)? If we follow the logic of the Marzullas, we should also protect the fruit of people's labor even when that labor is not land, just as the Marzullas say that "property is more than just land." *Id.* I suspect that Mr. Marzulla's clients would object to this result.

171. *Id.*

172. *Id.*

autonomy of the individual. As the Anti-federalists recognized, the creation of property rights served to protect mercantilist control, just as the history on the European continent suggests.[173] Property rights cannot successfully insulate the individual in any case because regardless of how much "land" a person owns, one must depend on another at some time:

> A proper conception of autonomy must begin with the recognition that relationship, not separation makes autonomy possible. . . . [D]ependence is no longer the antithesis of autonomy, but a precondition in the relationships—between parent and child, student and teacher, state and citizen—which provide the security, education, nurturing, and support that make the development of autonomy possible.[174]

The interdependence of humans should be uncontroversial, and once we take full account of the scientific evidence supporting the interdependence of humans with all life forms, then the necessity of regulation to limit the inevitable harms associated with exploitation of resources should be self-evident, and taxpayers should not have to pay property owners to recognize this.

If water were the central symbol of property for us rather than land, then what would our society be like? Could we be protecting community as well as individuality? "Water, after all, is in fact the subject of important and valuable property rights, and indeed, concerns about water can substantially modify the rules about land."[175] If the symbol for property were based in water rights rather than land rights, the tendency towards "fixed, stable, absolutist notions"[176] about private property rights very likely would not exist. Because of the "fluid and mobile physical nature" of water, "accommodation and compromise" are more likely where interests conflict.[177]

Where the relevant parcel is beachfront, flood plain, or wetland property, the "collision between private expectations and environmental protection is further exacerbated,"[178] however, because land, having stronger rights associated with it, remains the governing metaphor. The emphasis on physical invasions and disruptions of investment backed expectations are functions of our focus on land as the archetype of what property means to us:

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173. *See* Rose, *supra* note 35, at 335-38.
174. NEDELSKY, *supra* note 4, at 273.
175. Rose, *supra* note 35, at 351.
176. Lazarus, *supra* note 113, at 192.
177. *Id.*
178. *Id.* at 192-93.

> There is just something about land that makes you think that when you own it, it is really, really yours. Land stands still and lets you poke a fence into it, and hence it is easier to stake out ownership claims in land than in messier, more communal substances like water. On land we can exclude everybody else and stroll around like lords of the manor.[179]

Because we cannot retain our rights and move to avoid limitations on use of real property, land becomes the object of what is perceived as "confiscatory" regulation.[180]

The more powerful metaphor would be water because we substantially are made of water and we are born into water. Water detracts from the stability valued in land because water's nature is to move and change land.[181] Water is more pervasive than land. Using special photography techniques, Jennifer Greene has shown that a drop of water contains within it multiple layers of waves and that, if peeled like an onion, that drop of water would cover half an acre of land.[182] Water is useful for protecting community values because of its functions and movement. A drop of water transforms in multiple shapes as it merges with a larger body of water, so that it is the "archetypal mediator . . . between gravity and levity, between stillness and motion, between life and death."[183] The nature of water reflects the interconnectedness of all beings because water is a circulatory system with no beginning and no end.[184] "Water is everywhere in movement. The ever-flowing oceans make up 71 percent of the Earth's surface. . . . An acre of woodland on a summer day passes a 3,500 gallon stream of water into the atmosphere. Plants are vascular systems that pump water . . . in a dynamic interaction with the atmosphere."[185]

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179. Rose, *supra* note 114, at 1143. Rose also states that in "earlier traditions of European aristocracy and American civic republicanism, land was associated with independence, authority, even manliness—as opposed to the effeminacy, fluidity, and mutual dependence of commerce, whose products scarcely even counted as property." *Id.* Rose describes land as the "metaphor" for property. *Id.*

180. *See id.* at 1126.

181. *See* AUSUBEL, *supra* note 83, at 222.

182. *See id.* at 214. This photography method is precise enough to show the extraordinary sensitivity of water to pollution. Comparing photographs of healthy water and polluted water revealed a "radiant mandala with tendrils extending like an exploding star or a sand dollar. It has the pattern of a rosette. The other picture is contracted and depressed, a shadow of the former. It lacks the rosette imprint." *Id.* at 220. The latter picture is of polluted water, and the technology has revealed that higher concentrations of pollution disrupts the surface tension of water to such a degree "that no patterning shows on the boundary surfaces, indicating lost vitality." *Id.* Use of this technology has led to drastic changes in the European soap industry because of the evidence that laundry detergent was destroying the vitality of water. *See id.*

183. *Id.* at 214.

184. *See id.* at 216.

185. *Id.*

The water metaphor, however, would not solve the problem of the barrier between the individual and government authority. Water's nature is to connect rather than stand as a barrier. Similarly, air would also not represent in a metaphoric way the barrier that land has come to represent. Nevertheless, a more holistic view of our environment requires that we examine the relationship of land with water and air. Continued reliance on the land metaphor for stability in property rights ignores the scientific reality of the interconnectedness of the elements and species.

PART V—PRACTICAL DIFFICULTIES AND SOLUTIONS

The Marzullas discuss legislative remedies as a means of correcting for the failure of the judiciary to sufficiently restrain agency abuses in regulation by focusing on attempts in 1995 of the Congress to pass legislation on property rights.[186] They additionally suggest that although some states have passed planning bills[187] to promote property rights protection, this legislation does not correct the perceived abuses inherent in the *ad hoc* approach of the judiciary towards takings law, which renders liability planning a "shot in the dark."[188] The compensation bills attempt to improve the ability to plan for liability by providing bright line rules as to the exact diminution of value required to effect a taking;[189] nevertheless, compensation bills may "disparage the rights of property owners who are the victims of takings that fail to meet the threshold."[190] *Property Rights* presents the problem in extremes: either to require "condemnation proceedings for any diminution of value at all (even a fraction of a cent), or to permit the government to take everything without compensation."[191] Accordingly, the authors reason that a bright line rule is better than the current state of the law, which is apparently perceived as "no limit on takings at all."[192]

The Marzullas would probably approve of Florida's Private Property Rights Protection Act,[193] which creates a cause of action for property owners where takings law has not expanded enough to

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186. *See* MARZULLA & MARZULLA, *supra* note 4, at 170-74.

187. These require assessments of whether state laws and regulations could result in taking of private property. *See id.* at 172.

188. *Id.* at 172-73.

189. *See id.* at 174-76. The Marzullas recognize the weakness of such legislation in that bright line rules are inherently arbitrary. *See id.* at 175-76.

190. *Id.* at 175. Texas' property rights protection is discussed as the "most comprehensive property rights legislation to date." *Id.* at 173.

191. *Id.* at 176.

192. *Id.*

193. FLA. STAT. § 70.001 (1995).

provide a remedy to protect a landowner's existing use or a vested right to a specific use of land.[194] This law may be of particular interest to the Marzullas because the Act "compels the parties to pursue settlements quickly because of the Act's ripeness provision."[195] The illustrations of small property owners experiencing harsh economic consequences of regulation indicate a concern on the part of the Marzullas for the fee holder without a litigation fund for these matters. The Act's provision for settlement would mitigate the depletion of funds of fee holders in litigation, but it would also create costs for the tax paying public in the form of compensation where the Constitution does not require it as well as of reticent regulators dropping the ball on land use and environmental issues. The Marzullas respond to the National Wildlife Federation, raising that very issue of the burden on taxpayers, with criticism, however: "[t]heir solution is to refuse to compensate these individuals for takings, concentrating these same millions of dollars of costs upon the few whose property is actually physically taken."[196]

As the Marzullas admit, "a price cannot be placed upon civil rights,"[197] yet this begs the question of whether we can place a price on soil or water or human cells. We cannot put a correct number on any of these concepts, but we do in this society where costs and benefits of decisions are measured and corporations budget for liability. Unfortunately, the point of the Marzullas that some are singled out to pay costs inappropriately is not so persuasive. Their point requires the result that no matter what it costs all taxpayers, the government must bear the cost of providing property rights protection that promotes for the few the liberty to exploit. Although not every exploitative use of property creates toxic waste, the logic of the Marzullas' position requires that we compensate even where regulation prohibits toxins entering the environment. Surely there is another means to protect individuals from overbearing government authority than to classify as confiscatory a regulation designed to protect us from carcinogenic toxins.

Unfortunately for small property owners, the cost of litigating a takings claim can range from $50,000 to $500,000– too great for the

194. *See* Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL L. 247, 249 (1997) (analyzing the Florida Act as well as background of state and federal law).

195. *Id.* at 271, 264-65 nn.150-53.

196. MARZULLA & MARZULLA, *supra* note 4, at 174.

197. *Id.* at 176.

average citizen to bear[198] without the help of an organization like Ms. Marzulla's. The high cost of litigation may explain why the developments in favor of property rights appear to favor corporate interests. Even if the property owner prevails, it is only after years of litigation and then comes the difficulty of collecting.[199] The Marzullas describe the ripeness obstacle for property owners as the courts "rigidly" applying *Williamson County*[200] so that many cases are dismissed as unripe.[201] This requirement that the property owner start all over again in state court "plays right into the governmental defendant's litigation gamesmanship."[202] The Marzullas explained one creative attempt around the requirement to file in state court as using an allegation of a "conspiracy" of regulators to take property rather than alleging an actual taking.[203]

The use of regulations to protect all life forms, including human, in the United States should not be likened to an abuse of power in a totalitarian regime, which is starkly different from our society.[204] However, this is precisely what the Marzullas do in the course of this book. The Marzullas assert that "our federal, state, and local governments are regulating property and, in turn, destroying private property rights. As a result, countless individuals all across the country are being singled out to bear the cost of implementing policies that the government is unwilling or unable to bear itself."[205] The use of regulatory schemes to balance burdens among resource users is portrayed as an abuse of power: "the scales of justice are also unfairly tipped in favor of the government when citizens are faced with the threat of losing their property because of regulatory burdens."[206] Although I agree that no regulatory system is perfect and we have much still to do to improve our bureaucracies, property rights activists often reason from a misconception of the meaning of liberty: "[l]iberty never meant the license to do anything at will."[207]

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198. *See id.* at 164. Naturally, the costs of litigating in favor of regulation or lobbying for more protection are also prohibitively high for the average citizen, but this cost is not factored into the Marzullas' analysis.

199. *See id.* at 143-44 (illustrating with examples).

200. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (holding that a claim is not ripe for federal court review if (1) the property owner had not obtained a "final decision" from the applicable administrative agency; and (2) the property owner had not first filed the claim in state court to challenge the government action).

201. *See* MARZULLA & MARZULLA, *supra* note 4, at 145.

202. *Id.*

203. *See* Oberndorf v. City of Denver, 653 F. Supp. 304 (D. Colo. 1986).

204. *See generally* LATIN AMERICAN POLITICS & DEVELOPMENT (Howard J. Wiarda & Harvey F. Kline, eds., 3d ed. 1990).

205. MARZULLA & MARZULLA, *supra* note 4, at 163.

206. *Id.* at 164.

207. ATTENBOROUGH, *supra* note 2, at 38.

This is reflected in Franklin's characterization of private property as "a Creature of Society," where he reasoned that when "public Exingencies" require contributions, such "are not to be considered a Benefit on the Public, entitling the Contributors to the Distinctions of Honor and Power, but as the Return of an Obligation previously received, or as payment for a just Debt."[208]

We in the United States make up only 5% of the world population, but we enjoy the privilege of consuming 40% of the world's produced resources while half of the people living on this planet are undernourished and a fifth of the world population lives in extreme poverty.[209] We Americans have also provided an example of wealth and excess that leads the rest of the world into polluting practices that can do nothing but exacerbate the problems we are experiencing today. The solution lies in moving from "selfish ego-centered behavior to behavior that is eco-centered."[210] We must reinvent ourselves in harmony with the majestic web of nature, and the environmental and land use regulations that are ecologically based are steps in the direction of this reinvention. The attempts of the property rights movement to distract us from this process push us—not just the snail darter and the spotted owl—towards extinction. A holistic view of the world turns on the understanding that "the whole affects the parts as the parts affect the whole."[211] Diversity is not to be underrated: "[a]ny smart banker will recommend a diversified portfolio to hedge against risk."[212] I heartily agree that protecting individual rights against the tyranny of a majority is critical to the manifestation of the dream of a democracy. At the same time, the centralized accumulation of resources in the small wealthy group whose goal is the bloating of the bottom line has degraded our environment and inappropriately directed our land use decisions to such an extent that regulation has provided a useful response. Appropriate regulation properly enforced would have precluded a disaster like Love Canal from occurring, and I should think all property rights activists would agree that such a result has value. The fact of regulation is not the evil to be addressed—the question is whether regulation furthers life-honoring values that strike a balance between community and individual needs.

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208. JOHANSEN, *supra* note 36, at 104.
209. *See* AUSUBEL, *supra* note 83, at 179.
210. *Id.* at 238.
211. Duncan, *supra* note 40, at 1130.
212. AUSUBEL, *supra* note 83, at 42.