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Compensation Legislation: Private Property Rights vs. Public Benefits

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I. Introduction

Across the country, a battle is being waged over the rights of private property owners.[1] Its outcome could have a dramatic impact on the nation's environmental policy.[2] Initiating the fight is an amorphous amalgamation of groups known collectively as either the "private property rights" movement or the "wise use" movement.[3] Although proponents of wise use do not have a common leader or agenda, they are united by their shared resentment of government regulation of privately held property.[4] At the forefront of what many consider to be a general backlash against environmental protection,[5] the movement is fueled, at least in part, by a growing belief that environmental regulations and resource conservation are slowing down the economy and costing Americans jobs and money.[6] While this opinion has long been held by many business people, more recently it has become especially prevalent in rural populations, where many of those who work the land feel as if environmentalists are trying to turn the country into a natural history museum.[7]

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[1] *See, e.g.*, Paul Rogers, *Ecological Showdown: Environmental Activists Are Battling to Hold Back a GOP-Led Assault on Laws Protecting Air, Water, Animals and Habitat*, TACOMA WASH. NEWS TRIB., Sept. 17, 1995, at D6.

[2] *Id.* The Job Creation and Wage Enhancement Act, part of the Republican party's 1994 "Contract With America," would require the Environmental Protection Agency and other federal agencies to "shoulder a substantial share of the costs of regulation now borne by state and local governments and private enterprise." Frank Clifford, *Bill Would Limit Federal Power over Environment*, L.A. TIMES, Dec. 28, 1994, at A1.

[3] *See, e.g.*, David Helvarg, THE WAR AGAINST THE GREENS: THE "WISE USE" MOVEMENT, THE NEW RIGHT, AND ANTI-ENVIRONMENTAL VIOLENCE (1995).

[4] *Id.*; *see also* Brad Knickerbocker, *Sagebrush Rebels Take on Uncle Sam*, CHRISTIAN SCI. MONITOR, Jan. 3, 1996; Peter Huck, *Environment: War on the Range*, GUARDIAN, Nov. 22, 1995.

[5] *See, e.g.*, *House Democrat Predicts GOP Assaults Against Environment, Resources in 1996*, BNA ENV'T DAILY, Jan. 5, 1996.

[6] *See, e.g.*, Rogers, *supra* note 1; William Perry Pendley, *War on the West Spreads*, WASH. TIMES, July 27, 1995, at F6; Michael O'Keefe & Kevin Daley, *Checking the Right: Rightist Backlash Against the Environmental Movement*, BUZZWORM, May 1993, at 38 (discussing the backlash generally and giving the viewpoint of many environmentalists); *Environmental Groups: As Green Turns to Brown*, THE ECONOMIST, Mar. 5, 1994, at 27 (provides figures to support shrinking of financial support for conservation groups).

[7] Kate O'Callaghan, *Whose Agenda for America? Environmental Protection Versus Economic Growth*, AUDOBUN, Sept. 1992, at 80 (offers a closer look at the wise use movement-who it is, and what it is trying to accomplish); Betsy Carpenter, *This Land Is My Land*, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 65 (description of the property rights movement and

Private property rights advocates seek to lessen what they consider the unjust burden of natural resource preservation being borne by landowners through the passage of legislation known as "takings" or "compensation" bills.[8] This legislation requires the government to compensate private property owners whenever the fair market value of their property is reduced as a result of government regulation.[9] Supporters of takings legislation argue that it is needed to bring relief to both individuals and an economy suffering needlessly from over-burdensome regulations.[10] Opponents,[11] however, claim that compensation legislation would not only

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issue).

[8] Two types of bills, both of which could have serious effects on environmental policy if passed, have been pushed by property rightists at both the state and federal legislative levels in recent years. "Assessment" bills are typically modelled after President Reagan's Executive Order 12630. Exec. Order No. 12, 630, 3 C.F.R. 554 (1989), *reprinted in* 5 U.S.C.A. § 601 (West Supp. 192). This type of law requires public agencies to review all regulations for their takings implications before passage. *See, e.g.*, Report from Robert Meltz, CONGRESSIONAL RESEARCH SERVICE, *Comparison of Taking Principles in Executive Order No. 12630 with Supreme Court Taking Jurisprudence, and Related Questions* (Dec. 19, 1988). The focus of this comment, however, is on the second type of legislation known as "compensation" or "takings" bills. These would require government to pay owners for regulatory-related losses of property value. *See* Michelle K. Walsh, Note, *Achieving the Proper Balance Between the Public and Private Property Interests: Closely Tailored Legislation as a Remedy*, 19 WM. & MARY ENVTL L. & POL'Y REV. 317 (1995) (offers a more detailed description of compensation legislation).

[9] During the past several years compensation legislation has been proposed in both houses of Congress and in a number of state legislatures. *See, e.g.*, Jonathan E. Rinde, *"Take Me, Take Me": Can There Be a Private Property Rights Bill That Environmentalists Support*, PA. L. WKLY., Aug. 14, 1995, at S6 (discussing proposed bills: S. 605, 104th Cong., 1st Sess. (1995)-also known as the Omnibus Property Rights Act of 1995, H.R. 925, 104th Cong. 1st Sess. (1995)-also known as the Private Property Protection Act of 1995, and Pennsylvania Senate Bill, SB 805, 179th Gen. Assembly, 1995 Sess.); Lynda V. Mapes, *I-164 Foes Seeking Signatures Property Rights Bill Is Toughest in the Nation, Destined for Court*, SPOKESMAN REV., Apr. 20, 1995, at B1. (Although the specific details of each compensation bill vary, they are all designed to compensate individual owners when a predetermined percentage of his property value has been reduced (generally between 10% and 50%.) Thus, the results in case of passage would differ primarily as a matter of degree. Because I am concerned with the political ramifications of this *type* of bill, the discussion in this comment will be general, and the analysis will include discussion of similarly structured proposals where they illustrate concepts that have a broader application to the general debate over the appropriateness of partial compensation for regulatory takings).

[10] Richard Miniter, *You Just Can't Take It Anymore: America's Property Rights Revolt*, POL'Y REV., Fall 1994, at 40 (describes the property rights movement and its goals and claims that America is currently undergoing a grass-roots property rights revolt comparable to the grass-roots tax revolt that prompted the Reagan tax cuts of the 1980s).

[11] According to literature distributed by The Wilderness Society, opponents of the bill include a number of organizations representing interests as varied as civil rights, religious, health, consumer, labor, planning, historic preservation, public interest, and environmental conservation, as well as most of the nation's Attorneys General (packet on file with the author).

eviscerate crucial environmental, health, and safety regulations, but also bankrupt the government.[12]

Passage of one of the "takings" bills currently being circulated in Congress would succeed in changing compensation laws by circumventing the Supreme Court's interpretation of the Fifth Amendment's Takings Clause.[13] This change would increase the cost of land use regulation to the point that regulatory schemes along the lines of currently existing programs would become prohibitively expensive to enforce. Accordingly, government agencies would be forced to decrease dramatically their reliance on current command and control type regulations.[14] Supporters of compensation bills consider such an outcome necessary to foster economic growth. Some even go so far as to say that takings legislation is necessary to ensure the continuation of a free society.[15] Opponents of the measures, however, consider any law that would result in deregulation to be an open invitation to environmental exploitation with potentially dangerous consequences for public health, safety, and welfare.[16]

The stakes are high. Most observers agree that the fight in the property rights arena is likely to determine the direction of the nation's land use policy for the foreseeable future.[17] The issues that this debate engenders deserve careful consideration before any final decisions are made.[18] This paper attempts to help find a practical solution that protects

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[12] Clifford, *supra* note 2.

[13] *See, e.g.*, W.J. (Billy) Tauzin & Peter A. Berle, *Private Property and Public Rights*, THE CHRISTIAN SCIENCE MONITOR, Aug. 15, 1994, at 19, (debate over an earlier proposed compensation bill, H.R. 3875, 103rd Cong. (1994)). Congressman Tauzin argues, "We can preserve the environment and still protect citizens from the federal government unfairly 'taking' from the value of their land." Mr. Berle, president and C.E.O. of the National Audobon Society, says the "'Property Owners Bill of Rights' is an attempt to undermine environmental laws and help developers and mining and timber companies."

[14] Mary Beth Regan, *The GOP's Guerrilla War On Green Laws*, BUS. WK., Dec. 12, 1994, at 102.

[15] *See, e.g.*, Michael Greve, *The Importance of Property Rights: Capitalism Is the Process of Creative Destruction*, 59 VITAL SPEECHES OF THE DAY 569 (1993) (arguing that all bureaucrats, especially of the environmental sort, are nothing but worthless parasites and, for the good of the country, productive capitalists must triumph over them); Thomas Sowell, *The "Takings" Issue*, FORBES, Mar. 2, 1992, at 60.

[16] Jessica Mathews, *Property-Rights Extremists Have Hidden Agenda*, PALM BEACH POST, Feb. 16, 1994, (page unavailable); Paul Rauber, *Look Who's Taking: Property Rights and Environmentalism*, SIERRA, Sept. 1993, at 43.

[17] Carpenter, *supra* note 7, at 65.

[18] "Not since the birth of environmental activism a generation ago has there been as much at stake in the public debate over this issue." Edward Thompson, Jr., *Takings and Givings: Toward Common Ground on the Property Rights Issue*, AMERICAN FARMLAND TRUST, 1992, at 1; *see also* John Echeverria & Sharon Dennis, *Takings Policy: Property Rights and Wrongs*, SIERRA, Sept. 22, 1993, at 25 ("[T]he new [compensation] legislation reflects a trend that

the interests of both individual landowners and the general public by probing beyond the ideological rhetoric to focus on the legitimate concerns of each group. Part II outlines the history of takings jurisprudence in the Supreme Court. Part III focuses on the most recent legislative compensation proposals. It discusses the political genesis, theoretical background, goals, and probable impact of the proposed legislation on environmental policy. Part IV examines some alternative means for achieving the objectives of property rights advocates and environmentalists. Finally, Part V concludes that the goals of many property rightists and environmentalists are not mutually exclusive, and that if the grass-roots elements of each organization come together, they can foster the development of a system that protects natural resources by harnessing the powerful self-interest of private property holders.

II. The History of Takings Jurisprudence

The battle over property rights has its roots in the Fifth Amendment to the Constitution.[19] The relevant section of that amendment, known as the Takings Clause, states: "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."[20] The Supreme Court has recognized that this "guarantee . . . [is] designed to bar Government's forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[21] The precise method

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threatens to destroy not only precious natural resources but the fabric of U.S. Society.")

[19] For more comprehensive analyses of takings jurisprudence, see CHRISTOPHER J. DUERKSEN & RICHARD J. RODDEWIG, TAKINGS LAW IN PLAIN ENGLISH, (American Resources Information Network, Clarion Associates, Inc. 2d ed. 1994); Glenn P. Sugameli, *Taking Issues in Light of* Lucas v. South Carolina Coastal Council: *A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVT'L L.J. 439 (1993); Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought To Be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991) (arguing that the Claims Court, almost alone among judicial tribunals in this country, has intuitively understood the importance of the *ad hoc* factual inquiry prescribed by the Supreme Court); Susan Shaheen, *The Endangered Species Act: Inadequate Species Protection in the Wake of the Destruction of Private Property Rights*, 55 OHIO ST. L.J. 453 (1994) (examining the legal issues surrounding the current state of takings law and discussing how recent court decisions affect the federal regulation of endangered and threatened species).

[20] U.S. CONST. amend. V. The application of the takings provision to the individual states occurred after the provision was incorporated into the Fourteenth Amendment. Chicago, Burlington & Chicago R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

[21] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (*citing* Armstrong v. United States, 364 U.S. 40, 49 (1960)).

for determining exactly when and where a taking has occurred, however, is still being fleshed out by the Court.[22]

The application of the takings clause was originally limited to situations in which the government physically seized private property under its power of eminent domain.[23] In 1922, however, the landmark decision of *Pennsylvania Coal v. Mahon*[24] modified this strict interpretation. In an opinion authored by Justice Holmes, the Court recognized that every action by government results in a decrease in the value of some owners' property and an increase in the value of others.[25] Concluding that on the whole these various burdens and benefits created by the government tend to balance each other out, the Court held that it would be overburdensome and impractical for the government to account for each of these minor changes in value by compensating the affected landowner.[26] Nevertheless, in dictum, the Court stated that it was conceivable that a regulation that sufficiently reduced the value of property could cause a taking for which compensation would be required.[27] Thus, the door was opened for the future possibility of regulatory takings.

The Court's ruling in *Pennsylvania Coal* enabled the government to continue functioning, but it left lower courts with little practical guidance for determining when the government should have to pay a landowner for changes in property value caused by government interference. Unfortunately, takings jurisprudence has continued to be an area of great confusion for the Court,[28] which over the years has issued "a series of inconsistent pronouncements" on the subject.[29] For many years following *Pennsylvania Coal*, the Court advocated the use of factual analyses on a case-by-case basis in deciding if there was a taking.[30] Determinations

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[22] "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proven to be a problem of considerable difficulty." *Id.*

[23] "The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good." BLACK'S LAW DICTIONARY 523 (96th ed. 1990).

[24] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[25] The Court termed this phenomenon the "average reciprocity of advantage." *Id.* at 415.

[26] "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413.

[27] "The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

[28] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978).

[29] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

[30] *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 349 (1986); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

were based on multiple factors including loss of economic viability, reasonable investment-backed expectations, and the character of the governmental action.[31] During this era, decisions of the Court reflected a broad deference to the discretion of the legislative branches of the government in weighing public against private uses of land.[32] Even on those occasions when it did deem a regulation to be a taking, the Court usually preferred recision of the offending regulation to compensation as a remedy.[33]

Although the factors used in traditional takings jurisprudence continue to be relevant today, the outcomes of several recent decisions indicate that the wide deference past Courts have afforded the legislature is eroding.[34] For example, in *Nollan v. California Coastal Commission*,[35] the Court ruled that the state must be able to demonstrate a close "nexus" between the intended purpose of a regulation affecting private property and the means used to achieve it.[36] In *First English Evangelical Lutheran Church v. County of Los Angeles*,[37] the Court ruled that where a temporary taking has occurred, the remedial option of the owner is not limited to invalidation of the regulation, but also includes compensation.[38] A third case, which property rights advocates had hoped would expand the scope of regulatory takings, *Lucas v. South Carolina Council*,[39] resulted in only a slight clarification of takings law.[40] The Court identified two discrete categories of regulatory takings that require compensation regardless of the public interest advanced by the imposed restriction.[41] The first requires an owner to be compensated if a regulation results in an actual physical invasion of his property, no matter how small the intrusion may be.[42] The second requires compensation if a regulation completely denies an owner of all economically beneficial or productive use of his land.[43] Although

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[31] *MacDonald*, 477 U.S. at 349; *Kaiser Aetna*, 444 U.S. at 175.

[32] Thompson, *supra* note 18, at 2.

[33] *Id.*

[34] *Id.* at 3.

[35] 483 U.S. 825 (1987).

[36] DUERKSEN & RODDEWIG, *supra* note 19, at 13.

[37] 482 U.S. 304 (1987).

[38] *Id.*; *see also* DUERKSEN & RODDEWIG, *supra* note 19, at 12.

[39] Lucas v. South Carolina Council, 505 U.S. 1003 (1992).

[40] Henry N. Butler, *Regulatory Takings After Lucas*, 3 REGULATION 77 (1993).

[41] *Lucas*, 505 U.S. at 1015.

[42] *Id.* (applies to situations such as government mandated beachfront easements, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), and cable line installations, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[43] "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner

the second rule may appear to be a victory for property rights advocates because it is "hard and fast," its impact is not expected to be great.[44] For one thing, its premise, although not explicitly stated, was already taken for granted in takings jurisprudence. In addition, there are very few cases where government regulations reduce a property's value to nothing.[45]

With the balance of the Supreme Court having shifted in a conservative direction in recent years, its decisions have indicated a slight tendency to rule in a fashion more amenable to property rights advocates.[46] Nevertheless, the Court has been unwilling to set a minimum level of value reduction at which a partial regulatory taking would require compensation, let alone grant compensation for any regulatory interference that reduces value without preventing a public nuisance.[47] Instead it has chosen to continue the use of factual analyses on a case-by-case basis for partial regulatory takings.[48]

III. Compensation Legislation: Circumventing The Court

Property rights advocates have attempted to bring consistency to takings jurisprudence by getting the Court to reinterpret the Taking Clause and eradicate what they consider to be the arbitrary and illogical distinction made between total and partial regulatory takings.[49] They argue that this distinction does not make any sense because from the

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economically viable use of his land.'" *Lucas*, 505 U.S. at 1015 (*quoting* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). (This decision receives much attention in the debates of takings jurisprudence theory. *See, e.g.*, Sugameli, *supra* note 19, at 469 (argues that the impact of this ruling on real cases will be minor).

[44] *See, e.g.*, Butler, *supra* note 40; Sugameli, *supra* note 19.

[45] Butler, *supra* note 40; Sugameli, *supra* note 19.

[46] Robert Meltz, *Taking Decisions of the U.S. Supreme Court: A Chronology*, CRS Report for Congress, 93-164 A, Jan. 24, 1990, Revised: Jan. 27, 1993. "As a general rule, not without exception, the Court's decisions [since the late Seventies] evince a heightened concern for the property owner burdened by government-imposed property controls." *Id.*

[47] The closest the Court has come was when the majority in *Lucas* hinted that at some future date it may be willing to consider the question of whether a section of a larger property can be considered taken if regulations strip it of all economic value, but for now the Court limits its examination to the property as a whole. "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Lucas*, 505 U.S. at 1015, n.7.

[48] "[D]espite all the media attention and misunderstanding surrounding the *First English*, *Nollan*, *Lucas*, and *Dolan* decisions, the rules of the balancing act remain remarkably similar to what existed in 1978 when the Court decided the *Penn Central* case." DUERKSEN & RODDEWIG, *supra* note 19, at 14-15.

[49] Butler, *supra* note 40, at 78.

perspective of the burdened landowner, the question becomes not whether he will be unjustly forced to bear a disproportionate share of the burden of creating some public benefit, but how large his share will be.[50] Although the refusal of the Court up to this time to substantially alter its position on regulatory takings[51] is a setback for the wise use movement, property rights advocates have not given up the battle. While they are persisting in their efforts to sway the Court, they have also broadened the scope of their fight to include legislative efforts.[52] As popular support for the movement has grown,[53] those in its vanguard have increasingly turned their attention to the political arena to achieve their goals.[54]

The compensation bill that property rights advocates have proposed represents an effort to have Congress do what the Supreme Court would not — namely, reinterpret the Takings Clause. If passed, the bill would require that when a government regulation reduces the value of property by preventing its owner from using it in a way that would otherwise have been permissible under common law, the government must compensate the property owner for the value lost.[55] Because the potential impact of this bill on environmental policy is so dramatic, issues, such as where it comes from and what it would actually do, deserve careful consideration.

A. The Theoretical Underpinnings of Compensation Legislation

The intellectual architects of compensation legislation base its construction upon what they describe as James Madison's absolutist interpretation of property rights.[56] In 1792 Madison wrote "as a man is said to have a right to his property, he may be equally said to have a property in his rights."[57] If this is the case, then using the analogy that

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[50] *Id.*

[51] Marzulla, *supra* note 19 (observing that property rights advocates have found a much more receptive audience to their arguments in the U.S. Court of Federal Claims, also responsible for takings jurisprudence); Michael M. Berger, *Yes, There Can Be a Partial Taking Under Regulatory Law*, L.A. DAILY J., Apr. 13, 1994, at 7 (describing Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (1994)).

[52] Miniter, *supra* note 10.

[53] "There are more than 500 active property rights groups across the country, with a total of some 2 million members." Miniter, *supra* note 10, at 40.

[54] In addition to the proposals pending in Congress, "[in 1994] 33 states debated at least 86 'takings' bills, which require impact studies before new environmental regulations are approved." Miniter, *supra* note 10, at 43.

[55] S. 605, 104th Cong., 1st Sess. (1995); H.R. 925, 104th Cong., 1st Sess. (1995).

[56] Roger Pilon, *Proding the Court to Protect Property Rights*, CATO POLICY REP., Jan./Feb. 1994, at 10.

[57] *Id.*

describes property as "a bundle of sticks," each of which is associated with the right to use the property in a certain way, each "stick" represents a valuable property right to the owner.[58] The accumulated value of the "sticks," therefore, makes up the owner's interest in the property as a whole.[59]

Using Madison's definition of property, property rightists argue that when the government reduces the value of an owner's "bundle" by taking away one of his "sticks," for example, the right to fill in wetlands on his land, then it has taken valuable property from the owner and under the Fifth Amendment the owner should be compensated for his loss.[60] According to property rightists, the only time the government can legitimately take a property owner's "sticks" without compensating him is when it is acting under its police power to condemn a use of land that is inconsistent with the rights of others, such as when it orders the abatement of a nuisance.[61] Short of that, the government should not be able to force one person to "donate" his valuable property for public benefit.[62] Property rightists argue that the current environmental regulatory system is problematic because it seeks to provide public benefits by taking away individuals' rights in their property without just compensation. These deprivations are wrong, they say, because the exercise of the restricted rights, in most cases, would not have resulted in a public harm as determined by the common law of nuisance.[63]

Property rightists claim that the current system of environmental regulations was doomed from the start to overreach its Constitutional limitations because neither those who promulgated the regulations (Congress and the various administrative agencies,) nor those who enforce the regulations (the administrative agencies,) nor those who benefit from the regulations (presumably the public) have to shoulder their costs. All of the costs, they say, are borne by individual private property holders.[64]

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[58] *Id.*

[59] This definition of property, based on the philosophy of John Locke, is very appealing to libertarians. David Sauri-Pujol, *Environment and Economy: Property Rights and Public Policy*, ECONOMIC GEOGRAPHY, Oct. 1992, at 436 (book review) (offers critique of book with ambitious goal: "To offer an operational theory of rights, property, and property rights with the intent of informing economic analysis and public debate about natural resource and environmental problems.")

[60] Pilon, *supra* note 56, at 11.

[61] *Id.*

[62] *Id.*

[63] This conclusion is based on the property rights advocates' interpretation of the Fifth Amendment's Takings Clause as discussed in this comment. *See supra* part III A.

[64] Richard Epstein & John Echeverria, *Policy Forum: Property Rights and Environmental Protection*, CATO POL'Y REP., May 1, 1992, at 9 (a debate on the question, "Are property rights

Property rights advocates believe that the system was set up in this unjust fashion because politicians perceived that the scheme's benefits dramatically outweighed its costs. From the perspective of the politicians, the cost of the regulations promulgated to protect the environment were considered minimal because no public money was needed to create them.[65] In sum, the "benefits" of current environmental policy were achieved at the expense of private property holders by legislators' abuse of the police power, and the courts, which were following the Supreme Court's misguided interpretation of the Takings Clause, stood idly by and allowed this abuse to occur.[66]

As more and more individuals were affected by regulatory takings, they came together in the form of the private property rights movement and began to complain about their plight.[67] In doing so, they forced politicians to recognize the costs that had been unfairly shunted onto private landowners.[68] Now, they say, politicians should pass compensation legislation to right the wrongs caused by the earlier imposition of command and control type environmental regulations.[69]

The issue of private property rights, however, is not so clear cut as proponents of compensation legislation would have one believe. There is nothing in the Constitution that guarantees one the right to take advantage of every "stick" in his "bundle." While James Madison's views may be relevant to any discussion concerning interpretation of the Fifth Amendment, he does not have a monopoly on defining notions of "property." An analysis of property rights is much different if, for example, one begins with the Kantian notion of property as a social contract.[70] Kant argued that the rights that accompany a given parcel of land are fluid, rather than fixed. Having been given by the community, they can likewise be taken away if it is in the best interest of the community to do so.[71] From this

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are opposed to environmental protection?: Lucas v. South Carolina Coastal Council").

[65] *Id.*

[66] *Id.*

[67] "Scores of private groups have appeared in recent years to protect landowners from government intrusion." Miniter, *supra* note 10, at 42 (anecdotal evidence of several individuals who have been affected).

[68] "The property rights revolt is already changing the political calculus in Washington. Like supply-side economics, the movement has touched off a paradigm shift in the way many view property rights." *Id.*

[69] *Id.*

[70] *Id.*

[71] Richard M. Stapleton, *Who Owns the Land? A Fierce Controversy Surrounds Attempts to Balance Private Rights and Public Good*, NAT'L PARKS, Sept. 1993, at 26.

perspective, the ownership of property entails not just rights, but correlative duties and responsibilities as well.[72]

Supporters of environmental regulations claim that the Madisonian concept of property rights as inalienable and immutable leads to a notion of rights being divorced from responsibility, which ultimately harms society as a whole.[73] They also argue that our society's longstanding recognition of both the "nuisance exception"[74] and of the necessity of the legislature's police power is indicative of our acceptance of Kant's notion of property rights tied to responsibilities.[75] The opponents of compensation legislation argue that to shift suddenly to a notion of property rights as absolute and immutable would threaten to destroy not only the nation's natural resources, but the very fabric of our society as well.[76]

B. The Goals of the Private Property Rights Movement

The supporters of compensation legislation claim that theirs is a grassroots movement. Consequently, its agenda is not set by a central body.[77] All of its members share the goal of stopping the government

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[72] *Id.*

[73] [When rights] have a strident and absolutist character, they impoverish political and judicial discourse. They do not admit of compromise. They do not allow room for competing considerations they impair and even foreclose deliberation. Rooted in nineteenth-century ideas of absolute [private] sovereignty over property, they are ill-adapted to a long discussion of tradeoffs and competing needs. They are moreover, overly individualistic [and focused on the short term] . . . . They miss the "dimension of sociality" and posit selfish, isolated individuals asserting what is theirs rather than participating in communal life.

Cass R. Sunstein, *Rightalk*, NEW REPUBLIC, Sept. 2, 1991, at 33.

[74] The "nuisance" doctrine precludes the finding of a taking where a regulation prohibits an activity that would not have been permissible under the common law principle of nuisance, even if the regulation reduces the economic viability of the property to nothing. This principle is important to the discussion of the proposed compensation legislation because supporters of the legislation claim that its recognition of the nuisance exception is sufficient to protect the health, safety and welfare of the public, as well as the environment generally.

[75] [The] constitutionally protected right of property is not unlimited. It is subject to reasonable restraints and regulations in the public interest by means of the legitimate exercise of police power. The exercise of this police power may properly regulate the use of property and if the owner suffers injury "it is either *damnum absque injuria*, or in the theory of law, he is compensated for it by sharing in the general benefits which the regulations are intended . . . to secure."

State v. Johnson, 265 A.2d 711 (Me. 1979).

[76] Echeverria & Dennis, *supra* note 18.

[77] *Id.*

from forcing private individuals to bear public burdens.[78] On issues beyond this achievement, however, they do not all have the same agenda. The property rights movement can be split loosely into two groups. The first group, the "prioritizers," consists of those who claim to support the underlying policy goals of existing environmental legislation[79] but would like to see the country move away from what they classify as the "environmental extremism"[80] that puts the welfare of plants and animals above that of people.[81] The second group, the "free marketeers," believes that an economy functions best when it is completely unregulated. This faction would like to see the recision of all restrictions on the use of private property that were not historically available under the common law.[82]

Although the claimed goals of these two groups are incongruous, advocates of compensation legislation within each camp insist that each of their incompatible objectives can be achieved through passage of the same bill. A consideration of the likely effects that passage of the bill would actually have on the government's regulatory capacity, however, reveals that it would eviscerate existing environmental regulations, and thereby create an unrestricted market of the type favored by the more extremist free marketeers. A subsequent economic analysis demonstrates that the existence of a totally free market would not maximize the efficient use and protection of our nation's natural resources. Thus, the proposed compensation legislation would not ultimately result in the achievement of the goals of either faction within the property rights movement.

The prioritizers, who claim to support both this compensation bill and the goals of environmental conservation, say they are not interested in gutting existing environmental regulations; they only want the flexibility to adhere to them in a cost-effective manner.[83] They argue that making the government pay landowners when it reduces the value of their property

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[78] *Id.*

[79] "I support the goals of our nation's environmental laws, such as the Endangered Species Act. But the law must allow economic growth and respect private property rights." Tauzin, *supra* note 13.

[80] "We're not out to pillage the environment, but what we're seeing now is environmental extremism. What we'll be talking about is moving the pendulum back to the center." Heather Dewar, *GOP Considers Cash for Devalued Property*, PHILA. INQUIRER, Dec. 1, 1994, at A1, A10 (quoting Senator Larry Craig of Idaho regarding the Republican Job Creation and Wage Enhancement Act).

[81] *See, e.g. Endangered Property Rights*, WALL ST. J., Sept. 12, 1994, at A14, A16; Ike Sugg, *California Fires — Losing Houses, Saving Rats*, WALL ST. J., Nov. 10, 1993, at A20.

[82] *See, e.g.*, Gerald M. Freeman, *The Strangers in Our Yards: Property Rights and the Constitution*, 60 VITAL SPEECHES 659 (1994); Sowell, *supra* note 15; Epstein & Echeverris, *supra* note 64.

[83] Regan, *supra* note 14, at 103.

will right the wrongs of the existing, overreaching regulatory system by forcing regulators to prioritize their choices for preservation.[84] Once environmental regulators are forced to pay for property-value-reducing limitations on private land, the monetary cost of saving an endangered species located on that land, for example the Steven's kangaroo rat,[85] suddenly changes from being nothing to being quite expensive.[86] As a result, those responsible for making regulatory decisions will have to decide if the regulations are cost-effective.[87] In other words, it forces them to ask the question, "Is the benefit of saving these rats worth the cost we will have to inflict on these landowners [and ultimately ourselves] to do it."

C. The Problems With the Proposed Compensation Legislation

According to the prioritizers, the proposed compensation legislation embodies the dual aims of stopping the government from forcing private individuals to bear costs that benefit the public as a whole and improving the system used to protect scarce natural resources. While both of these goals are laudable, there are two related problems inherent in the current proposal that will prevent it from meeting its purported objectives. First, the bill would go too far in its dismantling of the current regulatory system to be an effective agent for policy reform. Second, once the current regulatory system has been rendered ineffective, the bill does not replace it with any effective means of protecting natural resources.

1. The Proposed Legislation Goes Too Far

Contrary to the purported goals of those who say they do not want to gut current environmental laws, passage of this bill in its present form would simply destroy the efficacy of the current regulatory system.[88] The

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[84] "The federal government is not going to be able to pay for every species of wildlife or acre of wetlands it would like to protect. Instead it will have to prioritize and focus its resources on what it cares most about." Clifford, *supra* note 2, at A1 (quoting Jonathan Adler of the Competitive Enterprise Institute).

[85] *See* Sugg, *supra* note 81.

[86] Epstein & Echeverris, *supra* note 64.

[87] *Id.*

[88] *See, e.g.*, Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVT'L L. 355 (1994). Secretary of the Interior Babbitt argues that a bill that "would require any federal agent to compensate owners of private property 'for any diminution in value' caused by any regulatory action taken under designated environmental law . . . [is] . . . a pernicious way of saying we are going to destroy the efficacy of government." *Id.* at 357, 359.

bill does not contain any provision making allowances for existing regulations; it says only that property holders must be compensated when land values are reduced by regulations.[89] By dramatically increasing the cost of regulation enforcement, this change from current takings laws[90] would have the desired effect of forcing government regulators to prioritize their conservation efforts. However, in this era of rampant government deficits, agencies would be forced to cut regulations back too far, if not prioritize themselves out of the regulatory business altogether.[91] This effect would be enhanced by the proposed plan to deduct from the budget of the regulating agency an amount of money equal to what was paid in compensation rather than deducting compensation money from the general treasury as is currently done.[92]

In defense of compensation legislation prioritizers argue that even if the takings law did gut the current regulations, the public welfare would be protected because this bill adheres to common law nuisance principles and respects the rights of a property owner to use his property as he sees fit only so far as he does not infringe on the rights of his neighbors to enjoy their land.[93] Nuisance principles alone, however, are inadequate to protect natural resources and the environment. If they were sufficient there would have been no need to establish the present regulatory scheme in the first place.[94]

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[89] "A private property owner is entitled to receive compensation . . . for any reduction in the value of property of 10 percent or more . . . that is a consequence of a limitation on an otherwise lawful use of the property imposed by a final agency action." H.R. 9, 104th Cong., 1st Sess. § 9001 (1995).

[90] The Supreme Court currently requires a fact specific inquiry for any regulatory takings case where economic diminution is less than complete. *See supra*, part II.

[91] Because these bills are so broad and inflexible, and because they often mandate compensation where none is warranted, the potential budgetary impacts are extremely high, and for some bills virtually unlimited. Even if these bills forced a reduction in new regulatory protection, they would still have a huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential protections.

Prepared Statement of John R. Schmidt, Associate Attorney General Criminal Division, Before the Senate Committee on the Environment and Public Works Concerning Takings Legislation, 104th Cong., 1st Sess. 6 (June 27, 1995); *see also* Thompson, *supra* note 18, at 6; Regan, *supra* note 14.

[92] *Prepared Statement of Sen. Orrin G. Hatch Before the Senate Judiciary Committee on S. 605, the Omnibus Property Rights Act of 1995*, 104th Cong., 1st Sess. 2 (Oct. 18, 1995).

[93] *See, e.g.*, Pilon, *supra* note 56, at 11; Clifford, *supra* note 2.

[94] Both S. 605 and H.R. 925 purport to address health and safety concerns by providing an exception to the compensation requirement where the property use at issue would constitute a nuisance under applicable State law. It is entirely inaccurate to suggest, however that this exception would allow for adequate protection of human health, public safety, the environment, and other vital protection important to the American people.

Common law nuisance evolved within a system that was concerned only with the direct protection of human health and property.[95] As a result, it developed effective means of enabling people either to get an injunction, recover damages or both in instances where a property owner's behavior was directly harmful to human health or safety.[96] However, because of its exclusive concern with direct impacts on the lives of human beings, the common law never developed the mechanisms to prevent private landowners from causing indirect harms to the nation's common natural resources, including wildlife, public waters, and public lands.[97] These common resources were left unprotected by a "gap" that the common law did not cover. When enough concerned people noticed that the resources left unprotected by this "gap" were being abused, they came together to form the environmental movement. Their elected representatives then responded by beginning to pass environmental protection measures that eventually evolved into the present regulatory system.[98]

In spite of what property rightists declare, the common law "gap" that resulted in the widespread natural resource degradation that gave birth to the environmental movement has not since been filled in. Although common law principles, such as private nuisance, public nuisance, and the public trust doctrine are slowly recognizing the importance of remedying ecological natural resource harms, they have not yet evolved to the point of being able to protect common pool resources to the same degree as the current regulatory scheme in cases where human beings are not directly affected.[99] Furthermore, because the common law varies significantly from jurisdiction to jurisdiction, without the uniformity provided by federal oversight, there is the potential for a "race of laxity" to develop between states competing to attract industrial development.[100]

It is for these reasons that opponents of the proposed compensation legislation can argue persuasively that its passage would turn the legal maxim "make the polluters pay" on its head and require the government

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Schmidt, *supra* note 91, at 10 (includes more detailed discussion of the inadequacy of the nuisance exception and other exceptions to the compensation requirement).

[95] Zygmunt J.B. Plater et al., ENVIRONMENTAL LAW AND POLICY: A COURSE BOOK ON NATURE, LAW AND SOCIETY (1992), at 109.

[96] *Id.* at 102.

[97] *Id.* at 109.

[98] *See, e.g.*, Betsy Carpenter, *Living With Our Legacy*, U.S. NEWS & WORLD REP., Apr. 23, 1990, at 60; Walsh, *supra* note 8, at 318-19.

[99] Plater, *supra* note 95, at 109, 129, 463.

[100] *Id.* at 727 (A race of laxity exists where local areas lower their standards of environmental protection in order to entice job-producing industries. Once one region starts, others feel they must go as low or lower to compete, and the race is on.).

to pay polluters not to pollute.[101] The concept is well illustrated by the way the bill would have affected a pollution problem that occurred in California's Kesterson National Wildlife Refuge.[102] Several years ago, scientists studying assorted health maladies of the waterfowl in the Kesterson Refuge discovered that the birds were being poisoned by selenium in irrigation tail water that was draining into the refuge from a nearby agricultural area. The Endangered Species Act[103] and the Migratory Bird Treaty Act[104] mandated some regulatory action be taken to stop the poisoning. The action that regulators chose was to say to the farmers, "clean up the pollution or we will sue you."[105] As a result, the pollution was cleaned up.

If the proposed compensation bill had been in effect when the pollution occurred, however, it is likely that the Kesterson situation would have developed much differently. Even though scientific evidence clearly indicated that the waterfowl, a precious common resource, were being harmed as a result of actions taken by farmers on their private property, it is unlikely that those harmful actions would have been preventable under the principles of common law nuisance. No one individual owns the birds that inhabit the refuge; therefore, there was no direct human harm involved. In order for a private plaintiff to sue under the common law principle of public nuisance, he must be able to show "special injury," different in kind and not just in degree, from the public as a whole.[106] Because no one would have been able to show special injury in this case, no one would have had standing to sue the farmers under the common law to stop them from poisoning the birds.

That is not to say that the government would not have had any options had the proposed law been in effect. Government regulators could have ordered the farmers to clean up even if the pollution could not have been stopped using the principles of the common law alone. However, if the result of such an order ended up causing the farmers a significant diminution in the value of their property, then the order would be considered a compensable taking.[107] Under the terms of the proposed legislation, the more expensive the ordered cleanup, the more likely the government would be required to reimburse the farmers.

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[101] Babbitt, *supra* note 88, at 358.
[102] *Id.* at 357.
[103] Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).
[104] Migratory Bird Treaty Act, 16 U.S.C. §§ 703-715 (1988).
[105] Babbitt, *supra* note 87.
[106] Plater, *supra* note 95, at 130.
[107] Babbitt, *supra* note 88, at 357.

The other action that regulators could have taken under the terms of the proposed bill, would have been simply to ignore the pollution. Making the choice between the two unsavory options of either doing nothing or paying for a cleanup is apparently what the advocates of property rights apparently refer to as "prioritization."[108] Whether the extortionate effect of purposefully this bill was produced or as a consequence of poor drafting is unclear, but it is clear that if this bill were passed it would thwart all reasonable efforts by the government to control the use of private property under the existing regulatory scheme in any meaningful way. The result would be to re-open the "gap" in the common law, thereby increasing the potential for private landholders to pollute public property.

2. *The Proposed Legislation Does Not Go Far Enough*

The second major flaw of the proposed compensation bill is that it does not go far enough because it fails to replace the regulatory system it dismantles with any effective means of resource protection. In attempting to cure the ills that are perceived to exist within the present regulatory system, the proposed compensation legislation ignores the underlying issues that caused the faulty system to have been installed in the first place. Thus, if it were passed as is, without any additional legislation, it would create at least as many problems as it would solve.

Sabotaging the operation of the present regulatory system would accomplish the property rightists' goal of preventing the government from limiting private rights for the benefit of the public at large, but it would also destroy the ability of the present system to protect the country's natural resources. Those resources would then return to being inadequately guarded as a consequence of the previously explained "gap" in the common law. In the end, we would simply be returning anew to the era that existed before the present regulatory scheme was in place. Thus, in the guise of addressing the issue of who should pay for environmental protection, the property rightists' proposal actually confronts us with the question of whether we should protect the environment at all.[109]

As was mentioned above, there are certain ideologues within the property rights movement who argue that the government should not attempt to protect natural resources.[110] These free marketeers believe

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[108] "The [compensation] bill's proponents are saying, 'We do not like environmental laws, and if they inconvenience us, we will send the government the bill and ask the public to pay.'" *Id.* at 358.

[109] *Forsaking the Earth*, ATLANTA CONSTITUTION, Dec. 15, 1995, at A18.

[110] *See, e.g.*, Greve, *supra* note 15; Epstein, *supra* note 64; Sowell, *supra* note 15.

that an unfettered, freely competitive market protects resources best by allocating them in the most efficient manner possible.[111] Although some of the tools of market economists can be helpful for finding a solution to the problems of natural resource preservation, taking free market economics to the extremes that these ideologues[112] advocate would cause more harm than good.[113]

In supporting their position that wildlife can be protected by a completely open market, free marketeers are fond of telling the story of how a group of concerned private citizens banded together to rescue the wood duck from extinction in the time before the Endangered Species Act (ESA)[114] or any other environmental protection regulations were in place.[115] The wood duck is unusual in that it builds its nest in holes in trees rather than on the ground as most ducks do.[116] Because of the length of time required for a tree to develop the type of hole that can house a wood duck, the ducks could live only in old growth forests. As old growth forests were cut down, the population of the wood duck shrank to the point of threatening the existence of the species. Fortunately, someone discovered that wood ducks will also nest in a wooden box that is mounted on a tree. Privately funded citizen groups, such as Ducks Unlimited, quickly organized a campaign to get landowners to hang these boxes on

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[111] Thompson, *supra* note 18, at 6.

[112] James Gordon satirically describes these ideologues as "Econs":

> "Econs" basically believe that material wealth is the highest human value, and justice, fairness, dignity, and protecting the helpless all cost money and are therefore "economically inefficient." The money would be better spent on much more transcendent things, like pet rocks, hemorrhoid pads, and other items needed to satisfy *aggregate demand.*
>
> Econs prove their theories by devising little mathematical formulas which assume whole truckloads of untrue things and then come to a particular conclusion. The conclusion is always - get this - the market will take care of itself. According to the Econs - I am not making this up either - there is a *giant invisible disembodied hand* that magically takes care of everything. Before you get too excited about this, remember that this is the same invisible hand that gave us the invisible *great depression.* Oh *that* invisible hand.
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> When you point out that the assumptions in the formulas are simplistic (a euphemism for "false"), the Econs get really testy and tell you that you don't understand the discipline.

James Gordon, *How Not To Succeed in Law School*, 100 YALE L.J., 1679, 1699 (1991).

[113] "[Free-marketeers] have fallen in love with their own ideology, pursuing it well past its practical usefulness into the realm of Wonderland." *Forsaking the Earth*, *supra* note 109.

[114] Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988).

[115] Fred L. Smith, Jr., *Sustainable Development — A Free-Market Perspective*, 21 B. C. ENVT'L AFF. L. REV. 297, 305 (1994) (argues that private property rights and market-based incentives will result in most efficient use and protection of natural resources).

[116] *Id.*

trees on their lands, and the results were so successful that Fish and Wildlife Service recently requested that hunters shoot wood ducks before other species because there are so many of them.[117]

Although the wood duck rescue story does teach some valuable lessons about resource conservation, it does not represent the ringing endorsement of unregulated free market capitalism that some property rightists would have us believe. First, it demonstrates the restorative capacity of humans who are motivated to preserve. Second, it shows that the most obvious solution, *i.e.* to stop cutting down wood duck nesting habitat — is not necessarily the best solution when it comes to the preservation of specific natural resources. It does not prove, however, that all natural resources in a free market system would be preserved as effectively.

The wood duck was saved not because of the free market system, but in spite of it. In a free market system people care only about things that they value. The wood duck survived because a great many people with extra time and money were interested in saving it. The thing that many, if not most, of those people valued about the wood duck was the joy that they got from shooting it. Unfortunately for most endangered species, however, people do not enjoy hunting them enough to go to the trouble of keeping them alive for the pleasure.

What is to become of these creatures? The free marketeers believe that they should be allowed simply to disappear. If that is what the market dictates, then because it is the most cost-effective of all possible outcomes, it is the one most beneficial to society. Using an evolutionary theory that is suitably described by the phrase "Charles Darwin meets Adolf Hitler," they have come to the specious conclusion that species that cannot co-exist with twentieth century human society on man's terms are maladapted, and therefore should properly become extinct as a result of "natural selection."[118] Applying this twisted theory to the case of the wood duck, one reaches the conclusion that if the wood duck had not evolved so as to have inspired human beings to want to rescue it from extinction, then it would have been maladapted for living under the conditions of twentieth century human society. However, since this fortunate bird has spent thousands of generations developing precisely the right evolutionary characteristics — namely, that it can live in a wooden box and people really like to shoot at it — it has been able to adapt and survive under modern conditions. Therefore, it is evolutionarily sound.

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[117] *Id.*

[118] Stephen M. Meyer, *The Final Act: In Defense of Endangered Species; U.S. Endangered Species Act Renewal in Congress*, NEW REPUBLIC, Aug. 15, 1994, at 24.

This theory does not describe the concept of evolution; it describes luck. Evolution does not occur overnight. One cannot expect, for example, that the Houston toad, which took millions of years to develop the characteristics necessary to survive in a very limited ecological niche, will suddenly be able to adapt to life in modern society when the area that was once its home gets paved over to become a shopping mall parking lot.[119] The extinction that is caused by that sort of habitat destruction is not a result of natural selection; it is "speciecide." Today's high rate of species extinction is not occurring because animals are maladapted for living in man's world. Rather, species are dying off because man does not care enough about the natural world around him to allow other creatures to exist. If man wants to poison the earth and denude the planet of all life that interferes with his ability to shop conveniently, that is all well and good, but let's at least own up to what we are doing and refrain from couching our destruction in terms of pseudoscientific euphemisms like "natural selection."

3. *Inadequacy of the Market for Purposes of Resource Protection*

The market system alone will not protect natural resources because it fails to account for values outside the scope of what is bought and sold on the trading block. Even if one is unwilling to accept that wildlife and other natural resource have intrinsic value in and of themselves,[120] these things still have value to humans for which the market does not account. Hunters and fishermen enjoy "consumptive values."[121] Photographers, hikers, birdwatchers, and the like enjoy "non-consumptive values."[122] There are also "option values" from knowing that a resource is there, and "bequest values" that reflect the resource as a legacy passed on to subsequent generations.[123] The market may not have a mechanism for accounting for these values, but that does not make them worthless.[124] When non-

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[119] *Id.*

[120] Plater, *supra* note 95, at 167.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] While it is not irrational to look to market price as *one* factor in determining the use value of a resource, it is unreasonable to view market price as the exclusive factor, or even the predominant one. From the bald eagle to the blue whale and snail darter, natural resources have values that are not fully captured by the market system . . . . Option and existence values may represent 'passive' use, they nonetheless reflect utility derived by humans from a resource.

market, "passive," values are preserved, they can even end up paying big dividends in the "real" market. One never knows when an unsuspected species may turn out to be monetarily valuable. For example, the Pacific yew was not considered valued in economic terms until its bark was discovered to be the source of taxol, which could produce a cure for ovarian cancer.[125] Had a previous generation shortsightedly extinguished all the Pacific yews, the present medicinal value of the trees would never have been realized.

Perhaps even more problematic than the free market's failure to value resources that should be preserved is its failure to place all the cost of resource consumption on those who should bear them. Markets can allocate resource costs effectively when all the costs of the resources being consumed and all external harms caused by that consumption are "internalized" as an expense to the consumer.[126] However, an open market without any outside means of forcing consumers to pay for the entire cost of resource consumption, which includes inefficient use of resources and external harm in the form of pollution, results in the waste and abuse of resources.[127] Rational consumers who do not have to bear the burden of these "externalities"[128] will pass them on to the public at large in the form of resource degradation and depletion.[129] Environmental regulations were passed as a means of internalizing the full costs of resource consumption even when that consumption occurs on private land. Ideally, environmental regulations do not preserve resources as if they

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Ohio v. United States Dep't of Interior, 880 F.2d 432, 464 (D.C. Cir. 1989).

[125] Meyer, *supra* note 118.

[126] Thompson, *supra* note 18, at 6.

[127] In addition to these short comings of the market, some economic scholars feel that the government should pass certain regulations that are not primarily based on the economic principals of efficiency and equity. Rather, these "social regulations" should concern themselves with areas of national importance like ethics, aesthetics, and culture, in which society as a whole has an interest:

> [S]ocial regulation expresses what we believe, what we are, what we stand for as a nation, not simply what we want to buy as individuals. Social regulation reflects public values we choose collectively, and these may conflict with wants and interests we pursue individually.

Mark Sagoff, *The Economy of the Earth: Philosophy, Law and Environment*, CAMBRIDGE U. PRESS (1988). Even though environmental regulations do not necessarily create inefficient use of resources, to the extent that they do, perhaps they could be considered an acceptable type of "social regulation."

[128] Thompson, *supra* note 18.

[129] *Id.* at 7.

were in a natural history museum; rather, they preserve them by reducing the incentive to waste them.[130]

Although both prioritizers and free marketeers seem to believe that environmental regulations are by their very nature economically detrimental, this is not necessarily the case. The goal of an effective environmental policy should not simply be one of natural resource preservation; it should be to preserve those resources that are in danger of disappearing forever, to consume as efficiently as possible those resources that are plentiful but finite, and to sustain through responsible management those resources that are capable of regenerating themselves.[131] A policy that would accomplish all of these goals, whether the resources were on private land or public land, would not harm the economy; it would help it. A policy that limits the ability of private landowners to create public expenses does not effect a "taking" of private rights but a "giving back" of public burdens.[132] Admittedly, it might affect the profit margins of some individual consumers of resources — who in turn become producers of goods — by preventing them from using their privately held resources at the expense of the public, but even these effects could be minimized by an innovative natural resource protection system.

IV. Resolving the Conflict: How to Achieve the Goals of Property Rightists and Environmentalists

Economists can argue forever about whether environmental regulations help or hinder the economy, but ultimately the question of whether or not our government should pass laws to protect natural resources is a political one. In the past, the majority of our society, through its representatives, chose to implement environmental regulations and the environment remains an important item on the public's agenda.[133] Today, opponents

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[130] For a more comprehensive analysis of environmental law and economics, see, e.g., PLATER et al., *supra* note 95, at 28-99.

[131] Lester R. Brown et. al, *A Planet in Jeopardy; The Environmental Crisis*, FUTURIST, May, 1992, at 10.

[132] The catch in the "takings" argument is that nothing is being taken. From the first tenuous settlements that included village green and commons, land use in America has historically been determined by, and in, the public interest. The right to do this or that on any given parcel of land is not inalienable; it has been given by the community, and it can be taken away by the community . . . . It is the developers and exploiters who have been doing the taking. It is time to set the record straight.

Stapleton, *supra* note 71, at 26; *see also* Thompson, *supra* note 18, at 8.

[133] The results from a poll taken during the 1994 congressional elections showed strong public support for environmental protection. Even though environmental concerns were not at

of environmental regulations admit that they do not have the political strength to win an open battle to repeal environmental regulations.[134] Having once determined as a society that conservation of natural resources is a priority, we should then use the political arena to determine how that goal can be accomplished most effectively and efficiently.[135] Participants in this debate should consider the views of all participants, including economists, environmentalists, and property rights advocates. Together these seemingly incompatible groups could develop innovative policies that solve the difficult problem of balancing private property protection against public benefits with beneficial results for all.

The debate between property rights advocates and environmentalists ultimately involves answering the question of who should pay the cost of protecting natural resources.[136] Within the parameters of the current resource protection paradigm, any protection afforded to natural resources is typically born by landowners in the form of reduced property values that reflect their lands' restricted use.[137] The more frequently land use regulations require the government to compensate landowners, however, the more the public must pay for resource protection.[138]

Unfortunately, acting within the present scheme of command and control regulations, the only way of re-allocating the burden from public to private and vice-versa is to trade off property-rights-reducing regulations with environmental-harm-causing deregulation. Shifting the balance to one side only creates inequities on the other. An appropriate solution to the private rights versus public benefits conflict should not, as the proposed compensation legislation would, solve one problem only to create an equally contentious one. A satisfactory approach must therefore address

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the top of the list of priorities of those voting, when asked to choose among three possible viewpoints, 51% chose the statement that "tough" environmental policies foster jobs and economic growth; 83% described themselves as "environmentalists" and almost 40% as strong or very strong environmentalists; 53% judged government environmental policy effective; and 71% said they support or strongly support the endangered Species Act. Jessica Mathews, *Green Sweep*, WASH. POST, Dec. 18, 1994, at C7. In addition:

> A Washington Post-ABC News poll in May found that 70% of respondents said they thought the federal government has "not gone far enough to protect the environment," compared with 17% who thought Washington had gone too far and 11% who said protections were about right.

Rogers, *supra* note 1.

[134] Miniter, *supra* note 10, at 40.

[135] *Forsaking the Earth*, *supra* note 109.

[136] Thompson, *supra* note 18, at 6.

[137] *Id.*

[138] *Id.*

the issue of environmental protection as well as the issue of individuals bearing too much of the costs of public benefit.

Real change in this area of natural resource regulation will be accomplished only when legislators are willing to step out of the current paradigm to develop and implement a progressive land use program.[139] Unless an innovative environmental regulatory program is implemented, future developments in the area of natural resource protection will likely be limited to a series of backlashes for or against environmental regulations, depending on public perception of the state of resource degradation, followed by the appropriate adjustments in regulatory policy. Using innovative techniques, however, a comprehensive legislative proposal could provide adequate resource protection at little or no additional public expense and without unduly infringing on the property rights of landowners. While the nuts and bolts construction of a comprehensive land use program is beyond the scope of this comment, the rest of this section includes several ideas that might be incorporated.

One major area that is ripe for policy adjustment is governmental "givings."[140] The opposite side of the "takings" coin, givings are government subsidies that are rarely conditioned on how land is used. They produce the contradictory effects of simultaneously encouraging uses of land that require public regulation and increasing the value of those lands.[141] Government action is ubiquitous. Some government actions add value to land and other actions take it away, but there is not an acre of private land in the U.S. whose value has not been affected by government.[142]

The many different types of governmental givings range from the more obvious examples, like subsidizing farmers directly, to the less obvious, like building logging roads in national forests or building bridges that encourage development in previously inaccessible areas.[143] Rather than continuing to adhere to the current pell mell arrangement of government subsidies that is based on an outmoded understanding of human impacts on the ecology and economic concerns of decades ago, an effective givings

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[139] *See, e.g.*, J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulation Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555 (1995) (providing comprehensive analysis of federal efforts to protect biodiversity, including what is wrong with the current approach and innovative suggestions as to how efforts could be unified and improved).

[140] Edward Thompson, Jr., *The Government Giveth*, ENVT'L F., Mar./Apr. 1994, at 22 [hereinafter *The Government Giveth*].

[141] *Id.*

[142] *Id.*

[143] *Id.*

program should direct governmental efforts in directions that encourage environmentally conscious development. Billions of dollars are tied up in current government givings programs that encourage the use and development of private property in environmentally undesirable ways.[144] Eliminating or redirecting that money to projects that foster environmentally positive development would save money, encourage economic growth, and reduce the number of takings claims against the government. Redirecting givings alone would go a long way towards improving the management of the nation's natural resources,[145] and thereby calm much of the furor over private property rights.

Take the example of agricultural subsidies. In order to assure that our country has a steady food supply, it is necessary for the government to pay about $30 million every day in government "set aside" programs that encourage farmers not to plant crops on part of their fields.[146] The direct payments to farmers and the artificially boosted crop prices enable the farmers to stay in business so they can continue to grow food.[147] These subsidies, however, have been capitalized into property values, adding about $250 billion to the total value of U.S. farmland.[148] The value added to the land by the government creates expectations that influence investment decisions.[149] In the case of farmland, these expectations often manifest themselves in environmentally damaging actions such as draining wetlands or plowing up highly erodible ground.[150] Thus, land that might have been left untouched is converted to farmland because subsidies have made it profitable to do so.[151]

A wiser use of public funds would shift money away from traditional set asides that only create fallow farmland, to "green incentives" paid to farmers to conserve soil, clean up non-point source pollution, dedicate prime farmland to rural open space, and preserve wetlands and other ecologically sensitive habitat.[152] Farmers would get the same amount of money, thus assuring a stable food supply, but instead of providing an incentive to destroy valuable natural resources, the money would be directed to programs that preserve and nurture them.[153]

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[144] *Id.*
[145] *The Government Giveth*, *supra* note 140, at 22.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Thompson, *supra* note 18, at 7.
[150] *The Government Giveth*, *supra* note 140, at 23.
[151] *Id.*
[152] *Id.* at 26.
[153] *Id.*

A second huge government subsidy program that should be revamped is the income tax deduction for home mortgage interest.[154] The goal of the current program is to encourage responsible citizenship by enabling people to own their own homes. Currently, however, home mortgage interest deductions can be taken no matter where a taxpayer builds her home. Thus, if the combined federal and state tax bracket of a tax payer is 35%, she will be able to deduct the same $35 from every $100 mortgage payment she makes no matter if she builds her home in a revitalized urban area or in the middle of an endangered species habitat.[155] Creators of an intelligent land use plan could forge this program into a powerful tool affecting where future developers would choose to build simply by adjusting the tax code to alter the size of a taxpayer's deduction based on the environmental impact of her home and its consistency with local comprehensive plans.[156] With no net loss to either the government or to homeowners, developers could be discouraged from building homes in environmentally sensitive areas because they would be more expensive and therefore harder to sell.[157]

Federal flood insurance is another federal program that misdirects funds. Experts have estimated that those who qualify for federally subsidized flood insurance are charged as little as 5% of actuarialy sensible premium rates.[158] This program has been described as a financial "time bomb" waiting to blow up in the taxpayers' face.[159] To add environmental insult to economic injury, the program encourages development in places that would be better left undeveloped, like well known flood plains and fragile barrier islands that are subject to hurricanes and major erosion.[160] Although programs such as federal flood insurance may bring development to coastal economies, the apparent prosperity that results is just a facade created by government handouts.[161]

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[154] *Id.*

[155] *The Government Giveth*, *supra* note 140, at 23.

[156] *Id.*

[157] *Id.*

[158] Thomas G. Donlan, *Liberty and Property: The Rights of Owners Don't Include a Federal Subsidy*, BARRON'S, June 1, 1992, at 10.

[159] "[T]he federal flood insurance fund has less than $1 billion in reserves to cover property worth at least $200 billion. Two big storms along the Atlantic Coast in one year would throw the whole program onto the taxpayers' backs." *Id.*

[160] Epstein & Echeverris, *supra* note 64. In this debate on the *Lucas* case, Echeverria argued that Lucas should not have received any compensation because the law that prevented him from building was to protect public safety from harms caused by beach erosion and flying debris ripped from houses in hurricanes.

[161] "A healthy economy is not propped up by phony insurance and a taxpayers' bailout." Donlan, *supra* note 158.

If the federal government expects private property owners to manage their lands efficiently and in an ecologically sound manner, it must set a good example.[162] It could start the redirection of federal subsidies by increasing the fees for resource extraction on public lands to approximate fair market value.[163] This would reduce the incentive of federal land users not to waste resources and stop public coffers from unjustifiably overlining the pockets of resource extractors. There are many instances when the private use of public natural resources is appropriate; nevertheless, the consumers of those resources, not the public, should have to pay for them.

The money that would be saved by cutting and redirecting misappropriated subsidies could be used to fund other federal programs that would promote resource conservation. For example, the government could give tax credits to property owners who signed conservation and stewardship agreements or who derived income from lands where rare animals or plants were allowed to thrive.[164] This would go a long way towards alleviating the problems that presently plague the Endangered Species Act (ESA). Presently the ESA often produces an effect that is opposite from the one it is trying to achieve.[165] Many landowners are so upset by the potential limitations that enforcers of the ESA could place on their lands, they are destroying or driving from the land the very creatures the act is supposed to protect.[166]

This destructive behavior could be halted simply by awarding a tax credit to people who either have endangered species on their land or create habitats in which those species could thrive.[167] The tax credits could be based either on the number of animals or the size of the habitat preserved. The preservation level of individual species could be kept at whatever level was desired by adjusting the value of the tax credits depending on the degree of the threat to each species or habitat. This policy would essentially create a property right in endangered species. The

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[162] Meyer, *supra* note 118.

[163] *Id.*

[164] *Id.*

[165] Gayle M.B. Hanson, *Landowners on the Offensive in Eco-Wars*, WASH. TIMES, Nov. 13, 1995, at 10.

[166] The act has angered private citizens and federal agencies alike. Violation of the act, such as by deliberately killing listed species or destroying their habitat, can, and has, resulted in criminal prosection. Nonetheless, some landowners have resorted to the 'scorched earth' approach: Stealthily eliminating endangered plants, animals or insects from their land before authorities learn of their presence.

The Law That Seemingly Pits Owls Against People and Jobs, L.A. TIMES, Jan. 3, 1993, at M4.

[167] Meyer, *supra* note 118.

result would be to raise, rather than reduce, the value of the land upon which endangered species are found. Private property owners could not justifiably be opposed to such a program because it would not be mandatory, and therefore would not result in the involuntary relinquishment of any rights. The program could even entail the availability of variances to habitat protection codes where development, under limited circumstances, would not threaten species' well-being.

This program would have the added benefit of solving the problems surrounding the National Biological Survey (NBS). The NBS is a program developed to inventory all the flora and fauna on the nation's lands, both private and public, to find out what is there for scientific purposes.[168] Many property rights advocates, however, consider the survey to be an intrusion on their property rights.[169] They also fear that if endangered species were found on their property, the information would be used to restrict their ability to use the land as they chose.[170] If it were made clear, however, that one would not be penalized for having an endangered species on one's land, and that to the contrary, the land could potentially be made more valuable through the availability of tax credits, those who are currently threatening the "trespassing" NBS volunteers with shotguns might start inviting them onto their property.[171]

The downside of governmental "givings" does not stop with the provision of undeserved and misdirected free lunches; "givings" are also inextricably tied to the issue of what constitutes "just compensation." The problems with government subsidy programs are compounded when governmental regulations later forbid property owners from developing lands whose potential development was only made profitable by government subsidies in the first place.[172] If a deprived owner were then able to recover compensation for a regulatory taking, as the current proposal provides, she would be recovering two windfalls from the government: first, when its actions inflated the value of her land, and later when it decided to take some of that value back.[173]

Take for example the case of the developer David Lucas who won a $1.5 million dollar verdict because he was prevented by the South Carolina

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[168] Babbitt, *supra* note 88, at 356.

[169] Brad Knickerbocker, *Endangered Species Watchdog Now Finds Itself Endangered*, THE CHRISTIAN SCIENCE MONITOR, Aug. 22, 1995, at 1.

[170] *Id.*

[171] Charles S. Cushman, *Means Green Team Carries Out Cultural Genocide*, WASH. TIMES, July 27, 1995, at F6.

[172] Thompson, *supra* note 18, at 8.

[173] *Id.*

Coastal Commission from developing two beach-front lots on the Isle of Palms.[174] If it had not been for governmental "givings" such as subsidized flood insurance, the highway built down the coastline, and the bridge connecting the island to the mainland, Lucas would never have wanted to build those houses, and the land upon which he proposed to do so would have been practically worthless.[175] If the government had not "given" so much to Lucas, the issue of compensable "taking" would never have arisen.

It is true that as taxpayers, people like Lucas have contributed to the system that provide governmental givings. His tax contributions, however, do not justify his benefitting disproportionately from givings, not any more than the protection of public natural resources justifies the disproportionate costs placed on private landowners by the government's environmental regulations.[176] It may not be just for the government to effect regulatory takings of private property, but neither is it just for a property owner to be "compensated" by the public when he has lost something that he should never have had in the first place.[177] Although this position is not likely to be stated in the pamphlets of any "wise use" groups, the sword of the private property rightists' argument cuts both ways.

While environmentalists are wont to blame greedy corporate developers for all of our country's environmental ills, more often than not the problems arise as a result of the mixed signals being given by a misguided land use policy.[178] These poorly designed programs encourage people to act environmentally irresponsibly, and then punish them when they do so.[179] The push-pull effect that results not only breeds animosity and resentment, but also wastes a great deal of time and money. It is like "driving a car with the brakes on, it will get you there, if at all, only at great cost."[180]

There will always be people who cannot be stopped from acting irresponsibly towards the environment except through draconian measures,[181] but many people would prefer to steward their land in an ecologically sound manner if it were economically feasible to do so.[182] Under the current regulatory scheme it often is not.[183] What is needed

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[174] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[175] Mathews, *supra* note 16.
[176] *Id.*
[177] *The Government Giveth*, *supra* note 140, at 26.
[178] Thompson, *supra* note 18, at 9.
[179] *Id.*
[180] *Id.*
[181] Meyer, *supra* note 118.
[182] *Id.*; Hanson, *supra* note 165.
[183] Thompson, *supra* note 18, at 9.

is a land use policy that uncouples government spending from land abuse and recouples it to the conservation of resources and the environment wherever possible.[184] The proposals that are described here are intended to create direct and indirect economic incentives to use land in ways that our society considers environmentally conscientious. They may not lead all the way to the end of the road, but at least they are a step in the right direction.

V. Conclusion: The Property Rights Movement Could Lead to the Environmentalists' Biggest Victory

Once the property rights advocates made the shift from judicial activism to legislative activism, the current battle lines between themselves and environmentalists were drawn in earnest. Interestingly, both sides claim to represent the downtrodden and the oppressed. If the sound-bytes of the opposing camps are to be believed, this is a fight between radical, tree-hugging, communist, bureaucrats who are trying to turn the whole county into a nature preserve and greedy, landgrabbing, corporate profiteers who will stop at nothing, including poisoning the environment, to selfishly exploit the country's resources for a buck.[185] Who's telling the truth? Who's lying? Which version is accurate? The answer is that it does not really matter.

The overall spectrum of this debate is too broad not to include a small number of extremists at either end whose visions for the country are so far apart that they have engaged each other in an ideological tug-of-war that neither side will likely be able to win. Unfortunately, however, in their zeal to vanquish one another, they have raised so much dust that they have clouded the terms of the debate. Too many people have too much at stake to afford being distracted by the outrageousness of a small number of fringe elements. The bulk of the participants in this debate have visions of progress that overlap more readily than they probably realize. They need to stop the name-calling and start a constructive dialogue that examines the issues intelligently and seeks to find a solution that will result in the greatest good for the greatest number of people.

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[184] *Id.*

[185] *See, e.g.*, Freeman, *supra* note 82; Kim Goldberg, *More Wise Use Abuse*, CANADIAN DIMENSION, May 1994, at 27; Ann Corcoran, *This Land Is Our Land and We'll Protect It Better Than Government Will*, HERITAGE FOUND. POL'Y REV., Winter 1993, at 72; O'Keefe & Daley, *supra* note 6; O'Callaghan, *supra* note 7; Rauber, *supra* note 16; Martin W. Lewis, *Forcing the Spring: The Transformation of the American Environmental Movement*, ISSUES IN SCI. & TECH., June 22, 1994, at 80 (book reviews).

The development of environmental policy on Capitol Hill is presently at an impasse.[186] Property rights advocates have enough strength to stop environmentalists from expanding regulatory programs, but not enough to repeal existing regulations.[187] Although many people see this situation as just another example of Washington "gridlock," the attention that the battle over property rights has focused on the area of environmental policy may present an opportunity to implement real change. It will only happen, however, if those who are manning the trenches on both sides stop trying to kill each other long enough to see the big picture.

Within the media and by the participants themselves, the issues of this debate are usually discussed in terms of a fight between property rightists and environmentalists. Although the goals of these two groups are mutually exclusive under the current regulatory paradigm, this comment has tried to demonstrate that when viewed from another perspective they become mutually enhancing. What is needed is a new way of thinking about land use controls, one that involves the redirection of government subsidies away from the small but powerful group of special interests who have convinced themselves — and much of Congress, it would seem — that they have a property right in receiving their public handouts.

Environmentalists should congratulate themselves on the job they have done in slowing the degradation of natural resources over the last several decades. They should also recognize, however, that the methods they have relied on for doing so have reached their limits. The new war environmentalists must wage is against government-subsidized special interests. The fight will not be easy, but a victory would represent a great triumph for the American people and for the environment. To defeat the powerful special interests environmentalists need to convince the property rightists that they should stop fighting against each other and join together to face their common enemy.[188] Rather than downplaying the grass-roots element of the property rights movement and complaining about how property rightists have been co-opted by corporations, environmentalists should take advantage of the grass-roots network that has been paid for in part by

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[186] Tom Bethell, *Property and Tyranny*, AM. SPECTATOR, Aug. 1994, at 16.

[187] Miniter, *supra* note 10.

[188] In order to succeed, environmentalists will have to:

> recognize that they have an important stake in solid economic growth. For one thing, people are more favorably inclined toward environmental protection when there is confidence in the economy and they are not afraid of losing their jobs. For another, some environmental goals can be furthered by intelligent development and land management practices — especially in heavily developed regions.

Meyer, *supra* note 118.

corporate dollars.[189] By doing so they may be able to educate private landowners about what the issues really are, and thus woo them to the conservationists' corner for the big fight.[190]

Across the country people are clamoring for a change in current environmental regulatory policy. What remains to be seen is whether the change that is enacted will represent a genuine "[rethinking] in the way we treat landowners as much as [a rethinking] in the way we treat the land,"[191] or merely a reversion to an already tried and failed method of dealing with the problems inherent in natural resources management.

William L. Inden

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[189] Richard M. Stapleton, *A Call to Action, Part 3: Wise Use Movement*, NAT'L PARKS, Mar. 1993, at 37 (arguing that to be successful the environmental movement will have to return to its roots as a grass-roots movement, and concentrate more efforts on local organizing and less in lobbying Washington, D.C.).

[190] Environmentalists should begin asking themselves: How do we protect the Earth if the property rights movement succeeds? A conservative/conservationist alliance could be forged around certain common ideas. A sure winner: Ending environmentally destructive subsidies. An array of federal programs, from farm subsidies and below-cost timber sales to federal canal and highway projects, actually encourage landowners and states to disrupt the environment. A more limited government would harm the environment less . . . . Prudent deregulation coupled with lower property taxes for wetlands could save most of them. Such measures would give property owners a financial incentive to protect wetlands and minimize adverse impacts.

Miniter, *supra* note 10, at 46.

[191] Thompson, *supra* note 18, at 9.