

Property Rights: Understanding Government Takings and Environmental Regulation

Nancie G. Marzulla and Roger J. Marzulla
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In his introduction to this book, Chief Judge Loren Smith of the United States Court of Federal Claims, himself a major force in the current renaissance in the recognition of the importance of property rights, credits Nancie and Roger Marzulla. "They approach the fundamental human right to property," he notes, "in the same spirit as did James Madison and the other framers of our Constitution—as part of the fundamental integrity and dignity of the human being."

The praise is deserved. For more than a decade, the Marzullas have been at the center of the property rights movement. Roger was the Assistant Attorney General for Land and Natural Resources during the 1980s, and was responsible for President Ronald Reagan's 1988 Executive Order 12630, "Avoiding Governmental Interference with Constitutionally Protected Property Rights." Nancie was also in the Department of Justice, but she is better known as the founder of the Defenders of Property Rights, a public interest law firm that prepares amicus briefs in Supreme Court cases, helps property owners with the detailed negotiations that characterize government regulation in this field, and backs up those efforts with trial court litigation. No two people could be better qualified to write about the sprawling, confused field of property rights.

Property Rights concentrates on law, not politics. The reader learns the state of legal play, not the machinations of the multitude of environmental and property rights defense groups that infest the area. The book starts with some introductory chapters reviewing the basics. The authors emphasize the breadth of the term "property," which includes real estate, water rights, contracts, trade secrets, pension rights, and numerous other tangible and intangible claims. All are protected by the Fifth Amendment to the Constitution, which says, "Nor shall private property be taken for public use without just compensation."

The broad definition of property makes the definition of "takings" complex. Courts have had no trouble finding a taking when the government seizes title or takes physical possession, but the more difficult question, and the one that provides most of the current conflict, involves takings by regulation. Here, the government does not seize the property,

but simply tells the owner what he can do with it—for example, by decreeing that nothing can be built on a wetland or that habitat be maintained for endangered species. The book documents the failure of the Supreme Court to develop any coherent standard for determining when a regulatory taking has occurred. The Court still clings to the formulation made by Justice Oliver Wendell Holmes in 1922: regulation becomes taking when “it goes too far.” Of course, the Court has developed several tests purporting to provide more guidance, and those are reviewed in *Property Rights*.

The Marzullas look at the takings issue in a series of specific contexts, reviewing the regulation of wetlands, the Endangered Species Act, Superfund, other environmental laws, and land use. All of those sections are short, designed to acquaint the reader with the basics, not to provide a treatise. The authors do a fine job of translating an area of great legal complexity into terms easily understood. They also use their hands-on experience to explain the practical impact of those doctrines on the people who must live with them. For example, they skillfully sketch the conflicting missions of the different agencies involved in defining protected “wetlands” and the bureaucratic imbroglios that result.

One particularly chilling story is of a Pennsylvania farmer who wanted to expand a wet spot in a hay field into a two-acre pond. He was confronted with a bureaucratic maze and unable to get approval for a project that, while important to him, would have had a trivial environmental impact. Others fared even worse and were put in jail for having used their private property without the proper ticket-punching by the regulatory agencies.

The final third of the book deals with general issues such as due process and equal protection, and discusses the status of current reform efforts in the area of property rights legislation. This part of the book also contains a valuable section on procedural issues, showing that property rights litigation is subject to some particularly knotty problems relating to the ancient legal doctrines of standing, ripeness, and jurisdiction. Many property owners find themselves out of court due to failure to master those arcana.

The authors include some interesting attachments at the end of the book. One addendum is the U.S. Attorney General’s Guidelines for Implementing Executive Order 12630. This is a formal government legal memorandum, undoubtedly prepared by the Marzullas during their tenure in the Department of Justice, and is itself a first-rate primer on the law of takings. Also, the authors include the two most important Supreme Court cases of the 1990s, to bring readers up to date.

This book will help readers understand the importance of safeguarding property rights and the damage that has been done by failing to see property rights as human rights.

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