The Development of Property Rights in America and the Property Rights Movement

STEVEN J. EAGLE*

I. INTRODUCTION

A. PROPERTY RIGHTS AND GOVERNMENTAL POWER: IMMINENT NEED FOR CHANGE

A nascent property rights movement has arisen in response to a generalized reluctance on the part of the courts to clearly define property rights and otherwise limit governmental abuse. This article describes the development of property rights in America and traces the increase in danger to those rights during the last century. Both legislative and judicial reforms are necessary to restore property rights and to protect individual liberty.

B. THE RISE OF THE PROPERTY RIGHTS MOVEMENT

Across the nation, dozens of advocacy groups have formed in recent years to defend private property rights from assault by officials at all levels of government. These groups constitute a true grass-roots movement.[1] Their growth is attributable primarily to the general disregard of private property rights by numerous federal and state agencies and the subsequent realization that the courts offer owners little help in vindicating their rights. Property rights organizations have already achieved some success by persuading the United States Congress and the legislature of almost every state to consider property rights legislation.[2] At least twenty states have enacted some form of statute protecting property rights.

Because the protection of property is a preeminent function of government, the work of property rights groups is of vital importance. Yet zeal alone, without guiding principles, cannot restore property rights. With an eye toward the first principles of the matter, therefore, this article will review the nature of the threat to property rights in America today and will explore the need for federal and

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* Professor of Law, George Mason University School of Law, Arlington, Va. 22201, seagle@gmu.edu. An earlier version of this article was published as THE BIRTH OF THE PROPERTY RIGHTS MOVEMENT (Cato Inst., Policy Analysis No. 404, 2001). The author would like to thank Roger Pilon for his editorial suggestions and Deborah Mellis, a student at George Mason University School of Law, for her research assistance.

1. *See, e.g.*, JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT–AND WHY YOU SHOULD CARE 3-4 (1997). For a brief sketch of some of the leaders of the property rights movement, see RICHARD POMBO & JOSEPH FARAH, THIS LAND IS OUR LAND: HOW TO END THE WAR ON PRIVATE PROPERTY 154-61 (1996); *see also* Philip Brasher, *Farmers Rebel Over Wetlands Regulations Environment: The Furor Is Fueling a Movement That Could Lead Congress to Gut Protective Laws in the Name of Property Rights*, L.A. TIMES, Apr. 23, 1995, at 9. A directory of many property rights groups is available on the Internet *at* http://www.allianceforamerica.org/Links.html.

2. For an overview of activity at the state level, see Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to 'Environmental Takings,'* 46 S. CAL. L. REV. 613, 633-38 (1995).

state legislation to better secure those rights and the liberty they ensure. It is crucial that the property rights movement be grounded in moral and legal principles, for without such a foundation, resulting legislation could be both ineffective and subversive.

Legislation that is essentially reactive, for example, that aspires to remedy a narrow range of abuses then in the public eye, is apt to be piecemeal and unduly complicated. Such legislation tends to offer little or no protection beyond the prevention of such abuses. Perhaps more disturbing is the possibility that unprincipled property rights "reforms" might actually undermine property rights. Inevitably, opportunists will invoke the need for property rights "protection" in their quest for special advantage. Their efforts will obscure the meaning of "property rights." Their successes will lead, ironically, to the expansion of government.[3] The largesse they acquire for themselves must be exacted ultimately from the property rights and taxes of other citizens.

In the end, however, the need for legislative protection of property rights results largely from default by the judicial branch of government. The courts of justice were established, after all, to constitute "the bulwarks of a limited Constitution against legislative encroachments."[4] Yet rather than protecting the rights of the people by ensuring that legislatures remain "within the limits assigned to their authority,"[5] the United States Supreme Court has acquiesced for many decades in governmental encroachments on private property rights. While the Court has made efforts over the past decade to correct the problem, its property jurisprudence thus far has proven inadequate. This article will explore the current effort to find legislative relief from the Court's failure—even though the ultimate source of the problem may be in those very legislatures.

II. LIBERTY AND PRIVATE PROPERTY IN OUR AMERICAN HERITAGE

The right to own property is essential to individual liberty and is a birthright of every American. This truth did not emerge from the current property rights movement. Nor are its origins as recent as the Constitution or the Declaration of Independence. Rather, as those who cherish liberty have always understood, property is a natural right of free persons. When individuals freely bargain to coordinate the use or sale of their property rights, they assert their human dignity and enhance their mutual welfare.[6]

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3. For an excellent treatment of how special interest groups capture government regulators, see Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 229 (1986). *See generally* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

4. THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

5. *Id.* at 525.

6. *See, e.g.*, Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 895 n.199 (1997) (noting that while some find legitimacy in the private market because it furthers productivity, others do so because it furthers liberty). Individual property ownership as necessary to a culture of family self-

Property enables people to satisfy life's material needs without becoming dependent upon the state. Property rights provide individuals with the confidence needed to invest their labor and capital in productive activity today, knowing that success will benefit themselves and their families tomorrow. Private property is thus the vehicle by which individual freedom and the enrichment of society are joined in a virtuous circle to enhance the welfare of all.

Five years before the Battle of Bunker Hill, the patriot and later Supreme Court Justice James Wilson declared,

> All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded in the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they would enjoy in an independent and unconnected state of nature.[7]

Six years after the Constitution was adopted, Supreme Court Justice William Paterson commented on the connection between liberty, government by consent, and property rights:

> It is evident, that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.[8]

A. LIBERTY AND PROPERTY THROUGH THE COLONIAL PERIOD

The development of the United States as a republic dedicated to securing individual liberty and economic opportunity results largely from the availability to its settlers of an English heritage of freedom and easily obtainable property in land.

1. A Legacy of Freedom

We are reminded by the eminent historian Henry Steele Commager that "neither Jefferson nor the American people invented" the principles of the

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reliance was stressed by Southern Agrarians. *See, e.g.*, M.E. BRADFORD, REMEMBERING WHO WE ARE: OBSERVATIONS OF A SOUTHERN CONSERVATIVE 86 (1985).

7. JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT, *quoted in* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 108 (1922).

8. Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795).

Declaration of Independence.[9] The entitlement to property and liberty of which the Framers' generation was "so proud" was not really new but was part and parcel of the historic "rights of Englishmen."[10] Those rights had been "elaborated by the generation of . . . Sidney, Milton, and above all John Locke in seventeenth-century England,"[11] and included the inalienable right to be secure in "person, property and privileges."[12]

Not limited to great landowners, those "rights of Englishmen" were embodied in a common law that exalted the right of the most humble owner of land to exclude the mighty. When John Adams told a jury that "an Englishman's dwelling House is his Castle,"[13] he was merely reiterating a famous declaration by William Pitt:

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![14]

As the Glorious Revolution of 1688 had affirmed, even the king was subject to the rule of law. Some had clung to the notion that a monarch was unaccountable to his subjects and was anointed by God. Yet the writers of the English and Scottish Enlightenment had a deeper understanding of the nature of government. They realized that government was a compact among individuals for the preservation of their liberties. The dissemination of their ideas was important to the success of the Glorious Revolution. The best known of those authors to eighteenth century Americans was John Locke, whose *Second Treatise of Government* famously declaimed, "Lives, Liberties, and Estates, which I call by the general Name, *Property*."[15] Just as a free individual's liberty is a property, so too his rightful use of his property is a property. Everyone could freely acquire, use and dispose of his property as was "consistent with maintaining both the rights of others and good order."[16] A century after John Locke wrote, his point would be simply restated by James Madison, who five years earlier had played a leading role in the adoptionof the American Constitution: "As a man is said to have a right to his property, he may be equally said to have a

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9. HENRY S. COMMAGER, JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT 84 (1975).

10. FORREST MCDONALD, *NOVUS ORDO SECLORUM*: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985).

11. COMMAGER, *supra* note 9, at 13.

12. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2 (1st ed. 1827) (hereinafter KENT).

13. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1358 (1992) (quoting I LEGAL PAPERS OF JOHN ADAMS 137-38 (Kinivin Wroth & Hiller B. Zobed eds., 1965)).

14. Gormley, *supra* note 13, at 1358 (quoting William Pitt, *Speech on the Excise Bill, in* 15 HANSARD PARLIAMENTARY HISTORY OF ENGLAND 1307 (1753-1765)).

15. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

16. 2 KENT, *supra* note 12, at 329.

property in his rights."[17]

The extent of Locke's influence on the Framers was shown earlier in this century by great historians of the Revolutionary period, led by Carl Becker[18] and Louis Hartz.[19] As Becker wrote:

> Locke, more perhaps than anyone else, made it possible for the eighteenth century to believe . . . [that] it was possible for men "to correspond with the general harmony of Nature"; that since man, and the mind of man, were integral parts of the work of God, it was possible for man, by the use of his mind, to bring his thought and conduct . . . into a perfect harmony with the Universal Natural Order. In the eighteenth century . . . these truths were widely accepted as self-evident: that a valid morality would be a "natural morality," a valid religion would be a "natural religion," a valid law of politics would be a "natural law." This was only another way of saying that morality, religion, and politics ought to conform to God's will as revealed in the essential nature of man.[20]

Locke's concepts were rooted in the earlier work of Hugo Grotius, writing in the early seventeenth century. For Grotius, natural law gave man rights as "a moral quality annexed to the person," entitling him to privileges, things, and land as well as his aptitudes.[21] These rights were inviolable by the government because the government was established for the very purpose of protecting those rights.[22] Even the sovereign was bound by natural law.[23] Locke extended this principle to mean that the sovereign may not violate a person's property rights, and the sovereign's doing so allowed a person to disobey the sovereign.[24]

2. The Framers' View of Property and Liberty

A clear example of the infusion of Locke's ideas into America's founding documents can be seen in the preamble of the Virginia Constitution, drafted by George Mason and unanimously adopted on June 12, 1776. It declared, "All men are created equally free and independent and have certain inherent and natural rights . . . among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[25] Thomas Jefferson was also an avid reader of Locke's work;

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17. James Madison, *Property*, 1 NAT'L GAZETTE, Mar. 27, 1792, at 174, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 478 (1867).

18. BECKER, *supra* note 7, at 27-30, 71-79.

19. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 59-64 (2d ed. 1991).

20. BECKER, *supra* note 7, at 57.

21. 1 HUGO GROTIUS, RIGHTS OF WAR AND PEACE 10-11 (A.C. Campbell trans., London, Boothroyd 1814) (1625).

22. 2 JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 597 (1904).

23. *See* GROTIUS, *supra* note 21, at 10-11.

24. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 137 (1990).

25. PA. GAZETTE, June 12, 1776, *reprinted in* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE, 126-27 (1997).

not surprisingly, therefore, the form and phraseology of parts of the Declaration of Independence closely follow certain sentences of the *Second Treatise*.[26] While he undoubtedly was aware of Mason's "Preamble," Jefferson dropped any reference to "property" in the Declaration—writing instead of rights to "life, liberty, and the pursuit of happiness"—largely to blur the contradiction between his own version of natural rights philosophy and the continuation of slavery.[27] Those discomforted by natural property rights have argued that the Framers intended government to have a large role in shaping private property,[28] but their views have been largely discredited.[29] As Pauline Maier, a leading American historian of the Revolutionary period, has recently concluded, "By the late eighteenth century, 'Lockean' ideas of government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."[30]

3. The Confluence of Free Land and a Free People

The availability of clear title to land for those willing to work to better their lot was a powerful lure to early settlement in the American colonies. As the legal historian James Ely observes,

> The high value attached to landownership by the colonists is best understood in terms of the English experience. In England, as in Western Europe generally, land was the principal source of wealth and social status. Yet landownership was tightly concentrated in relatively few hands, and most individuals had no realistic prospect of owning land. Moreover, in theory no person owned land absolutely: All the land was held under a tenurial relationship with the Crown . . . .
>
> Conditions in North America, however, were radically different from those in England, and traditional assumptions about landownership were ill suited

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26. BECKER, *supra* note 7, at 27-28.

27. JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 56 (1997). Alternatively, a few scholars have conjectured that Jefferson regarded property, unlike certain other rights, as alienable. Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 369 (1991) (citing Jean Yarbrough, *Jefferson and Property Rights*, *in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 66 (Ellen Frankel Paul & Howard Dickman eds., 1989)) ("It has been persuasively documented that Jefferson's omission was traceable not to a lack of respect for property, but his distinction between natural rights that are inalienable and those that may be transferred.").

28. The revisionist "civic republicanism" account of the American founding de-emphasizes the influence of Locke and natural rights theory. It asserts the primacy of republican subordination of individual interests to civic virtue, and of the contributions of British Whig, Scottish, and Continental political thought to the Framers' political outlook. For additional discussion of this issue, see, for example, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION xi-xii, 34-54 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 vii-ix, 6-9, 48-70 (1969); and GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 212-13 (1978).

29. *See, e.g.*, FORREST MCDONALD, *NOVUS ORDO SECLORUM*: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); THOMAS PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988).

30. MAIER, *supra* note 25, at 87.

> to the colonies. Because land was abundant, the trading companies and proprietors attracted settlers by granting land on generous terms . . . . As a further inducement, colonial governments granted land titles in fee simple . . . .[31]

B. PRIVATE PROPERTY IN A GROWING NATION

1. Change and Continuity

America's founding generation rejected the British monarchy and formed new structures of government. In doing so, however, they did not modify their view that the common law was bound up in liberty and that the new American organic law should protect liberty as well. The new Constitution, which established the scope of legitimate political power and its exercise, was bound by two significant limitations. The first was respect for contract, both private and public. The second was tradition, largely embodied in the common law, which served to identify and enforce personal rights. "[T]ogether these placed life, liberty, and property morally beyond the caprice of kings, lords, or popular majorities."[32]

Chief Justice John Marshall's respect for property rights had its genesis in "the Constitution's underlying Lockean premise that government was limited and that property, along with life and liberty, was one of the unalienable rights the law was designed to protect. For Justice Marshall's generation, property was a dynamic concept. It referred not merely to existing possessions but also to the industrious acquisition of wealth."[33] John Adams, who as president had appointed Justice Marshall, declared, "Property must be secured or liberty cannot exist."[34] The government, with the exception of restricting corporate acquisition, had "no right to limit the extent of the acquisition of property."[35] As even critics of the Lockean perspective have been forced to conclude, property rights were the "great focus" of the Framers.[36]

It is significant that James Madison had a broad view of "property." While it would include land, tangible personal items, and money, he declared that property "in its larger and juster meaning" also includes "everything to which a man may attach a value and have a right," including religious liberty and

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31. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11 (1992).

32. FORREST MCDONALD, *E PLURIBUS UNUM*: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790, 310 (1979).

33. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996).

34. 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1850), *quoted in* SMITH, *supra* note 33, at 388.

35. 2 KENT, *supra* note 12, at 265.

36. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 92 (1990) ("The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.").

personal security.[37] In addition to being the principal drafter of the Constitution itself, Madison drafted the Fifth Amendment, which includes the Takings Clause, under which the federal government's power to take private property is limited to instances in which the property is put to "public use" and the owner receives "just compensation."[38]

2. Constitutional Protections for Property

Three distinct aspects of the Constitution protected property rights. The most important was the doctrine of enumerated powers: while the federal government could be energetic, the legitimate objects of its powers would be limited to a few necessarily national functions. The second safeguard was the system of checks and balances: among them, three branches of government, two houses of Congress, and a division of sovereign power between the national government and the states. The third safeguard for property was a mixture of substantive and procedural rights that were embodied, explicitly and implicitly, in the text of the Constitution and the Bill of Rights.[39]

A few of those rights restricted the power of the states. For instance, the right of all Americans to trade in a national marketplace was protected by the Commerce Clause,[40] and their agreements were protected from state interference by the Contracts Clause.[41] However, most protections accorded by the Constitution and Bill of Rights were directed towards abuse by the national government. The Fifth Amendment plays a pivotal role here. It contains the Takings Clause, restricting the United States Government's inherent power to take private property (known as the power of "eminent domain") to instances in which the property would be put to "public use" and "just compensation" would be paid.[42] It also contains a Due Process Clause, which states: "No person shall . . . be deprived of . . . property, without due process of law . . . ."[43]

The phrase "due process of law" comes from a fourteenth century statute during the reign of King Edward III, which declared: "No man of what state or condition he be, shall be put out of his lands or tenements . . . without he be brought to answer by due process of law."[44] As Professor Corwin notes, "This

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37. James Madison, *Property*, 1 NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (R. Rutland et al. eds., 1983).

38. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

39. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11 (6th ed. 2000).

40. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . .").

41. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

42. U.S. CONST. amend. V.

43. *Id.*

44. Edward S. Corwin, *Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911) (quoting Chap. 3 of 28 Edw. III).

statute in turn harks back to the famous Chapter 39 of *Magna Carta*, which the Massachusetts constitution of 1780 paraphrases thus:"

> No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.[45]

This echo of the spirit of *Magna Carta* and the words of Locke's *Second Treatise* makes clear, as does the Fifth Amendment Due Process Clause, that the subordination of the sovereign to the rule of law is required to protect the liberty and property of a free people.

Because the Constitution was designed, for the most part, to protect against only federal deprivations of rights, it did not protect property rights from state interference.[46] However, the original state constitutions did contain explicit protections for property, consistent with the Lockean view that state leaders shared with their national peers.[47] By the 1820s, guarantees of compensation for takings had become an established part of state constitutional law.[48] Every state constitution contains a takings provision similar to that of the Fifth Amendment.[49]

Notwithstanding such protections at the state level, it became clear immediately after the Civil War that citizens would also need federal protection when states failed to protect rights. Thus, the post-Civil War amendments were passed and ratified, giving a measure of protection against state violations and denials. The Fourteenth Amendment is especially important in this regard, providing,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[50]

Unfortunately, the Privileges or Immunities Clause was soon dealt a grievous blow in *The Slaughter-House Cases*,[51] from which it has not recovered. In 1873, by the narrowest of margins, the Supreme Court upheld a Louisiana

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45. *Id.* (quoting DECLARATION OF RIGHTS, art. XII).

46. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

47. *See* GOTTFRIED DIETZE, IN DEFENSE OF PROPERTY 31-33, 217 n.92 (1963).

48. *See* 2 KENT, *supra* note 12, at 275 ("The right of eminent domain . . . gives to the legislature control of private property for public uses . . . [But] the constitutions of the United States and of this state, and of most of the other states of the Union, have imposed a great and valuable check . . . by declaring, that private property should not be taken for public use without just compensation.").

49. The provision is explicit in forty-nine states. Courts in North Carolina long have construed other elements of their constitution as implementing the common-law requirement for just compensation upon the exercise of eminent domain by the state and its subdivisions. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554-55 (1972).

50. U.S. CONST. amend. XIV, § 1.

51. 83 U.S. (16 Wall.) 36 (1873).

statute that gave one slaughterhouse a monopoly to serve all of New Orleans, thus restricting the employment and contract rights of all those not part of the monopoly.[52] In an impassioned opinion for the four dissenters, Justice Stephen J. Field quoted from *Corfield v. Coryell*,[53] an 1823 decision by Justice Bushrod Washington known for its exposition of the natural law. Washington had deemed as "fundamental" those privileges or immunities,

> which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States . . . [and] might be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.[54]

Justice Field argued that among the fundamental privileges or immunities of a citizen of the United States was the "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."[55]

Four years after *The Slaughter-House Cases*, the Court upheld a prohibition ordinance in *Mugler v. Kansas*[56] that led to the closing of a brewery without requiring a demonstration either that the brewery caused special harm or that less drastic means would not have served. Given its earlier holding that occupational liberty was not a federal privilege or immunity, the Court held that Kansas could protect against the injurious consequences of alcohol as it saw fit.[57]

The Supreme Court's recent rediscovery of the Privileges or Immunities Clause as a source of the constitutional right of interstate travel, in *Saenz v. Roe*,[58] gives some ground for guarded optimism that the Clause may again be interpreted to protect economic liberty and property rights.[59]

3. The Rise and Fall of Substantive Due Process

With the demise of the Privileges or Immunities Clause, the Court thereafter would invoke the Due Process Clause to protect individuals from state depriva-

52. *See id.* at 80.
53. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).
54. *The Slaughter-House Cases*, 83 U.S. at 97.
55. *Id.*
56. 123 U.S. 623 (1887).
57. *Id.* at 661-62.
58. 526 U.S. 489 (1999) (striking down state durational residency requirement for welfare benefits).
59. On the need for such a reinterpretation, see Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1 (1998).

tions of life, liberty, or property. That use of the Clause was not immediate, however. In fact, the Clause was used initially, in 1877, to ensure simply that deprivations followed only after "due process" had been afforded in the sense of procedural fairness.[60] In time, however, the Court fashioned a theory of "substantive due process" to accomplish what should have been accomplished under the Privileges or Immunities Clause. Thus, in 1897, the Court noted in dicta that the deprivation of "liberty" without due process of law could include not only physical restraint, but also the deprivation of,

> the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[61]

Also in 1897, the Court held in *Chicago, Burlington & Quincy R.R. v. Chicago*,[62] that the Fourteenth Amendment's Due Process Clause "incorporated," against the state, the Fifth Amendment's protections of property that until then had guarded against only federal violations.

The Court's due process theory was never well developed or grounded, however, as its uneven applications demonstrated. Protections afforded by economic substantive due process gave way periodically, and without clear reason, to government's police power. In the 1915 case of *Hadacheck v. Sebastian*,[63] for example, the Court upheld an ordinance requiring the closing of a brickyard that had operated for many years, saying that it stood in the path of urban development: the ordinance reduced the value of the land by eighty-seven percent, all of which the owners lost. Most important for our purposes, in *Village of Euclid v. Ambler Realty Co.*,[64] the Court, in 1926, upheld the sweeping notion of comprehensive zoning, based on little more than fleeting references to fire, congestion, and disease, all of which could have been dealt with individually on a more limited basis.[65]

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60. Davidson v. New Orleans, 96 U.S. 97, 105 (1877).

61. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

62. 166 U.S. 226, 234-35 (1897). Revealingly, the Court now regards *Chicago, Burlington & Quincy* not as providing substantive due process, but rather as incorporating the Takings Clause of the Fifth Amendment into the Fourteenth Amendment. *See* RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 15.11 n.29 (2d ed. 1992).

63. 239 U.S. 394, 410 (1915) (stating that "the police power" is "one of the most essential . . . [and] least limitable" powers of government).

64. 272 U.S. 365 (1926).

65. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 131-34 (1985).

The urgent need for the Supreme Court to develop a meaningful substantive due process jurisprudence is illustrated by its fractured opinions in the recent case of *Eastern Enterprises v. Apfel*.[66] That case involved the imposition by the federal government of very severe, unexpected, and extremely retroactive liability for health benefits to the dependents of miners who had worked for the company for brief periods many years earlier.[67] The demand for payment was imposed only to shore up an industry pension and medical plan to which the company had belonged in the past and that was on the verge of insolvency.[68] Four Justices, led by Justice O'Connor, found the regulation unconstitutional under the Takings Clause.[69] Four other Justices, led by Justice Breyer, dissented on the grounds that the regulation was constitutional under the Due Process Clause.[70]

Justice Kennedy, the swing vote, found the imposition violated the Due Process Clause.[71] He noted that because the regulation's constitutionality "appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles."[72] Furthermore, the company had not been deprived of a specific property right, but rather had been ordered to make a payment that could be derived from any of its resources.[73] Thus, he concluded, the Takings Clause was inapplicable.[74] However, the requirement to pay was arbitrary and unfair, and thus violative of the Due Process Clause.[75] The plurality refused to confront this argument, merely asserting that the regulatory scheme "implicates fundamental principles of fairness underlying the Takings Clause" and was unconstitutional.[76]

Thus, the plurality plus Justice Kennedy judged the regulation unconstitutional as applied, but the dissent plus Justice Kennedy constituted five justices who thought the case should be considered on due process principles. The U.S. Court of Appeals for the Federal Circuit subsequently observed that "although a minority of the Supreme Court has urged that a taking can occur when Congress has imposed an obligation to pay money, we are bound to follow the views of a majority of the Supreme Court."[77]

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66. 524 U.S. 498 (1998) (plurality opinion). For elaboration, see Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

67. *See E. Enters.*, 524 U.S. at 537 (plurality opinion).

68. *See id.* at 510-11.

69. *Id.* at 528-29.

70. *Id.* at 553 (Breyer, J., dissenting).

71. *See E. Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in judgment and dissenting in part).

72. *Id.* at 545 (Kennedy, J., concurring in judgment and dissenting in part).

73. *See id.* at 540 (Kennedy, J., concurring in judgment and dissenting in part).

74. *Id.* at 540 (Kennedy, J., concurring in judgment and dissenting in part).

75. *Id.* at 547-50 (Kennedy, J., concurring in judgment and dissenting in part).

76. *Id.* at 537-38 (plurality opinion).

77. Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338 (Fed. Cir. 2001) (citing *E. Enters.*, 524 U.S. at 537) (citation omitted).

III. A CONCEPTUAL FRAMEWORK OF PROPERTY RIGHTS

In order for it to be effective, the property rights movement must begin with a clear understanding of what "property" is.

A. THE NATURE OF "PROPERTY"

1. Property is a Set of Rights with Respect to Others

Non-lawyers tend to use the word "property" to refer to the things that one owns. Thus, in casual conversation one may say, "Get off my property," or, "This is an investment property." But a more precise usage is needed to explicate or defend property rights. For an individual stranded on an uninhabited island, there are lots of physical things, but no "property." It is only when other people are present that property rights are needed. Thus, property is the understanding among people regarding who has rights with respect to things.

It is helpful to remember that in the days of the Framers, "property" often referred to those attributes that were "proper" or appropriate to one's situation or station in life.[78] A "proper" attribute of a free person is liberty, and that is what John Locke was referring to when he said that one has property in one's rights. "Property," then, consists of rights that must be respected by others, not just land or buildings or shares of corporate stock. As the Supreme Court has noted,

> The term "property" as used in the Taking[s] Clause includes the entire "group of rights inhering in the citizen's [ownership]." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] [denotes] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." . . . The constitutional provision is addressed to every sort of interest the citizen may possess.[79]

As Locke related it, at the beginning the world was mankind's common heritage, but every person owned his own body and his own labor. As people apply their labor and skill to the natural bounty, they make the ensuing product their own.[80] Thus, those who take possession of unoccupied land and who sow crops are entitled to reap them and have their boundaries respected. "Property," as we know it in American society and law, was not established through some grand statute or scheme, but rather an unfolding of this basic pattern.

The Supreme Court has observed that property interests are not created by the Constitution,[81] but are to be found in "existing rules or understandings that stem

78. MCDONALD, *supra* note 10, at 10.

79. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 n.6 (1980) (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 377-78 (1945) (alterations in original) (citation omitted)).

80. LOCKE, *supra* note 15, §§ 26-32.

81. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

from an independent source such as state law."[82] As the U.S. Court of Appeals for the District of Columbia Circuit explained,

> The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement. These mutually reinforcing understandings can arise in myriad ways. For instance, state law may create entitlements through express or implied agreements .... [P]roperty interests also may be created or reinforced through uniform custom and practice.[83]

2. Property Rights Include Possession, Disposition, and Use

Although "ownership" is an abstract term, the property rights of which it is comprised are of crucial importance to individuals and to our society. The principal rights are the right to exclusive possession, the right to use and enjoy, and the right to dispose of one's interest through devise, sale, or gift.

Exclusive possession always has been recognized as a fundamental property right. Blackstone famously referred to property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[84] The drafters of the Constitution and the Bill of Rights, including the Fifth Amendment, were very familiar with Blackstone's legal commentaries.[85] The United States Supreme Court has declared that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[86]

Likewise, the right of an individual to dispose of his ownership interests has been championed by the common law courts since at least the thirteenth century.[87] It follows that if an owner has the right to exclusive possession, he has the right to invite others to share in or to assume his interest. In 1987, in *Hodel v. Irving*,[88] the Supreme Court struck down a law severely limiting Indian inheritance rights because it "amount[ed] to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in

82. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

83. Nixon v. United States, 978 F.2d 1269, 1275-76 (D.C. Cir. 1992) (citations omitted).

84. 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (1766). Blackstone's view of property was more nuanced than this language suggests, but it is indicative of his view that property was in a sense the culmination of the long-developing common law protection of individual rights.

85. *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1635 (1988); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (2d ed. 1985).

86. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (upholding exclusion of the general public from a private marina).

87. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS div. 1, pt. 2, introductory note (noting that one can view "the courts of 13th, 14th, and 15th century England as pursuing, consciously or unconsciously, a policy in favor of the free alienability of land").

88. 481 U.S. 704 (1987).

particular—has been part of the Anglo-American legal system since feudal times."[89]

The use right in one's property, such as the right to farm or construct a house on one's land, epitomizes the meaning of ownership, because it is through the use of the things we own that we derive most of their value. Yet, as we shall see,[90] it is the right of use that has been most under attack in America during this century.

B. PROPERTY IS PROTECTED BY THE INSTITUTIONS OF A JUST GOVERNMENT

1. Property as a Fundamental Right

The Declaration of Independence declared that governments are instituted among men for the purpose of securing rights.[91] Applying this truth to property rights, James Madison declared that "[g]overnment is instituted to protect property of every sort; . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[92]

In recent years, courts and commentators have focused on the Takings Clause of the Fifth Amendment, which requires that government pay "just compensation" when it takes private property.[93] We will consider the Takings Clause later when we consider the lack of a judicial framework for property rights.[94] The heavy reliance placed by the U.S. Supreme Court upon the Takings Clause, it must be noted, results from its failure to take seriously the protections for property that now will be discussed.

2. The "Police Power"

The "police power" is the lawyer's term for the implicit governmental function of protecting members of the community against harm. In an exposition familiar to the Framers, John Locke declared that in the state of nature every person has the executive power to secure his own rights, but that individuals abandon their unrestrained liberty in order to obtain the superior protection that civil society may afford. By entering into the social compact with others, individuals surrender their power of self-preservation and agree "to be regulated by laws made by the society so far forth as the preservation of himself and the rest of that society shall require . . . ."[95]

The police power is legitimate, for if we have the right to defend ourselves, we have the right to band together for our collective defense. Thus, the state may raise an army to protect against foreign invaders, establish a system of

89. *Id.* at 716 (citing United States v. Perkins, 163 U.S. 625, 627-28 (1896)). The statute at issue in *Irving*, slightly modified, was again struck down in *Babbitt v. Youpee*, 519 U.S. 234 (1997).

90. *See infra* text accompanying notes 144-51.

91. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

92. *See* MADISON, *supra* note 17 (emphasis in original).

93. U.S. CONST. amend. V.

94. *See infra* Part IV(C).

95. LOCKE, *supra* note 15, § 129.

police, courts, and jails to deter and punish theft, and institute public health measures as needed to prevent contagion. Each of these legitimate uses of the police power flows from the principle that government derives its powers from the governed. Every individual has the intrinsic right to resist invaders, thieves, and contagious disease, and may delegate these rights under the social compact. Likewise, government has a legitimate, if narrow, role in regulating land use. We say that a landowner commits a nuisance against a neighbor when he interferes with the neighbor's right to use his own lands—a right derived from the same source and having the same dignity as the offender's. The victim may bring a lawsuit for "private nuisance," by which he could seek compensation for past harm and an order forbidding further harmful conduct. Along this line, a person can also assert his property rights against another who contaminates the water or air flowing over his land.[96] Thus, common law actions based on property rights and nuisance are far more efficacious in dealing with environmental degradation than often supposed.[97]

Where the nuisance results in widespread harm, however, government may seek to vindicate the rights of all of the injured through one action for "public nuisance" or through legislation that properly defines and prohibits nuisance. Even though property is protected, the government may dictate the manner of use, especially when a use of property creates a nuisance or endangers the life, health, or peace of the public.[98] These police power acts must be clearly necessary for the safety, comfort, or well-being of society or necessitated by public need, to be constitutional. Government is not thereby asserting that it has an independent right as against its citizens, but merely that it might protect the aggregate rights of the numerous victims who otherwise might be stymied by the difficulty and expense of bringing individual lawsuits. When thus viewed, not only is the police power not antithetical to property rights, it is a principal tool for their defense.

However, many governmental acts that are rationalized as exercises of the police power are in fact totally unjustified by it. In particular, the police power is not a license for government to take property from some for the purpose of adjusting or harmonizing or maximizing its own view of the "well being" of society. Government cannot interfere with property rights to exclusive possession, use, and disposition when the exercise of those rights has not harmed others. But to invoke the police power to protect "the community" from conduct that does not violate the rights of any of its individual members is to illegiti-

96. *See, e.g.*, Bruce Yandle, *Grasping for the Heavens: 3-D Property Rights and the Global Commons*, 10 DUKE ENVTL. L. & POL'Y F. 13, 17-18 (1999).

97. *Id.* (noting that tradable rights in air, including air quality, existed by at least the nineteenth century). By the time of John Stuart Mill, English common law gave a person three-dimensional rights in his property (surface rights, subsurface rights, and air rights). Thus, upstream or upwind pollution could be enjoined or compensated for with damages payments.

98. 2 KENT, *supra* note 12, at 276.

mately invest government with "rights" not derived from its members.[99] Each individual then would be subject to a government more powerful than the people instituting it, and more powerful than the people had a right to make it.

The evil implicit in governmental overreaching through the police power was recognized in Justice Holmes' seminal opinion in *Pennsylvania Coal Co. v. Mahon*.[100] Justice Holmes was well aware of the proclivity of government to take from some in order to provide benefit or relief from distress for others. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[101] Thus, he famously declared that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[102]

To be sure, government may mandate that landowners not develop the land adjoining an airport runway, or that landowners transfer title to lands needed for a fort or post office. However, the legitimacy of these actions is not based on the police power, because there was no unreasonable conduct by the landowners. Rather it is based upon the power of government to facilitate commerce, national defense, or the mails. Similarly, governmental deprivations of possession or use rights in order to create scenic vistas or wildlife habitats are not predicated on the theory that the owner's building plans would constitute a nuisance, but rather upon an affirmative desire to create public goods that would benefit the society as a whole. Even if government wishes to style its actions as "regulatory," the substance is that the landowners have been subjected to eminent domain and are entitled to just compensation. The purpose of the police power is to secure rights, not to provide goods.

In Ernst Freund's classic words of a century ago, "it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . ."[103]

3. The "Public Use" Requirement

Even when governmental action is based upon the creation of a public benefit rather than the abeyance of a private harm, it is possible for government to go beyond its legitimate powers. This is because the Fifth Amendment to the U.S. Constitution (with state law generally corresponding) requires not only that the lawful exercise of eminent domain be predicated upon just compensation, but

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99. *See generally* EPSTEIN, *supra* note 65 (arguing that the Supreme Court's view of the Takings Clause has allowed the state to rise above the rights of those it represents and assert novel rights it cannot derive from the individuals it benefits).

100. 260 U.S. 393, 415 (1922).

101. *Id.* at 416.

102. *Id.* at 415.

103. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 511 (1904), *quoted in* Zev Trachtenberg, *Introduction: How Can Property Be Political*, 50 OKLA. L. REV. 303, 304 (1997).

also that the private property taken be for "public use."[104] The principled reason for this seems self-evident. As the U.S. Supreme Court stated in 1798, "a law that takes property from *A.* and gives it to *B.*" would be "contrary to the great first principles of the social compact" and "cannot be considered a rightful exercise of legislative authority."[105] Were the principle different, government officials and powerful interest groups could amass power by compelling the transfer of rights that the recipient would be unable to obtain from an unwilling seller. Kent, writing his *Commentaries on American Law* in 1825, confirmed this understanding of eminent domain when he stated that when a legislature determines that there is a public need, it may take private property. But, when the legislature takes that property for a non-public use, or the public use is fraudulent or pretextual, that law is unconstitutional and void.[106] Real property is held by grant or charter from government, and interfering with it is a violation of contract.[107] Even aside from the likelihood of widespread mischief, the victims of forced sales would inevitably be worse off. At a given time, most individuals do not have their property up for sale at the market price. Some derive sentimental value from it, others find it particularly suited and perhaps customized for their business needs, and all find relocation a substantial burden. The difference between the market price and what the owner actually would require for a consensual sale is lost to the owner when property is condemned. As Judge Richard Posner has noted, "Compensation in the constitutional sense is . . . not full compensation . . . ."[108] Given the loss to individual property owners that eminent domain inevitably entails, it follows that its use should be limited to situations in which the public will benefit through direct use of the rights that have been taken.

In a nutshell, then, respect for individual property rights requires that government adhere to two principles: that the police power is limited to the prevention of harm, and that eminent domain is limited to the taking of property to be dedicated to legitimate public uses.

IV. WHY PROPERTY RIGHTS ARE ENDANGERED IN AMERICA TODAY

We cannot deal effectively with the threat to property rights unless we understand its nature and causes. The threat cannot be attributed primarily to judicial misfeasance, although the courts have been uncertain defenders of private property at best. Nor is the threat simply a function of overly broad legislation or arbitrary administrative conduct, although both are widely present. Rather, the threat to private property results from the combined effects of (1) an inflated view of the legitimate objects of government and the corresponding

104. U.S. CONST. amend. V.
105. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).
106. 2 KENT, *supra* note 12, at 276.
107. *Id.*
108. Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

growth of the regulatory state, (2) pervasive confusion about the rights that individuals have retained and the powers that they have delegated to government, and (3) a failure to distinguish the discrete constitutional standard against which a specific act of government must be measured.

A. THE GROWTH OF THE REGULATORY STATE

Early in the twentieth century a broad-based reform movement, known as Progressivism, developed the theme that expert management of human endeavors could alleviate all manner of economic and social ills. Massive administrative regulations of commerce, labor, housing, and permissible land uses were embellishments on this theme.

In 1916, shortly before taking his seat on the U.S. Supreme Court, Progressive stalwart Louis Brandeis delivered a speech to the Chicago Bar Association. He declared, "At first our ideal was expressed as 'A government of laws and not of men.' Then it became 'A government of the people, by the people and for the people.' Now it is 'Democracy and social justice.'"[109] Thus is encapsulated the new ethos that has marked the past century. We have gone from the rule of law, by which government is carefully curtailed in order to protect our liberties, to the nanny state, in which individual property and other rights are subordinate to the government's notion of the "common good."

Modern land use controls in the United States began with the development and legal vindication of zoning in the early 1900s. Zoning was just one product of the impulse of the Progressives for order and predictability:

> The early enthusiasts for zoning ... were fighting a holy war against the libertarian sins of nineteenth-century development .... Control over land use would be removed from the amoral hand of the market and entrusted to expert elites removed from politics and business ....
>
> In part, advocates have sought to downplay the social and political significance of planning by arguing that planning controls land and other natural resources, not people. But the value of resources lies in their social utility, so man and land cannot be so neatly separated.[110]

If outside "experts" and governmental agencies were quick to assume that social and economic issues involving subtle complexities and a myriad of tradeoffs were susceptible to solution by regulation, so were state legislatures. The law of every state permits comprehensive regulation of land use. Most states delegate regulation to municipalities. While there is much to be said for government at the local level, in land use matters this generally has resulted in the dominant local group benefiting disproportionately at the expense of the

109. Louis D. Brandeis, *The Living Law*, 10 U. ILL. L. REV. 461, 461 (1916).

110. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 21 (1993).

minority.[111] Thus, in urban areas, rent control has favored sitting tenants over landlords. In the suburbs, zoning has favored homeowners over owners of yet-undeveloped land. When localities have been subjected to an overlay of statewide controls, other problems have emerged. In Vermont, town officials seeking a Wal-Mart store for the benefit of its inhabitants were rebuffed by state regulators.[112] In Washington, the state has required localities to draw arbitrary lines separating developable lands from those lands on which development is forbidden.[113] In New Jersey, the state supreme court's *Mount Laurel* doctrine[114] resulted in the imposition of an intricate formula mandating the apportionment of low-income housing, which resulted in some towns having to provide for more low-income migrants than the towns had existing residents.[115] At the national level, Congress has provided for land use regulation in terms of hazy aspiration, and the Executive Branch has filled in the details with almost ludicrous regulations. This is the process by which protection for the "navigable waters of the United States" have been applied to forbid century-old farming on fields damp two weeks per year,[116] and by which endangered species laws intended to protect large mammals have allowed homes to burn to protect kangaroo rats,[117] and a major dam to go unused to protect the snail darter.[118]

B. THE PROLIFERATION OF "REGULATORY TAKINGS"

The growing tendency of government since the Progressive Era to remake society by wresting control over land use from the "amoral hand of the market" and entrusting it to "expert elites" has resulted in comprehensive zoning, developmental prohibitions, and a subordination of use rights to amorphous concepts of environmental concerns. Yet, given the intent of the Framers and the

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111. *See generally* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 7 (1995) ("The paradigmatic instance of the majoritarian problem is local government land use regulation.").

112. *See In re* Taft Corners Assocs., Inc. 758 A.2d 804, 805 (Vt. 2000).

113. *See, e.g.*, King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 14 P.3d 133, 135 (Wash. 2000) (striking down amendment to county comprehensive plan and zoning code permitting active recreational uses on properties located within designated agricultural area).

114. *See* S. Burlington Council, NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) (*Mount Laurel I*) (providing that all developing municipalities in state provide their fair share of regional low- and moderate-income housing needs); S. Burlington Council, NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*) (imposing fair share burden on all municipalities and providing administrative structure for quantification of requirement).

115. *See* John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20, 27 (1987) (noting that one township with fewer than 800 housing units would have to construct 816 "fair share" units). "More than its facial complexity, however, the formula failed politically because it was rigid where subtlety and compromise were called for." *Id.*

116. United States v. Hallmark Const. Co., 30 F. Supp. 2d 1033, 1042 (N.D. Ill. 1998).

117. *See* Andrew P. Morriss and Richard L. Stroup, *Quartering Species: The "Living Constitution," the Third Amendment, and the Endangered Species Act*, 30 ENVTL. L. 769, 809 (2000).

118. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978). *See* Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 291-92 (1992) (noting dubious economics of dam in question and how its subsequent completion was driven by pork barrel politics).

constitutional language they employed, there is no way to square this development with respect for property rights. Instead, government has misused the eminent domain power to take property from some for transfer to others. On a scale far more vast, it has misused the police power that was intended to protect individual rights from harm so as to subordinate individual rights to the quest for public goods and public benefit.[119]

A notable example of the misuse of the power of eminent domain was the decision of the City of Detroit during the 1970s to condemn and level a thriving ethnic neighborhood so that the site could be transferred to General Motors for a new Cadillac assembly plant.[120] Another example is the condemnation of land for the construction of sports stadiums for private teams. While there are arguable "public benefits" from these activities, these "benefits" are incidental to the activities' essential character of transfers for private use.

Much more often, government will institute regulations that prohibit the owner from using his property in otherwise legitimate ways but will not take title. Rather than spruce up downtown streets as an attractive public venue, government will forbid shopping center owners from prohibiting political speech in their common areas.[121] Rather than condemning undeveloped land for a public park, government will preclude development as harmful to the land's natural characteristics.[122] Rather than purchasing tiny shares of ownership in parcels of land and combining them so as to make the land more valuable, government will cut off the right of the owners' heirs to inherit the small interests.[123] In each of these examples, government argued that it did not take "the property" and did not owe just compensation. But "property" is not a thing; rather it is rights in a thing that may be asserted against others. In the examples given, the shopping center owner was deprived of the right to exclude, the owner of undeveloped land was deprived of the right to use, and the owner of the tiny share was deprived of the right to dispose of his interest.

Each of these examples constitutes a "regulatory taking." That phrase was first used in a U.S. Supreme Court opinion in 1981, in Justice Brennan's dissent in *San Diego Gas & Electric Co. v City of San Diego*:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the

119. Strictly speaking, "public goods" are goods from which the marginal individual cannot be excluded, and for whom no additional cost is incurred in providing the good. A classic example is national defense. Other public benefits are those from which government could feasibly exclude those who choose not to pay or for which it incurs additional costs for providing the good to additional beneficiaries. In many cases, such as state universities, there is both feasible exclusion and additional costs.

120. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

121. *See* N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994), *cert. denied*, 516 U.S. 812 (1995).

122. *See* Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

123. *See* Hodel v. Irving, 481 U.S. 704, 716 (1987).

> public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. Appellees implicitly posit the distinction that the government intends to take property through condemnation or physical invasion whereas it does not through police power regulations .... But "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." ... It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.[124]

C. THE LACK OF A JUDICIAL FRAMEWORK OF PROPERTY RIGHTS

While governmental officials and legislators have a proclivity to intrude upon property rights, abuses may be nipped in the bud by a vigilant judiciary. Yet this requires that the courts form and act upon a sound understanding of constitutional limits on the scope of government. Without a principled jurisprudence of property rights, the courts cannot cabin the expanding regulatory state. Unfortunately, the current American law of property, as crafted by the U.S. Supreme Court over the course of the twentieth century, lacks the coherent, well-grounded conceptual framework of property rights that is the necessary predicate to a coherent property jurisprudence.

The following discussion enumerates some of the Court's categorical departures from principle. These result in a rag-tag array of cases that pay lip service to property rights, but which protect them only in the extreme cases in which the government has physically trespassed,[125] or has deprived the owner of all value.[126]

1. Ad Hoc Balancing

The lack of a coherent judicial framework for property rights is conceded in the case that today is the controlling precedent for most governmental regulations of land use, *Penn Central Transportation Co. v. City of New York*.[127] There, the Supreme Court reviewed New York City's decision to deny Penn

124. 450 U.S. 621, 652-53 (1981) (Brennan, J., dissenting) (quoting Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (other citations omitted)).

125. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

126. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

127. 438 U.S. 104 (1978).

Central a permit to construct an office building above Grand Central Terminal—a project contemplated in the building's original plans. The denial was based solely on the city's landmark ordinance, and was solely for the purpose of preserving the terminal's beaux-arts aesthetics for public enjoyment. Justice Brennan, reviewing the Court's takings cases and abjuring any "set formula" for applying the Fifth Amendment's Takings Clause, declared:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. [1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[128]

Under the *Penn Central* ad hoc "balancing test," a court would presumably consider and weigh the three factors enumerated in the preceding paragraph. Not one of those factors goes to the principles of the matter, however. Whether a regulation takes something belonging to the owner has nothing to do with "investment-backed expectations," for example, but simply upon whether the now-prohibited uses are otherwise legitimate. As Professor Richard Epstein, a leading authority on the law of property, has noted, no judge or scholar offers "any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' . . . ."[129]

Similarly, the "economic impact of the regulation on the claimant" tells us about the owner's finances, not about the owner's rights. The "character" of the interference test does not tell us whether the owner had over-stepped his rights, such as by having committed a nuisance; or whether the owner is made whole by benefiting from the imposition of the regulation on others. At most, it tells us only whether the object of the regulation sensibly might have been recast as an exercise of eminent domain on the grounds that the right was of more value to the government than to the landowner.

As Yale Law School Dean Anthony Kronman recently observed, in a striking understatement, "[T]he act of balancing remains obscure."[130] Balancing tests are "likely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberation too

128. *Id.* at 124 (internal citations omitted and brackets added).

129. Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

130. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 349 (1993).

nakedly."[131] The Court's *Penn Central* formulation demonstrates his point.

In fact, the *Penn Central* ad hoc balancing test has been synonymous with rubber-stamp deferential review that hardly ever finds government to have overstepped its authority.[132] The Court has seriously diluted the doctrine of enumerated powers, stretched the police power to encompass the provision of benefits as well as the prevention of harms, and has denigrated the notion that individuals have fundamental rights.

2. Failure to Recognize the Limited Powers of Government

As noted earlier,[133] the Framers intended that the scope of the new federal government be limited to the powers specifically enumerated for it, the primary intent of which was to provide a federal common market. As the Tenth Amendment clearly states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[134] Likewise, the states were limited by the inherent rights of the people, notably the understanding that individuals retained their common law property rights, by which, in John Locke's famous formulation, was meant their "Lives, Liberties, and Estates."[135] The Constitution of the United States provides both explicit and implicit protection for property rights. The constitution of every state protects private property as well. Yet for many decades the judicial, legislative, and executive branches of government have not accorded private property the deference that those documents and their Framers intended.

3. The Erosion of Fundamental Rights

The government established by the Framers was a social compact designed to further individual rights.[136] Yet, although entrusted with the power to protect fundamental liberties from encroachment, the Supreme Court has vacillated rather than taken a definitive stand. This vacillation is evidenced in cases expounding upon the most essential property rights.

The right to exclude others was the subject of *Kaiser Aetna v. United States*.[137] In that 1979 case, then-Justice Rehnquist wrote that the owners of a marina in a privately owned and dredged lagoon could exclude non-paying boats because the right to exclude was "fundamental."[138] Yet, only one year

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131. *Id.*

132. *See, e.g.*, James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life Under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 453-54 (2001).

133. *See supra* text accompanying note 39.

134. U.S. CONST. amend. X.

135. *See supra* text accompanying note 15.

136. *See* JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 71 (Prometheus ed. 1986) (1690). *See supra* text accompanying note 95.

137. 444 U.S. 164 (1979).

138. *Id.* at 179-80.

later he reversed course. In *PruneYard Shopping Center v. Robins*,[139] the California Supreme Court ruled that shopping center owners had no right to exclude those seeking to exercise their freedom of speech on the premises. In affirming that holding for the U.S. Supreme Court, Justice Rehnquist concluded that the owners had "failed to demonstrate that the 'right to exclude others' is *so* essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"[140]

In 1987, in *Nollan v. California Coastal Commission*,[141] the Court struck down a practice by which the California Coastal Commission refused to allow owners to build on their lands unless they "consented" to permitting the public to walk along a private beach behind their homes. Justice Scalia declared, "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property."'"[142] Yet in 1995, the Court refused to review a case in which the New Jersey Supreme Court had the previous year not only declared that regional shopping centers were now public forums for free expression, but had also observed that, in theory, all private lands within the state might be subject to the exercise of free speech.[143]

The right of use is an important attribute of constitutionally protected property, as the Supreme Court has confirmed.[144] In 1992, the Court proclaimed in *Dolan v. City of Tigard*, that the Takings Clause is not a "poor relation," but rather is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment."[145] However, the Court's bestowal of its imprimatur on comprehensive land use regulation in *Village of Euclid v. Ambler Realty Co.*[146] had the effect of placing the burden on landowners to demonstrate that a zoning ordinance violated their rights. The Court has yet to give restrictions on the use of property the same "strict scrutiny" accorded other Bill of Rights protections, such as freedom of religion[147] and of expression.[148] Under that standard, agencies would have to demonstrate that their regulations are narrowly tailored to serve a compelling state interest. Even interests that the Court has not regarded as "fundamental" may still receive the benefit of an "intermediate"

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139. 447 U.S. 74 (1980).

140. *Id.* at 84 (emphasis added).

141. 483 U.S. 825 (1987).

142. *Id.* at 831 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979))).

143. N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 779 (N.J. 1994), *cert. denied*, 516 U.S. 812 (1995).

144. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 n.6 (1980) (affirming that the term "property" under the Takings Clause "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it") (alteration in original) (citation omitted).

145. 512 U.S. 374, 392 (1994).

146. 272 U.S. 365 (1926).

147. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

148. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

level of scrutiny. Thus, agencies defending regulatory classifications based on sex[149] or illegitimacy,[150] for instance, must show a close fit between the rule and its objective. On the other hand, most regulations of property will be judged under the very deferential *Penn Central* ad hoc balancing test.[151]

The fundamental right to dispose of one's property has suffered from similar vacillation in the Supreme Court. In *Andrus v. Allard*,[152] the Court upheld a prohibition on the sale of eagle feathers that had been imposed by bird protection laws, even though the plaintiff's feathers were obtained before the law went into effect. While Justice Brennan agreed that the prohibition was "significant," he continued,

> But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.[153]

Justice Brennan gave no basis for concluding that property rights are important in the aggregate but not one by one. But in 1987, Justice O'Connor struck down a regulation limiting the right of inheritance:

> [T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.[154]

Her opinion barely mentioned *Allard* and made no attempt to reconcile its opposite result.

4. Failure to Recognize the Limits of the Police Power

If the Supreme Court has erred in consistently undervaluing the importance of fundamental individual rights, it has erred in the other direction in its over-expansive understanding of the police power. In *Euclid*,[155] the Court upheld comprehensive zoning on little more than a casual comparison of

149. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); *see also* Craig v. Boren, 429 U.S. 190 (1976).

150. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 99 (1982).

151. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). *See supra* text accompanying notes 127-32 for discussion.

152. 444 U.S. 51 (1979).

153. *Id.* at 65-66 (internal citations omitted).

154. Hodel v. Irving, 481 U.S. 704, 716 (1987).

155. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

apartment houses in neighborhoods of single-family homes with pigs in parlors instead of in barnyards.[156] Even if the facts in *Euclid* had suggested a public health or safety problem that could not be addressed through the common law of nuisance, a carefully-drawn opinion would have placed the burden on government to justify how its regulations were narrowly tailored to the specific ill. Instead, *Euclid* almost completely obliterated the common law notion that owners may use their lands as they wish unless there is a demonstrable injury to others.

5. Delay as a Tool of Government

While Justice Brennan was no friend of property rights, as his *Penn Central* opinion indicates, he was no advocate of the government run-around either. In 1986, he observed that even in the rare instance in which a court invalidated a regulation under the Takings Clause, the agency typically would not take "no" for an answer. "Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity."[157] He quoted remarks and publications by planners showing how changes in regulations could be used to pile delay upon delay:

> At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN. If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in [a recent California Supreme Court case] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again . . . . See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck."[158]

As will be discussed shortly, the Supreme Court has used "ripeness" and associated doctrines to make it difficult for a landowner to sue an agency that deprives him of his property rights until that agency has issued a "final decision." Unsurprisingly, agencies are notoriously unwilling to give "no" for an answer. In a vicious circle, the lack of clear legal recognition of an owner's property rights means that a governmental agency has almost unlimited scope for negotiation. It thus can return an owner's development plan without ap-

156. *Id.* at 388.

157. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting).

158. *Id.* (Brennan, J., dissenting) (emphasis in original) (citation omitted) (quoting James Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUN. L. REV. 192-93 (1975)).

proval or disapproval. Instead, the agency will suggest further modifications of the plan. Because the modification of one element of a plan affects others, the groundwork for one round of reconsideration after another is established. While owners must bear the taxes, interest, legal fees and other expenses of negotiating the possible use of a presently unproductive parcel, the officials with whom they deal are serene in their civil service positions and their legal advice is provided through tax dollars.

Undue delay is almost impossible to establish as a matter of law. An egregious example is the saga of PFZ Properties, which had attempted for eleven years to make the Commonwealth of Puerto Rico process its development plan for a resort hotel.[159] Substantial evidence was introduced in the U.S. district court to show that the Commonwealth's failure was deliberate and malicious, and that it even had gone so far as to remove records from its files to hinder the developer's progress.[160] Nevertheless, the U.S. Court of Appeals for the First Circuit ruled that the landowner's constitutional rights were not violated even if all of the charges of official misconduct were true.[161] The Supreme Court agreed to review the case, received the litigants' briefs, and heard oral argument. Subsequently, without any explanation, it dismissed the action without deciding its merits.[162]

In the same vein, the California Coastal Commission erroneously asserted jurisdiction over a parcel and completely blocked all development from late 1990 until early 1993, in spite of the fact that the owner had obtained a valid county development permit.[163] Only after winning its lawsuit against the Commission was the owner able to build.[164] The owner subsequently sued the Commission for temporarily depriving the owner of all use of the land.[165] The state supreme court found for the Commission, invoking an exception in the U.S. Supreme Court's requirement for compensation in situations in which the temporary deprivation was due to a "normal delay" in the permitting process.[166]

In its 1987 holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[167] the Supreme Court held that government could withdraw a regulation that constituted a taking, but would have to pay compensation for the time it was in effect. However, the U.S. Court of Appeals for the Ninth Circuit recently refused to apply the "temporary takings" doctrine in a case in which landowners have been prohibited from building homes on

159. PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 29-30 (1st Cir. 1991).

160. PFZ Props., Inc. v. Rodriguez, 739 F. Supp. 67, 70 (D.P.R. 1990).

161. *Rodriguez*, 928 F.2d at 33.

162. PFZ Props., Inc. v. Rodriguez, 503 U.S. 257 (1992) (dismissing writ of certiorari as improvidently granted).

163. Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1190-93 (Cal. 1998).

164. *Id.* at 1193.

165. *Id.*

166. *Id.* at 1189-90 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

167. 482 U.S. 304 (1987).

their land for twenty-two years through a series of planning moratoria on development.[168] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[169] the Ninth Circuit declared that the "*First English* Court very carefully defined 'temporary' regulatory takings [as] those regulatory takings which are ultimately invalidated by the courts. . . . The Court's definition, therefore, does not comprehend temporary moratoria, which from the outset are designed to last for only a limited period of time."[170]

The Supreme Court granted certiorari on the question of "[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the Constitution."[171] The Court's opinion[172] was "narrow."[173] It refused to adopt a categorical rule that a temporary moratorium on development—even one depriving the owner of all economic value of the land while it is in effect—is a per se taking requiring payment of just compensation. Much of the opinion was a paean to the virtues of planning and the role of fairness in takings adjudication. Justice Stevens, writing for the Court, reiterated the primacy of the "ad hoc" test adopted in *Penn Central*. Under this approach, the duration of a temporary deprivation of use would be one of the factors that a court should take into account. "[W]e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking," Stevens added. "[W]e simply recognize that it should not be given exclusive significance one way or the other."[174]

One hopeful sign that courts may treat landowners more fairly is the Supreme Court's 1999 decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[175] There, the landowner had sought to build homes for seventeen years, and first filed for a permit to build 344 residences in 1981.[176] The zoning law would have permitted more than 1,000 homes.[177] There followed a long history of rejections of proposals by the city's planning commission, each of which was for fewer units than the one before.[178] Finally, after exacting numerous forced dedications of land and agreements not to build on outer sections of the parcel, the planning commission agreed to allow 190 units to be built in the center of the parcel.[179] However, it then prohibited even that development on the environ-

168. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 768, 781 (9th Cir. 2000), *aff'd*, 122 S. Ct. 1465 (2002).
169. 216 F.3d 764 (9th Cir. 2000).
170. *Id.* at 778 (quoting *First English*, 482 U.S. at 310 n.16).
171. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 948 (2001).
172. 122 S.Ct. 1465 (2002).
173. *Id.* at 1470.
174. *Id.* at 1486.
175. 526 U.S. 687 (1999).
176. *Del Monte Dunes*, 526 U.S. at 695.
177. *Id.*
178. *Id.* at 695-96.
179. *Id.* at 696.

mental grounds that the center of the tract contained a plant that was the only natural habitat of an endangered insect, known as Smith's Blue Butterfly, which was not to be located on the site.[180] The U.S. Court of Appeals for the Ninth Circuit held for the landowners, concluding, among other things, that "the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state."[181]

Justice Kennedy, writing for the Supreme Court, emphatically rejected the city's claim that its actions could not be second-guessed by judges: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles."[182] Justice Kennedy's statement of facts seemingly incorporated the landowner's view that the city had imposed hurdle after hurdle only in an attempt to acquire the land for open space purposes at a bargain-basement price.[183] The Court upheld both the permissibility of a jury trial to determine the legitimacy of the city's actions and the jury's award of $1.45 million in damages.[184] As a result of *Del Monte Dunes*, localities imposing one new set of permit conditions after another in an attempt to derail projects through delay will have to think twice before being unwilling to take "yes" for an answer.

The Court's opinion in *Palazzolo v. Rhode Island*[185] takes a practical view of ripeness[186] and, to that extent, might result in some modest reduction in unfair delay. The Court also struck down the most extreme form of the "notice rule," by which a landowner could not make a takings challenge to a regulation of which he was, or should have been, aware at the time of purchase.[187] However, with Justice O'Connor serving as the swing vote, the Court refused to conclude that the mere existence of a regulation at the time of purchase should have no role in determining whether the regulation works a taking.[188]

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180. *Id.* at 697-98.

181. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1433 (9th Cir. 1996).

182. *Del Monte Dunes*, 526 U.S. at 707.

183. *See id.* at 698.

184. *Id.* at 721-22.

185. 533 U.S. 606 (2001).

186. *Id.* at 621 (noting that "the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands . . . . Further permit applications were not necessary to establish this point.").

187. *See id.* at 627 (stating "were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.").

188. *See id.* at 635 (O'Connor, J., concurring) ("If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost. As I understand it, our decision today does not remove the regulatory backdrop against which an owner

6. Judicial Resistance to Hearing Property Rights Cases

In the 1803 landmark case *Marbury v. Madison*, Chief Justice John Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[189] Yet when it comes to property rights, the Supreme Court has consistently provided mechanisms for federal judges to shirk their duty to declare and apply the law in actual cases. Whether out of fear of becoming "Grand Mufti" of zoning,[190] or out of disdain for deciding the "garden-variety zoning dispute,"[191] even conservative judges seem to have a palpable dislike for property rights cases. In fact, federal courts have been so unwilling to hear regulatory takings cases that the probability of dismissal of their lawsuits often is the greatest barrier between injured property owners and their receipt of just compensation. One commentator, in a scholarly study of all takings cases litigated between 1983 and 1988, noted that judges avoided the merits in over ninety-four percent of them.[192]

The vast disarray in property rights jurisprudence undoubtedly is a factor. Were judges to possess a coherent and well-grounded theory of property rights, examining allegations of state overreaching would not be a difficult matter. The Supreme Court's vague balancing test, however, requires that judges juggle large quantities of information regarding local politics, sociology, economics, and administrative custom, all to no apparent purpose. Under these circumstances, the process quite naturally must seem bewildering and distasteful. It is no wonder that, in the words of one appellate court, "[t]he lack of uniformity among the [federal] circuits in dealing with zoning cases . . . is remarkable."[193]

To fully appreciate how procedural impediments work, however, one fact above all must be grasped: Whereas at one time Americans could use their property freely, today, virtually everywhere, any change in use can come about only after government at some level—sometimes several levels—has given the owner permission to make the change. The permitting process today is ubiquitous. And it can be an insurmountable hurdle. In *Suitum v. Tahoe Regional Planning Agency*,[194] the Supreme Court decided that an elderly widow, after nearly a decade of hearings, appeals, and lawsuits, had the right to sue in federal

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takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry."(footnote omitted)).

189. 5 U.S. (1 Cranch) 137, 177 (1803).

190. *See* Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989) ("The Supreme Court has erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards.").

191. In *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988), Judge Richard A. Posner disclaimed that "[t]his case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law."

192. Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Decisions*, 10 J. LAND USE & ENVTL. L. 91, 92 n.3 (1994).

193. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1217 (6th Cir. 1992).

194. 520 U.S. 725 (1997).

court. Thus, she could start her whole suit over again from the beginning. Mrs. Suitum and her husband bought a lot in 1972 in a subdivision near Lake Tahoe in Nevada.[195] Upon application for construction permits in 1989, the Tahoe Regional Planning Agency denied Mrs. Suitum's application to build, but gave her supposedly valuable "transferable development rights," (TDRs) which she could sell to a developer in another area.[196] These TDRs could afford a developer more intensive development than otherwise permitted. In 1997, after eight years of delay, while similar lots in the Suitums' subdivision were being developed in exactly the way Mrs. Suitum desired, the Supreme Court finally ruled against the agency, allowing Mrs. Suitum to sue in federal court before she sold the TDRs.[197]

In another example of unjust delay, Paul Preseault sued the State of Vermont in October 1981 to recover possession of a strip running through his yard for which an easement had been given for railroad use only.[198] Although the railroad was long-abandoned, the state insisted that the strip was open for public use of the recreational trail that it had paved over the former track bed running through the Preseaults' yard.[199] The Preseaults have been to the Supreme Court twice and have had their case litigated several times in the U.S. Court of Appeals for the Federal Circuit and the Court of Federal Claims.[200] The case was finally decided in May 2001, twenty years after it began, when a federal court ruled that the government must pay the Preseaults $234,000 plus fifteen years' worth of interest.[201]

In another takings case that went on for decades, Florida Rock Industries was denied a wetlands permit to mine limestone in its land in southern Florida in 1980 and brought a takings action in the predecessor of the Court of Federal Claims in 1982.[202] It won twice in that court, but both times the federal government appealed to the Federal Circuit, which remanded.[203] The case was in its third trial on the merits[204] when it was settled in late 2001, with the landowner to receive $21 million for its 1,560 acres of land.[205]

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195. *Id.* at 730.

196. *Id.* at 728.

197. *Id.* at 733.

198. *See* Preseault v. ICC, 494 U.S. 1, 9 (1990).

199. *Id.*

200. *See* Preseault v. ICC, 494 U.S. 1 (1990). The most recent published substantive opinion is *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

201. *See* Preseault v. United States, 52 Fed.Cl. 667, 670 (2002) (referring to settlement and awarding attorney fees). *See also Government to Pay Landowners for "Trail Taking,"* PR Newswire, May 23, 2001, LEXIS, Nexis Library, PRNEWS file.

202. *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1562 (Fed. Cir. 1994).

203. *Id.* at 1573.

204. The last published opinion on the merits is *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

205. *See Florida Rock Selling Land, Making Acquisition,* MIAMI DAILY BUS. REV., Sept. 25, 2001, at A8.

7. Procedural Barriers in the Courts

The web of procedural barriers contrived by federal judges makes it almost impossible for landowners to obtain a hearing in federal court on claims that they have been deprived of their property rights in violation of the Federal Constitution.

The regulatory takings "ripeness test" is the most important procedural barrier. The basic principle underlying judicial ripeness rules is sound. The Supreme Court has said that the doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ."[206] However, the federal courts do not apply a standard ripeness test to regulatory takings cases. Instead, they have developed a labyrinth-like "special ripeness doctrine applicable only to constitutional property rights claims."[207]

In recent congressional testimony, the noted land use expert Professor Daniel Mandelker declared that "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits."[208] The lack of practical recourse to the courts puts citizens at a grave disadvantage. With little chance of being called to account in the federal courts, states and localities have an even greater incentive to take private property through the subterfuge of regulation rather than through exercise of the power of eminent domain.

The ripeness rule is not applied to claims that ordinances or regulations are flatly unconstitutional on their face (i.e., under all circumstances). Owners making such claims will get their day in federal court—and almost certainly will lose. Because the Supreme Court gives government the benefit of the doubt when the validity of a land use regulation is "fairly debatable,"[209] and because it "has been unable to develop any set formula" for property rights cases,[210] only the most egregious rule would be deemed unconstitutional under every conceivable circumstance.

As a practical matter, then, landowners must assert that regulations or governmental actions violate the Takings Clause or fail to provide due process of law when applied to their particular situations. It is in these cases that the special ripeness test wreaks havoc. In order to establish that his fact-laden claim is "ripe" for federal judicial review, an owner must spend many years and often hundreds of thousands of dollars. He must surmount an open-ended and often endless series of administrative hurdles. "Practically speaking," one authority

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206. Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967).

207. Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992).

208. *Amendments to the Web-Kenyon Act and the Private Property Implementation Act of 1997: Hearing on H.R. 1063 and H.R. 1534 Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 105th Cong. 67 (1997) (statement of Daniel R. Mandelker).

209. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

210. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987).

has noted, "the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small."[211]

The principal case in which the Supreme Court has established its regulatory takings ripeness doctrine is *Williamson County Regional Planning Commission v. Hamilton Bank*.[212] The tip of the *Williamson County* iceberg is its "two-prong" test requiring (1) a "final decision" by the governmental agency on the merits and (2) a denial of "state compensation."[213]

Until an agency issues a "final decision," it cannot be sued. Thus, the property owner has to overcome every excuse or delay that the agency poses. One branch of the "final decision" prong requires the owner to apply for a "specific use"[214] and another requires a "meaningful" application.[215] This means that the owner's initial application cannot simply ask for the maximum use permitted by law; and it also means that the owner may have to make several applications, each succeeding application responsive to comments in the agency's earlier denials. Yet another branch requires the owner to seek a "variance" (i.e., an administrative exception from a rule) following a denial based on non-compliance with the rule.[216] Nevertheless, if the owner can prove that the agency's mind is made up and that it would be senseless to continue this process, he can seek relief under a "futility exception." That final resort, however, is itself a difficult hurdle.

To better appreciate what is going on in this process, one can imagine what it would be like if a speaker had to "clear" his remarks before speaking. Imagine negotiating the text with a government agency, which would be free to come up with continual modifications and suggestions. While years might go by until the right to speak was formally denied, the speaker would have no recourse to federal court, for only then would the denial be "ripe."

The other prong of *Williamson County* is the "state compensation" requirement. It is not enough to show that government has "taken" a property right by finally denying a permit. The owner must also show that government has not provided "just compensation" for that taking in order for his federal constitutional rights to be violated. The fact that the agency has denied that there has been a taking and refuses to pay does not count. The owner must seek compensation through additional applications to state agencies and litigation in the state courts. Only after receiving a definitive rejection there is he free to go to federal court.

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211. Gregory M. Stein, *Regulatory Takings and Ripeness in Federal Courts*, 48 VAND. L. REV. 1, 43 (1995).

212. 473 U.S. 172 (1985).

213. The various sub-prongs of the *Williamson County* ripeness rules are complex. For a discussion of them, see STEVEN J. EAGLE, REGULATORY TAKINGS § 13-3 (2d ed. 2001); MICHAEL M. BERGER, REGULATORY TAKINGS UNDER THE FIFTH AMENDMENT: A CONSTITUTIONAL PRIMER 13-19 (1994); Stein, *supra* note 211.

214. *E.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

215. *E.g.*, Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 405 (9th Cir. 1996).

216. *E.g.*, Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 737 (1997) (quoting *Williamson County* at 193).

To add to the *Alice in Wonderland* quality of the takings "ripeness" test, some federal appellate courts have held that the state court review that is necessary to determine that compensation is not forthcoming also serves to preclude litigation of the same issues in federal court. In other words, the state court's decision results in an immediate re-characterization of the landowner's complaint in federal court from "unripe" to "overripe" with no intervening stage. "Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten."[217] Significantly, the Supreme Court recently has declined to review a case that raised squarely the issue of whether a landowner *ever* has the right to litigate a takings challenge based on the Federal Constitution in federal court.[218] Clearly, this "ripeness mess" cries out for reform.[219]

The so-called "Tucker Act shuffle"[220] is another procedural barrier to judicial redress when it is the federal government that injures property rights. The Tucker Act[221] is a broad statute giving the Court of Federal Claims jurisdiction over all claims for money damages against the United States not based upon accidents or other government torts. A suit for money damages as compensation for regulatory takings by a federal agency is included under the Tucker Act.[222] Often, however, owners want to keep their property rights rather than sell them to the government for "just compensation." If so, those owners must go instead to the federal district courts, which have the power to issue injunctions forbidding the federal government from committing acts that constitute wrongful takings. While seemingly an acceptable remedy, it can trap the unwary.

In the district court, the federal agency will often respond that it was not intruding on the owner's rights out of inadvertence but was acting in a deliberate way to implement an important and necessary federal policy. Thus, it might tell the district judge that the owner must seek money damages in the Court of Federal Claims, where the case must begin all over again. But if the owner had initially sought damages in the Court of Federal Claims, the government might have asserted that a suit for modification of its activities affecting the land was the owner's proper recourse. Should the court agree, it would dismiss the suit and force the owner to begin anew in the district court. By the time the owner could do this, the statute of limitations on the filing of an action might make it too late to assert his claim. Even if the owner were inclined to undertake the wasteful process of suing in both the Claims and district courts at the same time,

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217. Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 72 (1995).

218. Rainey Bros. Constr. Co. v. Memphis and Shelby County Bd. of Adjustment, 178 F.3d 1295 (6th Cir. 1999), *cert. denied*, 528 U.S. 871 (1999).

219. For an excellent summary of the problem and some proposed legislative solutions, see John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999).

220. This term is memorialized in 105 H.R. 992, the "Tucker Act Shuffle Relief Act of 1997."

221. 28 U.S.C. § 1491(a)(1) (2002).

222. 28 U.S.C. § 1491(b)(2) (2002).

such a dual filing is precluded by law.[223] As commentators have noted, "This 'Tucker Act shuffle' is more than a procedural annoyance which may result in the dismissal of an otherwise meritorious case, for it places a premium upon the drafting of sharp pleadings and the gerrymandering of opinions to avoid the jurisdictional dividing line."[224]

8. The State Courts

The courts of every state are free to interpret the provisions of their own constitutions so as to provide more protection for the property rights of their citizens than the United States Supreme Court has provided under the Federal Constitution. For the most part, however, state courts have been quiescent. The courts of Illinois, Pennsylvania, and a few other states have respected private property more than the norm, but the courts of California and New Jersey have been disdainful of property rights.[225] However, it is fair to say overall, state courts have not been at the forefront of preserving the property rights of their citizens.

V. PROPERTY RIGHTS ABUSES AND CITIZEN CONCERN

A. ABUSES CONTINUE

Building moratoria still prevent citizens from constructing homes on their lands for many years.[226] Endangered species laws are enforced well beyond any reasonable contemplation of legislators.[227] Wetlands regulations prohibit the use of lands that are moist only a few weeks each year.[228] Movements led by affluent weekenders prevent the construction of Wal-Mart stores where less

223. 28 U.S.C. § 1500 (2002).

224. 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, 566 (1991); *see also* statement of Loren A. Smith, Chief Judge, United States Court of Federal Claims, presented on Sept. 10, 1997, Before the House Subcomm. on Immigration and Claims, *quoted in* Wendie L. Kellington, *Developments in State and Federal Legislation*, ALI-ABA CLE Aug. 13, 1998, SD 14 ALI-ABA 561, 612.

225. *See* COYLE, *supra* note 110.

226. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court held that moratoria precluding all development had to be judged in light of the amorphous standards of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See supra* text accompanying notes 127-32. Tellingly, while the Court in *Tahoe-Sierra* stressed the principle of fairness, it employed procedural devices to limit its review to a 32-month period. In fact, the denial of development has continued unabated from 1981 through the present day.

227. *See, e.g.*, State v. Sour Mountain Realty, Inc., 714 N.Y.S.2d 78 (App. Div. 2000) (upholding finding under state ESA that landowner's construction of snake-proof fence along its property line after discovering a timber rattlesnake den nearby constituted a "taking" of a threatened species).

228. *See, e.g.*, United States v. Mills, 817 F. Supp. 1546 (N.D. Fla. 1992) (reluctantly sentencing landowner and son to prison for placing clean dirt fill on building lot that did not have outward appearance of being a wetland).

wealthy locals could shop.[229] Such actions are daily occurrences and demean the notion of property rights as an essential liberty of a free people. In recent years, numerous published accounts of such unjustified regulations have contributed to the growth of property rights movements and have led to calls for legislative reform.[230]

B. MYTHS THAT MISLEAD THE PUBLIC

One reason opponents of a principled approach to property rights have been successful in misleading the public about the need for reform is their effective repetition of untruths.

One such myth is that if property rights were unfettered, pollution would become endemic.[231] It is not the intent of the property rights movement to obtain additional "rights" for property owners—the goal is enforcement of rights they already possess under the common law and the United States Constitution. Those rights do not include a "right to pollute." John Locke wrote in his *Second Treatise of Government* that "nothing was made by God for Man to spoil or destroy."[232] Justice Scalia carefully noted in *Lucas v. South Carolina Coastal Council*[233] that landowners are not exempt from actions by "adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances . . . ."[234]

Another myth is that if property rights were unfettered, all governmental actions would trigger massive raids on the public treasury.[235] It is just as obvious now as it was when Justice Holmes first found a regulatory taking in *Pennsylvania Coal Co. v. Mahon* that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[236] If a regulation imposes broad and

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229. *See, e.g.*, Wal-Mart Stores, Inc. v. Planning Bd. of N. Elba, 668 N.Y.S.2d 774 (App. Div. 1998) (upholding rejection of conditional use permit for a large store because the decision was not based on public sentiment, but rather on environmental considerations that permissibly went beyond those established in state law).

230. *See, e.g.*, JONATHAN ADLER, ENVIRONMENTALISM AT THE CROSSROADS (1995); RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED (1985); JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE (1997); WILLIAM PERRY PENDLEY, IT TAKES A HERO: THE GRASSROOTS BATTLE AGAINST ENVIRONMENTAL OPPRESSION (1994); MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA (1993); RICHARD POMBO & JOSEPH FARAH, THIS LAND IS OUR LAND: HOW TO END THE WAR ON PRIVATE PROPERTY (1996); LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION (Bruce Yandle ed., 1995).

231. *See generally* Robert H. Cutting, *"One Man's Ceilin' is Another Man's Floor": Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819 (2001).

232. LOCKE, *supra* note 15, at 308.

233. 505 U.S. 1003 (1992).

234. *Id.* at 1029.

235. *See, e.g.*, Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 473-475 (2001) (depicting property rights legislation as regulation that imposes considerable costs on the government).

236. 260 U.S. 393, 413 (1922).

general benefits and burdens on all individuals in the community, it secures, as Justice Holmes put it, an "average reciprocity of advantage."[237] Many regulations are of this type. Whatever theoretical "taking" they cause is compensated by the benefit that each person derives from the imposition of the regulation on others.

Fettering property rights would reduce political accountability. The Supreme Court has said that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[238] The unfairness of imposing inordinate burdens on the few is compounded by the fact that in a democracy the few will be outvoted and the majority inevitably will be tempted to impose burdens upon them in lieu of financing government through taxes.[239] Likewise, officials would be tempted to confiscate property rights rather than incurring the wrath of the voters by purchasing property rights and raising the needed revenue. Limiting governmental activities to those that have to be justified to the taxpayers reduces waste as well as preserves rights.

Finally, it is difficult to reconcile the claim that there are relatively few governmental abuses of private property rights with the assertion that there would be a vast run on the treasury if unjust deprivations had to be compensated.

Another myth is that if property rights were unfettered, owners would misuse their lands. This canard is premised on the fallacy that people own things, rather than rights pertaining to things, that others must respect. Property owners do not own "land"; they own the right to possess and exclude others, the right of use, and the right of disposition. A typical formulation of the argument for state control is,

> Where the private autonomy of ownership would clash with the greater public good, that is where the private rights in property come to an end and the social obligation of property begins. Were it not for this public interest boundary on private property rights, the laws created to protect property could become powerful instruments to defeat public welfare. A government empowered to act only in the public interest never could have constitutionally conferred such an extensive measure of property ownership.[240]

The premises of this argument are (1) that property rights are derived from government instead of from moral right, individual labor, and consensual

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237. *Id.* at 415.

238. Armstrong v. United States, 364 U.S. 40, 49 (1960).

239. This point is well elaborated in Justice Scalia's dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 21-24 (1988).

240. John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 347-48 (1989).

trade;[241] (2) that democratic government can formulate a popular mandate regarding "the good";[242] and (3) that enlightened policymakers and technical innovations can command good results.[243]

An extravagant application of this view is the Wisconsin Supreme Court's holding in *Just v. Marinette County*.[244] The court upheld an extensive wetland regulation as,

> a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property. . . . An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[245]

The premise of *Just* was not nuisance as the common law knows it, because the "harm" in Just's conduct is never defined beyond the general assertion that "upsetting the natural environment" damages the general public. Perhaps the court believes that the property right to develop the land belongs to the ecosystem itself. It is clear that the court concludes that, while individuals might "own" the land, use rights belong to the state.

Yet another myth, often expressed by individuals with a different perspective, is that if property owners lose more than *X* percent of value, they are entitled to compensation from government.[246] People who purport to be allies of the property rights movement but who want government protection from change popularize this canard. It also has been incorporated into property rights legisla-

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241. *But see* Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 HARV. J.L. & PUB. POL'Y 165, 170-75 (1983).

242. If there are two or more solutions to a problem, and no clear majority for any of them, there is no rational way to determine a group preference. "Log rolling" and the order in which bills are introduced often determine legislative outcomes. Professor Arrow was awarded the Nobel Memorial Prize in Economics in 1972 largely for his mathematical proof that the problem of determining a method to maximize social welfare is intractable. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); DENNIS C. MUELLER, PUBLIC CHOICE II 2-3 (1989).

243. The notion that the state could smoothly coordinate the property rights and labor of millions is an illustration of the "fatal conceit" described in F.A. HAYEK, THE FATAL CONCEIT 27 (1988). A planned economy deprives planners of the very information that they need to plan properly—market prices, which embody information about preferences, resources, and technology. *See* Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, *in* COLLECTIVIST ECONOMIC PLANNING (F.A. Hayek ed., 1935). The free market produces order from what appears to be chaos by apparently effortlessly organizing all kinds of information in coherent patterns that no planner could reproduce through conscious effort. *See* F.A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER, chs. VII-IX (1948).

244. 201 N.W.2d 761 (Wis. 1972). *Just* was reconfirmed in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996).

245. 201 N.W.2d at 767-68.

246. To some extent, this idea might have its origins or support in Justice Holmes' words in *Pennsylvania Coal Co. v. Mahon*: "[W]hen [regulation] reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. 393, 413 (1922).

tion, as will be noted below. The fact is that just as people are not "entitled" to be made whole from the vicissitudes of life by non-negligent tort defendants, they are not "entitled" to be made whole from reductions in the value of their assets by takings defendants. This principle applies, for example, to oyster propagators who establish businesses to take advantage of past governmental modifications in water salinity levels and who then claim a taking when the salinity levels are changed again.[247] It applies as well to utility companies that want to be protected from losses due to the termination of their monopoly status through deregulation of their industries,[248] and to others whose cases essentially are grounded in "value."[249]

The problem with these cases is that "property" does not equate to "value." While the loss of "property" results in the loss of "value," the loss of "value" is not necessarily a result of the loss of "property." As Justice Robert Jackson noted, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them . . . ."[250] The ownership of a motel on the old main road might have been very valuable. The government might have deprived the owner of value by building a nearby interstate highway. Yet "the state owes no person a duty to send traffic past his door."[251] Furthermore, individuals may benefit from governmental largesse, but unless law, contract, or custom makes those benefits irrevocable, government may withdraw them without payment of compensation.[252]

VI. A PRINCIPLED APPROACH TO PROPERTY RIGHTS RESTORATION

The existence today of a vibrant property rights movement is cause for both celebration and concern. That so many individuals are moved to speak up for liberty and for limited government as ordained by the Framers is a tribute to the vibrancy of freedom. That many individuals have joined because their families and neighbors have been the victims of abuse testifies to the need for vigilance.

On the heels of the Supreme Court's 1926 *Euclid* decision,[253] legislatures in every state authorized comprehensive local zoning measures and most cities

247. Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996).

248. *See* J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES (1997).

249. *See, e.g.*, Dep't of Transp. v. Gefen, 636 So. 2d 1345 (Fla. 1994). The owner of commercial property suffered a considerable loss of vehicular traffic past the premises when a nearby interstate highway ramp was closed (although access from his property to the fronting public streets was undiminished). As the Florida Supreme Court put it, "No person has a vested right in the maintenance of a public highway in any particular place because the state owes no person a duty to send traffic past his door." *Id.* at 1346. *Accord*, Dep't of Transp. v. Taylor, 440 S.E.2d 652 (1994). For additional elaboration, see STEVEN J. EAGLE, REGULATORY TAKINGS, §2-4(2)(2) (2d ed. 2001).

250. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

251. Dep't of Transp. v. Gefen, 636 So.2d 1345, 1346 (Fla. 1994) (citing Jahoda v. State Road Dep't, 106 So.2d 870, 872 (Fla. Dist. Ct. App. 1958)).

252. *See* McKinley v. United States, 828 F. Supp. 888, 893 (D.N.M. 1993) (holding modification of grazing permit not compensable).

253. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

adopted zoning and planning ordinances. In the words of Yale Law Professor Carol Rose, we have gone from a situation where people say "anything goes" regarding land use to one in which they say "'anything goes' for the *regulation* of private land uses .... [L]and use regulators became accustomed to believing that they were entitled to regulate anything that they pleased under the auspices of *Euclidean* zoning...."[254] While pre-*Euclid* land use was subject to the common law of nuisance, the unwillingness of courts to intervene gives land use regulators untrammeled power.

Given that state legislatures and Congress have authorized land use restrictions, it might seem paradoxical that citizens now turn to them for relief from governmental abuses of private property rights. Local governments and federal agencies have engaged in most violations, however, and the courts have failed to intervene. Thus, property rights advocates have increasingly sought aid in the state houses and in Congress. Almost all states have considered legislation that protects property rights against diminution, and at least twenty have passed some type of statute. The U.S. House of Representatives passed substantial property rights bills in recent years, but companion bills never were brought to a final vote in the Senate.[255]

Although property rights legislation is important, it must augment litigation and not replace it. Legislative success will hasten judicial success. Judges are not insensitive to changing mores, and the enactment of protective legislation will lead them to reconsider holdings subordinating property rights to other individual liberties.

A. SUPREME COURT REFORM HAS BEEN SLOW AND UNCERTAIN

The categorical takings rule of *Lucas v. South Carolina Coastal Council*[256] applies only when an owner is deprived of all economically viable use.[257] Given that most regulatory restrictions leave owners with at least some modicum of use, it is difficult to see that *Lucas* will be of much practical effect.[258] As discussed earlier,[259] the Supreme Court's *Penn Central* ad hoc balancing test is both nebulous and extremely deferential to government.[260] While a few more

254. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 589 (1990).

255. *See* Private Property Rights Implementation Act of 1999, H.R. 2372, 107th Cong. (2002), which passed in the House by a vote of 226 to 182 on March 16, 2000. The Senate companion bill, Citizens Access to Justice Act, S. 1028, 106th Cong. (1999), was referred to the Committee on the Judiciary on May 13, 1999 and not acted upon thereafter.

256. 505 U.S. 1003 (1992).

257. *Id.* at 1015.

258. This point is confirmed by the Supreme Court's recent decision in *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (holding that, while the government may not evade the compensation requirement by leaving the landowner a "token interest," a regulation "permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle'").

259. *See supra* text accompanying notes 127-32.

260. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

recent opinions have upheld property rights, they are not rooted in principle and therefore sound an uncertain trumpet. Of broader import, perhaps, is *Nollan v. California Coastal Commission*, in which the Court invalidated a regulation having no "nexus" with the purpose for which the agency promulgating it was created.[261] Likewise, *Dolan v. City of Tigard* placed the burden on the agency to establish a "rough proportionality" between restrictions imposed on the owner and public burdens allegedly created by development of the owner's property.[262] The efficacy of the *Nollan-Dolan* rule will be determined by how assiduously the courts enforce it.

Chief Justice Rehnquist's *Dolan* opinion noted the deference given to state and local land use planners in the Court's earlier cases. He added, however, that those cases "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."[263] But what is the relevance of that distinction? What if an ordinance places upon one industry a disproportionate share of the burden of beautifying downtown? The Court recently refused to hear a case raising just that issue. Joined in his dissent from that refusal only by Justice O'Connor, Justice Thomas declared,

> A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[264]

The Supreme Court's 1999 decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* is the first case in which it has upheld an award of damages for a regulatory taking.[265] The Court also held that a jury trial for takings damages was permissible and that municipal arguments that courts have no business "second guessing" local land use regulations have no constitutional support.[266] However, the case could be litigated in the federal courts only because at the time the taking occurred California had no state provision for

261. 483 U.S. 825, 825 (1987).
262. 512 U.S. 374, 391 (1994).
263. *Id.* at 385.
264. Parking Ass'n of Georgia v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116, 1118 (1995) (mem.) (Thomas, J., dissenting).
265. 526 U.S. 687 (1999).
266. *See supra* text accompanying notes 175-84.

paying temporary takings damages. (During the course of litigation the state purchased the land, thus terminating the period for which damages were sought.) Now every state allows for temporary takings compensation (at least in theory).[267] The case provides no assurance that federal courts will hear takings cases or that state courts will have to permit jury trials. Furthermore, it contains troubling dicta that might be construed as limiting *Dolan v. City of Tigard* to force dedication of property in exchange for development permits.[268] While, as I have argued elsewhere,[269] critics of property rights may have made too much of this dicta, the fact remains that the Court is hesitating to develop a coherent property rights jurisprudence.

To be sure, the Supreme Court's decisions in recent years have provided grounds for hope. In 1999, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[270] the Court upheld regulatory takings damages awarded by a jury that had sufficient grounds to determine that the city's refusal to issue a development permit was in bad faith. In 2000, in *Village of Willowbrook v. Olech*,[271] the Court vindicated the plaintiff's claim that "irrational and wholly arbitrary" conditions for connection to the public water system deprived her of equal protection of the laws as required by the Fourteenth Amendment. No specific ill intent need be demonstrated. Its 2001 holding in *Palazzolo v. Rhode Island* rejected the worst form of the notice rule,[272] observing that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle."[273]

In spite of these positive results, however, the Court has offered no coherent theory of property rights. Indeed, other aspects of *Palazzolo* make it clear that the Court intends not to focus on "property" at all, but rather to slog through the miasma of "expectations."[274]

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267. Although the California rule against temporary takings damages was overruled in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), it was only thirteen years later that the state supreme court permitted temporary takings damages actually to be paid. Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999), *review denied*, Ali v. City of Los Angeles, No. S085680, 2000 Cal. LEXIS 3230, at *1 (Cal. Mar. 29, 2000). Except for *Ali*, even in the most egregious cases, the plaintiff's claim has been remanded to the agency that long trampled upon the landowner's rights, together with a bland assurance that the agency would make up for past wrongs. *See, e.g.*, Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997).

268. 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.").

269. Steven J. Eagle, *Del Monte Dunes, Good Faith and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10103 (2000).

270. 526 U.S. 687 (1999).

271. 528 U.S. 562 (2000).

272. 533 U.S. at 628.

273. *Id.* at. 627.

274. *See id.* at 633 (O'Connor, J., concurring); *see also supra* text accompanying note 188.

B. STATE PROTECTIVE LEGISLATION

The twenty state property rights protection statutes[275] differ from each other in important details.[276] However, they may be roughly categorized into "takings impact assessment statutes" and "compensation statutes."[277] Also, all of the statutes only operate prospectively, so that they do not pertain to present regulations and past actions. The following discussion compares the two general types of statutes enacted and notes some of the more important state provisions.

1. Takings Impact Assessment Statutes

Takings impact assessment (TIA) statutes require a review to ensure that agency rules or actions do not constitute uncompensated takings. They define a "taking" using current United States Supreme Court rulings.

TIA statutes might be inspired by the assessment mechanism in the National Environmental Policy Act of 1969 (NEPA),[278] which imposes broad planning and assessment requirements on federal agencies. Their working model, however, often is the Reagan Administration's Executive Order 12,630, "Governmental Actions and Interference with Constitutionally Protected Property Rights."[279] That Executive Order requires that federal agencies evaluate their prospective actions in light of guidelines promulgated by the Attorney General based on current Supreme Court jurisprudence. The sufficiency of the assessment under NEPA has determined the outcome in numerous cases, but Executive Order 12,630 generally has been disregarded by federal officials and often has precluded citizen enforcement.

Almost all state assessment statutes have been enacted during the past few years. Some TIA statutes are fairly perfunctory. Indiana and Delaware, for instance, require the state attorneys general to decide if agency rules are in

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275. *See* ARIZ. REV. STAT. ANN. § 9-500.12 (West 2002) (cities and towns), § 11-810 (West 2002) (counties); DEL. CODE ANN. tit. 29 § 605 (2001); FLA. STAT. ANN. § 70.001 (West 2002); IDAHO CODE § 67-8001 to -8004 (Michie 2002); IND. CODE ANN. § 4-22-2-31 to -32 (West 2002); KAN. STAT. ANN. § 77-701 to -707 (2001); ME. REV. STAT. ANN. tit. 5 § 8056(1)(A) (West 2002); MICH. COMP. LAWS ANN. § 24.421:425 (West 2002); MISS. CODE ANN. § 49-33-13 (2002); MO. ANN. STAT. § 536.017 (West 2002); MONT. CODE ANN. § 2-10-101 to -105 (2002); N.C. GEN. STAT. § 113-206 (2002); OR. REV. STAT. § 197.796 (2001); TENN. CODE ANN. § 12-1-201 to -206 (2002); TEX. GOV'T CODE ANN. § 2007.041-.045 (Vernon 2001); UTAH CODE ANN. § 63-90-1 to -4 (2002); VA. CODE ANN. § 2.2-4007 (Michie 2002); WASH. REV. CODE § 36.70A.370 (2002); W. VA. CODE §§ 22-1A-1 to -3 (2002); WYO. STAT. ANN. § 9-5-301 to -305 (Michie 2002); Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187, 190 n.16 (1997); Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 FORDHAM L. REV. 787 (1998).

276. For discussion, *see* Cordes, *supra* note 275; Drees, *supra* note 275; and Ann L. Renhard Cole, *State Private Property Rights Acts: The Potential for Implicating Federal Environmental Programs*, 76 TEX. L. REV. 685 (1998).

277. The categorizations here borrow heavily from the detailed compilation in Cordes, *supra* note 275.

278. 42 U.S.C. §§ 4321, 4332(2)(C) (2002). *See* 40 C.F.R. § 1500.2 (2002).

279. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 13, 1988).

compliance, a task that as a practical matter leads to blanket certification.[280] Idaho, Michigan, and Tennessee require only that agencies make informal determinations of the constitutionality of their actions in accordance with standards promulgated by the attorneys general.[281]

The statutes that are apt to prove more efficacious require agencies to prepare formal, written analyses, which must include assessments of alternative actions that could impact property rights less. The states with such statutes include Kansas, Montana, Texas, Utah, and West Virginia.[282] Some of these states require an estimate of the cost of compensation and the source of payment (Montana and West Virginia). Some require that the assessment contain an affirmative justification for the restriction (Kansas, Utah, and West Virginia).

The scope of these regulations also varies widely. A few states limit the assessment process to select state agencies (Utah, West Virginia, and Michigan).[283] About half of the states with TIA statutes impose their requirements on all state agencies, but not political subdivisions. Four states include both state agencies and all or most local governments (Washington, Idaho, and Texas).[284] Three states preclude judicial review of the assessments (Idaho, Kansas, and Washington).[285] Two states require limited judicial review (Delaware to ensure that the attorney general has reviewed the rule in question and Texas for voiding the action, but only if no assessment has been prepared).[286] Other states have no explicit rule.

TIA statutes are broadly beneficial in the sense that they force agencies and attorneys general to give at least some thought to property rights and the takings issue. It is unrealistic to think that agencies will zealously police themselves, however, and TIA statutes are apt to be effective only if citizens are given standing to contest decisions made on insufficient assessments, as they are under NEPA.

2. Compensation Statutes

Compensation statutes are intended to provide relief to landowners who have suffered regulatory takings. They preclude compensation where the proscribed use constituted a common law nuisance, which is entirely appropriate, because

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280. IND. CODE ANN. § 4-22-2-31 to -32 (West 2002); DEL. CODE ANN. tit. 29, § 605 (West 2001).

281. IDAHO CODE § 67-8001 to -8004 (2002); MICH. STAT. ANN. § 24.423 (West 2002); TENN. CODE ANN. § 12-1-201 to -206 (2002).

282. KAN. STAT. ANN. § 77-701 to -707 (West 2001); MONT. CODE ANN. § 2-10-101 to -105 (West 2002); TEX. GOV'T CODE ANN. § 2007.041 to .045 (West 2001); UTAH CODE ANN. § 63-90-1 to -4 (West 2002); W. VA. CODE § 22-1A-1 to -3 (West 2002).

283. UTAH CODE ANN. § 63-90-1 to -4 (West 2002); W. VA. CODE § 22-1A-1 to -3 (West 2002); MICH. STAT. ANN. § 24.423 (West 2002).

284. WASH. REV. CODE § 36.70A.370 (West 2002); IDAHO CODE § 67-8001 to -8004 (West 2002); TEX. GOV'T CODE ANN. § 2007.041 to .045 (West 2001).

285. IDAHO CODE § 67-8001 to -8004 (2002); KAN. STAT. ANN. § 77-701 to -707 (West 2001); WASH. REV. CODE § 36.70A.370 (West 2002).

286. DEL. CODE ANN. tit. 29, § 605 (West 2001); TEX. GOV'T CODE ANN. § 2007.041 to .045 (West 2001).

owners do not have property in uses that are nuisances. Some proposed legislation would have required compensation where governmental actions result in a relatively small percentage diminution in value.

Five states have enacted compensation statutes. Arizona has enacted an administrative appeals process that is limited to the removal or modification of exactions imposed by a city or county in connection with the granting of a permit.[287] Mississippi requires that just compensation be paid for the regulation of agricultural and forest land that causes at least a 40% diminution in value.[288] A similar law in Louisiana is triggered by a 20% diminution.[289] Both statutes refer to the "affected" land or "part" of land. The two state laws having the greatest potential for property rights protection are those of Texas and Florida.[290] Both are too new, however, for a meaningful assessment of their costs or benefits.

The 1995 Texas "Private Real Property Rights Preservation Act" is a combined assessment and compensation statute.[291] It mandates the comprehensive review of proposed actions and possible alternatives and mandates judicial relief when no analysis is prepared.[292] Where there is at least a 25% diminution in value the agency either must pay or withdraw the regulation or action. However, it is unclear whether the 25% standard applies to the parcel as a whole or to the affected part.[293] Of six cases involving the Act, only one has found for a landowner.[294]

Florida's "Bert J. Harris, Jr., Private Property Rights Protection Act"[295] is the most innovative of the state property rights statutes. Its compensation trigger point is not a set percentage diminution, but rather the imposition of an

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287. *See* ARIZ. REV. STAT. ANN. § 9-500.12 (West 2002) (cities and towns), § 11-810 (West 2002) (counties).

288. MISS. CODE ANN. § 49-33-1 to -19 (2002).

289. LA. REV. STAT. ANN. § 3:3601 to :3602 (West 2001).

290. TEX. GOV'T CODE ANN. § 2007.001 (Vernon 2002); FLA. STAT. ANN. § 70.001 (West 2002).

291. TEX. GOV'T CODE ANN. § 2007.001 (Vernon 2002).

292. *See generally* Daniel Anderson, *The Texas "Takings" Statute: Ten Basic Facts to Know*, 60 TEX. B.J. 12 (1997).

293. The governmental action that would constitute a "taking" is limited to that which "affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently . . . and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property . . . ." § 2007.002(5)(B). It is unclear whether the 25 percent diminution could be applied to the affected segment of the parcel or must be applied to the parcel as a whole. *See* Jerome M. Organ, *Understanding State and Federal Property Rights Legislation*, 48 OKLA. L. REV. 191, 207 (1995).

294. *Compare* Bragg v. Edwards Aquifer Auth., 71 S.W.3d 729, 737 (2002) (holding Act did not require a takings impact assessment prior to adopting well permitting regulations or acting on permit applications), *and* S. W. Prop. Trust, Inc. v. Dallas County Flood Control Dist. No. 1, 2001 WL 1161010, at *8 (Tex. App. 2001) (denying summary judgment on agency's claim that new tax fell under exception to statute), *with* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 71 S.W.3d 19 (Tex. App. 2002) (holding developer was entitled to damages for a taking when forced to pay for improvements to public street as condition of plat approval).

295. FLA. STAT. ANN. § 70.001 (West 2002).

"inordinate burden."[296]

> The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" or "inordinately burdened" do not include: temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law; a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.[297]

This provision in part tracks the Supreme Court's case law, particularly its "investment-backed expectations" language in *Penn Central*.[298] However, the "disproportionate share of a burden imposed for the good of the public" language is new. While its rhetoric tracks the previously quoted "fairness and justice" language of *Armstrong v. United States*,[299] the language of the Florida act seems intended to establish legal rights instead of reflecting mere aspirations:

> The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, *as a separate and distinct cause of action from the law of takings*, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.[300]

The Florida statute also contains innovative and potentially important procedural reforms. The first is its careful provision for the award of damages. The trial court is charged with ascertaining whether the owner had a property right

296. *Id.* § 70.001(2).
297. *Id.* § 70.001(3)(e).
298. 438 U.S. at 124.
299. 364 U.S. 40, 49. *See also supra* text accompanying note 238.
300. FLA. STAT. ANN. § 70.001 (West 2002).

that was inordinately burdened.[301] If so, it would ascertain the percentage of compensation due from each governmental entity involved, if there were more than one.[302] Then, a jury would be empanelled to determine the amount of compensation owed.[303]

Perhaps most importantly, the Florida act develops an innovative mandate that requires an agency to issue a timely "written ripeness decision identifying the allowable uses to which the subject property may be put."[304] This decision "constitutes the last prerequisite to judicial review."[305] To date there are no reported decisions of any significance involving the Act, but it has been the subject of substantial scholarly commentary.[306]

3. Oregon's "Initiative Measure 7"

Possibly the most important state measure protecting private property rights was adopted by the voters of Oregon in November 2000. Initiative Measure 7 would amend the state constitution to provide,

> If the state, a political subdivision of the state, or a local government passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of reducing the value of a property upon which the restriction is imposed; the property owner shall be paid just compensation equal to the reduction in the fair market value of the property.[307]

Measure 7 defines "real property" broadly, so as to include structures and crops.[308] It also comprehensively defines "reduction in fair market value" as,

> the difference in the fair market value of the property before and after application of the regulation, and shall include the net cost to the landowner of an affirmative obligation to protect, provide, or preserve wildlife habitat,

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301. *Id.* § 70.001(6)(a).

302. *Id.*

303. *Id.* § 70.001(6)(b).

304. *Id.* § 70.001(5)(a).

305. *Id.*

306. *See, e.g.*, Ronald L. Weaver & Nicole S. Sayfie, *Environmental and Land Use Law: 1999 Update on the Bert J. Harris Private Property Rights Protection*, 73 FLA. BAR J. 49 (1999); Vivien J. Monaco, *The Harris Act: What Relief From Government Regulation Does it Provide for Private Property Owners?*, 26 STETSON L. REV. 861 (1997); Julian Conrad Juergensmeyer, *Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 U. FLA. L. REV. 695 (1996); Nancy E. Stroud & Thomas G. Wright, *Florida's Private Property Rights Act—What Will it Mean for Florida's Future?*, 20 NOVA L. REV. 683 (1996).

307. Oregon Ballot Measure 7, subsection (a) (2000). This initiative was approved by Oregon voters at the general election on November 7, 2000, but was overturned by the Oregon Supreme Court because it did not adhere to the Oregon Constitution's single amendment requirement. League of Oregon Cities v. State, 56 P.3d 892 (Or. 2002); *see* OR. CONST. art. XVII, § 1.

308. Oregon Ballot Measure 7, subsection (e).

> natural areas, wetlands, ecosystems, scenery, open space, historical, archaeological or cultural resources, or low income housing . . . .[309]

There are several limitations on the duty to pay compensation. No compensation needs to be paid when a regulation is imposed, "to the minimum extent required" to "implement a requirement of federal law,"[310] or if a regulation is discontinued within ninety days after a claim for compensation is filed.[311] A third limitation excludes regulations imposed prior to the current owner's purchase of the real property.[312] This limitation is less justifiable than the others, because it nullifies the previous owner's right to transfer his compensation claim.

The fourth limitation, which is at the heart of the measure, states that "adoption or enforcement of historically and commonly recognized nuisance laws shall not be deemed to have caused a reduction in the value of a property. The phrase 'historically and commonly recognized nuisance laws' shall be narrowly construed in favor of a finding that just compensation is required under this section."[313] In other words, government would not have to compensate for loss in value resulting from the prohibition of nuisance, as narrowly construed. Because "nuisance" refers to activities which unreasonably deprive other landowners of use rights in their property, the ability to commit a nuisance is not really a property right at all. The message for government is clear. Regulations that protect the property of others do not give rise to liability. Other regulations generally will require compensation. The measure requires that government pay for diminution of the value of land caused by regulations that extend beyond traditional nuisance law.

C. THE NEED FOR CONGRESSIONAL ACTION

Congress certainly has the power to legislate against the abuse of private property by the federal government or by state and local programs employing federal funds. Before considering that type of legislation, it is important to note that Congress also has the power to enact constitutional legislation applicable to the states.

1. Federal Legislation to Protect Private Property from State and Local Abuses

The Fourteenth Amendment to the Constitution enables Congress to legislate against certain abuses by state or local governments. Section 5 declares that "Congress shall have power to enforce" the amendment's provisions. Section 1 provides, "No State shall make or enforce any law which shall abridge the

309. *Id.*
310. *Id.* at subsection (c).
311. *Id.* at subsection (e).
312. *Id.*
313. *Id.* at subsection (b).

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

There are several obstacles to Congress using Section 5 to protect private property. One is the Supreme Court's gutting of the Privileges or Immunities Clause in *The Slaughter-House Cases*,[314] which makes that guarantee of liberty practically unavailable. Another is the Court's current adamancy that deprivations of property rights are not violative of the Fourteenth Amendment's Due Process Clause. Rather, the Court insists that such deprivations be judged only by the standards of the Fifth Amendment's Just Compensation Clause, which is made applicable to the states by the Fourteenth Amendment.[315]

Finally, the Court has recently made clear that only a long history of abuse of individual rights would permit Congress to use Section 5 to regulate state conduct.[316] This abuse would be difficult to establish, and would call into question an extensive array of state activities, thus raising significant issues of federalism.

Another route for federal courts to review state and local land use actions is for them to entertain suits brought solely on the grounds that those actions violate property owners' federally-protected rights.[317] Federal district judges often have abstained from deciding such suits, either because the resolution of state law by state courts could eliminate what otherwise would be a difficult federal question[318] or because the case touched upon a complex state regulatory scheme concerning important matters of state policy better addressed by state courts.[319] The Senate Judiciary Committee's "Citizens Access to Justice Act of 1998" would have required federal district courts to forego abstention and decide more takings cases on the merits.

2. Federal Legislation to Protect Private Property From Federal Abuses

Congress has the unquestioned authority and a significant opportunity to protect individual property rights from abuse by federal agencies and courts through substantive and procedural reform.

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314. 83 U.S. 36 (1872). *See supra* text accompanying notes 51-54 for discussion.

315. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994) (asserting that the rationale was based on the Fifth Amendment Takings Clause in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234-35 (1897)). *But see Dolan*, 512 U.S. at 405-07 (Stevens, J., dissenting) (asserting that the Court applied due process in holding states liable to compensate for the takings in *Chicago*).

316. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act).

317. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (indicating that federal claims might be explicitly reserved in takings actions filed in state courts for subsequent presentation in federal courts).

318. This is known as "*Pullman* abstention." *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941).

319. This is known as "*Burford* abstention." *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943). This doctrine and that of "*Pullman* abstention," *see supra* note 318, is discussed in Julie A. Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1 (1986).

During the 104th Congress (1995-96) each house considered comprehensive and substantive property rights legislation designed to provide compensation to owners affected by federal actions not amounting to "takings" under Supreme Court jurisprudence. The House passed H.R. 925, the "Private Property Protection Act of 1995." The Senate Judiciary Committee issued S. 605, the "Omnibus Property Rights Act of 1995," which was not acted on by the full Senate.

The House bill provided that "[t]he [f]ederal[g]overnment shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20% or more."[320] However, only wetlands regulations under the Clean Water Act and the Food Security Act of 1985, habitat restrictions under the Endangered Species Act, and various restrictions on rights to use or receive water were subject to its provisions.[321]

The bill exemplifies both the intent of the House to apply remedies to areas in which there have been substantial abuses and the tendency of legislation not scrupulously tied to a clear principle to go astray. The principal defect of the bill is apparent from its statement of general policy: "[I]t is the policy of the [f]ederal [g]overnment that no law or agency action should limit the use of privately owned property so as to diminish its value."[322] Its application provision reflects this goal: "Each [f]ederal agency, officer, and employee should exercise [f]ederal authority to ensure that agency action will not limit the use of privately owned property so as to diminish its value."[323] The problem is that there is no reason for the federal government to protect value—its only responsibility is to protect property. Also, there is no definition of what is meant by affected property (that is, how "that portion" of the land for which diminution in value will be compensated is determined). Thus, it is entirely plausible that an owner whose lands have suffered a small overall diminution as a result of an environmental program that indirectly affected him could claim that one small portion of his lands was reduced in value by over 20%.

The Senate bill contained provisions that would require takings impact assessments by federal agencies and would provide compensation if the federal regulatory action resulted in the fair market value of the "property or the affected portion of the property" being reduced by 33%.[324]

While S. 605 had a 33% threshold for compensation as opposed to the 20% requirement of H.R. 925, the Senate bill was not limited to a few federal programs.[325] Neither the House nor the Senate bill established principles for measuring the physical area of the property "affected" or the analytical nature of the property rights lost.

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320. Private Property Protection Act, H.R. 925, 104th Cong. § 2 (1995).
321. *Id.*
322. *Id.*
323. *Id.*
324. Omnibus Property Rights Act, S. 605, 104th Cong. (1995).
325. *See id.*

The epitome of this type of legislation was a Washington State bill passed by the legislature requiring compensation for *any* diminution in value.[326] Opponents forced a statewide referendum, at which voters rejected the bill by a 60% to 40% margin.[327] Environmentalists and other liberal groups spearheaded the drive for repeal.[328] However, it is important to understand that they focused their campaign on the tax and bureaucratic increases that would flow from the statute.[329] The absence of a meaningful threshold requirement would mean that far more tax funds would go to attorneys' fees and administrative expenses than to compensate owners whose property had in fact been taken.

Procedural, as opposed to substantive, reform was emphasized in the 105th Congress. H.R. 992, the "Tucker Act Shuffle Relief Act of 1997," and H.R. 1534, the "Private Property Rights Implementation Act of 1997," were combined in a Senate bill, S. 2271, "Property Rights Implementation Act of 1998."[330] This bill was brought to the Senate floor by the Judiciary Committee, but failed to obtain the necessary sixty votes to end a filibuster against it.

The Senate bill would have ended the "Tucker Act Shuffle"[331] by giving both the U.S. District Courts and the Court of Federal Claims jurisdiction to hear "all claims relating to property rights in complaints against the Federal Government." It also would have eliminated the provision precluding the Court of Federal Claims from entertaining a suit which is also pending in another court.[332]

It also provided that a case would be ripe for federal court review as soon as a federal agency denied one meaningful application, the owner sought an administrative waiver or appeal, and the waiver or appeal was denied.[333] All appeals from the district court or Court of Federal Claims would be heard by the U.S. Court of Appeals for the Federal Circuit.[334] A landowner prevailing in court could be awarded attorneys' fees.[335]

In addition to these modifications relating to federal agency actions, the Senate bill would have sharply curtailed the ability of district judges to abstain from deciding challenges to state and local land use regulations brought solely under federal law.[336] Such a claim could take the form that a state or locality deprived the landowner of rights secured by a federal statute or by the Constitu-

326. Private Property Regulatory Fairness Act of 1995, ch. 98, 1995 Wash. Laws 360 (repealed 1995 by ballot referendum).

327. *See* Ed Carson, *Property Frights: Why Property Rights Initiatives are Losing at the Polls,* REASON, May 1996, at 27.

328. *Id.*

329. *Id.*

330. Citizen's Access to Justice Act, S. 2271 (1998).

331. *See supra* text accompanying note 220.

332. *See supra* text accompanying note 223.

333. *See* Citizen's Access to Justice Act, *supra* note 330.

334. *Id.*

335. *Id.*

336. *See supra* discussion of the background of these provisions accompanying note 319.

tion, including the Takings Clause of the Fifth Amendment.[337]

Property rights-protective legislation introduced in the 107th Congress includes the Constitutional Land Acquisition Act (H.R. 1592), which would restrict coercive acquisition policies targeting lands close to federal property, and the "Private Property Rights Act of 2001" (S. 1412), which would require federal agencies to conduct takings impact analyses and permit actions to be brought either in the district courts or in the Court of Federal Claims. Neither was reported out of committee.

3. Topics for Legislative Reform

The most important reform that a state legislature or the U.S. Congress might provide is to restrict police power to the prevention of harm and to restrict the power of eminent domain to property seized for legitimate public use. In large part, that would entail the provision of compensation to all property owners who were deprived by government of their rights to exclude others from their property, to dispose of it, or to use it, all subject to the rights of others to do the same. Without such a principled solution, only partial and improvised solutions are available. The removal of the ripeness and jurisdictional barriers to prompt and comprehensive determinations of individual rights are clearly important as well.

The adoption of the Florida Harris Act's "inordinate burden" standard[338] by Congress and state legislatures would also help, as would the wider adoption of a recent Arizona provision for the appointment of an "ombudsman for private property rights," to advance the interests of property owners in proceedings involving governmental action.[339]

The enthusiastic and informed actions of the private property rights movement are essential to conforming state and federal law to the principles of individual rights so important to the Framers.

337. *See* 42 U.S.C. § 1983 (2001).
338. FLA. STAT. ANN. § 70.001(6)(a) (West 2002).
339. ARIZ. REV. STAT. ANN. § 41-1311 (West 2001).