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**TESTIMONY OF STEVEN J. EAGLE  
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**HEARING BEFORE THE  
HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION**

**ON**

**STATE APPROACHES TO PROTECTING PROPERTY RIGHTS**

**SEPTEMBER 23, 1997**

Mr. Chairman, distinguished members of the subcommittee:

My name is Steven J. Eagle. I am a professor of law at George Mason University.

I testify today in my personal capacity as a teacher of property and constitutional law whose principal interest is the study of regulatory takings. I want to thank the subcommittee for giving me this opportunity to testify on what the Congress might learn from the states that have developed innovative legislation for the protection of private property rights.

The problem of defining property rights often has been called intractable and the problem of enforcing property rights is difficult. But I have confidence that well-advised congressional action can play an important role in vindicating individual rights. I hope that my testimony will assist the subcommittee in its efforts.

#### **RECOMMENDATIONS FOR SUBCOMMITTEE CONSIDERATION**

At the outset of my formal testimony, I think it would be useful for me to present those aspects of state approaches to protecting property rights that I think would be most germane to federal legislation and worthy of subcommittee consideration. The points made here are explained in the balance of my testimony.

- **Consider granting owners access to federal court through adoption of a Florida-style “ripeness decision” requirement**

The present federal “ripeness test” allows state agencies to play almost-endless games in order to avoid giving property owners a “final decision” upon which they could sue in federal court. Since ripeness in this context is a matter of prudence rather than of Constitutional import, Congress should provide affirmative access to the federal courts to owners who do not receive a timely and definitive statement of their rights from agencies that regulate their lands.

- **Consider establishing a fairer substantive standard for owner compensation along the lines of the Florida “inordinate burden” standard.**

This might be accomplished through ordinary legislation with respect to actions of federal agencies. It might be effectuated for actions of state agencies as well, through Congress’s power under Section 5 of the Fourteenth Amendment.

- **Consider establishing strong statutory requirements for takings impact assessments for federal actions along the lines of the Texas statute (or Executive Order 12,630).**

Property owners aggrieved by the absence or insufficiency of takings impact assessments should be granted the right to raise these claims in federal court. If they prove correct, they should benefit from a presumption that the agency could not meet its burden to demonstrate the necessity for the regulation or action.

- **Consider establishing a “pay or withdraw” requirement for federal actions that significantly affect property rights along the lines of the Texas statute.**

Federal agencies now have to pay compensation for the period during which regulations subsequently determined to violate the Takings Clause are in effect. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). However, the case allows for “reasonable delays,” and, as a practical matter, *First English* damages rarely are obtained. A statute that provides for an expedited review of a agency action, followed by a clear requirement that it quickly pay permanent compensation or withdraw an impermissible regulation, should pass muster under *First English* and will make almost all affected owners better off.

## **THE IMPORTANCE OF “PROPERTY”**

The protection of the individuals right to property has been a fundamental tenant of American jurisprudence. I have developed this theme at some length in my takings treatise and in my Senate testimony on property rights protection during the 104th Congress. Steven J. Eagle, *Regulatory Takings*, 39-74 (1996); Testimony, Oversight Hearing Before the Senate Committee on Environment and Public

Works, The Likely Effects of Pending Proposals to Legislatively Redefine the Constitutional Right to Just Compensation for Property Owners (H.R. 925, S. 605) July 12, 1995. [Available on Westlaw, 1995 WL 412477.] Here, I will simply note that the total deprivation of a person's property was deemed by the Supreme Court in *Lucas v. South Carolina Coastal Council* to be "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." 505 U.S. 1003, 1028 (1992). As the Court declared in *Lynch v. Household Finance Corp.*: "Property does not have rights. People have rights.... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." 405 U.S. 538, 552 (1972).

### **THE NATURE OF THE PROBLEM**

By now members of the Congress are well aware of the popular dissatisfaction resulting from arbitrary or Draconian regulations. During the 104th Congress the House of Representatives passed H.R. 925, the Private Property Protection Act of 1995. The Senate Judiciary Committee reported out S. 605, the Omnibus Property Rights Act of 1995. The House bill would have provided compensation where the regulatory diminution exceeded twenty percent of value and the Senate bill where it exceeded thirty-three percent of value. However, the House bill applied only to federal actions under the Clean Water Act, the Endangered Species Act, and provisions of the Food Security Act of 1985. The Senate bill was considerably broader in scope. While neither bill ultimately was enacted, the strong support that they received attests to a growing congressional responsiveness to the property rights issue. The resentment of citizens who have suffered large monetary losses due to the casual disregard of their property rights continues to impel protective legislation. Not infrequently, the fact that officials may commandeer property rights without paying for them leads to the institution of programs that are feasible only if their real costs to landowners are disregarded. Even where actions that result in the loss of property rights are perfectly justified, failure to compensate still is a moral and Constitutional wrong. "The 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.” *Armstrong v. United States*, 346 U.S. 40, 49 (1960).

Since these hearings concern mechanisms for property protection rather than the need for it, I will not rehearse the governmental actions that have awakened a large segment of the public to the need for reform. There is by now a considerable literature in this area. I will cite to a few sources containing references to others: Jonathan Adler, *Environmentalism at the Crossroads* (D.C.: Capital Research Center, 1995); James V. DeLong, *Property Matters* (N.Y.: The Free Press, 1997); Richard Pombo and Joseph Farah, *This Land is Our Land: How to End the War on Private Property* (N.Y.: St. Martins Press, 1996).

Likewise, I will not rehearse the line of United States Supreme Court cases that have led to the erosion of property rights protection. These include *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Court gave carte blanche to the new disciplines zoning and planning without careful qualification; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), where it combined “ad hoc” adjudication coupled with great deference towards governmental officials; and *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), where the Court deemed it reasonable for occasionally damp lands to be classified as navigable waters of the United States.

In fairness, at times judicial actions that seem excessive do accurately reflect legislative intent, or at least legislative aspirations as inserted in statutes. Such was true in the well-known Endangered Species Act “snail darter” case, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Chief Justice Burger noted that it might “seem curious” that the “survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million.” However, “the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as “incalculable.” *Id.* at 187-188. While Congress might intend “incalculable” benefits from statutes such as the ESA, it clearly is not prepared to levy “incalculable” taxes to pay for them. Courts then are relegated to the options of declaring parts of popular programs unconstitutional, or of

countenancing the diminution of property rights that agencies utilize to remain within authorized expenditure levels.

## **STATE TAKINGS LEGISLATION**

The failure of the courts to provide sufficient protection to private property rights has led to the introduction of protective legislation in almost every state. For an overview, see Nancie G. Marzulla, “State Private Property Rights Initiatives as a Response to ‘Environmental Takings,’” 46 *S. Cal. L. Rev.* 613 (1995).

As of earlier this year, at least seventeen states have passed property rights legislation. These are listed in the Appendix, and comprise Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. In addition, North Carolina has a very limited statute. It is somewhat difficult to generalize about the contents of these statutes, since there are many variations. My goal here is to divide the statutes into two general classifications and to highlight the features that are or are not desirable in federal legislation.

### **Takings Impact Assessment Statutes**

The most common type of enactment is the so-called “assessment” statute. These statutes require an assessment of whether the intended actions of state agencies constitute “takings,” as the courts now interpret that term. (All of the state statutes discussed in my testimony provide for prospective application only.) An agency determining that its actions would constitute a “taking” would either have to modify it to as to not run afoul of the Constitution or else provide compensation. These statutes have an inspiration—and a model.

The inspiration is the assessment mechanism established in the National Environmental Policy Act of 1969 (NEPA), 42 USCA § 4321, 4332 (2)(C). The Act imposes broad planning and assessment requirements on federal agencies. See 40 C.F.R. §1500.2. The model is the Reagan Administration’s Executive Order 12,630, entitled “Governmental Actions and Interference With Constitutionally

Protected Property Rights.” 53 F.R. 8859 (1988), reprinted in 5 U.S.C. §601. The Order requires that federal agencies consider evaluate their prospective actions in light of guidelines promulgated by the Attorney General based on current Supreme Court jurisprudence. While the sufficiency of the assessment under NEPA has proved outcome determinative in numerous cases, E. O. 12,630 did not provide for private rights of enforcement.

A recent article by Professor Mark Cordes includes a handy compilation of state property rights laws. Mark W. Cordes, “Leapfrogging the Constitution: The Rise of State Takings Legislation,” 24 *Ecology L. Q.* 187 (1990). Cordes groups the states into those in which the attorney general decides if agency rules are in compliance (Indiana and Delaware); those in which agencies may make their own informal determinations pursuant to attorney general guidelines (Idaho, Michigan, Tennessee); and those requiring agencies to prepare formal, written analysis that must include assessments of alternative actions that might have less impact on property rights (Kansas, Louisiana Montana, North Dakota, Texas, Utah, West Virginia). Of this last group of states, some require an estimate of the cost of compensation and the source of payment (Louisiana, Montana, North Dakota, West Virginia). Finally, Kansas, Utah, West Virginia, Louisiana, and North Dakota require that the assessment contain an affirmative justification for the restriction. *Id.* at 206-208.

The scope of these regulations also varies significantly. A few states limit the assessment process to select state agencies (West Virginia, Michigan). About half of the states impose their requirements on all state agencies, but not political subdivisions (Delaware, Kansas, Montana, North Dakota, Tennessee, Utah). Four states include both state agencies and all or most local governments (Washington, Idaho, Texas, Louisiana). *Id.* at 208.

Three states preclude judicial review of the assessments (Idaho, Kansas, Washington). 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). Other states have no explicit rule. *Id.* at 210.

## Compensation Statutes

Unlike the assessment statutes, the compensation statutes do provide relief to adversely affected landowners. These statutes preclude compensation where the proscribed use constituted a common law nuisance. Some proposed legislation would have required compensation if there had been any diminution in value due to the restriction. The best known example is Washington, where a measure was enacted but then overturned by statewide referendum.

Four states have enacted compensation statutes. Mississippi requires that just compensation be paid for regulation of agricultural and forest land causing a forty percent diminution in value. Miss. Code Ann. §§ 49-33-1 to -19 (Supp. 1996). Louisiana's similar law is triggered by a twenty-percent diminution. La. Rev. Stat. Ann. §§ 3:3601-02 (West Supp. 1997). Both statutes refer to the "affected" land or "part" of land.

### ***The Texas statute***

The Texas law, passed in 1995, is a combined assessment and compensation statute. Tex. Gov't Code Ann. § 2007.043(a). It provides for a written and comprehensive review of the proposed action and alternatives and for judicial relief should no analysis be undertaken. Most importantly, it provides that were there is a twenty-five percent diminution in value the agency either must pay or must withdraw the regulation or action. The statute exempts cities, defers applicability to counties until 1997, and also exempts "good faith" emergency responses to threats to life or property and responses to threats to the public safety or health that do not create unnecessary burdens. The statute defines a taking in terms of whether the action "affects an owner's private real property . . . 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 real property." 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. Some commentators suggest the latter approach. See Cordes, 24 *Ecology L. Q.* at 216-217; Jerome M. Organ, "Understanding State and Federal Property Rights Legislation," 48 *Okla. L. Rev.* 191, 214 (1995).

### ***The Florida statute***

Florida's "Bert J. Harris, Jr., Private Property Rights Protection Act" is the most innovative of the state property rights statutes. Fla. Stat. Ann. §§ 70.001 (West Supp. 1997). Its compensation trigger point is not a set percentage diminution, but rather the imposition of an "inordinate burden." § 70.001 (2).

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 or 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. § 70.001(3)(e).

This provision in some respects tracks takings tests propounded by the Supreme Court, particularly the "investment backed expectations" language in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). On the other hand, the "disproportionate share of a burden imposed for the good of the public" language is new. While its rhetorical genesis might be in the previously quoted "fairness and justice" declaration in *Armstrong v. United States*, 346 U.S. at 49, that formulation was a dictum. A strong case that the language of the Florida act is intended to be more than dicta can be made from its first section:

... 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. § 70.001 (1) (emphasis added).

The Florida statute also contains procedural provisions that are innovative and potentially very important. 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 that was inordinately burdened. If so, it would ascertain the percentage of compensation due from each governmental entity involved, if there is more than one. § 70.001 (6)(a). At this point a jury is empanelled to determine the amount of compensation owed.

... The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities. ... § 70.001 (6)(b).

Perhaps most important, the Florida act develops an innovative mandate that the agency issue to the owner a “ripeness decision.”

During the 180-day-notice period [prior to the owner being permitted to file an action], unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice ... shall issue a written ripeness decision identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a written ripeness decision during the 180-day-notice period shall be deemed to ripen the prior action of the governmental entity, and shall operate as a ripeness decision that has been rejected by the property owner. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies. § 70.001 (5)(a).

The ripeness decision also serves the same function as a settlement offer, providing a baseline against which the court could measure whether the limitation of the owner to uses provided in that decision would constitute an “inordinate burden.”

## HOW CONGRESS MIGHT BENEFIT FROM STATE APPROACHES TO PROTECTING PROPERTY RIGHTS

The treatment of property owners by the federal government and by the states has been deficient in two principal ways. The first is that property rights are defined too narrowly. The second is that those property rights that are recognized are insufficiently protected.

### Expanding the Definition of Property Rights

At present, private property rights are not protected in the manner that the Due Process clauses of the Fifth and Fourteenth Amendments and the Takings Clause of the Fifth Amendment in my opinion require. The vague, overly-deferential, and ad-hoc balancing test of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), still controls in most circumstances. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), requires compensation where there has been a complete deprivation of all economic enjoyment, but no governmental agency rationally would take and pay for 100% of value when it could take 95% and pay nothing. A case that might prove more effective in protecting property rights is *Dolan v. City of Tigard*, 512 U.S. 374 (1994). However, while the Court in *Dolan* does provide for a “rough proportionality” between governmental exactions on development and the burdens imposed on government by that development, the principle so far applies only to “judicative determinations.” *Id.* at 385. While Justice Clarence Thomas eloquently has raised the question of why an unreasonable exaction can constitute a taking if imposed by a city agency but not by a city council, the Court has been unwilling to consider the issue. See *Parking Association of Georgia v. City of Atlanta*, 115 S.Ct. 2268 (1995) (Thomas, J., dissenting from denial of certiorari).

In my view, the Congress has the right to expand the Constitutional protections for property rights beyond the Supreme Court’s current interpretation using its powers under Section 5 of the Fourteenth Amendment. The basis for this view is that state deprivations of property rights are essentially violative of due process, and also because the circumstances that recently led the Supreme Court to strike down an exercise of Congress’s power under Section 5 are not applicable here. *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). In the *Boerne* case, the Court found that the Religious Freedom Restoration Act “is so out of proportion to a supposed remedial or preventive object that it cannot be

understood as responsive to, or designed to prevent, unconstitutional behavior.” *Id.* at 2170. In the property rights area, however, a long and detailed history of deprivations does justify invocation of Congress’s remedial power to enforce the Fourteenth Amendment under Section 5. Furthermore, it was in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897), that the Court first required that a state entity compensate a landowner whose property it had taken. The Court noted that the Fourteenth Amendment Due Process Clause regulated the substance, as well as the form, of a taking. *Id.* at 234-35. Tellingly, the Court now interprets this case not as providing substantive due process, but rather as incorporating the bill of rights into the Fourteenth Amendment. See Ronald D. Rotunda, et al., *Treatise on Constitutional Law: Substance & Procedure* § 15.11 n.29 (1986, 1991). Whether the federal remedy for uncompensated takings by the states is limited to the Fifth Amendment Takings Clause as incorporated in the Fourteenth Amendment, or includes the Fourteenth Amendment Due Process Clause, is still hotly contested. See Justice Stevens’ argument favoring the Due Process approach in *Dolan v. City of Tigard*, 512 U.S. 374, 405-407 (1994) (Stevens, J., dissenting), and the sharp retort in the majority opinion written by Chief Justice Rehnquist. *Id.* at 383-384 & n. 5.

Congress might prefer a statutory alternative, which would be sufficient for takings arising from federal agency actions and could be imposed as a condition to the receipt of federal funds by state and local programs. The Florida Private Property Rights Protection Act’s “inordinate burden” standard is yet to be fleshed out. However, it clearly is intended to be broader than the Supreme Court’s current Fifth Amendment takings requirements. Congressional should give serious evaluation to implementing such a standard.

### Expanding Procedural Protections for Property Rights

As I have noted, I fault as too weak the Supreme Court’s ad hoc regulatory takings test enunciated by the late Justice William Brennan in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). However, to the extent that Justice Brennan did recognize property rights, he was vociferous in objecting to the artifices by which government thwarts them. Indeed, the term “regulatory taking” first appeared in a Supreme Court opinion in Justice Brennan’s dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981). There he asked the rhetorical question if “a po-

liceman must know the Constitution, then why not a planner?" *Id.* at 661 n.26. Why should not a government official with the power to rearrange the landscape of cities take individual rights as much into account as a prosecutor charged with ferreting out crime must take into account the constitutional rights of suspects?

### ***The "Ripeness Test" Deprives Owners of Recourse to Federal Court***

One sometimes-forgotten aspect of Justice Brennan's dissent in *San Diego Gas* is of particular importance in this subcommittee's work. Brennan attacked the fact that, even in those rare instances where the courts did find that a regulation constituted a compensable taking, government typically would not take "no" for an answer. "Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity." 450 U.S. at 655, n.22.

He quoted remarks and publications by planners showing how changes in regulation 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 the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C. 3d 110, [109 Cal. Rptr. 799, 514 P.2d 111 (1973)] 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.'" Longtin, "Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)," in 38B NIMLO *Municipal Law Review* 192-93 (1975) (emphasis in original). *Id.*

The most distressing aspect of this situation is that almost nothing has changed. One needs to look no further for confirmation than the Supreme Court's May decision in *Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997). Bernadine Suitum, an elderly woman in frail health, had purchased with her husband a subdivision lot near the Nevada shore of Lake Tahoe. Construction of their dream house had to be deferred because of his illness and death. When she finally was ready to

build, Mrs. Suitum's requested permission from the agency, which regulates land use in the region. It turned her application down, applying a general growth-control formula to determine that her property was ineligible for development. No special characteristic of her lot or plans was questioned. The agency did give her allegedly valuable "Transferable Development Rights," which could be sold by her to a developer in another area. Ownership of the TDRs would permit the developer to construct a larger building than otherwise permitted. The agency asserted that Mrs. Suitum's cause of action was not ripe until after she sold the TDRs. After eleven years of onerous and expensive administrative review and litigation, the Court has now declared that Mrs. Suitum's claim to the right to build her retirement home is ripe for adjudication. After a decade of battle, this widow has won the right to go to court to gain permission to build a house on her land in a subdivision of similar houses.

At every step of the way, the agency was able to use an effectively unlimited amount of taxpayer funds to delay the resolution of the claim of an elderly person of modest health and means.

This notion of "ripeness" has proved to be the greatest barrier to the protection of property rights. The Supreme Court's "ripeness doctrine" never was enunciated full-blown, but arose as the aggregate effect of a series of cases in which the Court, for one procedural reason or another, was reluctant to reach the merits of the dispute. See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); and *Agins v. Tiburon*, 447 U.S. 255 (1980). I emphasize here that we are not speaking of the normal requirements that a matter involves a case or controversy over which the court has jurisdiction or the normal prudential requirements. Rather, the Supreme Court has developed "a special ripeness doctrine applicable only to constitutional property rights claims." Timothy V. Kassouni, "The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights," 29 *Cal. W. L. Rev.* 1, 2 (1992).

The basic statement of the Supreme Court's special ripeness test for takings was enunciated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). The test has two prongs: finality of the governmental land use decision, and the amount of compensation (if

any) that the government agreed to pay. *Id.* at 194. While these tests sound simple, they are but the surface of an astoundingly difficult process.

### *The “Finality” Prong*

A succinct summary of the final decision requirement of Williamson County has been developed by one of the leading practitioners in this area of law, Michael Berger. He has categorized the cases into (at the moment) five branches this first prong:

(1) The property owner must apply for a specific use. *Agins v. City of Tiburon* 447 US 255 (1980).

(2) The property owner apparently must make more than one application. A “meaningful” application for use is required. *Penn Central Transp. Co. v. City of New York*, 438 US 104 (1978) and *MacDonald, Sommer & Frates v. Yolo County*, 477 US 340 (1986). Berger notes that in *MacDonald* the applicant initially requested that level of development and density that the general plan and the zoning plan called for.

(3) The owner must apply for a variance. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). The notion is that if government is not prepared to permit a use under a planning or zoning ordinance they will be amenable to waiving the ordinance.

(4) The owner must obtain a “final” determination of what the government will permit. *Williamson County, Id.*

As Berger notes, the professional skill of a planner is to devise an abstract and general scheme of development and to ascertain if the specific proposal of a landowner violates the plan. Planners are not trained in discerning the optimal specific use of any given parcel or the exact configuration of its buildings and other design elements. He adds: “Anyone who thinks that he can get a planning agency to tell him what he *can* do on his land has probably been abusing some controlled substance—or doesn’t understand the planning process. *Id.* at 58-159 (emphasis in original).

(5) The owner must suffer actual injury by application of the regulation. *Hodel v. Virginia Surface Mining & Reclamation Ass’n* 452 US 264 (1981), *et al.* See Michael Berger, *The Ripeness Mess*,

SB14 ALI-ABA 155 (1997).

These sub-prongs have themselves generated internal rules and tests. The complexity of the ripeness test is only hinted at here. See Gregory M. Stein, “Regulatory Takings and Ripeness in the Federal Courts,” 48 *Vand. L. Rev.* 1 (1995), and Steven J. Eagle, *Regulatory Takings*, 628-640 (1996).

#### *The “State Compensation” Prong*

The “state compensation” prong of *Williamson County* results from the particular requirements of the Takings Clause: “The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. ... [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied.” 473 U.S. at 194 & n.13 (emphasis in original). The government need not even tender payment. The opening of the doors of its courts is sufficient, since “all that is required is that a ‘reasonable, certain and adequate provision for obtaining compensation’” exist at the time of the taking. *Id.* at n.13. Until the landowner runs the panoply of substantive and procedural obstacles in state court on the compensation issue, he or she has no right to a federal court hearing on federal constitutional claims.

#### *Preclusion from Federal Court*

The *Williamson County* ripeness requirements do not permit an owner to assert his or her federal claim under the Takings Clause until that owner has bargained with local authorities and has sued for compensation in state court. However, the existence of this state litigation, at which the property owner might have asserted federal claims, could mean that the federal courts would abstain from hearing the case at all. If this is true, then a property owner loses access to federal court to assert a wrong under the U. S. Constitution because the federal courts have forced that person, to become an involuntary plaintiff in state court. The answer to whether this is the case might be “yes.” *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993), *Old Vail Partners v. County of Riverside*, 108 F.3d 338 (9th Cir. 1997) (unpublished disposition). It might be “no.” *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995). Or, then again, it might be “maybe.” *Von Kerssenbrock-Praschma v. Saunders*, \_\_\_ F.3d \_\_\_, 1997 WL 428880 (8th Cir. August 1, 1997).

It is vital that the Congress open the doors of the federal courts to property owners seeking to assert their federal rights. A bill introduced by a member of the Committee on the Judiciary, Mr. Gallergly, is intended to do just that. H.R. 1534.

Furthermore, where an owner claims that his or her property has been taken by the federal government, the Supreme Court in *Williamson County* deemed the availability of compensation to owners through suit under the Tucker Act sufficient. 473 U.S. at 194, 28 U.S.C. § 1491(a)(1) (vesting jurisdiction in the Court of Federal Claims respecting claims against the United States “founded either upon the Constitution, or any Act of Congress or any regulation...”). Later, in *Preseault v. Interstate Commerce Commission*, the Court required a denial of compensation under the Tucker Act as a requisite to a challenge to the validity of the underlying regulation as well as to the alleged taking based upon it. 494 U.S. 1 (1990). This state of events again brings to mind the inequity whereby aggrieved owners must seek money damages in the Court of Federal Claims, but injunctive or declaratory relief in the U.S. District Court. Mr. Smith of Texas has pending in the Committee on the Judiciary a bill “to end the Tucker Act shuffle” and to allow owners to seek full relief in the Court of Federal Claims or in the District Courts. H.R. 992. This type of relief is sorely needed.

## **THE EXPENSE OF REFORM**

There will be a cost to the enhanced protection of property rights. It would take the form of a mixture of increased compensation awards to property owners and the loss of governmental actions not feasible if compensation need be paid. However, there would be a gain to the American people to the extent that actions, which would be wasteful if the costs to property owners are taken into account, would be averted. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), was the first case in which the Supreme Court found that a regulation might constitute a compensable taking. Justice Oliver Wendell Holmes declared: “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.” *Id.* at 416.

Similarly, the Congress might want to augment the Supreme Court's takings compensation formula. "Just compensation" almost never is full compensation, since the landowner almost invariably loses more than the government takes. An succinct explanation is contained in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988):

Compensation in the constitutional sense is ... not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners are "intramarginal," meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not "for sale"). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it "personal") value that they obtain from the property, but this limited confiscation is permitted provided the taking is for a public use.

In addition, there is no requirement for compensation for the often-heavy relocation costs and incidental damages that individuals and businesses often incur when they are forced to move to accommodate governmental programs. Congress should consider providing compensation for at least some of these costs as a general rule. See Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B. C. L. Rev. 283 (1991); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829 890-892 (1989).

#### **APPENDIX: STATES ADOPTING PROPERTY RIGHTS LEGISLATION**

See Del. Code Ann. tit. 29, § 605 (Supp. 1996); Fla. Stat. Ann. § 70.001 (West Supp. 1997); Idaho Code §§ 67-8001 to 67-8004 (1995); Ind. Code Ann. §§ 4-22-2-31 to 4-22-2-32 (West Supp. 1996); Kan. Stat. Ann. §§ 77-701 to 77-707 (Supp. 1995); La. Rev. Stat. Ann. § 3:2609,; 3622.1 (West Supp. 1997); 1996 Mich. Legis. Serv. 101 (West); Miss. Code Ann. §§ 49-33-1 to 49-33-19 (Supp. 1996); Mo. Ann. Stat. § 536.017 (West Supp. 1996); Mont. Code Ann. §§ 2-10-101 to 2-10-105 (1995); N.D. Cent. Code § 28-32-02.5 (Supp. 1995); Tenn. Code Ann. §§ 12-1-201 to 12- 1-206 (Supp. 1996); Tex. Gov't Code Ann. §§ 2007.041 to .045 (West 1996);

Utah Code Ann. §§ 63-90-1 to 63-90-4 (Supp. 1996); Wash. Rev. Code § 36.70A.370 (West Supp. 1997); W. Va. Code §§ 22-1A-1 to 22-1A-3 (1994); Wyo. Stat. Ann. §§ 9-5-301 to 9-5-305 (Michie 1995). One other state, North Carolina, has passed an extremely limited takings statute. Source: Mark W. Cordes, "Leapfrogging the Constitution: The Rise of State Takings Legislation, 24 Ecology L. Q. 187, 190 n. 16 (1997).