TESTIMONY OF DANIEL R. MANDELKER* ON H.R. 2372

Before the House Judiciary Committee Subcommittee on the Constitution September 15, 1999 *Howard A. Stamper Professor of Law, Washington University School of Law, St. Louis, Missouri. Professor Mandelker received no compensation to assist NAHB's effort to support the Bill, although his travel expenses were met. He would like to acknowledge the research assistance of Duane Desiderio in the preparation of this testimony.

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I am Daniel R. Mandelker, the Stamper Professor of Law at the University of Washington in St. Louis, Missouri. My area of expertise is the law of zoning and land use planning. I am the author of numerous articles in this area and have written 16 books on the topic. A copy of my curriculum vitae is attached. I am pleased to submit these comments on H.R. 2372, the Private Property Rights Implementation Act of 1999. I am here on my own behalf to support the bill. In offering this testimony I do not represent any interest group nor have I received any compensation, but the National Association of Home Builders has agreed to reimburse me for my travel and lodging expenses so I could appear here today. To prepare my submission I have reviewed, among other materials, the letter dated August 15, 1997, from Andrew Fois, Assistant Attorney General, United States Department of Justice, to Senator Patrick Leahy raising many policy concerns about H.R. 2372. I have also read the letter responding to the Department of Justice's criticisms, dated September 5, 1997, from John J. Delaney and Duane J. Desiderio of Linowes and Blocher LLP, to Mr. Fois. I have also read Messrs. Delaney's and Desiderio's article in Spring 1999 edition of The Urban Lawyer ("Who will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse"). Some of my testimony relies upon the Linowes and Blocher letter and the article, with which I concur. My written testimony has two goals. First, I will explain why, in my opinion, H.R. 2372 is necessary to afford aggrieved landowners access to the federal courts when they suffer from unconstitutional government conduct. Second, I intend to explain what H.R. 2372 does, and does not, accomplish.

I. THE NEED FOR H.R. 2372SEPThe Fifth Amendment Restricts the "Taking" of Private Property. The Fifth Amendment prohibits the federal government from "taking" private property for public use unless the affected property owner is paid "just compensation." The restrictions of the takings clause apply to state and local governments through the Fourteenth Amendment. The Constitution thus operates under the presumption that all levels of government can regulate private property for public purposes--such as zoning, environmental preservation, or any other reason to protect the safety, health and welfare of the community. However, in the words of Justice Holmes, sometimes government regulation for a public purpose goes "too far" and causes a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Holmes, J.) For this

reason, one of the "principal purposes" of the takings clause is to prevent 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.'" Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). Government regulation effects a taking, and requires the payment of just compensation, if it does not substantially advance a legitimate state interest or denies an owner economically viable use of his or her land. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). Ripeness Rules and the Fifth Amendment. Before a property owner can bring a takings claim against a government body, he must satisfy certain rules established by the Supreme Court to ensure the case is "ripe." In Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), the Court announced a two-part ripeness test before a court can decide, on the merits, whether a regulation "goes too far" so as to require the payment of compensation. First, a land use agency must deliver a final decision "regarding how [a landowner] will be allowed to develop its property," that represents "a definitive position à inflict[ing] an actual, concrete injury" upon the property owner. 473 U.S. at 191, 192. Second, a property owner must exhaust any compensation remedies under state law before litigating its federal constitutional claims in federal court. Id. at 194-95. In applying this two-part test, the Court has found takings claims unripe where a property owner did not: (1) submit initial development plans for approval in the first instance;(1) (2) submit to a process to obtain a permit that may allow development;(2) (3) apply for a variance or waiver from applicable land use regulations;(3) or (4) provide alternate or scaled-down development plans compared to an initial proposal.(4) I agree that certain rules are necessary to determine when a takings claim is ripe for adjudication. However, the lower courts' applications of the Supreme Court's precedents are riddled with obfuscation and inconsistency. Indeed, "[t]he lack of uniformity among the [federal] circuits in dealing with zoning casesàis remarkable." Pearson v. City of Grand Blanc, 961 F.2d 1211, 1217 (6th Cir. 1992) (substantive due process land use case). The ripeness opinions are in such disarray that federal judges and landowners need some objective criteria so that all parties know, up front, the point at which a government land use decision becomes final. I believe that H.R. 2372 goes a long way toward achieving that objective in a manner that is fair to both property owners and government officials. The Lower Federal Courts' Rejection of their Duty to Resolve Cases Concerning Constitutionally-Protected Property Rights. In my opinion, 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. The circumstance is all-too-frequent that federal judges greet land use matters with an air of condescension--even though private property rights protected by the Fifth and Fourteenth Amendments are at stake. When lower courts are asked to decide whether property is taken by final agency action without compensation, I disagree with the Ninth Circuit's assessment that they sit as "the Grand Mufti of local zoning boards." Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989). I find it unconscionable that federal judges are predisposed to dismiss cases raising deprivations of constitutionally-protected property rights as "garden-variety zoning dispute[s] dressed up in the trappings of constitutional law." Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988). This mind-set is causing a chilling effect to dissuade aggrieved citizens from seeking judicial redress, even though they have suffered at the hand of unconstitutional government conduct. One commentator notes that judges avoided the merits in over 94% of all takings cases litigated between 1983-1988. See 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 & Envt'l L. 91, 92, n. 3 (1994). The case survey included by Messrs. Delaney and Desiderio in their article (see 31 The Urban Lawyer at 202-231 (Spring 1999)) has been provided to this Subcommittee. I have reviewed this survey, and note that 83% of the takings claims initially raised in the United States district courts, from 1990-1998, never reached the merits. For those property owners who commenced land use litigation in the federal trial courts and brought appeals therefrom during the same period, more than 64% saw their takings claims dismissed. Moreover, the survey notes that of the small portion of appellate cases where takings claims were found ripe and the merits reached, "it took property owners, on the average, 9.6 years to have an appellate court reach its determination. These landowners thus endured almost a decade of negotiation and litigation to obtain a judicial determination that their takings arguments could be heard on the merits." 31 The Urban Lawyer at 205 (emphasis in orginal). The lower courts' condescension against constitutional land use matters "forget[s] 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." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Holmes, J.) H.R. 2372 would prevent federal judges from their persistent efforts to sacrifice the takings clause on the ripeness altar. The bill would curtail the nearly wholesale abdication of federal jurisdiction in lawsuits where issues are raised concerning the constitutional validity of land use regulation.

Abuses of the Ripeness Doctrine. Land use agencies across the country have applied the ripeness requirement to frustrate as-applied takings claims in federal court. I was of counsel on an amicus curiae brief submitted by the American Planning Association (APA) in a ripeness takings case decided in the 1996-1997 term,(5) Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997). The brief supported the land use agency in this matter, but it also recognized that current ripeness rules: invite[ ] local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of [the ripeness requirement]à. Brief Amicus Curiae of the American Planning Association in Support of Respondent, Suitum v. Tahoe Regional Planning Agency, No. 96-243, at 13 ("APA Brief"). Examples of these sentiments, in the reported case law alone, are legion. The problem is especially serious because property owners may have neither the means nor stomach to litigate ripeness issues indefinitely. See Stein, Regulatory Takings and Ripeness in Federal Courts, 48 Vand. L. Rev. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small"). Consider Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir.), on remand, 95 F.3d 1422 (9th Cir.), aff'd, 119 S.Ct. 1624 (1999). In 1981, the property owners submitted a subdivision proposal to build 344 residential units. The plan was rejected, and city planners informed that a plan for 264 units would be reviewed favorably. The owners then submitted a plan for 264 units; city planners rejected it, and informed that a plan for 224 units would be reviewed favorably. The owners then submitted a plan for 224 units; city planners rejected it, and informed that a plan for 190 units would be reviewed favorably. The owners then submitted a plan for 190 units; city planners rejected it, and the owners appealed to the city council. The city council found the plan "conceptually satisfactory," and granted a conditional 18-month use permit to commence

construction for the project. Subsequently, the developer worked with planning board staff to meet the city council's conditions for the 190-unit development. Staff recommended approval of the site plan, but the planning board overrode staff's recommendation and issued a denial. The property owners then appealed this decision to the city council, which this time denied the site plan for 190 units. Meanwhile, a sewer moratorium was imposed, a request to extend the special use permit was rejected, and the permit expired. The local officials thus expected the developer to start from square one. Following this Kafkaesque process, the federal district court dismissed a takings claim for lack of ripeness, but the appellate court then reversed. See 920 F.2d at 1502-1506; 119 S.Ct. at 1632. After 17 years of negotiation and litigation--and because the municipality permitted absolutely no use of the property at issue--the Supreme Court finally put an end to this case by upholding the lower court's award of just compensation to the land owner. It is significant that the Supreme Court recognized that takings plaintiffs have a federal constitutional right under the Seventh Amendment to a federal jury trial in a 5th Amendment property rights cases. 119 S.Ct. at 1637-1645. Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109 (E.D. Pa. 1993), also merits discussion. There, after a local board rejected a development plan, the property owner purchased buffer lands so the applicable zoning could accommodate the proposed development. Subsequently, the county council met clandestinely in a "behind-closed-doors" executive session to re-zone the property and repeal the earlier provisions of the zoning ordinance that would have permitted the development. Nonetheless, the property owner was not able to get the federal court to address the merits of his federal constitutional grievances. Even though the property owner never had the opportunity to participate in the secret session, and even though the re-zoning was done for the specific purpose of preventing the development at issue, the court said the claims were unripe because the property owner never challenged the re-zoning's validity. A California state case typifies the situation that landowners commonly confront when dealing with local officials. In Healing v. California Coastal Comm'n, 27 Cal Rptr. 758 (Ct. App. 1994), a state agency denied a permit for constructing a one-story, three-bedroom home, where it had not received a recommendation from a non-existent board as to whether the property should be restricted from development under a non-existent program for acquisition and set-asides of lots in the Santa Monica mountains. When the property owner sought compensation for a taking, the state argued that the claim was unripe. The court decided that the claim was, in fact, ripe, and acknowledged the abuses of the land use process inflicted upon the property owner: It is in the nature of our work that we see many virtuoso performances in the theaters of bureaucracy, but we confess a sort of perverse admiration for the Commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgmentà.To state the Coastal Commission's position is to demonstrate its absurdity. Id. at 764. It is my opinion that, based on the nature of the takings clause, property owners must first pursue some negotiation with land use officials to determine how far a regulation goes. However, I do not believe that ripeness barriers should be arbitrary, insurmountable or labyrinthine. I support H.R. 2372 because it would facilitate the negotiation process, while providing a more precise and just basis for determining when federal courts have jurisdiction in takings cases.

HOW THE BILL DEALS WITH THE "RIPENESS MESS." I suggest that H.R. 2372 goes a long way to remedy the "ripeness mess" that currently precludes landowners from asserting constitutional takings claims in federal court. See Michael M. Berger, The Ripeness Mess in

Federal Courts, or How the Supreme Court Converted Federal Judges into Fruit Peddlers, Institute on Planning, Zoning and Eminent Domain 7-1 (1991). Before I discuss specific provisions of the bill, I take this opportunity to bring some larger issues to the Subcommittee's attention. A. No Change in Substantive Law. H.R. 2372's purpose is to establish avenues of access to federal courts in constitutional land use cases. It does not alter the substantive law of Fifth Amendment takings or any other constitutional provision. For example, some prior bills have specified that, if a land use regulation causes a reduction in property values by a certain arbitrary percentage (i.e., 25%, 30%), then the landowner must be compensated. H.R. 2372 does nothing of this sort; it proposes strictly procedural reforms. The bill clarifies those circumstances in which property owners can obtain access to federal courts, so judges can perform their sworn task to interpret the Constitution and decide whether a land use regulation is a taking of property. To make H.R. 2372's procedural remedy clear, the bill does not amend 42 U.S.C. º 1983--the statute creating a cause of action to remedy the unconstitutional conduct of those acting under "color of State law." Rather, H.R. 2372 proposes to amend the statutes conferring jurisdiction in the United States district courts and the Court of Federal Claims, for Section 1983 and takings claims against municipalities and the federal government. B. Solely Federal Claims. The court access benefits conferred by H.R. 2372 would apply only when a landowner raises a federal claim in federal court. It would not cover situations where a property owner decides to litigate a state law claim concurrently with a federal one. Under this latter scenario, federal judges may utilize their traditional discretion to abstain from jurisdiction. C. No Change in Sovereign Immunity Case Law. H.R. 2372 does not tamper with Section 1983 precedent regarding sovereign immunity. The Supreme Court has established that, while Section 1983 contemplates law suits against those acting "under color of State law," the Eleventh Amendment renders state officials, acting in their official capacities, immune from suit in federal court. See Scheuer v. Rhodes, 416 U.S. 232 (1974). However, municipalities and counties are not immune from suit under Section 1983. Owen v. City of Independence, 445 U.S. 622, 636-37 (1980); Monell v. Department of Social Servs., 436 U.S. 658-69 (1978). Consequently, H.R. 2372's procedural reforms would apply to landowners that bring suit against local governments for unconstitutional takings. In short, the bill does not alter the sovereign immunity law that has developed in the Section 1983 cases. D. The Option of Court Access. In essence, the benefit of H.R. 2372 to property owners and to government agencies is simply to preserve a meaningful option of court access that can test the scope of the takings clause. Under the bill, when a landowner receives a final decision from a land use agency and pursues a waiver and/or appeal therefrom, she can either: (1) further negotiate with local officials or (2) sue. Based on the reality of the regulatory process, in my opinion the vast majority of landowners will opt for further negotiation and pursue less intensive land uses compared to their initial development applications. Developers do not hastily select litigation as their best opportunity to achieve the maximum profit expectations in their land. They would much rather spend funds to build their projects than pay legal fees. If a property owner decides to litigate, H.R. 2372 by no means ensures that a taking will be found and compensation awarded; a plaintiff would still need to prove on the merits that a taking has occurred. This is a heavy burden indeed, and would likely require proof that the land use agency has denied all economically viable uses of the parcel at issue. See, e.g, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Considering this difficult evidentiary burden, it is doubtful that landowners will rashly opt to pursue litigation over further negotiation. Nonetheless, when a land use regulation may not permit the economically viable use of land, or when local decision-making procedures may require the submission of repetitive proposals, I

submit that the jurisdictional requirements for resolving constitutional claims must be clarified. This is H.R. 2372's overriding purpose. E. No Fear of Crowding Federal Dockets. I understand that concerns have been raised regarding the potential for H.R. 2372 to overload the federal courts with takings cases. I believe these fears are unfounded for several reasons. First, land use litigation already assumes an active position on the federal docket; however, the parties and the courts typically remain preoccupied with jurisdictional issues like ripeness. By specifying when a takings claim is ripe, H.R. 2372 could result in more efficient use of judicial resources, allowing litigants and judges to devote their attention to the merits. Second, I do not think the bill would cause a rush of property owners into the federal court. Quite simply, the overwhelming disincentive to litigation is cost. This is especially true in the takings arena, where it is so hard to win on the merits. The primary objective of landowners, particularly those in the development business, is to realize their projects and make a profit. They will be far more inclined to negotiate with zoning officials rather than antagonize them with needless litigation. Third, I am not convinced that groundless prophecies of overwhelmed federal judges should excuse a citizen's right to litigate meritorious federal claims in federal court. Landowners should be secure in their right of access to a fair and impartial federal tribunal when their property has been taken in violation of the Fifth Amendment. F. Clarify Ripeness Requirements for Other Constitutional Claims in Land Use Cases. In land use cases concerning constitutional rights, property owners often allege deprivations of procedural due process, substantive due process and equal protection, in addition to claims of taking without just compensation. The lower federal courts have utterly failed to agree on the ripeness requirements for claims other than a taking. Some of the federal courts proclaim that a ripe due process or equal protection claim is governed by the same two-part test from Williamson County. See, e.g., River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th Cir. 1994); Acierno v. Mitchell, 6 F.3d 970 (3d Cir. 1993). Other judges, however, rule that due process and equal protection claims are not subject to the ripeness requirement for a taking. See, e.g., Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990); Oberndorf v. City and County of Denver, 900 F.2d 1434 (10th Cir.), cert. denied, 498 U.S. 485 (1990). Indeed, even the same circuit, in the same year, reached varying conclusions on the issue. Compare Harris v. County of Riverside, 904 F.2d 497, 500-501 (9th Cir. 1990) (procedural due process claim does not require the same ripeness requirements as a takings claim) with Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 507 (9th Cir. 1990) ("[a]ll as-applied challenges to regulatory takings, whether based on the just compensation clause, the due process clause, or the equal protection clause, possess the same ripeness requirementà."). I do not believe that ripeness standards should vary based on the type of constitutional claim a plaintiff makes in a land use controversy. I support H.R. 2372 because it would level the playing field for all constitutional claims asserted by property owners. The bill provides courts and litigants with the certainty that the same ripeness requirements apply to claims arising under due process, equal protection, and takings clauses.

H.R. 2372 SECTION 2: SECTION 1983 ACTIONS A. In General. Section 2 of H.R. 2372 would amend 28 U.S.C. º 1343 subsection (a)(3), the provision conferring original jurisdiction in the United States district courts over actions under Section 1983. B. Abstention. Ripeness is not the only problem litigants face when they bring land use cases in federal courts. The opportunity for judges to abstain from hearing cases that raise state law questions creates additional barriers to federal jurisdiction. Federal courts may abstain from hearing a land use case when state law is not clear (Pullman abstention), when a state judicial proceeding is pending (Younger abstention),

and when complex issues in state regulatory programs require interpretation (Burford abstention). I am aware that some opponents have criticized the bill because they construe its abstention provisions as applying in any Section 1983 case, regardless of the alleged constitutional violation. However, this is not the intent of H.R. 2372. I believe that the Bill's text is clear when it states (my emphasis is underscored): "(c) Whenever a district court exercises jurisdiction under subsection (a) in an action where the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court where no claim of a violation of a State law, right, or privilege is allegedà." Abstention of jurisdiction can significantly delay the resolution of constitutional claims by federal courts. See, e.g., Laurence Tribe, American Constitutional Law, º 3-29 at 201 (2d ed. 1988) (abstention doctrine "imposes substantial costs [on litigants] through the delay of federal constitutional issues common where a definitive state court resolution of the state issues in the case must be obtained"). The Supreme Court has declared that "'abstention from the exercise of federal jurisdiction is the exception, not the rule.'" Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984) (citation omitted). Unfortunately, this rule has been turned on its head in the takings arena. Federal courts routinely dodge the merits of Fifth Amendment land use cases, and have invoked abstention doctrine to achieve this result. I understand that the Department of Justice fears that H.R. 2372 would "radically shift" authority over local issues from state and local courts to federal courts because it will modify abstention rules. I disagree. Justice O'Connor recently wrote that the Supreme Court "has frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2045-46 (1997) (O'Connor, J, concurring). H.R. 2372 comports with this principle, and I do not believe it would work an injustice on abstention doctrine. The bill would simply ensure that aggrieved property owners, raising solely federal claims, have the right to have those claims resolved in federal court. Should a landowner decide to allege a claim of state constitutional, statutory, or common law pendent to the federal claim, H.R. 2372 would not apply. In my opinion, the bill is carefully drafted to accommodate a property owner's right to access the federal courts with the historic discretion of federal judges to certify questions of state law, and with the basic constitutional precept recognizing state sovereignty. The following tabulation best portrays the situations in which H.R. 2372 would (and would not) apply, and depicts the bill's efforts to preserve a state court's right to resolve issues of state or local law:

NATURE OF LITIGATIONAPPLICATION OF H.R. 2372 Property owner only alleges federal constitutional violations in federal court land use action.H.R. 2372 would apply. State law claim alleged pendent to federal claim in federal court.H.R.2372 would not apply. Federal judge has traditional discretion to accept or reject pendent state claim. Property owner or public agency brings parallel proceeding in state court related to a simultaneous land use action in federal court (Younger abstention).H.R. 2372 would not apply. If federal judge exercises traditional discretion and abstains, all claims must be litigated in state court. Federal claim rests on an unsettled issue of state law (Pullman abstention).H.R. 2372 would allow the federal judge to certify the question for state court interpretation. Federal claim requires interpretation of complex state regulatory program (Burford abstention). H.R. 2372 would allow the federal judge to certify the question for state court interpretation.

The three branches of abstention relevant to H.R. 2372 are discussed below in more detail. (1) Younger Abstention. H.R. 2372 avoids the problem of so-called Younger abstention. Under this branch of abstention, a federal court has the discretion to abstain from exercising its jurisdiction over federal claims (or relinquishing it altogether and dismissing the federal suit), where parallel state proceedings would apparently provide an adequate forum for airing the constitutional claims. See Younger v. Harris, 401 U.S. 37 (1971). While state courts have concurrent jurisdiction to decide Section 1983 cases, see Felder v. Casey, 487 U.S. 131, 139 (1988), my understanding is that Younger abstention is beyond H.R. 2372's scope because the bill does not contemplate institution of a parallel state proceeding. Nevertheless, the bill makes this clear as follows (my emphasis is underscored): "(c) Whenever a district court exercises jurisdiction under subsection (a) in an action where the operative facts concern the uses of real property, it shall not abstain from exercising or relinquishing its jurisdiction to a State court in an action where no claim of a violation of a State law, right, or privileged is alleged, if a parallel proceeding in State court arising out of the same operative facts as the district court proceeding is not pending." (2) Pullman Abstention. Federal courts sometimes abstain jurisdiction even in situations where a plaintiff asserts only federal claims. Under the doctrine of Pullman abstention, when a "federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975) (construing Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)). Federal courts have used Pullman abstention to avoid deciding land use controversies wherein property owners allege infringements of the United States Constitution. See, e.g., Pearl Inv. Co. v. San Francisco, 774 F.2d 1460, 1463-64 (9th Cir. 1986), cert. denied, 476 U.S. 1170 (1986); Bob's Home Serv., Inc. v. Warren County, 755 F.2d 625, 628 (8th Cir. 1985). (6) (3) Burford Abstention. Another branch of abstention calls for federal courts to avoid construing "complex" state regulatory programs. See Burford v. Sun Oil Co., 319 U.S. 315 (1943). Federal judges have sometimes invoked Burford abstention to dodge the merits of land use matters, even though constitutionally-protected property rights are at stake. See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 945 F.2d 760, 764 (4th Cir 1991), cert. denied, 503 U.S. 937 (1992); 2BD Ltd. Partnership v. County of Commissioners for Queen Anne's County, 896 F.Supp. 518 (D. Md. 1995). C. The Supreme Court's College of Surgeons Opinion. With regard to the federal courts' obligation to invoke their jurisdiction over takings claims and refrain from abstention, the Subcommittee should consider the Supreme Court's decision in City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), and the Seventh Circuit's opinion on remand, 153 F.3d 356 (7th Cir. 1998). In College of Surgeons, property owners filed both state law and federal takings claims against local officials over their application of a historic preservation ordinance in a manner that prohibited building demolition. The plaintiffs initially brought suit in state court; the municipal defendants then sought to remove the case to federal court, arguing that the federal court had original jurisdiction over the takings claim and supplemental jurisdiction over the state law claims.(7) Plaintiffs argued that the federal courts could not hear the case, but the Supreme Court disagreed. In her majority opinion Justice O'Connor concluded, "a case containing claims that local administrative action violates federal law à is within the jurisdiction of federal district courts."(8) Moreover, Justice O'Connor sanctioned the ability of federal judges to delve into the underlying factual record that supports a particular local land use decision. The Court recognized that there is nothing in the United States

Constitution or any federal statute to "suggest[ ] that district courts are without supplemental jurisdiction over claims seeking à review of local administrative determinations" based on a factual record.(9) Indeed, the vast majority of the Justices expressly rejected the suggestion that "federal courts can never review local administrative decisions."(10) In short, it is wholly appropriate for federal judges to review the conduct of local officials and ensure adherence to Fifth Amendment principles. Delaney and Desiderio, 31 The Urban Lawyer at 199. Thus, the Supreme Court ruled that a case containing claims that local administrative action violate federal law, along with state law claims for on-the-record review of the local agency's administrative findings, can be removed to federal court by the municipality. The basis for such removal is that the federal and state law claims could have been brought in federal court to begin with. If a municipality can remove federal (and supplemental state) claims to federal court, then necessarily takings plaintiffs must be allowed to bring their claims in federal court from the start. The Supreme Court then remanded for the lower court to determine if abstention was appropriate. The Seventh Circuit refused to abstain under any appropriate doctrine: The Seventh Circuit recognized that "the doctrine of abstention is 'an extraordinary remedy and narrow exception to the duty of a District Court to adjudicate a controversy properly before it' and may be invoked only in those 'exceptional circumstances' in which surrendering jurisdiction 'would clearly serve an important countervailing interest.' "(11) While the ordinance at issue "reflect[ed] important local policy concerns regarding the development and preservation of à real estate,"(12) the Seventh Circuit easily found that the matter before it could be decided on the merits. Delaney and Desiderio, 31 The Urban Lawyer at 200. To conclude the Seventh Circuit's treatment of City of Chicago on remand confirms H.R. 2372's "fundamental proposition that federal courts have an obligation to hear federal takings cases premised on the conduct of local officials." Id. D. Certification of State Law Question. I favor the Bill's mechanism through which a federal court can certify an unsettled but significant question of state law to the highest appellate court of the pertinent state to assist in resolving whether a land use agency has violated the federal Constitution. Professor Tribe recognizes: Delay can be substantially diminished under a promising alternative to Pullman abstention, allowing the direct submission of state law question to an authoritative state tribunal, thereby removing the need to file a separate state action and speeding ultimate disposition of the case; a significant number of states have passed statutes allowing such certification. See generally Note, Certification Statutes: Engineering a Solution to Pullman Abstention Delay, 59 Notre Dame L. Rev. 1339 (1985); see also Field, The Abstention Doctrine Today, 125 U.Pa.L. Rev. 590, 605-09 (1977). Tribe, supra, º 3-30 at 201 n. 18. The bill's certification provision thus respects local decisionmaking processes in particular and state sovereignty in general, insofar as state courts are provided the opportunity to interpret matters of state and local law. While certification can expedite resolution of a Section 1983 suit, I submit that the mechanism should not be blithely invoked to delay consideration of the merits. H.R. 2372 wisely proposes that a federal district court should not certify a question unless the state law issue will "significantly affect the merits of the injured party's federal claim." The apparent intent here is that only unsettled state questions essential for resolving the federal Section 1983 claim are susceptible for certification. The second check on certification is that the state law question must be patently unclear. The bill's text tracks the Supreme Court's sentiments in Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236-37 (1984), and thus states that certification should not be permitted unless the state law question is "patently unclear." H.R. 2372 would have no effect on state law certification procedures already in existence, nor would it create any certification mechanism. Accordingly, questions could not be certified to the highest

appellate courts in those states that lack a certification procedure.(13) However, even in these jurisdictions, federal courts hearing diversity cases decide state law issues all of the time, so I do not believe that H.R. 2372 would undermine the authority of local officials or impair principles of federalism. For example, federal courts in states without formal certification procedures routinely interpret local statutes and ordinances to assess their constitutionality on the merits.(14) In any event, federal courts in these states are well-qualified to decide the ultimate issue of whether local officials have denied property owners federal constitutional rights. E. Ripeness. As noted earlier (supra pp. 2-9), the ripeness rules spawned by Williamson County raise significant impediments to federal court resolution of takings claims on the merits. To reiterate, Williamson County requires two ripening elements for a takings claim: (1) a final agency decision on the application of the regulations at issue to the particular land in question; and (2) exhaustion of state court compensation remedies. H.R. 2372 addresses both prongs of Williamson County. (1) Final Decision Prong. Proposed new Section 1343(e) provides that, when a claimant suffers an "actual and concrete injury" from a "definitive decision regarding the extent of permissible uses on the property that has allegedly been infringed or taken," the Fifth Amendment claim would be ripe. Williamson County is the patent inspiration for the proposed text. According to the Supreme Court, a takings challenge ripens when "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." 473 U.S. at 193. The bill further amplifies the "final decision" requirement in three respects, as discussed below: (a) on-site uses; (b) one meaningful application; and (c) futility. (a) On-Site Uses. The first clarification, in proposed new Section 1343(e)(2)(A), states that a "final decision" exists when a person acting under color of State law "expresses a definitive decision regarding the extent of permissible uses on the property...without regard to any uses that may be permitted elsewhere" (emphasis supplied). I believe this language would simply confirm the recent holding in Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997). The Court unanimously ruled that a property owner did not need to sell her transferable development rights ("TDRs") to yield a ripe takings claim, but never reached the merits of whether a taking had, in fact, occurred. TDRs, by definition, contemplate property uses elsewhere, apart from the subject parcel; they are rights that the owner of the regulated parcel can sell to another landowner to permit more intense development, that would not otherwise be allowed, on the property receiving the TDRs. For ripeness purposes only, H.R. 2372's intent is to make clear that a final decision regarding land uses on the property at issue is all that is required, without reference to development on other lands. The "on the property" language does not address the current debate in federal courts regarding whether, as a substantive matter, the relevant "denominator" in the takings fraction is the parcel as a whole or the portion of the tract burdened by land use regulation.(15) (b) One Meaningful Application. Proposed new Section 1343(e)(2)(B) further clarifies the "final decision" requirement. In MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986), a case involving denial of a single subdivision application, the Supreme Court decided that a takings claim is unripe without a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." Following this pronouncement, property owners aggrieved by government action have been plagued by the following question: How many proposals or applications must they submit to a land use body before a takings claim ripens? For example, in Southview Assocs. v. Bongartz, 980 F.2d 84, 92 (2d Cir. 1992), cert. denied, 507 U.S. 987 (1993), the court decided a takings claim was not ripe because the landowner "did not attempt to modify the location of the units or otherwise seek to revise its application." The court failed to decide how many reapplications would be necessary to

reach the merits. In Schulze v. Milne, 849 F.Supp. 708 (N.D. Cal. 1994), aff'd in part, rev'd in part on other grounds, 98 F.3d 1346 (9th Cir. 1996), property owners submitted a total of 13 revised plans over three years to renovate their home. Each time they submitted a plan "in compliance with all applicable zoning laws," local officials nonetheless "refused to approve the plan, and instead informed plaintiffs that there were additional requirements, not found in any zoning or other statutes, which plaintiffs had yet to meet." 849 F.Supp. at 709. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 119 S.Ct. 1624 (1999), discussed earlier, typifies the conundrum that many property owners confront when they must submit application after application to obtain development approvals. The bill would bring order to the chaos surrounding the reapplication requirement. H.R. 2372 uniformly calls for submission of one development application to a zoning body, and pursuit of one available waiver and/or appeal therefrom. I understand that this provision is intended to codify the body of cases requiring that a property owner make "one meaningful application" to the relevant land use decisionmaking body to ripen a constitutional claim.(16) It is interesting that the Ninth Circuit, a court typically sympathetic to local governments in constitutional land use cases, has pioneered the "one meaningful application" rule. See Gregory Overstreet, Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation, 20 Zoning and Planning Law Report 21-22 (March 1997). I am aware that as this legislation moved through the House last Congress two additional requirements were added. Under applicable circumstances, an agency or board may provide, with the disapproval of an application, a written explanation that clarifies the use, density, or intensity of development of the property that would be approved, with any conditions that might also apply. The party seeking redress must resubmit another meaningful application taking into account the terms of the disapproval. Under these circumstances, only upon rejection of this further application (and pursuit of additional processes as outlined in the bill) has a final decision occurred. In addition, if the applicable state statute or ordinance provides for review of the application by elected officials, a final agency decision has only occurred if the party seeking redress has also applied for but been denied by such officials in addition to the initial application and denial. While I understand the purposes of these additions, I prefer that H.R. 2372's goal be to render a decision ripe after one meaningful development proposal is submitted to a land use agency, and a waiver or appeal is pursued from a denial of the application. As one commentator notes, "[t]he reapplication requirement forces a property owner to concede away portions of his or her constitutional rights in order to gain access to the federal courts." Gregory Overstreet, supra, 20 Zoning and Planning L. Rep. at 22. Any additional reapplication process forces property owners to bargain away valuable interests in the development of their land in order to get local approval. H.R. 2372 should remedy this problem by giving the landowner the option to pursue litigation after he has made one meaningful application to a land use agency, without risking a tortuous process of re-submission, rejection, and more re-submission. As I previously advocated: [T]he determination of when "enough is enough" [for ripeness purposes] should not be left for the local governments to decide. Rather, it should be for the landowner or developer who must weigh the risks of litigation versus another application proposal to decide whether in fact to contest the decision rendered after the first application. APA Brief at 13. H.R. 2372 is consistent with this judgment. The bill preserves the option for property owners to choose federal court resolution of their constitutional grievances, rather than meander through an open-ended game of reapplication where land use officials play dual roles as both player and referee. (c) Futility. The bill offers an additional gloss on the "one application" requirement: following Section 1343(e)(2)(B), the proposed text provides that a property owner need not make one

application, or pursue a waiver/appeal therefrom, where "the prospects for success are reasonably unlikely and intervention by the district court is warranted to decide the merits." This provision would codify the so-called "futility" exception to ripeness. See Gilbert v. City of Cambridge, 932 F.2d 51, 61 n. 12 (1st Cir. 1991) (futility exception applies "where the degree of hardship that would be imposed by waiting for the permit process to run its course is so substantial and severe, and the prospects of obtaining the permit are so unlikely, that the property may be found to be meaningfully burdened and the controversy concrete enough to warrant immediate judicial intervention"); Kinzli v. City of Santa Cruz, 818 F.2d 1449, amended, 830 F.2d 968 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988) (takings claim ripened after plaintiff made one application and sought one variance and both were denied, because further reapplications would be futile). In the Suitum case, I urged the Supreme Court to establish a futility exception similar to that proposed in H.R. 2372: It is respectfully submitted that the "futility" exception should always apply after one application has been made for a land use approval or administrative reliefâ.[T]he finality requirement should be applied reasonably to recognize that a local government's position on the nature and intensity of development can be determined from factors other than repeated applications and denials. APA Brief at 21. While I concur that the futility exception should be codified, it is significant that the language in H.R. 2372 only compels property owners to pursue available avenues for appeal and/or waiver. It is appropriate that H.R. 2372 rejects cases like Shelter Creek Dev. Corp. v. Oxnard, 838 F.2d 375, 379 (9th Cir. 1988), which required an application for an unavailable variance to ripen a takings claim. I thus endorse the bills text which provides: "The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (A) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the application or reapplication would be futile." (2) State Exhaustion Prong. The second prong of Williamson County requires claimants to exhaust available state compensation remedies before receiving a federal hearing on the merits of a taking. Williamson County, 473 U.S. at 194-95. In my opinion, however, a federal court charged with the responsibility of determining constitutional violations is as qualified as a state court to decide when the Fifth Amendment has been violated. Indeed, a federal court is better able to make this decision where, as in the scenario covered by H.R. 2372, a citizen asserts solely federal claims. Santa Fe Village Venture v. City of Albuquerque, 914 F.Supp. 478 (D.N.M. 1995), illustrates the serious problems that occur when plaintiffs in takings cases must run the gauntlet between federal and state courts. In that case, the local city council established a building moratorium to preclude any development on lands near a national monument site. Plaintiff had an option to purchase land within areas subject to the moratorium, but never exercised that option because of the total land use restriction. Rather, it filed a lawsuit in federal district court seeking just compensation from the local government for its inability to develop the property. That first suit was dismissed on ripeness grounds, because the property owner never sought a compensation remedy in state court. In other words, exhausting state compensation procedures was necessary to make a federal claim ripe for resolution. The property owner then filed a second action for inverse condemnation in state court without raising any federal claims. The state court dismissed this complaint for lack of standing. After exhausting state proceedings, plaintiff then filed a third suit in federal court under Section 1983, alleging only deprivations of federal rights (including due process, equal protection, and takings). The United States District Court for the District of New Mexico then dismissed this federal action as unripe, because the federal claims were not raised in state court--even though the state court already decided that the property owner lacked standing to bring its action there. In this regard it

is important to consider the interplay between the state exhaustion prong for "compensation ripeness," and the concept of res judicata. Res judicata, or claim preclusion, provides that "a final judgment on the merits bars further claims by parties or their privies on the same cause of action." United States v. Mendoza, 464 U.S. 154, 158 n.3 (1984). This doctrine precludes parties from re-litigating claims "that were or could have been raised" in an initial litigation. Kremer v. Chemical Constr. Corp., 456 U.S. 461 n. 6 (1982) (emphasis added). A federal court must afford res judicata effect to a final judgment rendered in a prior state court proceeding.(17) The concept is extremely pertinent here. If a property owner exhausts state proceedings to obtain a compensation remedy but receives no award, then Williamson County would deem her federal taking claim ripe and allow her to litigate the alleged constitutional violation in United States district court. A federal judge, however, could still preclude all federal court access under res judicata, because the property owner could have raised her Section 1983 claim for federal relief in the earlier state proceeding. Accordingly, even if the property owner strictly adheres to Williamson County, her failure to raise a federal constitutional claim in state court could destroy her chances from ever having a federal judge address the Fifth Amendment claim. I do not think that property owners should be forced to litigate federal takings claims in state court, yet this is the ironic effect of the synergy between ripeness and res judicata. In my opinion, H.R. 2372 resolves this tension(18) as well as the problem identified by the Tenth Circuit in Wilkinson v. Pitkin County Bd. of Comm'rs, 142 F.3d 1319 (10th Cir. 1998). The court effectively ruled that the property owner, who initially filed its takings claim in state court, could never have a federal judge hear the takings claim because of the preclusion doctrines. As the court wrote, "Williamson [County's] ripeness requirement may, in actuality, almost always result in preclusion of federal claimsà.It is difficult to reconcile the ripeness requirement of Williamson County with the laws of [issue and claim preclusion]." Id. at 1325 n. 4. I believe that the cases requiring a plaintiff to seek compensation in state court "effectively drain the ripeness rules of any meaning. They prevent federal courts from ever reaching the final decision issue because, under this view, a takings plaintiff must seek compensation in state court until that court clearly says it will not entertain a compensation remedy." APA Brief at 24. In short, I wholly concur with H.R. 2372's objective to remove the state exhaustion requirement from the ripeness landscape.

H.R. 2372 SECTIONS 3 and 4: TAKINGS CLAIMS AGAINST THE FEDERAL GOVERNMENT. A. In General. H.R. 2372 Section 3 proposes amendments to 28 U.S.C. º 1346. This provision confers concurrent jurisdiction in the United States district courts and the United States Court of Federal Claims for claims against the federal government, including Fifth Amendment takings, where $10,000 or less is at stake. Section 4 proposes amendments to 28 U.S.C. º 1491, the Tucker Act provision conferring exclusive jurisdiction in the United States Court of Federal Claims, for claims against the federal government (including takings) for more than $10,000. I am mindful that, considering the expense of takings litigation, Section 1346 is rarely invoked as a practical matter. However, I believe it is correct to amend both statutes to achieve consistency. The bill's reform measures should clarify court access to any takings claim against the federal government, whatever the amount. B. Abstention. Sections 3 and 4 concern federal law suits premised on unconstitutional takings committed by federal agencies, under federal laws. For example, these sections would address "takings" by the U.S. Army Corps of Engineers under Section 404 of the federal Clean Water Act; the U.S. Fish and Wildlife Service under the federal Endangered Species Act; the U.S. Environmental Protection Agency under

federal Superfund; or the Department of Interior under the federal Surface Mining and Control Reclamation Act. In these actions, no person would be acting under color of State law, and no parallel state proceedings could be instituted. Abstention thus is not an issue when property owners bring federal takings claims against federal actors.(19) For this reason, H.R. 2372 Sections 3 and 4, unlike Section 2, do not address the abstention problem. C. Ripeness. In contrast, ripeness is an issue that federal courts have addressed in federal takings cases.(20) See, e.g., Good v. United States, 1997 U.S. Claims LEXIS 179, at *64-*71 (Aug. 22, 1997) (discussing the re-application requirement and futility exception, in case concerning wetlands permitting and endangered species issues). Federal courts have also addressed the issue of whether a takings claimant can avoid seeking a permit or variance from federal regulations under the "futility" exception. See, e.g., Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 407 (1989), aff'd, 926 F.2d 1169, 1171 (Fed. Cir. 1991), cert. denied, 502 U.S. (1991) (in context of facial challenge, takings occurred upon enactment of federal statute because it would have been futile to apply for permit; no opinion regarding same issue in context of as applied challenge); Broadwater Farms, supra, 35 Fed. Cl. at 236 (federal takings claim ripe where it would have been futile to apply for an "after-the-fact" wetlands permit from the Corps). For these reasons, the bill properly incorporates ripeness reform measures for federal takings claims in new Sections 3 and 4, similar to those stated in Section 2 for Section 1983 actions. I propose that my suggested changes to the bill regarding "one meaningful application" and "futility," discussed earlier on pages 21-24 and 24-25, respectively, also be incorporated where appropriate in Sections 3 and 4 dealing with federal takings actions.(21)

H.R. 2372 SECTION 5: DUTY OF NOTICE TO OWNERS This section requires a Federal agency to provide notice to property owners explaining their rights and the procedures for obtaining any compensation that may be due to them whenever that agency takes an action affective their private property. The goal of this section is both to provide property owners with the information they need to know to defend their rights, but also to force federal agencies to be more aware of the impact of their regulatory decisions. I believe this section will create a dual benefit of a federal government less likely to take property and a public better able to keep the government in check.

CONCLUSION The ripeness rules developed by the courts have caused hardship to property owners who seek court access so their constitutional claims can be heard. Williamson County and its progeny should no longer be misused to block takings cases where concrete and ascertainable injuries flow from final land use decisions. The Supreme Court has declared that "the takings clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First or Fourth Amendment, [and] should not be relegated to the status of a poor relationà." Dolan v. City of Tigard, 512 U.S. ---, 114 S.Ct. 2309, 2320 (1994). I believe that H.R. 2372 would help restore the takings clause to its deserved place of importance, and ensure that federal courts apply the takings clause to test the constitutional parameters of government action.

1. Agins v. Tiburon, 447 U.S. 255, 260 (1980) (takings claim challenging zoning ordinance held unripe, because property owners had not yet submitted development plans).

2. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1011-13 (1992) (had a "special permit procedure" to the Coastal Council, for the purpose of determining permanent deprivations

of viable land uses, been available to petitioner, he would have been required to pursue those avenues for a ripe takings claim).

3. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 (1981) (court rejects facial challenge to Surface Mining Control and Reclamation Act, because "[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance ... or a waiver ...."; thus, takings claim "not ripe for judicial resolution"); Williamson County, 473 U.S. at 192 (1985) (takings claim not ripe because developer had not sought variances from zoning ordinance).

4. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986) (property owners submitted only one subdivision proposal rejected by a zoning body; as alternative uses of the site existed other than the one proposed, the takings claim was unripe because the zoning body had not yet rendered "a final and authoritative determination of the type and intensity of development legally permitted on the subject property"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978) (property owners had not sought approval for any plan other than constructing a 50-foot office building above Grand Central Terminal; thus it was unclear whether the Landmarks Preservation Commission would deny approval for all uses).

5. However, the opinions expressed herein are my own.

6. State law issues can potentially be relevant in the context of federal takings claims. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025-27 (1992) (state nuisance law can define constitutionally-protected property interests); Nollan v. California Coastal Comm'n, 483 U.S. 825, 857 (1987) ("state law is the source of those strands that constitute a property owner's bundle of property rights"); Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 240 (1996) (relying on Lucas, and recognizing that state law treats "each lot as a separate parcel for tax purposes"). At least theoretically, Pullman abstention could arise in the context of a federal takings claims if pertinent and crucial issues of state property law are "unsettled."

7. The supplemental jurisdiction statute provides that "in any civil action of which the district courts have original jurisdiction, the[y] shall have supplemental jurisdiction over all other claims that à form part of the same case or controversy." 28 U.S.C. º 1367.

8. Id. at 528-29.

9. Id. at 533.

10. Id. at 532.

11. City of Chicago, 153 F.3d at 360.

12. Id. at 362.

13. Research conducted during the summer of 1997 showed that 12 states lacked certification procedures at that time--namely, Arkansas, California, Illinois, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Tennessee, Utah, Vermont, and Virginia.

14. See, e.g., Berry v. City of Little Rock, 904 F.Supp. 940 (E.D. Ark. 1995) (interpreting city housing code ordinance); Golden Gate Hotel Ass'n v. City and County of San Francisco, 864 F.Supp. 917 (N.D. Cal. 1993) (city residential hotel ordinance); Independent Coin Payphone Ass'n, Inc. v. City of Chicago, 863 F.Supp. 744 (N.D. Ill. 1994) (city franchise and zoning ordinances); Bender v. City of St. Ann, 816 F.Supp. 1372 (E.D. Mo. 1993) (Missouri city's commercial sign ordinance); Carpenter v. Tahoe Regional Planning Agency, 804 F.Supp. 1316 (D. Nev. 1992) (zoning ordinance of California/Nevada compact agency); Crow-New Jersey 32 Ltd. Partnership v. Township of Clinton, 718 F.Supp. 378 (D.N.J. 1989) (New Jersey township's land use ordinance); South Shell Inv. v. Town of Wrightsville Beach, 703 F.Supp. 1192 (D.N.C. 1988) (North Carolina town's zoning ordinance); Bloomsburg Landlords Ass'n v. Town of Bloomsburg, 912 F.Supp. 790 (M.D. Pa. 1995) (Pennsylvania town's ordinance regulating rental units); Knights of the Klu Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F.Supp. 745 (M.D. Tenn. 1990) (local parade permit ordinance); Katsos v. Salt Lake City Corporation, 634 F.Supp. 100 (D. Ut. 1986) (airport authority ordinance); Keleher v. New England Tel. & Tel. Co., 755 F.Supp. 117 (D. Vt. 1991) (ordinance of Vermont municipality); Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, 946 F.Supp. 1225 (E.D. Va. 1996) (court would not avoid substantive interpretation of zoning code on abstention grounds).

15. This substantive takings issue has yet to be decided by the Supreme Court. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n. 7 (1992).

16. See, e.g., Eastern Minerals Int'l, Inc. v. United States, 36 Fed. Cl. 541, 548 (1996) ("Each plaintiff must satisfy the threshold requirement of a single meaningful application" to yield a ripe takings claim); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1232 (9th Cir.), cert. denied, 115 S.Ct. 193 (1994) (property owners must submit "one formal development plan"); Unity Ventures v. Lake County, 841 F.2d 770, 775 (7th Cir. 1988).

17. See 18 Wright, Miller & Cooper, Federal Practice and Procedure, º 4466 at 30,042 ("Res judicata doctrine cannot escape the federalistic problems that permeate our overlapping systems of courts and substantive rights"). See also id. ºº 4469-4471 (federal courts supplying res judicata effect to state court decisions).

18. The related doctrine of collateral estoppel, or issue preclusion, requires a federal court to avoid relitigating issues that were actually decided by, and necessary to, the judgment of a state court. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979). Like res judicata, collateral estoppel's relationship to Williamson County prong 2 can prevent a property owner from ever litigating a federal taking claim in federal court. See, e.g. Dodd v. Hood River County, 59 F.3d 852, 861-62 (9th Cir. 1995) (although property owner exhausted compensation remedy under Oregon law, court remands for consideration as to whether related doctrine of collateral estoppel bars any further litigation in federal court).

19. For example, in the myriad reported Section 404 takings cases brought against the Corps, issues of state property law have not arisen to the extent that abstention has become a concern.. See, e.g., Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Tabb Lakes Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993); Broadwater Farms, supra, 35 Fed. Cl. 232 (1996); Bowles v. United States, 31 Fed. Cl. 37 (1994); Formanek v. United States, 26 Cl. Ct. 332 (1992);

Ciampitti v. United States, 22 Cl. Ct. 332 (1991) Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981); Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981).

20. Exhaustion of remedies also can potentially delay federal courts from addressing the merits of federal takings claims. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-19 (1984) (provisions of Federal Insecticide, Fungicide and Rodenticide Act "implement[ ] an exhaustion requirement as a precondition to a Tucker Act claim"); Burlington Northern R.R. Co. v. United States, 752 F.2d 627 (Fed. Cir. 1985) (takings claim dismissed without prejudice because owner failed to apply for federal permit and government argued permit could be granted if sought). Cf. Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1558 (Fed. Cir. 1985) (pursuit of a coal exchange under 30 U.S.C. º 1260(b)(5) is not a remedy that must be exhausted before bringing suit under Tucker Act).

21. The full text of Sections 3 and 4 with my suggestions are set forth at pp. 33-35.