109TH CONGRESS
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HOUSE OF REPRESENTATIVES

REPORT
109–658

PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 2006

SEPTEMBER 14, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4772]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4772) to simplify and expedite access to the Federal courts for injured parties whose rights and privileges under the United States Constitution have been deprived by final actions of Federal agencies or other government officials or entities acting under color of State law, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Rights Implementation Act of 2006".

SEC. 2. JURISDICTION IN CIVIL RIGHTS CASES CONCERNING REAL PROPERTY.

Section 1343 of title 28, United States Code, is amended by adding at the end the following:

"(c) Whenever a district court exercises jurisdiction under subsection (a) in an action in which the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court if the party seeking redress does not allege a violation of a State law, right, or privilege, and no parallel proceeding is pending in State court, at the time the action is filed in the district court, that arises out of the same operative facts as the district court proceeding.

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"(d) In an action in which the operative facts concern the uses of real property, the district court shall exercise jurisdiction under subsection (a) even if the party seeking redress does not pursue judicial remedies provided by a State or territory of the United States.

"(e) If the district court has jurisdiction over an action under subsection (a) in which the operative facts concern the uses of real property and which cannot be decided without resolution of an unsettled question of State law, the district court may certify the question of State law to the highest appellate court of that State. After the State appellate court resolves the question so certified, the district court shall proceed with resolving the merits. The district court shall not certify a question of State law under this subsection unless the question of State law—

"(1) is necessary to resolve the merits of the Federal claim of the injured party; and

"(2) is patently unclear.

"(f)(1) Any claim or action brought under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) to redress the deprivation of a property right or privilege secured by the Constitution shall be ripe for adjudication by the district courts upon a final decision rendered by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, which causes actual and concrete injury to the party seeking redress.

"(2) For purposes of this subsection, a final decision exists if—

"(A) any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one waiver and one appeal, if the applicable statute, ordinance, regulation, custom, or usage provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.".

SEC. 3. UNITED STATES AS DEFENDANT.

Section 1346 of title 28, United States Code, is amended by adding at the end the following:

"(h)(1) Any claim brought under subsection (a) that is founded upon a property right or privilege secured by the Constitution, but was allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, which causes actual and concrete injury to the party seeking redress.

"(2) For purposes of this subsection, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one waiver and one appeal, if the applicable law of the United States provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.".

SEC. 4. JURISDICTION OF COURT OF FEDERAL CLAIMS.

Section 1491(a) of title 28, United States Code, is amended by adding at the end the following:

"(3) Any claim brought under this subsection founded upon a property right or privilege secured by the Constitution, but allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress. For purposes of this paragraph, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one

waiver and one appeal, if the applicable statute, ordinance, regulation, custom, or usage provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.".

SEC. 5. CLARIFICATION FOR CERTAIN CONSTITUTIONAL PROPERTY RIGHTS CLAIMS.

Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended by adding at the end the following: "If the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns—

"(1) an approval to develop real property that is subject to conditions or exactions, then the person acting under color of State law is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional;

"(2) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any State or territory, or the District of Columbia, then such a claim shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the State, territory, or the District of Columbia; or

"(3) alleged deprivation of substantive due process, then the action of the person acting under color of State law shall be judged as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

For purposes of the preceding sentence, 'State law' includes any law of the District of Columbia or of any territory of the United States.".

SEC. 6. CLARIFICATION FOR CERTAIN CONSTITUTIONAL PROPERTY RIGHTS CLAIMS AGAINST THE UNITED STATES.

(a) DISTRICT COURT JURISDICTION.—Section 1346 of title 28, United States Code, is amended by adding at the end the following:

"(i) If a claim brought under subsection (a) is founded upon a property right or privilege secured by the Constitution that concerns—

"(1) an approval from an executive agency to permit or authorize uses of real property that is subject to conditions or exactions, then the United States is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional;

"(2) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any State or territory, or the District of Columbia, then such a claim against an executive agency shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the State or territory, or the District of Columbia, as the case may be; or

"(3) an alleged deprivation of substantive due process, then the United States shall be judged as to whether its action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In this subsection, the term 'executive agency' has the meaning given that term in section 105 of title 5.".

(b) COURT OF FEDERAL CLAIMS JURISDICTION.—Section 1491 of title 28, United States Code, is amended by adding at the end the following:

"(4) If a claim brought under subsection (a) is founded upon a property right or privilege secured by the Constitution that concerns—

"(A) an approval from an executive agency to permit or authorize uses of real property that is subject to conditions or exactions, then the United States is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional;

"(B) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any State or territory, or the District of Columbia, then such a claim against an executive agency shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the State, or territory, or the District of Columbia, as the case may be; or

"(C) an alleged deprivation of substantive due process, then the United States shall be judged as to whether its action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In this paragraph, the term 'executive agency' has the meaning given that term in section 105 of title 5.".

SEC. 7. DUTY OF NOTICE TO OWNERS.

(a) IN GENERAL.—Whenever a Federal agency takes an agency action limiting the use of private property that may be affected by the amendments by this Act, the agency shall, not later than 30 days after the agency takes that action, give notice to the owners of that property explaining their rights under such amendments and the procedures for obtaining any compensation that may be due them under such amendments.

(b) DEFINITIONS.—For purposes of subsection (a)—

(1) the term "Federal agency" means "agency", as that term is defined in section 552(f) of title 5, United States Code; and

(2) the term "agency action" has the meaning given that term in section 551 of title 5, United States Code.

SEC. 8. SEVERABILITY AND EFFECTIVE DATE.

(a) SEVERABILITY.—If any provision of this Act or the amendments made by this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, the amendments made by this Act, or the application thereof to other persons not similarly situated or to other circumstances shall not be affected by such invalidation.

(b) EFFECTIVE DATE.—The amendments made by this Act shall apply to actions commenced on or after the date of the enactment of this Act.

PURPOSE AND SUMMARY

The purpose of H.R. 4772, the "Private Property Rights Implementation Act of 2006", is to ensure that private property owner's Fifth Amendment takings claims can be heard by a Federal court.

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 4772 will allow greater and fairer access to Federal courts by those who assert Federal property rights claims under the Fifth Amendment's Takings Clause. H.R. 4772, the "Private Property Rights Implementation Act", is substantially the same as H.R. 2372, which passed the House during the 106th Congress on March 16, 2000, by a vote of 226–182.

Under current law, property owners are now blocked from raising a Federal Fifth Amendment takings claim in Federal court. The Supreme Court's decision in *Williamson County* v. *Hamilton Bank*, 473 U.S. 172 (1985), requires property owners to pursue, and exhaust, all available remedies for just compensation in State court before the property owner can file suit in Federal court under the Fifth Amendment. In *San Remo Hotel* v. *City and County of San Francisco*, 125 S.Ct. 2491 (2005), the Supreme Court recently confirmed and did not modify prior lower court case law that held that once a property owner tries their case in State court, and loses, the doctrines of *res judicata* and claim preclusion allow Federal courts to dismiss the claims on the grounds they were already decided by the State court. The combination of these two rules means that those with Federal property rights claims are effectively shut out of Federal court on their Federal takings claims, setting them unfairly apart from those asserting any other kind of Federal right, such as every Americans' First Amendment right to freedom of speech and freedom of religion, which may be asserted in Federal court in the first instance.

The late Chief Justice Rehnquist observed in his concurring opinion in *San Remo* that the "Williamson County [decision] all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guar-

antee." Chief Justice Rehnquist specifically noted in *San Remo* that "[i]t is not clear to me that Williamson County was correct in demanding that . . . the claimant must seek compensation in State court before bringing a federal takings claim in federal court." Indeed, the Second Circuit Court of Appeals previously noted that "[i]t would be both ironic and unfair if the very procedure that the Supreme Court required [property owners] to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation [takings] action—also precluded [them] from ever bringing a Fifth Amendment takings claim." [1]

Rep. Chabot's Private Property Rights Implementation Act—which is based on the constitutionally-explicit authority of Congress to define the jurisdiction of the lower Federal courts, in Article III, section 1, and the appellate jurisdiction of the Supreme Court, in Article III, section 2, clause 2—would allow property owners raising solely Federal takings claims to have their cases decided in Federal court without first pursuing a (sometimes fruitless) litigation detour in State court. H.R. 4772, far from "federalizing" local land use issues, preserves federalism values. The current legal regime that violates the right of Americans to bring Federal suits to enforce Federal rights itself is a violation of federalism principles. H.R. 4772 simply makes it easier for individuals to hold local planners accountable for Federal rights violations. As Supreme Courts Justices William Brennan and Thurgood Marshall have said, "After all, a policeman must know the Constitution, then why not a [local] planner?" [2]

H.R. 4772 levels the playing field for small and middle class property owners and retirees. The expense of bringing a Constitutional takings claim through the labyrinthine of procedures in place today is disproportionately borne by private citizens who often lack the resources to litigate these complex claims, and cannot draw on the public treasury to defend their rights. H.R. 4772 helps small developers and middle class Americans, whose finances are particularly strained by the costs of defending their Fifth Amendment property rights. (The current procedural rules favor the wealthiest developers, who can afford to maintain a Fifth Amendment takings claims all the way to Federal court, even though these claims, once heard in Federal court, are almost always rejected on procedural grounds.)

H.R. 4772 does not grant greater access to Federal courts to those asserting their Federal Fifth Amendment rights than to those who assert any other Federal constitutional rights. Indeed, the Constitution forbids the government from depriving its citizens of life, liberty, or property without due process of law, just as takings may not occur without just compensation. Yet few would seriously argue that plaintiffs claiming any deprivation of constitutionally-protected rights without due process of law under 42 U.S.C. § 1983 should not be able to sue in Federal courts without first having engaged in costly and protracted litigation at the State level.

Indeed, more takings cases should be allowed to be heard and decided in Federal court to help clarify takings law itself. As the Su-

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[1] *Santini* v. *Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 130 (2d. Cir. 2003).

[2] *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

preme Court stated in *Lingle* v. *Chevron U.S.A., Inc.*, "regulatory takings jurisprudence cannot be characterized as unified."[3] More cases must be allowed to be brought in Federal court in order to ensure that Federal precedents can be applied in a national and uniform manner. It is essential that Congress help ensure this outcome because State supreme courts are currently applying standards inconsistent with those handed down by the Supreme Court, secure in the knowledge that those suffering under the different standards applied by those State supreme courts will have no chance of being appealed to the Federal courts.[4] This process undermines the uniform, national application of Federal rights that the Constitution affords to all Americans, irrespective of their State of residence.

H.R. 4772 would also remove another artificial barrier blocking property owners' access to Federal court: *Williamson County* also requires that, before a case is "ripe" (that is, ready) for review by a Federal court, property owners must first obtain a "final decision" from the State government on what is an acceptable use of their land.[5] This has created an incentive for regulatory agencies to avoid making a final decision, thereby perpetually denying a property owner access to court. Studies of takings cases in the 1990s indicate that it took property owners nearly a decade of negotiation and litigation (which most property owners cannot afford) before takings claims were "ripe" enough to be heard on the merits in any court.[6] H.R. 4772 would clarify when a final decision has been

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[3] 125 S.Ct. 2074, 2082 (2005).

[4] For example, consider the following dynamic in Ohio. The U.S. Supreme Court has established a two part disjunctive test. The application of a zoning law will be deemed an unconstitutional taking if the ordinance (1) does not substantially advance legitimate State interests or (2) denies an owner economically viable use of his land. *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980). The government has the burden of proving a substantial interest is served by the zoning regulation. *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825 (1987). By establishing a disjunctive test, a property owner need only satisfy one of two burdens to show a zoning regulation is unconstitutional. In 1990, Ohio adopted its own test for applying the Fifth Amendment takings clause to zoning challenges. Rather than the disjunctive Federal test, Ohio adopted a conjunctive test. In order to invalidate a zoning ordinance on constitutional grounds, a property owner had to show, beyond "fair debate," that the zoning classification denied them "the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community." *Ketchel* v. *Bainbridge Twp.*, 557 N.E.2d 779, 783 (Ohio 1990). "Fair debate" has been analogized to the criminal probative standard of "beyond a reasonable doubt." *Central Motors Corp.* v. *Pepper Pike*, 653 N.E.2d 639, 642 (Ohio 1995). The Federal standard places the burden of proof on the government. In applying this two-part test, the court would first determine whether the zoning ordinance allowed the landowner an economically feasible utilization of his land. Next, the court would determine whether the ordinance permissibly advanced a legitimate interest of the city. *Columbia Oldsmobile, Inc.* v. *Montgomery*, 564 N.E.2d 455, 457–458 (Ohio 1990). In 1998, Ohio realigned itself with the Agins disjunctive test. After reconsidering Agins and its own prior cases on zoning challenges, the Ohio Supreme Court held that a zoning ordinance may be found unconstitutional if it is "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare regardless of whether it has deprived the landowner of all economically viable uses of the land." *Goldberg Cos. Inc.* v. *Richmond Heights*, 690 N.E.2d 510, 514 (Ohio 1998). Despite adopting the disjunctive Agins test, the property owner challenging the zoning ordinance maintained the burden of proof, and the standard of proof remained beyond fair debate. Id. at 515. This same burden of proof remains Ohio law today. Consequently, current Ohio law is less protective of constitutionally guaranteed property rights than current Federal law. By placing a high burden on the aggrieved property owner, i.e. "beyond a reasonable doubt," to show a zoning ordinance either serves no legitimate government interest or denies himself or herself of the economically viable use of his property, the Ohio Supreme Court has made it easier to pass unconstitutional zoning ordinances. Ohio is essentially depriving property owners of constitutionally protected rights. This is a fundamental violation of constitutional law. H.R. 4772 would solve this problem by allowing an aggrieved property owner in Ohio to immediately sue under the Fifth and Fourteenth Amendments in Federal court.

[5] *See Williamson County* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985) ("holding that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.").

[6] *See* H.R. Rep. No. 106–518, at 10 (2000).

issued and when the case is ripe for Federal court review. Under the bill, if a land use application is reviewed by the relevant agency and rejected, a waiver is requested and denied, and an administrative appeal also rejects the application, then a property owner can bring his or her Federal constitutional claim in a Federal court. The bill would not change the way agencies resolve disputes; rather, H.R. 4772 simply makes clear to the court when a "final agency action" has taken place.

• H.R. 4772 also clarifies the rights of property owners who assert certain types of constitutional claims:[7]

• H.R. 4772 clarifies that conditions or exactions that are imposed upon a property owner before they can receive a permit must be proportional to the impact the development might have on the surrounding community. One recent example of an abusive exaction occurred in Burbank, California, where the city required that a Home Depot build a day-laborer center—for use by people, many of them illegal aliens, who were loitering in the Home Depot parking lot against Home Depot policy and looking for spot contracting jobs from Home Depot customers. The government conditioned Home Depot's construction of its store on its paying an annual fee that finances the center's operation.[8] Property owners and business owners may constitutionally be required to cover the government's costs that are incurred due to development or expansion of a business. For example, exactions may be imposed on developers to pay for expanding schools to accommodate children who will be living in the new development; and a business owner who is seeking permission to expand the business may be required to pay for the costs of installing a stop light if the expansion will result in increased traffic, and the increase in traffic merits a stop light. However, sometimes the conditions imposed on a development bear no relation to public costs associated with the development plan. Occasionally, a government will try to impose a condition for development approval that has nothing to do with the project at hand or has no relationship to the project's impact.[9] A developer should not be required to build a new school for children who already live in the town[10] and should not be required to pay for a road that will

[7] Each of the following provisions simply clarifies what types of property rights cases can be brought in Federal court. 42 U.S.C. § 1983, which H.R. 4772 amends, already states that cases can be heard in Federal court for—quote—"deprivation of any rights, privileges, or immunities secured by the Constitution and laws." All the following provisions do is further define what, in the property rights context, is a "deprivation of any rights, privileges, or immunities secured by the . . . laws."

[8] *See* Michael Martinez, "Hiring Site For Day Labor Stirs Protest," The Chicago Tribune (February 6, 2006) at 3 ("Opponents contend the center legitimizes illegal immigrants . . . Home Depot built it, then deeded the site to the city; the retailer pays a $94,000-a-year fee, which the city uses to pay Catholic Charities to run the center . . . Never before has Home Depot been required to build a day-laborer center in tandem with a store and then pay an annual fee that ultimately finances the center's operation . . . Burbank's demand for the approximately 2,500-square-foot worker site coincides with Home Depot's ban on day laborers and other outsiders soliciting store customers").

[9] *See* "A Caution Flag on Developer Fees," The Press Democrat ("The case concerned Richard K. Ehrlich, a Culver City man who wanted to tear down a money-losing private tennis club and build 30 homes. The city, citing a shortage of public tennis courts and swimming pools, said the man would have to pay a $280,000 recreation fee and $33,000 to fund public arts projects for his plan to be approved. That would have added more than $10,000 to the cost of each house, even before all other impact fees are added in.").

[10] *See Volusia County* v. *Aberdeen at Ormond Beach L.P.*, 760 So. 2d 126 (Fla. 2000) (requirement of public school impact fees on a mobile home park struck down because the park did not increase the need for new schools since no students lived in the park).

not be used by residents of the subdivision under construction.[11] In addition, a business owner should not be required to build a library or fund art exhibits in exchange for receiving approval to expand her store.[12]

Fundamental fairness dictates that property owners should have the right to defend themselves in Federal court against unreasonable exactions or impact fees that amount to unconstitutional extortion. The U.S. Supreme Court in *Nollan* v. *California Coastal Commission*, 483 U.S. 827 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), has affirmed these principles, but H.R. 4772 clarifies that *Nollan* and *Dolan* apply to both regulatory and legislatively-imposed exactions, and extortionate conditions in any form—whether they encompass the compelled give-away of land, the payment of disproportionate fees, or some other demanded condition that has no "essential nexus" to the project or its impact on public resources.[13] The lower Federal and State courts have reached varying decisions on what types of exactions are subject to the "essential nexus" and "rough proportionality" requirements. One source of this judicial divergence is uncertainty as to whether the standards apply only to exactions calling for the actual dedication of land with public access (such as the hiker and biker path at issue in *Dolan*), or whether *Nollan* and *Dolan* also apply to monetary exactions like the payment of an impact fee.[14] Another aspect of the controversy concerns whether *Nollan* and *Dolan* apply to legislative actions, or only to adjudicatory actions that concern conditioned approvals directed toward a specific project and property owner.[15] In order to remedy the confusion created by the lower courts, H.R. 4772 amends 42 U.S.C. § 1983 to state that Fifth Amendment takings claims challenging an unconstitutional exaction apply whether the exaction is legislative or adjudicative in nature, or whether the exaction seeks a land dedication or payment of a monetary fee as a condition to development approval.

• H.R. 4772 clarifies the so-called "denominator question"[16] in cases concerning subdivided lots by requiring that Federal courts

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[11] *See Town of Flower Mound* v. *Stafford Estates Limited Partnership*, 135 S.W.3d. 620 (Tex. 2004) (holding a taking an exaction that required construction and improvement of streets adjacent to development when there was insufficient evidence that new traffic related to the subdivision would use such roads).

[12] *See* Jennifer Kabbany, "Vista, Calif., Council Agrees to Study Art Development Fee," North County Times (September 29, 2004) ("The City Council on Tuesday agreed with the concept of creating a development fee to pay for public art projects, undeterred by complaints from those who said it would hurt businesses and home buyers *** The commission proposed that a fee of 5-cents per square foot be tacked on to residential, commercial and industrial building permits for projects larger than 500 square feet, starting in July 2006. The fee would increase to 10 cents for the 2007–08 fiscal year that begins July 1. In 2008–09, the fee would jump to 15 cents per square foot.").

[13] In *Lingle* v. *Chevron U.S.A., Inc.*, 125 S.Ct. 2074 (2005), the Supreme Court clarified that one of the theories available to a takings plaintiff is that an exaction, or a regulatory condition imposed by a government body as a precondition to a development approval, may be unconstitutional. *Lingle* affirmed the prior ruling from *Nollan*, which held that a regulatory condition imposed on development must have an "essential nexus" to support the government's stated objective in imposing the condition in the first place. *Lingle* also affirmed the standard from *Dolan*, which held that the government has the burden to show that any condition on development bear "rough proportionality"—that is, the development condition must be related both in nature and extent to the impact of the proposed development.

[14] *See, e.g., Town of Flower Mound* v. *Stafford Estates Ltd. P'Ship*, 135 S.W.2d 620 (Tex. 2004); A.S. Klein, "Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof," 43 A.L.R. 3d 862.

[15] *See, e.g., Parking Ass'n of Georgia* v. *City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of petition for writ of certiorari).

[16] When a court tries to figure out what fraction of piece of property has been denied all economic value by a regulation, it must look to the fraction x/y, where "x" is the area of the prop-

look at the impact of a takings claim on each individual lot that is recognized as a separate independent property unit under State law (instead of looking to the impact of the taking in the context of all such lots grouped together). That is, H.R. 4772 would clarify that if property units are individually taxed under State law, then the adverse economic impact a regulation has on a piece of property should be measured by determining how much value the regulation has taken away from the individual lot affected, not the broader collection of lots grouped together. The Supreme Court, in *Lucas* v. *South Carolina Coastal Council*,[17] established the rule that a taking occurs, as a categorical matter, when a regulation deprives a land owner of all economically viable uses of the property. The Court recognized that "the rhetorical force of our deprivation of all economically feasible use rule is greater than its precision, since the rule does not make clear the property interest against which the loss of value is to be measured."[18] The Court also held: "[T]his uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court * * *"[19]

As a result, the lower Federal and State courts have rendered inconsistent decisions on the proper scope of the takings denominator. Some courts have held that a taking should be judged by considering what portion of land has been regulated in the context of the entire parcel. Other courts have held that the bottom part of the takings fraction should focus on the specific land that has been taken.[20] The denominator question is particularly troublesome in the context of subdivided lots. When a landowner subdivides property pursuant to a local ordinance, State law generally treats each subdivided lot as a unique and distinct property interest. Indeed, a land owner typically bears a much higher tax burden on subdivided property (compared to raw land), and assessments are levied on a lot-by-lot basis. Accordingly, if a landowner must treat individual lots as separate units for taxation purposes, then the standards determining just compensation should be the same when government takes subdivided lots under the Fifth Amendment's takings clause. To level the playing field, where subdivided land is at issue, the denominator in the takings fraction should be each lot—not the entire land holding. To accomplish this, H.R. 4772 amends 42 U.S.C. § 1983 to provide that the relevant parcel, for purposes of Fifth Amendment takings claims in the context of land subdivisions, is each subdivided lot if such lots are separately taxed under State law as individual units.

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erty denied all economic value and "y" is the area of the larger property of which "x" is a part. The question courts have come to different answers on is what exactly is "y"? Is "y" a subdivided lot within a larger set of lots, or is "y" itself a subdivided lot? If the answer is the former, fewer takings will be found unconstitutional. If the answer is the latter, more takings will be found unconstitutional because the x/y ratio will be higher.

[17] 505 U.S. 1003 (1992).

[18] 505 U.S. 1003, 1016, n.7.

[19] *Id.*

[20] *Compare Loveladies Harbor, Inc.* v. *United States,* 28 F.3d 1171, 1180 (Fed. Cir. 1994) (acknowledging that the scope of the denominator was the "key question," and ruling that the relevant focus was only the regulated 12.5 acres that were rendered useless from the larger parcel) with *District Intown Props. Ltd. P'Ship* v. *Dist. of Columbia,* 198 F.3d 874, 880 (D.C. Cir. 1999) (recognizing that "we must first define what constitutes the relevant parcel" and deciding that all nine lots in the subdivision provided the appropriate denominator, not just the lots that were subject to regulation).

• H.R. 4772 also clarifies that due process violations involving property rights should be found when the government has been found to have acted in an "arbitrary and capricious" manner. In *Lingle* v. *Chevron U.S.A., Inc.*[21] the Supreme Court overruled an earlier holding that a taking arises when a regulation "does not substantially advance legitimate State interests." *Lingle* held that the "[substantially advances] formula prescribes an inquiry in the nature of a due process, not a takings, test, and * * * it had no proper place in our takings jurisprudence."[22] Justice Kennedy, in a concurring opinion, stated that the majority's decision "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."[23]

Lingle also characterized a seminal case, *Village of Euclid* v. *Ambler* (1926), as a "historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.'"[24] But because the *Lingle* case was so recently decided, the Supreme Court's modern land use due process jurisprudence is not developed. As a result, the lower courts are in utter disarray over the proper test for a land use due process claim. The Second, Fourth, Sixth and Tenth Circuits adhere to a traditional test that an arbitrary, capricious, or irrational land use regulation may violate due process.[25] The Fifth and Seventh Circuits have adopted a "reasonable basis" or "rational relationship" standard for analyzing due process claims,[26] while the Eighth Circuit has announced a "truly irrational test."[27] The Third Circuit (and the First Circuit, at least in part) rely on a test that government conduct must "shock the conscience" before due process is violated.[28] The D.C. Circuit throws an "egregious conduct" standard into this analysis.[29]

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[21] 125 S.Ct. 2074 (2005).

[22] 125 S.Ct. 2074, 2083 (2005).

[23] *Id.* at 2087 (following earlier due process analysis in his concurrence in *Eastern Enterps.* v. *Apfel,* 524 U.S. 498, 539 (1998)).

[24] *Lingle,* 125 S.Ct. at 2083.

[25] *See, e.g., Warren* v. *City of Athens,* 411 F.3d 697, 707 (6th Cir. 1997) ("a substantive due process violation occurs when arbitrary and capricious government action deprives an individual of a constitutionally protected property interest"); *Southern Blasting Servs, Inc.* v. *Wilkes County,* 288 F.3d 584 (4th Cir. 2002) (no due process violation found where plaintiff failed to "demonstrate that the County's actions were arbitrary or irrational"); *Harlen Assocs.* v. *Inc. Vill. of Mineola,* 273 F.3d 494, 503 (2d Cir. 2001) (substantive due process claim survives summary judgment where a plaintiff shows that he has a protectable property interest and that the government "infringed that property interest in an arbitrary or irrational manner"); *Crider* v. *Bd. of County Comm'rs of County of Boulder,* 246 F.3d 1285, 1289 (10th Cir. 2001) (plaintiff bringing a land use due process claim must show that "the challenged government action was 'arbitrary and capricious'").

[26] *See, e.g., Simi Inv. Co.* v. *Harris County,* 236 F.3d 240, 249 (5th Cir. 2000) (substantive due process claims governed by a "deferential 'rational basis' test"); *Durigan* v. *Sanitary Dist. No. 4,* 5 Fed. Appx. 492, 494–95 (7th Cir. 2001) ("[l]and use regulations satisfy substantive due process if they do not violate a specific constitutional guarantee and are rationally related to a legitimate governmental interest").

[27] *See, e.g., Iowa Coal Mining Co.* v. *Monroe County,* 257 F.3d 846, 853 (8th Cir. 2001) (government action must be "truly irrational" in order to violate due process rights).

[28] *See, e.g., United Artists Theatre Circuit, Inc.* v. *Township of Warrington,* 316 F.3d 392, 400–402 (3d Cir. 2003) (overruling prior line of Third Circuit cases, employing "unrelated to the merits" and "improper notice" standard, in favor of "shocks the conscience" test for due process claims); *Barrington Cove Ltd. P'Ship* v. *Rhode Island Housing and Mortg. Fin. Corp.,* 246 F.3d 1, 5 (1st Cir. 2001) (for substantive due process claim to survive a motion to dismiss, the complaint must "either (i) allege that [the agency] deprived [the plaintiff] of a cognizable property interest * * * or, failing that, (ii) allege that the [agency's] conduct was so egregious as to 'shock the conscience'").

[29]. *See, e.g., George Washington Univ.* v. *Dist. of Columbia,* 318 F.3d 203, 209 (D.C. Cir. 2003) ("the doctrine of substantive due process constrains only egregious government misconduct" that is designed to "prevent[] only grave unfairness").

Prior to *Lingle*, the Ninth Circuit had ruled that due process claims are subsumed within a takings claim,[30] while the Eleventh Circuit had taken the most hostile position that deprivation of land use rights simply cannot support a substantive due process claim.[31] Both of those circuits will likely need to revisit their rulings in light of *Lingle's* recognition that due process claims do, indeed, have a place in constitutional land use litigation.

These cases clearly demonstrate that constitutional land use cases are notorious for their inconsistency. The chaos surrounding the standard for due process claims is extraordinary and begs for congressional guidance. In order to correct this situation, H.R. 4772 amends 42 U.S.C. § 1983 to state that a government land use body violates due process when its actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In this regard, the language tracks the text of the Administrative Procedure Act,[32] which includes the traditional and deferential standard that courts are accustomed to employing when judging the legality of government regulatory action. Under this standard, it is well established that a government agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

HEARINGS

The Committee's Subcommittee on the Constitution held a hearing on H.R. 4772 on June 8, 2006. Witnesses appearing at the hearing were: Joseph L. Trauth, Jr., Keating, Muething & Klekamp, PLL; Franklin Kottschade, President, North American Realty; Daniel L. Siegel, Supervising Deputy Attorney General, Office of the Attorney General, State of California; and Steven J. Eagle, Professor of Law, George Mason University School of Law.

COMMITEE CONSIDERATION

On July 12, 2006, the Committee met in open session and ordered favorably reported the bill H.R. 4772 with an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during the committee consideration of H.R. 4772.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Rep-

[30] *See, e.g., Armendariz* v. *Penman,* 75 F.3d 1311, 1325–26 (9th Cir. 1996).

[31] *See, e.g., Lewis* v. *Brown,* 409 F.3d 1271, 1273 (11th Cir. 2005) (regulatory "deprivations of State-created rights, which would include land use rights, cannot support a substantive due process claim, not even if the plaintiff alleges that the government acted arbitrarily and irrationally").

[32] 5 U.S.C. § 706(2)(A).

resentatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4772, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

AUGUST 31, 2006.

Hon. F. JAMES SENSENBRENNER, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4772, the Private Property Rights Implementation Act of 2005.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople.

Sincerely,

DONALD B. MARRON,
Acting Director.

Enclosure.

H.R. 4772—Private Property Rights Implementation Act of 2005

H.R. 4772 would provide greater access to the federal courts to parties whose property rights have been affected by the decisions of federal, state, and local governments. As a result, the bill is likely to impose additional costs on the federal government by increasing both the number of cases heard by federal courts and the number of claims brought against the United States. CBO has no basis, however, for estimating new discretionary expenses (incurred by the court system to try new cases) or increases in direct spending (for future awards that may be paid from the permanent indefinite judgment appropriation).

CBO has not reviewed this bill for intergovernmental or private-sector mandates. Section 4 of the Unfunded Mandates Reform Act of 1995 excludes from application of that act legislative provisions that enforce constitutional rights of individuals. CBO has determined that H.R. 4772 would fall within that exclusion because changes to federal jurisdiction over property rights cases would involve the enforcement of certain individual constitutional rights.

The Fifth Amendment prohibits the taking of private property for public use without just compensation. This restriction on government action is extended to the states through the due process clause of the 14th Amendment. Under current law, parties who believe that a government agency's actions or decisions have taken their property may sue the federal, state, or local government. Plaintiffs alleging takings by state and local governments are often

denied access to federal district courts, however, until they have exhausted their opportunities to obtain compensation through the state courts.

H.R. 4772 would give greater access to federal courts to plaintiffs making claims based on property owners' rights secured by the Constitution. First, this bill would prohibit a federal district court from refusing to hear claims of takings by states and localities until a final decision has been rendered by a state court. The bill also would make other changes to existing law applicable to takings claims, such as defining "final decision" for the claims, thereby relaxing the standards by which such claims are found ripe for adjudication in federal district courts or in the U.S. Court of Federal Claims.

Section 6 of the bill would change the standards for evaluating takings claims where the United States is acting as a defendant. Under current law, courts analyze contiguous lots as a single parcel to determine whether a taking has occurred. H.R. 4772 would narrow the courts' analysis to the impact on each lot, effectively allowing some claims that would have been denied under a "parcel as a whole" analysis. In addition, under H.R. 4772, a taking would be deemed a violation of substantive due process if decisionmaking by a federal agency was found to be "arbitrary and capricious."

CBO expects that enacting the changes under H.R. 4772 would impose additional costs on the U.S. court system to the extent that additional takings claims are filed and heard in federal courts. Based on information obtained from various legal experts, however, CBO estimates that only a small percentage of all civil cases filed in state courts involve takings claims and that only a small proportion would be tried in federal court as the result of enacting H.R. 4772 (in part because state and local regulators may have an incentive to settle with plaintiffs to avoid a trial in federal court). On the other hand, most cases that would reach trial in a federal court as a result of this bill are likely to involve relatively large claims and could be time-consuming and costly to adjudicate. In addition, based on information from the Department of Justice, CBO estimates that the number of cases brought to court would increase under the new standards. Lower legal standards may also increase the number and size of payments from the permanent, indefinite judicial settlement fund. However, CBO has no basis for estimating the number of cases that would be affected or the amount of court costs that would result. Administrative costs for handling additional cases would be paid from appropriated funds, while any additional judgment payments would increase direct spending.

The CBO staff contact for this estimate is Daniel Hoople. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4772, the Private Property Rights Implementation Act of 2006, is designed to ensure that private property owner's Fifth Amendment takings claims can be heard by a Federal court.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

Section 1. Short title

This section provides the short title for the bill as the "Private Property Rights Implementation Act of 2006."

Section 2. Jurisdiction in civil rights cases concerning real property

This section prevents a Federal court from refusing to hear a case in which only Federal claims are alleged. If a matter of State law is unresolved, then the Federal district court may certify the question of State law to the highest appellate court of that State. After the State appellate court resolves the question certified to it, the Federal district court shall proceed with resolving the merits of the Federal claim.

This provision addresses abstention, the legal principle under which courts relinquish their jurisdiction over a case and refuse to hear it. Abstention is one of the primary jurisdictional hurdles that currently prevent nearly all property owners from having their Federal Fifth Amendment taking claims heard in Federal court. This provision of H.R. 4772 states that abstention can not be exercised by a Federal court in a takings case where no State law claim is alleged, and where there is no pending State court proceeding addressing the same claims. Moreover, to address any concerns about Federal courts' entangling themselves with State law issues, this section allows a Federal judge to have unresolved questions concerning State law answered by the State courts through a certification procedure if doing so is factually necessary to resolve the Federal constitutional property rights claim. This ensures that Federal courts do not decide State law issues, while ensuring property owners have access to Federal court to defend their Fifth Amendment rights.

This section also allows a property owner whose constitutional rights may have been violated the same access to Federal court that other claimants alleging a violation of their constitutional rights (such as freedom of speech and religion) have. Accordingly, under this section, a property owner raising solely Federal claims can have his or her case decided in Federal court without first pursuing a litigation detour in State court on the same issues. If an individual claims that his constitutional right to free speech was violated, he can take that claim directly to Federal court. The same goes for alleged infringements of other constitutional rights, like the rights to privacy and the free exercise of religion, and all such claims can be brought immediately in Federal court. However, property owners with a Fifth Amendment claim have been treated differently and unfairly by courts. Unlike other constitutional cases, the Federal courts require that property owners with takings and due process claims litigate their case in State court first. This

unfair situation derives from the Supreme Court's Williamson County (1985) decision, which the lower Federal courts have interpreted as requiring property owners to pursue, and exhaust, all available remedies for just compensation in State court, before the property owner can file suit in Federal court on a Fifth Amendment claim. Moreover, the Supreme Court's decision in San Remo (2005) confirmed that once a takings case is brought to State court and decided there, the property owner is forever precluded from a review of the case in Federal court, thereby placing property owners who want to file a constitutional takings claim in Federal court in an untenable Catch-22.

Section two of the bill also clarifies when a constitutional takings claim is "ripe" and therefore ready for Federal adjudication. Current case law requires, among other factors, a "final decision" to be rendered before a constitutional takings claim is ripe, because exactly what a "final decision" is is unclear under current law. Under the terms of the bill, a final agency decision exists after a property owner goes through three steps: (1) the property owner submits and is denied a "meaningful application" to use property that is consistent with local land use and zoning requirements; (2) the property owner then applies for but is denied a waiver from applicable land use requirements that caused the initial application to be rejected; and (3) after the waiver is denied, the property owner then pursues but is denied an administrative appeal on the waiver. Therefore, the legislation provides that a property owner would have a ripe Fifth Amendment constitutional claim for adjudication in Federal court only after land use reviews at the application, waiver, and administrative appeal levels.

Finally, section two includes an explanation of "futility." This provision reflects current case law of the Supreme Court and states that a property owner shall not be required to apply for an appeal or waiver if no such appeal or waiver is available, if the appeal or waiver cannot provide the relief requested, or if the application would be futile.

Section 3. United States as defendant

This section closely mirrors section 2 but applies to takings claims against the United States. This section applies only to suits against the Federal government involving $10,000 or less. Under Federal law, these cases are tried in Federal district court.

Section 4. Jurisdiction of Court of Federal Claims

Section 4 is identical to section 3, except it applies to suits against the Federal government involving more than $10,000. Under Federal law, these cases are heard in the Court of Federal Claims.

Section 5. Clarification for certain constitutional property rights claims

Section 5 clarifies the rights of property owners raising certain types of constitutional claims.

Subsection 1 of section 5 clarifies that conditions or exactions that are imposed upon a property owner in order to receive a permit must be roughly proportional to the impact the development might have. This would apply to all kinds of exactions, regardless

of whether the exaction stems from a legislative or regulatory requirement. Property owners and business owners may constitutionally be required to cover the government's costs that are incurred due to development or expansion of a business. For example, exactions may be imposed on developers to pay for expanding schools to accommodate children who will be living in the new development. Also, a business owner who is seeking permission to expand the business may be required to pay for the costs of installing a stop light if the expansion will result in an increase in traffic, and the increase in traffic merits a stop light. However, sometimes the conditions imposed on a development plan amount to nothing more than extortion. Occasionally, a government will try to palm-off on a property owner a condition for approval that has nothing to do with the project at hand or has no relationship to the extent of the project's impact. For example, a developer cannot be required to build a new school for children who already live in the town and likewise should not be required to pay for a road that will not be used by residents of the subdivision under construction, and the business owner should not be required to build a library or fund art exhibits in exchange for receiving approval to expand her store. Property owners should have the right in Federal court to defend themselves against unreasonable exactions or impact fees that amount to extortion. The Supreme Court in the Nollan (1987) and Dolan (1994) cases affirmed these principles, but this subsection clarifies that these principles apply to both regulatory and legislatively-imposed exactions, and extortionate conditions in any form, whether they encompass the forced relinquishment of land, the payment of disproportionate fees, or some other demanded condition that has no nexus to the project or its impact on public resources.

Subsection 2 of section 5 clarifies the so-called "denominator question" in cases concerning subdivided lots by requiring that Federal courts look at the impact of a takings claim on each individual lot that is recognized as a separate independent property unit under State law. If a government approves subdividing a property into lots, the property owner is often required to pay higher property taxes on each of the newly-created lots. On occasion, the government will later impose restrictions on some of the lots that deprive the property owner of all use of that particular lot. In challenging such an action as an unconstitutional taking, courts frequently look at the entire swath of owned property. In doing so, the courts almost always rule that as long as the property owner can still develop some of the lots in a larger subdivision, it is not a taking. In this scenario, the property owner is now saddled with unusable lots on which he or she is paying a higher property tax burden. It is unjust for cities to both receive the higher tax revenue on individual lots and also deny the property owner the use of that lot. If the government wants to receive the monetary benefit of taxing each individual lot as a separate unit, then it should also have the responsibility of paying compensation when it takes each individual lot and renders it unusable by regulation. The proper remedy is for the courts to look at each individual lot rather than the entire subdivision, and that is what this section of H.R. 4772 requires. This means that a property owner may have a valid con-

stitutional takings claim if any single lot is rendered unusable due to government actions.

Subsection 3 of section 5 clarifies due process violations in a takings case should be found when the government has been found to have acted in an "arbitrary and capricious" manner. This section of H.R. 4772 provides that the appropriate question in a due process case in land use matters is whether the government had no rational basis for its decision and it made an "arbitrary and capricious" decision. (Proving that a government made an arbitrary and capricious decision on a land use matter remains an extremely high standard, and only a small number of land use cases will meet it.)

Section 6. Clarification for certain constitutional property rights claims against the United States

This section, which was added by an amendment by Representative Flake, extends the clarifications of section 5 to cases in which the Federal government takes property in violation of the takings clause.

Section 7. 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 impacting their private property.

Section 8. Severability and effective date

This section makes the provisions of this act severable should any provision be found unconstitutional. This section also provides that the amendments made by this act become effective when it is signed into law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

* * * * * * *

PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

* * * * * * *

§ 1343. Civil rights and elective franchise

(a) * * *

* * * * * * *

(c) Whenever a district court exercises jurisdiction under subsection (a) in an action in which the operative facts concern the uses

of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court if the party seeking redress does not allege a violation of a State law, right, or privilege, and no parallel proceeding is pending in State court, at the time the action is filed in the district court, that arises out of the same operative facts as the district court proceeding.

(d) In an action in which the operative facts concern the uses of real property, the district court shall exercise jurisdiction under subsection (a) even if the party seeking redress does not pursue judicial remedies provided by a State or territory of the United States.

(e) If the district court has jurisdiction over an action under subsection (a) in which the operative facts concern the uses of real property and which cannot be decided without resolution of an unsettled question of State law, the district court may certify the question of State law to the highest appellate court of that State. After the State appellate court resolves the question so certified, the district court shall proceed with resolving the merits. The district court shall not certify a question of State law under this subsection unless the question of State law—

(1) is necessary to resolve the merits of the Federal claim of the injured party; and

(2) is patently unclear.

(f)(1) Any claim or action brought under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) to redress the deprivation of a property right or privilege secured by the Constitution shall be ripe for adjudication by the district courts upon a final decision rendered by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, which causes actual and concrete injury to the party seeking redress.

(2) For purposes of this subsection, a final decision exists if—

(A) any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one waiver and one appeal, if the applicable statute, ordinance, regulation, custom, or usage provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.

* * * * * * *

§ 1346. United States as defendant

(a) * * *

* * * * * * *

(h)(1) Any claim brought under subsection (a) that is founded upon a property right or privilege secured by the Constitution, but

was allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, which causes actual and concrete injury to the party seeking redress.

(2) For purposes of this subsection, a final decision exists if—

(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one waiver and one appeal, if the applicable law of the United States provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.

(i) If a claim brought under subsection (a) is founded upon a property right or privilege secured by the Constitution that concerns—

(1) an approval from an executive agency to permit or authorize uses of real property that is subject to conditions or exactions, then the United States is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional;

(2) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any State or territory, or the District of Columbia, then such a claim against an executive agency shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the State or territory, or the District of Columbia, as the case may be; or

(3) an alleged deprivation of substantive due process, then the United States shall be judged as to whether its action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In this subsection, the term "executive agency" has the meaning given that term in section 105 of title 5.

* * * * * * *

CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

* * * * * * *

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) * * *

* * * * * * *

(3) Any claim brought under this subsection founded upon a property right or privilege secured by the Constitution, but allegedly in-

fringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress. For purposes of this paragraph, a final decision exists if—

(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one waiver and one appeal, if the applicable statute, ordinance, regulation, custom, or usage provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.

(4) If a claim brought under subsection (a) is founded upon a property right or privilege secured by the Constitution that concerns—

(A) an approval from an executive agency to permit or authorize uses of real property that is subject to conditions or exactions, then the United States is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional;

(B) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any State or territory, or the District of Columbia, then such a claim against an executive agency shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the State, or territory, or the District of Columbia, as the case may be; or

(C) an alleged deprivation of substantive due process, then the United States shall be judged as to whether its action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In this paragraph, the term "executive agency" has the meaning given that term in section 105 of title 5.

* * * * * * *

SECTION 1979 OF THE REVISED STATUES OF THE UNITED STATES

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. *If the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns—*

(1) an approval to develop real property that is subject to conditions or exactions, then the person acting under color of State law is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional;

(2) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any State or territory, or the District of Columbia, then such a claim shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the State, territory, or the District of Columbia; or

(3) alleged deprivation of substantive due process, then the action of the person acting under color of State law shall be judged as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

For purposes of the preceding sentence, "State law" includes any law of the District of Columbia or of any territory of the United States.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JULY 12, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:45 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 4772, the "Private Property Rights Implementation Act of 2005," for purposes of mark up and move its favorable recommendation to the House.

[The bill, H.R. 4772, follows:]

I

109TH CONGRESS
2D SESSION

H. R. 4772

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges under the United States Constitution have been deprived by final actions of Federal agencies or other government officials or entities acting under color of State law, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 16, 2006

Mr. CHABOT (for himself, Mr. GORDON, Mr. GALLEGLY, Mr. FLAKE, Mr. SENSENBRENNER, Mr. BOYD, Mr. FEENEY, and Mr. POMBO) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges under the United States Constitution have been deprived by final actions of Federal agencies or other government officials or entities acting under color of State law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Rights Implementation Act of 2005".

SEC. 2. JURISDICTION IN CIVIL RIGHTS CASES CONCERNING REAL PROPERTY.

Section 1343 of title 28, United States Code, is amended by adding at the end the following:

"(c) Whenever a district court exercises jurisdiction under subsection (a) in an action in which the operative facts concern the uses of real property, it shall not abstain from exercising or relinquish its jurisdiction to a State court if the party seeking redress does not allege a violation of a State law, right, or privilege, and no parallel proceeding is pending in State court that arises out of the same operative facts as the district court proceeding.

"(d) In an action in which the operative facts concern the uses of real property, the district court shall exercise jurisdiction under subsection (a) even if the party seeking redress does not pursue judicial remedies provided by a State or territory of the United States.

"(e) If the district court has jurisdiction over an action under subsection (a) in which the operative facts concern the uses of real property and which cannot be decided without resolution of an unsettled question of State law, the district court may certify the question of State law to the highest appellate court of that State. After the State appellate court resolves the question so certified, the district court shall proceed with resolving the merits. The

1 district court shall not certify a question of State law
2 under this subsection unless the question of State law—
3 "(1) is necessary to resolve the merits of the
4 Federal claim of the injured party; and
5 "(2) is patently unclear.
6 "(f)(1) Any claim or action brought under section
7 1979 of the Revised Statutes of the United States (42
8 U.S.C. 1983) to redress the deprivation of a property right
9 or privilege secured by the Constitution shall be ripe for
10 adjudication by the district courts upon a final decision
11 rendered by any person acting under color of any statute,
12 ordinance, regulation, custom, or usage, of any State or
13 territory of the United States, which causes actual and
14 concrete injury to the party seeking redress.
15 "(2) For purposes of this subsection, a final decision
16 exists if—
17 "(A) any person acting under color of any stat-
18 ute, ordinance, regulation, custom, or usage, of any
19 State or territory of the United States, makes a de-
20 finitive decision regarding the extent of permissible
21 uses on the property that has been allegedly in-
22 fringed or taken, without regard to any uses that
23 may be permitted elsewhere; and
24 "(B) one meaningful application to use the
25 property has been submitted but denied, and the

party seeking redress has applied for but is denied one waiver and one appeal, if the applicable statute, ordinance, regulation, custom, or usage provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.".

SEC. 3. UNITED STATES AS DEFENDANT.

Section 1346 of title 28, United States Code, is amended by adding at the end the following:

"(h)(1) Any claim brought under subsection (a) that is founded upon a property right or privilege secured by the Constitution, but was allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, which causes actual and concrete injury to the party seeking redress.

"(2) For purposes of this subsection, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken,

without regard to any uses that may be permitted elsewhere; and

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one waiver and one appeal, if the applicable law of the United States provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.".

SEC. 4. JURISDICTION OF COURT OF FEDERAL CLAIMS.

Section 1491(a) of title 28, United States Code, is amended by adding at the end the following:

"(3) Any claim brought under this subsection founded upon a property right or privilege secured by the Constitution, but allegedly infringed or taken by the United States, shall be ripe for adjudication upon a final decision rendered by the United States, that causes actual and concrete injury to the party seeking redress. For purposes of this paragraph, a final decision exists if—

"(A) the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, without regard to any uses that may be permitted elsewhere; and

"(B) one meaningful application to use the property has been submitted but denied, and the party seeking redress has applied for but is denied one waiver and one appeal, if the applicable statute, ordinance, regulation, custom, or usage provides a mechanism for waiver by or appeal to an administrative agency.

The party seeking redress shall not be required to apply for a waiver or appeal described in subparagraph (B) if such waiver or appeal is unavailable or can not provide the relief requested, or if pursuit of such a mechanism would otherwise be futile.".

SEC. 5. CLARIFICATION FOR CERTAIN CONSTITUTIONAL PROPERTY RIGHTS CLAIMS.

Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) is amended by adding at the end the following: "If the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns—

"(1) an approval to develop real property that is subject to conditions or exactions, then the person acting under color of State law is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional;

"(2) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any State or territory, or the District of Columbia, then such a claim shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the State, territory, or the District of Columbia; or

"(3) alleged deprivation of substantive due process, then the action of the person acting under color of State law shall be judged as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

For purposes of the preceding sentence, 'State law' includes any law of the District of Columbia or of any territory of the United States.".

SEC. 6. DUTY OF NOTICE TO OWNERS.

(a) IN GENERAL.—Whenever a Federal agency takes an agency action limiting the use of private property that may be affected by the amendments by this Act, the agency shall, not later than 30 days after the agency takes that action, give notice to the owners of that property explaining their rights under such amendments and the procedures for obtaining any compensation that may be due them under such amendments.

(b) DEFINITIONS.—For purposes of subsection (a)—

(1) the term "Federal agency" means "agency", as that term is defined in section 552(f) of title 5, United States Code; and

(2) the term "agency action" has the meaning given that term in section 551 of title 5, United States Code.

SEC. 7. SEVERABILITY AND EFFECTIVE DATE.

(a) SEVERABILITY.—If any provision of this Act or the amendments made by this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, the amendments made by this Act, or the application thereof to other persons not similarly situated or to other circumstances shall not be affected by such invalidation.

1 (b) EFFECTIVE DATE.—The amendments made by
2 this Act shall apply to actions commenced on or after the
3 date of the enactment of this Act.

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Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point.

The Chair recognizes the author of the legislation, Mr. Chabot, Chairman of the Subcommittee on the Constitution, for 5 minutes to explain the bill.

Mr. CHABOT. Thank you, Mr. Chairman.

I would first like to compliment the Chairman on his gavel. We appreciate it. There is a story behind that, and one must check out the *New York Times* if they——

Chairman SENSENBRENNER. If the gentleman would yield, it is the front page of yesterday's New York Times.

Mr. CHABOT. Yes, so if anybody wants to get to the details of this.

But I thank the Chairman.

We introduce this bill, H.R. 4772, the "Private Property Rights Implementation Act," along with our Democratic colleague Bart Gordon of Tennessee, earlier this year to help all Americans defend their constitutionally protected property rights.

I would also like to thank the gentleman from California, Mr. Gallegly, for his leadership on this issue as well as his work over the years and getting it successfully passed back in, I believe, the 105th Congress.

Most Americans are familiar with one recent decision involving all Americans' property rights, the case of *Kelo v. City of New London,* in which the Supreme Court held that the Constitution allows Government to take private property from one citizen and give it to a private company.

The House of Representatives acted to correct that victorious decision by passing a bill, H.R. 4128, by the overwhelming bipartisan margin of 376 to 38. However, the Supreme Court during its last term handed down another bad decision that fails to protect the property rights of all Americans and correcting that decision through the legislation we will be addressing today should have the same bipartisan support.

Here is the problem. Strange as it sounds, under current law property owners are now blocked from raising a Federal fifth amendment takings claim in Federal court. Here is why! The Supreme Court's 1985 decision in *Williamson County v. Hamilton Bank* requires property owners to pursue to the end all available remedies for just compensation in State court before the property owner can file suit in Federal court under the Fifth Amendment.

Just last year in the case of *San Remo Hotel v. City and County of San Francisco,* the Supreme Court held that once the property owner tries their case in State court and loses, the legal doctrine of claim preclusion requires Federal courts to dismiss the claims that have already been raised in State court, even though the property owner never wanted to be in State court with their Federal claim in the first place.

The combination of these two rules means that those with Federal property rights claims are effectively shut out of Federal court on their Federal takings claims, setting them unfairly apart from those asserting any other kind of Federal rights, such as those asserting free speech or religious freedom rights, who nearly universally enjoy the right to have their Federal claims heard in Federal court in the first instance.

The late Chief Justice Rehnquist commented directly on this unfairness, observing in his concurring opinion in the *San Remo* case that, "The Williamson County decision all but guarantees that claimants will be unable to utilize the Federal courts to enforce the Fifth Amendment's just compensation guarantee."

The 2nd Circuit Court of Appeals also noted that, "It is both ironic and unfair if the very procedure that the Supreme Court required property owners to follow before bringing a Fifth Amendment takings claim, a State court takings action, also precluded them from ever bringing a fifth amendment takings claim in the Federal court."

H.R. 4772, the "Private Property Rights Implementation Act" that we are considering here today, will correct the unfair legal bind that catches all property owners in a Catch-22. This bill, which is based on Congress' clear authority to define the jurisdiction of the Federal courts and the appellate jurisdiction of the Supreme Court, would allow property owners raising Federal takings claims to have their cases decided in Federal court without first pursuing a wasteful and unnecessary litigation detour and possible dead end in State court.

H.R. 4772 would also remove another artificial barrier blocking property owners' access to Federal court. The Supreme Court's Williamson County decision also requires that before a case can be brought for review in a Federal court, property owners must first obtain a final decision from the State government on what is an acceptable use of their land. This has created an incentive for regulatory agencies to avoid making a final decision at all by stringing out the process and thereby forever denying property owner access to court.

Studies of takings cases in the 1990's indicate that it took property owners nearly a decade of litigation, which most property owners can't afford, before takings claims were ready to be heard on the merits in any court. To prevent that unjust result, H.R. 4772 would clarify when a final decision has been achieved and when the case is ready for Federal court review.

Under this bill, if a land use application is reviewed by the relevant agency and rejected, a waiver is requested and denied, and an administrative appeal also rejects the application, then a property owner can bring their Federal constitutional claim in Federal court.

Mr. Chairman, I would ask for an additional 2 minutes.

Chairman SENSENBRENNER. Without objection.

Mr. CHABOT. Thank you.

The bill would not change the way agencies resolve disputes. Rather, H.R. 4772 simply makes clear the steps the property owner must take to make their case ready for court review.

H.R. 4772 also clarifies the rights of property owners raising certain types of constitutional claims in the following ways.

First, it would clarify that conditions that are imposed upon a property owner before they can receive a development permit must be proportional to the impact the development might have on the surrounding community.

Second, it would clarify that if property units are individually taxed under State law, then the adverse economic impact the regulation has on a piece of property should be measured by deter-

mining how much value the regulation has taken away from the individual lot affected, not a whole collection of lots grouped together.

And, third, the bill would clarify that due process violations involving property rights should be found when the Government has been found to have acted in an arbitrary and capricious manner.

Mr. Chairman, I urge my colleagues to join me in supporting this bipartisan legislation and yield back the balance of my time.

Chairman SENSENBRENNER. Does the gentleman from Virginia wish to give the Democratic opening statement?

Mr. SCOTT. No, Mr. Chairman. I would ask unanimous consent that the Ranking Member of the Committee be allowed to enter a statement into the record.

Chairman SENSENBRENNER. Without objection.

[The prepared statement of Mr. Conyers follows:]

Statement of Congressman John Conyers, Jr.
Committee on the Judiciary Markup of H.R. 4772
"Private Property Rights Implementation Act of 2005"
Wednesday, July 12, 2006, 10:30AM, Room 2141

Today I would like to voice strong opposition to H.R. 4772, the "Private Property Rights Implementation Act of 2005," just as I did in the 105th and 106th Congresses when we first took up this legislation.

This bill does little more than single out developers and corporations for a special fast track into federal court. If a megastore is dissatisfied with a local land use decision, it now has the threat of federal litigation in its bag of tricks.

In November of 2005, I joined with my colleagues on both sides of the aisle to protect property owners from state and local governments taking private property under the guise of "economic development." Such takings did not constitute public uses and were found to be totally inconsistent with the 5th Amendment of the United States Constitution – "nor shall private property be taken for *public use*, without just compensation."

Today my friends on the other side of the aisle will argue that the bill we are taking up today, H.R. 4772, is another effort to protect property owners. They will say that this bill will simply make it easier for property owners to have their day in court – *federal court that is*.

However, H.R. 4772 appears to do little more than permit land developers to forum shop between state and federal courts when they pursue regulatory takings claims against the government. And unfortunately, instead of advancing our Constitutional principles, this bill undermines long standing interpretations of the 5th Amendment.

The Supreme Court has ruled – *twice* – in Williamson County (473 U.S. 172 (1985)) and San Remo (545 U.S. 323) (2005)) – that landowners must pursue remedies for just compensation *from the state, in state court*.

The Court has confirmed that a federal court cannot properly consider a takings claim unless or until a landowner has been denied an adequate remedy. To do otherwise would make cases unconstitutionally ripe for federal review and also limit a federal court's ability to abstain from state questions.

Unfortunately, this is exactly what H.R. 4772 will do – allow regulatory takings claims into the federal courts prematurely. With the threat of federal litigation, states and localities will be restricted in their land use decisions. For example, it will be harder for jurisdictions to protect against groundwater contamination, waste dumps, and adult bookstores.

Perhaps most disturbingly, this bill elevates the rights of property owners over all other categories of persons having constitutional claims. Are the rights of real estate developers more important than the rights of other Americans? It is simply not true that there is anything special or unique about real property takings that necessitates a special bill to carve out protections for developers. This legislation undermines equal justice under law, the very cornerstone of our legal system.

Chairman SENSENBRENNER. Without objection, all Members may enter opening statements in the record.

At this point, are there amendments?

For what purpose does the gentleman from Arizona seek recognition?

Mr. FLAKE. I have an amendment at the desk.

Chairman SENSENBRENNER. Clerk will report the amendment.

The CLERK. "Amendment to H.R. 4772, offered by Mr. Flake of Arizona. Insert the following after Section 5 and redesignate succeeding sections accordingly"——

[The amendment by Mr. Flake follows:]

H.L.C.

AMENDMENT TO H.R. 4772

OFFERED BY MR. FLAKE OF ARIZONA

Insert the following after section 5 and redesignate succeeding sections accordingly:

1 SEC. 6. CLARIFICATION FOR CERTAIN CONSTITUTIONAL
2 PROPERTY RIGHTS CLAIMS AGAINST THE
3 UNITED STATES.
4 (a) DISTRICT COURT JURISDICTION.—Section 1346
5 of title 28, United States Code, is amended by adding at
6 the end the following:
7 "(i) If a claim brought under subsection (a) is found-
8 ed upon a property right or privilege secured by the Con-
9 stitution that concerns—
10 "(1) an approval from an executive agency to
11 permit or authorize uses of real property that is sub-
12 ject to conditions or exactions, then the United
13 States is liable if any such condition or exaction,
14 whether legislative or adjudicatory in nature, includ-
15 ing but not limited to the payment of a monetary fee
16 or a dedication of real property from the injured
17 party, is unconstitutional; or
18 "(2) a subdivision of real property pursuant to
19 any statute, ordinance, regulation, custom, or usage

1 of any State or territory, or the District of Colum-
2 bia, then such a claim against an executive agency
3 shall be decided with reference to each subdivided
4 lot, regardless of ownership, if such a lot is taxed,
5 or is otherwise treated and recognized, as an indi-
6 vidual property unit by the State or territory, or the
7 District of Columbia, as the case may be; or
8 "(3) an alleged deprivation of substantive due
9 process, then the United States shall be judged as
10 to whether its action is arbitrary, capricious, an
11 abuse of discretion, or otherwise not in accordance
12 with law.
13 In this subsection, the term 'executive agency' has the
14 meaning given that term in section 105 of title 5.".
15 (b) COURT OF FEDERAL CLAIMS JURISDICTION.—
16 Section 1491 of title 28, United States Code, is amended
17 by adding at the end the following:
18 "(4) If a claim brought under subsection (a) is found-
19 ed upon a property right or privilege secured by the Con-
20 stitution that concerns—
21 "(A) an approval from an executive agency to
22 permit or authorize uses of real property that is sub-
23 ject to conditions or exactions, then the United
24 States is liable if any such condition or exaction,
25 whether legislative or adjudicatory in nature, includ-

1 ing but not limited to the payment of a monetary fee
2 or a dedication of real property from the injured
3 party, is unconstitutional;
4 "(B) a subdivision of real property pursuant to
5 any statute, ordinance, regulation, custom, or usage
6 of any State or territory, or the District of Colum-
7 bia, then such a claim against an executive agency
8 shall be decided with reference to each subdivided
9 lot, regardless of ownership, if such a lot is taxed,
10 or is otherwise treated and recognized, as an indi-
11 vidual property unit by the State, or territory, or the
12 District of Columbia, as the case may be; or
13 "(C) an alleged deprivation of substantive due
14 process, then the United States shall be judged as
15 to whether its action is arbitrary, capricious, an
16 abuse of discretion, or otherwise not in accordance
17 with law.
18 In this paragraph, the term 'executive agency' has the
19 meaning given that term in section 105 of title 5.".

Page 2, line 11, insert after "State court" the following: ", at the time the action is filed in the district court,".

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. And the gentleman from Arizona is recognized for 5 minutes.

Mr. FLAKE. I thank the Chairman.

This is really a noncontroversial amendment. This simply would apply the same clarification that this bill makes in cases in which a locality is taking private property to cases in which the Federal Government is taking private property.

Chairman SENSENBRENNER. Would the gentleman yield?

Mr. FLAKE. Yes.

Chairman SENSENBRENNER. It sounds good to me. I am willing to accept it.

Mr. FLAKE. Sounds good.

Mr. CHABOT. Mr. Chairman, we support the amendment as well.

Chairman SENSENBRENNER. Okay.

The question is on the amendment offered by the gentleman from Arizona, Mr. Flake. Those in favor will say "aye."

Opposed, "no."

The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments?

For what purpose does the gentleman from California, Mr. Gallegly, seek recognition?

Mr. GALLEGLY. Strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GALLEGLY. And I won't take 5 minutes, Mr. Chairman.

I want to congratulate Mr. Chabot. We worked on this issue for many, many years together. In fact, almost 10 years ago, in fact it may be over 10 years ago—I lose time when we are having fun.

But this bill that we had back in the 105th passed by an overwhelming majority, a bipartisan majority, in the House, and was only a couple of votes short of cloture in the Senate. Had they not had the cloture provision over there or the 60 percent rule, this rule would have been passed out of the House. What would have happened with it during the Clinton administration, of course, we will never know.

But the fact remains that this is critical legislation. The gentleman from Ohio is to be commended for his leadership, and I would urge my colleagues to join in a strong vote of support and move this on to the floor.

Mr. Chairman, I yield back.

Mr. SCOTT. Will the gentleman yield?

Mr. GALLEGLY. I would yield, yes.

Mr. SCOTT. I would ask the gentleman if you could explain the 100 percent rule and what the bill does to it.

Mr. GALLEGLY. Mr. Chabot?

Chairman SENSENBRENNER. The gentleman from California controls the time.

Mr. GALLEGLY. I would yield to Mr. Chabot for——

Mr. CHABOT. If the gentleman would yield, are you talking about the subdivisions? The denominator question? The subdivisions?

Mr. SCOTT. Yes.

Mr. CHABOT. Essentially what we are talking about here is that if an individual subdivision, one of the parcels is taxed individually,

then it would be considered based upon its own, not the relationship within the whole subdivision.

Mr. GALLEGLY. Reclaiming my time.

Mr. Chairman, I would urge my colleagues to join in supporting this bill.

I yield back.

Chairman SENSENBRENNER. Are there amendments?

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman from Virginia has already been recognized for the minority statement.

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from California seek recognition?

Ms. LOFGREN. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. And I would yield my time to Mr. Scott.

Mr. SCOTT. Thank you.

Mr. Chairman, I would seek to clarify on the 100 percent rule and ask the gentleman from Ohio, if the property as a whole is being considered and one portion of that is rendered undevelopable, but the property of the whole can be developed nicely, would that constitute a taking? Is there a substantive change in the law in the bill?

Mr. CHABOT. Would the gentleman yield?

If the property is taxed separately, if it is a separate piece of property, then it would be considered on its own.

Mr. SCOTT. Is that a substantive change in the law?

Mr. CHABOT. It is a clarification of the law.

Chairman SENSENBRENNER. Does the gentlewoman from California yield back?

Ms. LOFGREN. I would yield back the balance of my time.

Chairman SENSENBRENNER. Are there amendments? If there are no amendments, a reporting quorum is not present.

Without objection, the previous question is ordered on the motion to report the bill H.R. 4772 favorably, and the vote on this question will be taken when a reporting quorum appears.

[Intervening business.]

The question occurs on the motion to report the bill H.R. 4772 favorably as amended upon which the previous question has been ordered.

All those in favor will say "aye."

Opposed, "no."

The ayes appear to have it. The ayes have it. The motion to report favorably is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment and in the nature of a substitute incorporating the amendments adopted here today.

Without objection, the staff is directed to make any technical conforming changes and all Members will be given 2 days as provided by the House rules in which to submit additional dissenting supplemental or minority views.

[Intervening business.]

Chairman SENSENBRENNER. This concludes the business that is on the agenda. And without objection, the Committee stands adjourned.

[Whereupon, at 2:30 p.m., the Committee was adjourned.]

DISSENTING VIEWS

We respectfully dissent from the favorable reporting of H.R. 4772, the "Private Property Rights Protection Act of 2005." This legislation will narrow the judicial doctrine of ripeness[1] and significantly pare back the abstention doctrine[2] for land owners asserting so-called regulatory takings claims against state and local governments in federal courts. Supporters of H.R. 4772 argue that the legislation would allow greater and fairer access to federal courts by those who have federal property rights claims under the Fifth Amendment's Taking Clause.[3] However, H.R. 4772 appears to do little more than permit landowners to forum shop between state and federal courts when they pursue takings claims against the government. In addition, this bill would make significant changes to takings law as established by Supreme Court precedent.[4]

OVERVIEW

H.R. 4772 deals with regulatory takings—takings in which the government subjects property to regulations but does not change its ownership—such as zoning ordinances. H.R. 4772 would force premature federal involvement in local land use disputes and tells the states and municipalities that they are not competent to adjudicate their land disputes. This legislation would also benefit just one set of plaintiffs—real property owners alleging Fifth Amendment takings—to the exclusion of other persons who face abrogation of their constitutional rights and who must first bring their claims in state court. Furthermore, evidence suggests that state courts quickly and fairly resolve most takings cases so legislation like H.R. 4772 is unnecessary. Most significantly, H.R. 4772 may be unconstitutional as it would make cases prematurely—and unconstitutionally—"ripe" for review, even if the claimant had not pursued available state remedies. Since such actions may not meet

[1] Ripeness is a judicial doctrine, partly rooted in Article III of the United States Constitution's "cases" and "controversies" requirement, which seeks to ensure that a matter is sufficiently mature for resolution.

[2] Abstention is a discretionary doctrine under which a federal court may decline to decide cases that are otherwise properly before the court. The abstention doctrine is based on the notion that federal courts should not intrude on sensitive state political and judicial controversies unless it is necessary.

[3] See Letter from Joseph M. Stanton, Chief Lobbyist, National Association of Homebuilders to Members of the United States House of Representatives (March 1, 2006).

[4] H.R. 4772, as well as its predecessors, was introduced in response to the United States Supreme Court's decision in *Williamson County* v. *Hamilton Bank* (473 U.S. 186) (1985). The Court's decision in Williamson County established that a takings plaintiff was barred from filing suit in federal court absent a definitive final decision by the local land use authorities and if plaintiff had failed to pursue available state procedures for obtaining compensation. Most recently, in *San Remo Hotel* v. *City and County of San Francisco* (545 U.S. 323) (2005). The Supreme Court confirmed and did not modify prior case law that held that once a property owner tries their case in state court, and loses, the doctrine of collateral estoppel bars the owner from re-litigating takings issues previously resolved by the state court. Furthermore, Subsection 2 of Section 5 overrides the parcel as a whole rule as upheld by the Supreme Court in 2002 in *Tahoe-Sierra Preservation Council* v. *Tahoe Regional Planning Agency* (535 U.S. 302).

the constitutional standard of "finality," such claims would be dismissed by the courts.

H.R. 4772 revives—with some significant additions—a set of legislative proposals that have been pending in Congress for almost a decade. Most of the provisions of H.R. 4772 first appeared in the 105th Congress as H.R. 1534, which passed the House by a mostly party line vote of 248 to 178, and as a portion of S. 2271, and which died on the Senate floor on a 52 to 42 cloture vote. In the 106th Congress, the House passed a similar bill, H.R. 2372, by a vote of 226 to 182, but the proposal died in the Senate. Prior to this year, most observers had believed that this failed legislative effort had run its course.

This so-called "procedural approach" to the takings issue was launched in the 105th Congress in response to the widely perceived extremism of the takings provision in the Contract with America in the 104th Congress. The Contract with America proposal would have inserted into federal law a new statutory standard for takings liability that went far beyond the standard for takings liability under the Takings Clause of the Fifth Amendment to the U.S. Constitution. This proposal passed the House, again, on a mostly party line vote, but generated widespread opposition and eventually died in the U.S. Senate. The procedural approach to takings in H.R. 1534 was presented as an alternative, less extreme approach to takings. It also reflected the emerging role in the takings debate of the developer lobby, which is primarily interested in using the threat of takings litigation as leverage in land use negotiations.

While H.R. 4772 includes many of the procedural elements of H.R. 2372 (and the earlier H.R. 1534), it also is designed to revive the controversial, discredited approach of altering the constitutional standard for takings liability. Indeed, in some ways H.R. 4772's approach to modifying constitutional standards is more extreme than the approach in the Contract with America. This bill would establish new standards of liability that would alter the constitutional standards under both the Takings Clause and the Due Process Clause. Unlike the Contract with America proposal, which primarily focused on altering the standard of liability applicable to the federal government, H.R. 4772 would establish new standards of liability exclusively applicable to state and local governments. In this sense, H.R. 4772 is a far greater assault on federalism that any prior takings proposal in Congress.

Many groups join us in concluding that H.R. 4772 is not sound policy. These groups include the American Planning Association, the Community Rights Counsel, American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Friends of the Earth, National Audubon Society, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, the Wilderness Society, U.S. Public Interest Research Group, the United States Conference of Mayors, the National Center for State Courts, the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association.[5]

[5] See Letters from the American Planning Association, the Community Rights Counsel, American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Friends of the Earth, Na-

Continued

The United States Conference of Mayors "support[s] the longstanding requirement that claimants under the Takings Clause of the U.S. Constitution pursue available State compensation procedures before filing a federal Takings claim in Federal court."[6] The Conference of Chief Justices and the National Center for State Courts note that there is "no record that state courts generally fail to render fair decisions in land use cases."[7] Notably, the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association believe that "the bill raises very serious constitutional questions. The Supreme Court has repeatedly stated that a takings claimant suffers no constitutional injury unless a state court has denied a claim for just compensation."[8]

CONCERNS WITH LEGISLATION

I. H.R. 4772 ENCOURAGES FEDERAL INTERFERENCE IN LOCAL MATTERS

H.R. 4772 would undermine local zoning and land use authority by giving large land developers and special interests a "club" with which to intimidate communities that cannot afford to put up a fight in federal court. In addition, by permitting takings plaintiffs to bring their cases in federal court prematurely, it would burden localities with higher legal fees—again discouraging independent decision-making at the local level at the risk of engaging in a protracted federal court fight. The costs of defending unjustified federal takings litigation would threaten local community fire, police, and environmental protection services.

For example, a developer may apply for a permit to build 800 homes on a parcel of land. A zoning official may deny that request, and a zoning board may as well. Without any determination of what would be a permissible use of that land short of the denied use, the case could be brought before a federal district court. Currently, such an issue might be deferred, dismissed or stayed while a state administrative agency or court concludes consideration of the claim. H.R. 4772 gives claimants a "fast track" to the federal courts, potentially burdening both the federal judiciary and the land use procedures of states and localities.

H.R. 4772 would also minimize the local citizens' ability to effectively participate in the land use process. At the administrative level, neighbors can participate without hiring a lawyer. Neigh-

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tional Audobon Society, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, the Wilderness Society, U.S. Public Interest Research Group, the United States Conference of Mayors, the National Center for State Courts, the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association to Members of Congress (109th Congress) (on file with the House Committee on the Judiciary).

[6] Letter from the United States Conference of Mayors to the Honorable Arlen Specter, Senate Judiciary Chairman, and the Honorable Patrick Leahy, Senate Judiciary Ranking Member (June 6, 2006).

[7] Letter from Randall T. Shepard, Supreme Court of Indiana Chief Justice and Conference of Chief Justices President, to the Honorable James Sensenbrenner, Jr. House Judiciary Chairman, and the Honorable John Conyers, Jr., House Judiciary Ranking Member.

[8] Letter from the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association to the Honorable Steve Chabot, House Judiciary Constitution Subcommittee Chairman, and the Honorable Jerrold Nadler, House Judiciary Constitution Subcommittee Ranking Member (June 8, 2006).

boring property owners and citizen groups sometimes do not find out about harmful land use proposals until the later stages of local processes—the very stages that the bill would allow developers to bypass. The bill would eliminate the most convenient and inexpensive forums for neighbors, who may be concerned about a proposal's impact on their property, health, safety, community, and environment. We need to ask ourselves whether we really want to make it more difficult for our local governments to protect their citizens against groundwater contamination or to prevent a corporation from operating a waste dump? Do we really want to limit the ability of our local governments to regulate adult bookstores? Yet this is precisely the effect H.R. 4772 will have by prematurely allowing takings claims to be brought into federal court.

II. H.R. 4772 ENCOURAGES FORUM SHOPPING AND CREATES AND UNDUE BURDEN ON FEDERAL COURTS

H.R. 4772 increases a plaintiff's ability to forum shop. Under the regime of H.R. 4772, developers would be given greater flexibility to choose to file suit in federal court when that forum appears to be more favorable to them in a particular jurisdiction, or to file suit in state court when the state forum is perceived to be more favorable. To the extent that courts apply the constitutional takings standard in a slightly different manner, we should not encourage parties to take unfair advantage of such variations among jurisdictions.

The changes wrought by H.R. 4772 are likely to result in a significant increase in the federal judicial workload. In 1997, with respect to an earlier version of this legislation, the Congressional Research Service (CRS) has found "there is a sound argument that H.R. 1534 will result in a significant increase in the workload of the federal courts, particularly from takings litigation."[9] When this legislation was first taken up in the 105th and 106th Congresses, the Judicial Conference of the United States commented, "this legislation could sweep large numbers of takings claims into the federal courts. Such an increase in case filings, especially if brought prematurely, could raise workload impact concerns and contribute to existing backlogs in some judicial districts."[10]

Another problem is that the legislation's limitation on the abstention doctrine raises problems where the States do not have formal certification procedures. The bill creates a procedure whereby federal courts certify "significant but unsettled" questions of state law to the highest appellate court of the State. But not all States have adopted such procedures. Thus, the bill may block the federal courts from abstaining and could force them to decide the State law question themselves.

Ultimately, H.R. 4772 creates a scheme completely at odds with federalist principles: the massive transfer of power over local land use decisions to the federal judiciary.

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[9] Robert Meltz, CRS Report for Congress, "Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534, September 22, 1997 (97–877A).

[10] Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Rep. Henry J. Hyde, Chairman, Committee on the Judiciary, Feb. 14, 2000, at 3.

III. H.R. 4772 IS UNNECESSARY

Advocates of the bill allege that takings claims get bottled up for years in expensive and time-consuming litigation. In fact, there is no reliable evidence that this occurs with any statistical frequency.[11] California Deputy Attorney General Daniel Siegel finds, "[w]hen compared to the many thousands of land use decisions made every year by the nation's 35,000 cities and towns, however, and the typical length of time that the judicial process requires, the stories of extreme delay are isolated."[12] Although the National Association of Home Builders ("NAHB") has stated that it takes an average of 9.6 years to resolve takings disputes, the facts do not support this contention. NAHB arrived at this statistic by using only 14 federal appellate court cases over a nine-year period (1990–1998).[13] In view of the hundreds of land use matters handled by local governments every day, this tiny statistical sample—fewer than two cases per year—is meaningless. By ignoring the countless land use disputes that are resolved in the local planning process without litigation, as well as the hundreds of takings cases litigated in state court each year (the bulk of the lawsuits), the NAHB's selective sampling biased the results of its survey.[14] Moreover, if the NAHB's argument concerning federal court delays has merit, it would see to militate against this bill which would place these cases into federal system. For all the complaints about the state courts, the NAHB study does not address that system at all.

Supporters also allege that federal courts are hostile to property rights because they dismiss 83% of takings cases without reaching the merits.[15] This statistic, too, is misleading. In the vast majority of the cases surveyed (29 of 33 cases), the federal court dismissed the takings case because the claimant's lawyer refused to follow state procedures for seeking compensation before suing in federal court.[16] The Supreme Court repeatedly has ruled that the Constitution requires takings claimants to follow state compensation procedures first.[17] Federal courts hardly can be faulted for applying this straightforward and binding rule. It is therefore disingenuous to suggest that these cases demonstrate hostility to property rights by federal courts or local governments. This statistic merely shows that a few takings claimants (33 over a nine-year period) tend to lose when their attorneys ignore the rules that apply to everyone.

IV. H.R. 4772 DEPARTS FROM TRADITIONAL CONSTITUTIONAL INTERPRETATION AND SIGNIFICANTLY CHANGES TAKINGS LAW

H.R. 4772 contains provisions that were not found in the 105th and 106th's versions of this bill. These new provisions are found in Section 5 and give additional cause for concern.

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[11] *See* Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution, 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General).

[12] *Id.*

[13] Community Rights Counsel, Talking Points, The False and Misleading Statistics Behind the NAHB Takings Bill, available at http://www.communityrights.org/PromotesSmartGrowth/NAHB/talkingpoints.asp.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See City of Monterey* v. *Del Monte Dunes*, 526 US 687, 710 (takings claimants "suffer no constitutional injury" until the state court denies compensation).

Subsection 1 of Section 5 addresses conditions or exactions imposed on developers in conjunction with the grant of development authorizations. It does so in a highly ambiguous and confusing fashion. The language appears to be circular in the sense that it states that localities shall be liable under section 1983 if conditions or exactions are unconstitutional.

The bill broadens the terms "condition" or "exaction" by adding "whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party." Although the Constitution appears to supply the governing standard for the purpose of this provision, this language can be read as at least attempting to encourage the view that all kinds of conditions and exactions may be subject to the same heightened constitutional scrutiny regardless of whether they are legislative or adjudicatory in nature, and regardless of whether they involve the payment of money or dedication of real property.

The U.S. Supreme Court has said that a heightened standard of review, including specifically the so-called "essential nexus," or Nollan test,[18] and the "rough proportionality," or Dolan test,[19] apply to certain exactions, in particular those involving dedications of entitlements to physically occupy private property imposed through adjudicatory procedures.

The Supreme Court has not said that the rule applicable to exactions applies to any and all sorts of conditions. In particular, it is very doubtful under current precedent whether these demanding tests apply to conditions requiring payment of money or exactions imposed through general legislation. Virtually all courts that have addressed the issue have concluded that financial exactions imposed through legislative measures are not subject to these demanding tests.[20] To the extent this subsection is designed to promote the opposite viewpoint, it departs from the established reading of the Constitution.

Subsection 2 of Section 5 would override the so-called "parcel as a whole" rule, a proposition the Supreme Court has repeatedly reaffirmed by finding that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[21] Instead, the Court focuses "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[22] There has long been a debate about whether regulatory takings claims should be evaluated by focusing on the restricted portion of a property or an owner's entire contiguous ownership. The Supreme Court effectively resolved this debate in favor of the parcel as a whole rule in the 2002 decision in

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[18] *Nollan* v. *California Coastal Comm'n,* 483 U.S. 825 (1987).

[19] *Dolan* v. *City of Tigard,* 512 U.S. 374 (1994).

[20] *See, e.g., Rogers Machinery* v. *Washington County,* 45 P.3d 966 (Or.App. 2002).

[21] *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104,131–133 (1978); See Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution, 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General). At the hearing, Daniel Siegel stated, "the bill seeks to modify the existing "parcel as a whole" rule under which the courts analyze the owner's entire property interests, rather than the particular portion of the property that is regulated, to determine whether the impact of the regulation on a parcel is "so onerous" as to amount to a taking."

[22] *Id.*

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency.[23] Many courts have recognized that the parcel as a whole rule applies regardless of whether the property is divided into separate tax lots or is otherwise divided up for other purposes.[24]

In overriding the established application of the parcel as a whole rule, Subsection 2 of Section 5 would allow a developer to divide up the lot in order to have a small section considered independently for takings purposes. For example, if a developer owned property, 99% of which was suitable for development, and 1% of which consisted exclusively of wetlands, the bill would allow the developer to divide that 1% into an independent parcel and claim a 100% loss that would be potentially compensable. The new rule would thus allow a developer to game the system and force taxpayers to pay "compensation" for the developer's ability to build on 99% of his land. The Constitution has never guaranteed the ability to build on every square inch of property regardless of the harm it would cause neighboring landowners and the community at large. This radical change in the parcel as a whole rule which would give developers a limitless ability to game the system and defraud taxpayers.

Faced with an attempt by a plaintiff to divide a property in the manner permitted by this legislation, the Idaho Supreme Court had this to say:

> We cannot say, however, that the transfer and fact of separate ownership by themselves necessarily end the inquiry. Indeed, the City has questioned the purpose of the transfer and we believe the circumstances of the transfer may be entirely relevant to the denominator inquiry. To explain: a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis. It is not pure fantasy to imagine a scenario wherein halfway through a takings suit, Landowner agrees with Company to transfer a parcel of Beachacre—which appears, as the waterward parcel does here, to be separate from Landowner's other parcel-with a wink-and-a-nod agreement to transfer back after the suit or to jointly manage, use, and develop the property. As the Court of Claims explained in Ciampitti, supra, the purpose of the denominator inquiry is to define the property as realistically and fairly as possible in light of the factual circumstances. We cannot endorse a rule that turns a blind eye to all the relevant factual circumstances, including the purpose, character and timing of any transfer, especially one made during the course of a takings case.[25]

Finally, subsection 3 of Section 5 would provide that, in the case of alleged deprivations of property rights or privileges, a substantive Due Process claim should be evaluated based on "whether [the government action] is arbitrary, capricious, an abuse of discre-

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[23] 535 U.S. 302 (2002).

[24] *See e.g. Broadwater Farms Joint Venture* v. *United States,* 232 F.3d 908 (Fed. Cir. 2000), *District Intown Properties Ltd.* v. *District of Columbia,* 198 F.3d 874 (D.C. 1999).

[25] *City of Coeur D'Alene* v. *Simpson,* 136 P.3d 310, 320 (2006) (citations omitted).

tion or otherwise not in accordance with law." The provision is apparently designed to overturn the widely accepted view that substantive due process claims should be evaluated under a "shocks the conscience" standard.[26] Deputy Attorney General Siegel testified, "[u]nder that standard [the "shocks the conscience" standard], it is "insufficient" to allege that local government "arbitrarily applied" a land use restriction."[27]

V. H.R. 4772 IS LIKELY UNCONSTITUTIONAL

In its 1985, 7–1[28] opinion in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, the Supreme Court held that a takings claim is not ripe for federal court review if: (1) the property owner had not obtained a "final decision" from the appellate administrative agency, and (2) the property owner had not first filed the claim in state court to challenge the government action.[29] Importantly, the Court held that these requirements inhere in the nature of the Takings Clause of the Constitution. The Court found that the plaintiff needed to avail itself of the state's and locality's procedures in order to evaluate essential components of the takings claim—the economic impact of the regulation and whether the claimant was denied just compensation.[30] This rule is "compelled by the very nature of the inquiry required by the Just Compensation [Takings] Clause" because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final definitive position regarding how it will apply the regulations at issue to the particular land in question." This Supreme Court authority indicates that H.R. 4772 unconstitutionally attempts to circumvent these constitutionally mandated ripeness requirements through a statutory mechanism.[31]

Significantly, the Supreme Court reaffirmed this principle in 1999. In 1999, in *Del Monte Dunes,* the Court stated, "A federal court . . . cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate post deprivation remedy. Even the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one."[32] H.R. 4772 would therefore appear to make cases prematurely—and unconstitutionally—"ripe" for review, even if the claimant had not pursued available State remedies.

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[26] *See, e.g., United Artists Theatre Circuit* v. *Township of Warrington,* 316 F.3d 392 (3rd Cir. 2003) (Alito, J.); See also Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution, 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General).

[27] Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution, 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General).

[28] Justice Powell Took no part in the decision.

[29] 473 U.S. at 186.

[30] *Id.* at 191–95.

[31] *Williamson,* 473 U.S. at 190–91; *see also McDonald,* 477 U.S. at 350 ("Whether the inquiry asks if a regulation has gone 'gone too far,' or whether it seeks to determine if proffered compensation is 'just,' no answer is possible until a court knows what use, if any, may be made of the affected property.").

[32] 526 U.S. at 721.

VI. H.R. 4772 ELEVATES PROPERTY RIGHTS OVER OTHER CONSTITUTIONAL RIGHTS

H.R. 4772 elevates property rights over other constitutional rights by giving claimants with takings claims expedited access to the federal courts, while leaving in place requirements that plaintiffs with other constitutional claims exhaust state court procedures before filing a case in federal court. This turns the very purpose of Section 1983 actions completely on its head by making property rights the civil right most explicitly and prominently protected by Section 1983. Section 1983 was adopted as part of the Civil Rights Act of 1871 and was specifically designed to halt a wave of lynchings of African Americans that had occurred under guise of state and local law.

In numerous instances, courts have stated that prior to filing a constitutional claim under 42 U.S.C. § 1983 in federal court, the plaintiff must first pursue state court remedies. The CRS finds that Federal courts invoke the abstention doctrine against many Section 1983 claims—not just those Section 1983 claims that involve takings of property.[33] This has occurred, for example, in cases involving constitutional challenges to the termination of parental rights,[34] detention in violation of the 6th Amendment right to counsel,[35] confinement for juvenile offenders in violation of the 8th Amendment,[36] denial of Medicaid benefits in violation of 1st Amendment religious protections,[37] gender discrimination,[38] and many others.[39] If we are going to give property owners the ability to "jump the line" into federal court, it seems only fair that we should extend this same right to other Section 1983 plaintiffs.

CONCLUSION

In conclusion, H.R. 4772 presents a substantial number of concerns. We believe that H.R. 4772 serves as an assault on the principles of federalism. This legislation encourages forum shopping with no evidence that there is a need for increased access to federal courts for takings claims. Significantly, H.R. 4772 departs from traditional Constitutional interpretation and makes substantive changes in takings law. In fact, this bill could be deemed unconstitutional itself. We also take issue with this bill elevating property

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[33] CRS stated specifically, "[a]bstention is indeed invoked by federal courts to dismiss or stay non-real-property-related section 1983 claims." Robert Meltz, CRS Memorandum, "Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534, (September 22, 1997).

[34] *See, e.g., Amerson* v. *State of Iowa,* 94 F.3d 510 (8th Cir. 1996).

[35] *See, e.g., Mann* v. *Jett,* 781 F.2d 1448 (9th Cir. 1985). *See also Bullock* v. *Woodside,* 2000 U.S. App. LEXIS 12814 (9th Cir. 2000) (the abstention doctrine outlined in Mann applies only to criminal prosecutions).

[36] *See, e.g., Manney* v. *Cabell,* 654 F.2d 1280 (9th Cir. 1990), cert. denied, 455 U.S. 1000 (1982), *See also Toussaint* v. *Yockey,* 722 F.2d 1490 (9th Cir. 1984) (abstention in Manney was proper because the law which was at issue in the case was "unusual.")

[37] *See, e.g., Winters* v. *Lavine,* 574 F.2d 46 (2d Cir. 1978). *Winters* identified three times when abstention is proper: (1) when the state statute is unclear or the issue of law uncertain; (2) when resolution of a federal issue depends upon the interpretation given to a state law; and (3) when the state law is susceptible to an interpretation that would avoid or modify the constitutional issue. *Id.*

[38] *Tiger Inn* v. *Edwards* held that abstention is proper for the state court to clarify the state court position on the applicable law. 636 F. Supp. 787 (D.N.J. 1986).

[39] *See, e.g., Allen* v. *McCurry,* 449 U.S. 90 (1980) (individual required to litigate a Fourth Amendment search and seizure claim in a state criminal proceeding is completely barred from asserting his federal constitutional claim in a subsequent Section 1983 action in federal court); *Heck* v. *Humphrey,* 512 U.S. 477 (1994) (abstention may be appropriate when there is a parallel state-court criminal proceeding).

rights over the very civil rights 1983 was enacted to protect. It is for these reasons that we must submit dissenting views on H.R. 4772.

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