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PRIVATE PROPERTY RIGHTS IMPLEMENTATION ACT OF 2000

MARCH 13, 2000.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CANADY of Florida, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2372]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2372) to simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by 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; to prevent Federal courts from abstaining from exercising Federal jurisdiction in actions where no State law claim is alleged; to permit certification of unsettled State law questions that are essential to resolving Federal claims arising under the Constitution; and to clarify when government action is sufficiently final to ripen certain Federal claims arising under the Constitution, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

79–006

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Rights Implementation Act of 2000".

SEC. 2. JURISDICTION IN CIVIL RIGHTS CASES.

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 in an action in which no claim of a violation of a State law, right, or privilege is alleged, if a parallel proceeding in State court arising out of the same operative facts as the district court proceeding is not pending.

"(d) 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 certified to it, 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) will significantly affect the merits of the injured party's Federal claim; and

"(2) is patently unclear.

"(e)(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, that causes actual and concrete injury to the party seeking redress.

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

"(i) 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, as described in clauses (ii) and (iii), regarding the extent of permissible uses on the property that has been allegedly infringed or taken;

"(ii)(I) one meaningful application, as defined by applicable law, to use the property has been submitted but has been disapproved without a written explanation as described in subclause (II), and the party seeking redress has applied for one appeal and one waiver which has been disapproved, in a case in which the applicable statute, ordinance, custom, or usage provides a mechanism for appeal to or waiver by an administrative agency; or

"(II) one meaningful application, as defined by applicable law, to use the property has been submitted but has been disapproved, and the disapproval explains in writing the use, density, or intensity of development of the property

that would be approved, with any conditions therefor, and the party seeking redress has resubmitted another meaningful application taking into account the terms of the disapproval, except that—

"(aa) if no such reapplication is submitted, then a final decision shall not have been reached for purposes of this subsection, except as provided in subparagraph (B); and

"(bb) if the reapplication is disapproved, or if the reapplication is not required under subparagraph (B), then a final decision exists for purposes of this subsection if the party seeking redress has applied for one appeal and one waiver with respect to the disapproval, which has been disapproved, in a case in which the applicable statute, ordinance, custom, or usage provides a mechanism of appeal to or waiver by an administrative agency; and

"(iii) if the applicable statute or ordinance provides for review of the case by elected officials, the party seeking redress has applied for but is denied such review, or is allowed such review and the meaningful application is disapproved.

"(B) The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (A) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the application or reapplication would be futile.

"(3) For purposes of clauses (ii) and (iii) of paragraph (2), the failure to act within a reasonable time on any application, reapplication, appeal, waiver, or review of the case shall constitute a disapproval.

"(4) For purposes of this subsection, a case is ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State or territory of the United States.

"(f) Nothing in subsection (c), (d), or (e) alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

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, that 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, as defined in subparagraph (B), regarding the extent of permissible uses on the property that has been allegedly infringed or taken; and

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

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if application or reapplication to use the property would be futile.

"(3) For purposes of paragraph (2), the United States' failure to act within a reasonable time on any application, appeal, or waiver shall constitute a disapproval.

"(4) Nothing in this subsection alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

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, as described in subparagraph (B), regarding the extent of permissible uses on the property that has been allegedly infringed or taken; and

"(B) one meaningful application, as defined by applicable law, to use the property has been submitted but has been disapproved, and the party seeking

redress has applied for one appeal or waiver which has been disapproved, in a case in which the applicable law of the United States provides a mechanism for appeal or waiver.

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if application or reapplication to use the property would be futile. For purposes of subparagraph (B), the United States' failure to act within a reasonable time on any application, appeal, or waiver shall constitute a disapproval. Nothing in this paragraph alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.".

SEC. 5. DUTY OF NOTICE TO OWNERS.

Whenever a Federal agency takes an agency action limiting the use of private property that may be affected by the amendments made by this Act, the agency shall 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 to them under such amendments.

SEC. 6. 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

Over the years, Federal courts have handed down prudential rules governing when and how a property owner may bring a "takings" claim under the fifth amendment of the Constitution. These procedural rules have proven so confusing and so burdensome to those with civil rights claims under the fifth amendment, that over the past decade one survey revealed that 83 percent of the takings claims raised in the United States district courts never reached the merits of the case, and of those property owners who could afford to appeal their cases, more than 64 percent still failed to have their appeals heard on the merits. The same survey notes that of the small portion of appellate cases where takings claims were found procedurally "ripe" and the merits reached, it took property owners, on the average, 9.6 years to have an appellate court reach a determination on the merits. H.R. 2372 would clarify the steps a property owner must take before bringing solely Federal claims under the fifth amendment in Federal court, thereby allowing both individuals and local governments the chance to reach the *merits* of their cases with less delay and expense. In doing so, H.R. 2372 would do nothing to alter substantive law under the fifth amendment. As always, it will be up to the courts, both State and Federal, to ensure that local actions do not violate constitutionally guaranteed individual rights.

BACKGROUND AND NEED FOR THE LEGISLATION

The fifth amendment to the United States Constitution prohibits the Federal Government from taking "private property . . . for public use without just compensation." This "takings clause," which was made applicable to the States through the 14th amendment, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), has been held to require the government to provide just compensation not only when the government directly appropriates property, see *Legal Tender Cases*, 12 Wall. 457, 551 (1871), but also when government regulations require the property owner to suffer a physical invasion of his property, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and when govern-

mental regulations deprive the property owner of all beneficial uses of the land, see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

However, property owners whose property has been taken through government regulation may not proceed directly to Federal court to vindicate their rights. Instead, those property owners have been required to first clear two prudential hurdles established by the Supreme Court to ensure that such claims are sufficiently "ripe" for adjudication. First, property owners must demonstrate that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). Second, property owners much show that they "[sought] compensation through the procedures the State has provided for doing so." *Id.* at 194.

The application of these requirements in the lower Federal courts has wreaked havoc upon property owners whose takings claims are systematically prevented from being heard on the merits. Additionally, many property owners are forced to endure years of lengthy, expensive, and unnecessarily duplicative litigation in State and Federal court in order to vindicate their constitutional rights.

REPRESENTATIVE CASE STUDIES

In *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 119 S.Ct. 1624 (1999), for example, landowners submitted a subdivision proposal in 1981 to build 344 residential units on a 37.6 acre oceanfront parcel in Monterey, California. At that time, the property was littered with trash and was traversed by 15 foot dunes which housed a sewer line. See *id.* at 1631. There were also remnants of an oil company terminal on the property, including tank pads, an industrial complex, broken pipes and concrete, and oil-soaked sand. See *id.*

The oil company that formerly occupied the property had also planted a nonnative ice plant to prevent erosion and to control soil conditions around the oil tanks. The ice plant was incompatible with the parcel's natural flora, which included buckwheat, the natural habitat of the endangered Smith's Blue Butterfly. Only one larva of the butterfly had been found on the property between 1981 and 1984, and the parcel was isolated from other habitats of the butterfly. See *id.*

Despite the fact that the 344 unit proposal was well below the 1000 units that were permissible under the relevant zoning requirements, the city's planning commission denied the proposal in 1982, but indicated that it would approve a plan for 264 units. See *id.* at 1632. The landowners thus submitted a proposal to build 264 units, which the planning commission denied in late 1983, stating that it would approve a plan for 224 units. See *id.* The landowners then prepared a proposal to build 224 units on the property, and the planning commission denied that proposal in 1984. See *id.*

The landowners appealed the commission's decision to the city council, which reversed the commission and sent the matter back with instructions for the commission to consider a proposal for 190 units. See *id.* Pursuant to the council's suggestions, the landowners

submitted four detailed plans to build 190 units on the parcel. The planning commission rejected these proposals later in 1984. See *id.*

Once again, the city council overruled the commission and approved one of the plans subject to certain conditions. For the next year, the landowners revised their plan according to the city's conditions, preserving sufficient public open space, landscaped areas, public and private streets, and preserving and restoring the buckwheat for the Smith's Blue Butterfly. See *id.* The planning commission's architectural review committee recommended approval of the plan, but the planning commission rejected the committee's recommendation in 1986. See *id.*

The landowners again appealed to the city council, which this time denied approval of the final plan, stating, among other things, that the plan would disrupt the habitat of the Smith's Blue Butterfly (notwithstanding the fact that the plan would have removed the harmful ice plant and preserved or restored buckwheat on over half of the property). The council also refused to specify any measures the landowners could take to obtain approval of the plan, and refused to extend the conditional permit to allow the property owners time to address the council's concerns. See *id.* The council's decision also came at such a time that a sewer moratorium issued by another agency would have made it more difficult or impossible to gain approval of a new plan. See *id.*

The property owners filed suit in the United States District Court for the Northern District of California, alleging that, among other things, the denial of the proposal by the city was an unconstitutional regulatory taking of their property without just compensation. Notwithstanding the fact that the dispute with the city had gone on for 5 years, with 19 different site plans and 5 formal decisions, the district court held that the property owners' claim was not ripe because they "had neither obtained a definite decision as to the development the city would allow nor sought compensation in State court." *Id.* at 1633.

The property owners appealed that decision to the United States Court of Appeals for the Ninth Circuit, which reversed the district court, holding that the city's decision was sufficiently final for review, and that the landowners were not required to seek compensation in State court because California provided no remedy for temporary regulatory takings when the city issued its final denial. See 920 F.2d 1496 (9th Cir. 1990). On remand to the district court, the landowner's claims were finally submitted to a jury, which awarded the landowners $1.45 million on February 17, 1995, *14 years after the landowners submitted their initial development plan to the city*. See 119 S.Ct. 1624, at 1634. That decision was affirmed by the ninth circuit in 1996, see 95 F.3d 1422 (9th Cir. 1996), and by the United States Supreme Court on May 24, 1999, see 119 S.Ct. 1624 (1999), at 1634.

Another example of the injustice resulting from the application of the ripeness requirements in lower Federal courts is *Reahard* v. *Lee County*, 30 F.3d 1412 (11th Cir. 1994). In that case, Richard Reahard and his family sought to develop a subdivision on a 40 acre parcel of land his family had owned in Florida for at least 40 years. While the Reahards were planning the subdivision, however, the Lee County Board of Commissioners passed a land use plan

which classified Mr. Reahard's property as a "Resource Protection Area." See *id.* at 1413. As a result of this classification, the property could only be used for a single residence or "for use of a 'recreational, open space or conservation nature.'" *Id.*

For the next 5 years, the Reahards unsuccessfully sought administrative relief from the confiscatory classification. On September 1, 1989, the Reahards filed suit in Florida State court, alleging that the county's classification of their land constituted an uncompensated taking of private property in violation of both State and Federal law. See *id.* at 1414. The county removed this action to Federal court on October 5, 1989. See *id.*

In July 1990, the Lee County Attorney's Office (the administrator of the plan) ruled that the Reahards could construct four single-family residences on the land. See *id.* The Reahards appealed this decision to the Board of County Commissioners, but the Board rejected the Reahards' appeal, and in fact modified it to permit the construction of only one single-family residence on the property. See *id.*

The Reahards' claims were eventually tried before a Federal magistrate judge, who ruled that the county's land use plan had in fact resulted in a taking of the Reahards' property. A jury awarded the Reahards $700,000, plus interest, as compensation. See *id.* In 1992, the United States Court of Appeals for the Eleventh Circuit reversed the magistrate judge's decision, however, holding that the judge had misapplied the test for a regulatory taking. See 968 F.2d 1131 (11th Cir. 1992). In an addendum opinion issued later, the court of appeals instructed the magistrate to consider on remand whether the Reahards had made sufficient efforts to pursue administrative remedies and whether there were judicial remedies available to them in State court. See 978 F.2d 1212 (11th Cir. 1992). The court of appeals stated that "[a]ssuming that these claims could be satisfied through adequate State judicial procedures, the Reahards have not stated a ripe Federal claim under *Williamson County*." *Id.* at 1213.

On remand, the magistrate judge concluded that all State remedies had in fact been exhausted by the Reahards because no further administrative remedies existed and because no judicial remedy existed under Florida law. The magistrate judge again found that a taking had occurred and reinstated the jury award of $700,000. See 30 F.3d at 1414.

In 1994, the eleventh circuit reversed the district court's decision for a second time, holding that the Reahards' claim was not sufficiently ripe for adjudication in Federal court. According to the eleventh circuit, the county's decision regarding the permissible uses of the subject property was not "final" for ripeness purposes until September 19, 1990, the date the County Board of Commissioners modified the administrator's decision regarding the number of single-family residences that could be constructed on the property. See *id.* at 1416. Thus, the court reasoned, the plaintiff's claim could not have "ripened" before that date. See *id.*

The court then noted that although there was no judicial remedy under Florida law on the date the Reahards filed their suit in Federal court in 1989, the Florida Supreme Court had recognized such a remedy in April 1990—*before* September 19, 1990, the date on

which the Reahards' claim supposedly ripened. "Thus," the court continued,

> by the time that the "final decision" obstacle was removed from the path of the Reahards' Federal claim, a second obstacle to that claim had been erected in the form of a newly-recognized State remedy for inverse condemnation. The Reahards' claim therefore never has become ripe while on the Federal docket . . .
>
> *Id.* at 1418.

As a result of this tortured reasoning, the court of appeals reversed the magistrate judge's decision and remanded the case to State court. The Reahards then pursued their claim in State court, and in 1997, a jury awarded them $600,000 in damages plus $816,000 in interest, *13 years after the county took their property*. The jury also awarded the Reahards $455,000 in attorneys fees and an additional $100,000 in costs.

Property owners whose Federal takings claims are dismissed on ripeness grounds by Federal courts also face another procedural pitfall that results from being forced to litigate first in State court—namely, application of the doctrines of res judicata and collateral estoppel to bar Federal takings claims. This procedural trap operates as follows: Federal courts often dismiss property owners' takings claims because the property owners have not first litigated their claims in State court; when the property owners return to Federal court after litigating the State law claims in State court, the same Federal courts hold that the Federal takings claims are barred because they could have been litigated in the State court proceedings.

In *Dodd* v. *Hood River County*, 136 F.3d 1219 (9th Cir. 1998), for example, the plaintiffs purchased a piece of property on which they planned to build their retirement home. After they purchased the property, changes in the zoning ordinances resulted in the denial of a land use permit for construction of the residence. See *id.* at 1223. The landowners appealed the decision through the State administrative process and then to the Oregon Court of Appeals and the Oregon Supreme Court, all of which affirmed the denial of the permit. See *id.* The property owners expressly reserved their Federal takings claim during the State court proceedings, and the Federal claim was not litigated. See *id.*

Before the Oregon Supreme Court had decided the case, the property owners filed suit in Federal district court, alleging that their property had been taken in violation of the 5th and 14th amendments. See *id.* That claim was dismissed by the district court as unripe, because the State court proceedings were not complete. See *id.* The landowners appealed to the ninth circuit, which reversed the district court because the Oregon Supreme Court had issued its final decision. On remand, the district court held that the landowners' Federal takings claims were barred by the doctrine of collateral estoppel, even though the Federal claims had not been litigated in Federal court and had been expressly reserved. See *id.* 1228.

In *Santa Fe Village Venture* v. *City of Albuquerque*, 914 F. Supp. 478 (D. N.M. 1995), a landowner filed suit in Federal court claim-

ing that a property acquisition policy and building moratorium constituted a taking of his property. The district court dismissed the Federal claim because the plaintiff had not sought compensation through the judicial and administrative processes of the State. See *id.* at 480. The landowner then filed suit in State court, but the court granted summary judgment for the city on standing grounds. See *id.* No Federal claims were presented or litigated in the State court.

The landowner then filed suit in Federal court, claiming that his property had been taken in violation of the 5th and 14th amendments. The district court granted summary judgment for the city on the grounds that "[c]laim preclusion bars claims that were or could have been brought" in the State court proceedings. See *id.* at 481. "The fact that resorting to State court was necessary to create ripeness under *Williamson County*," the court continued, was "insufficient to preclude the application of claim preclusion in a subsequent Federal court action." See *id.* at 482.

The effect of the reasoning of these cases is that many property owners end up with *no opportunity* to have their Federal constitutional claims heard in Federal court. Federal takings claims cannot be brought in Federal court until all State court remedies are exhausted; Federal takings claims cannot then be heard in Federal court because they could have been brought in State court. No other constitutional rights are subjected to such tortuous procedural requirements before the merits of plaintiffs' cases can be reached.

In addition to the procedural hurdles outlined above, Federal courts have also invoked various abstention doctrines in order to avoid deciding the merits of takings claims. For example, Pullman abstention allows a Federal court to abstain from deciding a Federal question pending the resolution of an unsettled question of State law in State court. See *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941). Numerous Federal courts have invoked Pullman abstention in order to avoid deciding property owners' takings claims. See, e.g., *Slyman* v. *City of Willoughby*, 134 F.3d 372 (6th Cir. 1998); *Bob's Home Serv.* v. *Warren County*, 755 F.2d 625 (8th Cir. 1985); *Pearl Inv. Co.* v. *San Francisco*, 774 F.2d 1460 (9th Cir. 1986).

Similarly, *Burford* abstention allows Federal courts to abstain in cases involving complex State regulatory schemes based primarily upon local factors. See *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). Federal courts have also relied upon this doctrine in order to avoid the merits of property owners' takings claims. See, e.g., *Front Royal & Warren County* v. *Town of Front Royal*, 945 F.2d 760 (4th Cir. 1991); *2BD Ltd. Partnership* v. *Queen Anne's County*, 896 F. Supp. 518 (D. Md. 1995).

THE SCOPE OF THE CURRENT CRISIS IN PROCEDURAL TAKINGS LAW

When local governments take advantage of the ambiguities in current takings procedural law by denying takings plaintiffs a definitive answer as to precisely how they can use their property if their initial application for property use is denied, takings plaintiffs are left in a perpetual holding pattern in which they cannot land in Federal court. The result is a situation in which, as one

commentator has shown, judges have avoided addressing the merits of Federal takings claims in over 94% of all takings cases litigated between 1983 and 1988. See Gregory Overstreet, The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions, 10 J. Land Use & Envt'l L. 91, 92, n. 3 (1994). An even more recent survey reveals that 83% of the takings claims initially raised in the United States district courts, from 1990 to 1998, never reached the merits. Of those property owners who could afford to appeal their cases, more than 64% still failed to have their appeals heard on the merits. Moreover, the survey notes that of the small portion of appellate cases where takings claims were found procedurally "ripe" and the merits reached, "it took property owners, on the average, 9.6 years to have an appellate court reach its determination." See Delaney and Desiderio, 31 The Urban Lawyer at 202–231 (Spring 1999), at 196.

Even these shocking statistical profiles of denials of justice cannot reveal the numbers of additional low income or middle class property owners, who—in the face of the extremely expensive and purely procedural challenges that now stand between them and a Federal forum on the merits of their Federal civil rights claims—are too intimidated to even start down the long road to a hearing on the merits of their case.

H.R. 2372 was designed to address this systematic suppression of constitutionally protected property rights by clarifying and simplifying the procedures which govern Federal property rights claims in Federal court. In particular, H.R. 2372 clarifies, for purposes of the application of the ripeness doctrine, when a "final decision" has been made by the government regarding the permissible uses of the property. H.R. 2372 also removes the requirement that property owners litigate their Federal takings claims in State court first. H.R. 2372 also prevents Federal judges from abstaining in cases that involve only Federal takings claims, although they may certify questions of State law to State courts in certain circumstances. Similar legislation passed the House during the last Congress (H.R. 1534) by a vote of 248 to 178.

H.R. 2372 does nothing to alter the substantive law of takings under the fifth amendment. Therefore, there should be no concern that H.R. 2372 will do anything to deter local governments from continuing to enact ordinances and regulations protecting the environment, and the health and safety of its citizens, as it sees fit, and with due regard to the rights of individuals under the fifth amendment of the Constitution.

THE ROOTS OF THE CURRENT CONFUSION IN PROCEDURAL TAKINGS LAW

It is a well-established principle that a claim for just compensation for a taking of private property accrues "at the time of [the] taking." *Danforth* v. *United States*, 308 U.S. 271, 284 (1939). Nevertheless, the Supreme Court's decision in *Williamson County* has bred confusion in this area, treating takings claims against State and local governments as essentially nonaccrued until State remedies are pursued. When combined with the doctrines of res judicata or collateral estoppel, the takings claims cannot be litigated

once they "accrue" for purposes of Federal litigation. By predicating the *Williamson County* ripeness decision upon an erroneous assumption concerning when a takings claim accrues—which stands in tension with but does not overrule prior statements of when a taking accrues—the Supreme Court adopted a doctrine of ripeness in *Williamson County* that has led to harsh and unsound results.

The *Williamson County* Court "granted certiorari to address the question whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." 473 U.S. at 185. The Supreme Court, however, did not decide the case on the questions presented. Instead, *Williamson County* left the temporary takings issue "for another day," concluding that the property owner's claim for just compensation was "premature." *Id.* at 186. The primary basis for this conclusion was the Court's application of the rule that a regulatory takings claim "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." *Id.*

After having explicated the final decision requirement, the Court in *Williamson County* concluded that the petitioner planning commission's "denial of approval does not conclusively determine whether respondent [property owner] will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision." 473 U.S. at 194. The opinion could have stopped at that point, but it did not. Without the benefit of briefing, the Supreme Court introduced a "second reason [why] the taking[s] claim is not yet ripe," namely, that the property owner "did not seek compensation through the procedures the State has provided for doing so." *Id.* This aspect of *Williamson County* varies sharply from the Court's established Just Compensation Clause jurisprudence.

The *Williamson County* decision failed to acknowledge what has been the consistent rule of the Supreme Court for many decades, namely that the government's taking of private property and the government's obligation to pay just compensation for such takings come into being at the same time. The Supreme Court has formulated this rule in varying ways: the event of taking "gives rise to the claim for compensation," *United States* v. *Dow*, 357 U.S. 17, 22 (1958); *United States* v. *Clarke*, 445 U.S. 253, 258 (1980); compensation becomes due "at the time of taking," Danforth, 308 U.S. at 284; "an obligation to pay for" the land arose "when it was taken," *United States* v. *Dickinson*, 331 U.S. 745, 751 (1946); the claim for just compensation "accrued at the time of the taking," *Soriano* v. *United States*, 352 U.S. 270, 275 (1957), the government's duty to pay just compensation is triggered "[a]s soon as private property has been taken," *San Diego Gas and Electric Company* v. *City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting).

The notion that State compensation must be first pursued to determine whether there has been a violation of the Federal Constitution is contrary to the established case law holding that takings claims accrue at the time of the regulatory action that denies use of property.

Consistent with *Dow, Clarke, Danforth, Dickinson*, and *Soriano*, no court treats Federal claims for just compensation for completed takings of property as *inherently* unripe or premature. That is, no *State* judicial system refuses to adjudicate *Federal* claims for just compensation on the ground that they are unripe or premature until a property owner has first pursued to completion all claims for compensation under *State* law. State judicial systems will hear and determine *Federal* claims for just compensation *as soon* as a taking has occurred.[1] The Supreme Court, moreover, has routinely exercised jurisdiction to review State court judgments concerning such claims without suggesting that the claims were unripe or premature because the property owner had not *first* pursued claims for compensation under State law.[2]

The notion that a State's action is somehow not "complete" until after the property owner avails himself of State law compensation procedures cannot be reconciled with the rule that a State's taking of property, without more, gives rise to a "right to recover just compensation" on the part of the owner and a corresponding "obligation to pay just compensation" on the part of the State. *First English*, 482 U.S. at 315. Once a taking has occurred, liability is unavoidable and "no subsequent action by the government can relieve it of the duty to provide compensation." *Id.* at 321 (internal quotation marks omitted).

Moreover, even if property owners can manage to salvage the formal right to bring their Federal claims in Federal court, they may effectively lose that right through application of the rules of issue preclusion, see, e.g., *Dodd* v. *Hood River County*, 136 F.3d at 1227 ("Nor does the Dodds' previous reservation of this Federal takings claim . . . prevent operation of the issue preclusion doctrine."), *cert. denied*, 119 S. Ct. 278 (1998), or claim preclusion. In applying issue preclusion in *Dodd*, the ninth circuit has equated the State takings question—whether a land use regulation "allows a landowner some substantial beneficial use of his property" for purposes of the compensation provision of the Oregon Constitution—with the Federal takings question of whether "a land owner has been deprived of 'economically beneficial uses' of his property" for purposes of the Just Compensation Clause of the United States Constitution. 136 F.3d at 1225. In so doing, the court deprived the property owner of an opportunity *ever* to present its Federal claims for a cat-

[1] See, e.g., *Jacobs Wind Electric Co. Inc.* v. *Department of Transportation*, 636 So. 2d 1333, 1337 (Fla. 1993) (contemplating that a patent holder would assert its claims under the Just Compensation Clause along with its claims under the State analogue and under State common law); *Kavanau* v. *Santa Monica Rent Control Board*, 941 P.2d 851, 855 (Cal. 1997) (observing that property owner brought a claim for "'just compensation' in the form of lost rental income and interest" under both "article I, section 19 of the California Constitution and the fifth amendment of the United States Constitution"), *cert. denied*, 118 S. Ct. 856 (1998); *Mayhew* v. *Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1997) (finding ripe the property owner's "just compensation takings claims" brought at the same time "under the United States Constitution and [the] Texas Constitution").

[2] See, e.g., *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992) (property owner did not first pursue State law remedies for compensation; rather, once the regulatory agency had made final decision, owner "promptly filed suit in the South Carolina Court of Common Pleas" seeking just compensation for regulatory taking); *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 308–09 (1987) (little more than a month after the ordinance was adopted, property owner brought action simultaneously seeking damages in tort and just compensation for a regulatory taking); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982) (without first pursuing separate State law remedies for compensation, property owner sued seeking damages for trespass and just compensation for government-sponsored physical invasion).

egorical taking to a Federal court. In a case evidencing the same procedural trap, *Wilkinson* v. *Pitkin County*, 142 F.3d 1319 (10th Cir. 1998), the tenth circuit was compelled to state, "We do note our concern that *Williamson*'s ripeness requirement may, in actuality, almost always result in preclusion of Federal claims . . . It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel." *Id.* at 1325 n.4. These kinds of decisions can be expected to multiply, given that nearly every State has a compensation provision that is, or has been interpreted to be, very similar to the Just Compensation Clause.

H.R. 2372 would go far toward removing some of the internal contradictions present in current Supreme Court case law caused by its various formulations of prudential ripeness requirements.

THE COMBINED EFFECT OF THESE PROCEDURAL RULES IS THAT PROPERTY RIGHTS ARE PROCEDURALLY DISADVANTAGED COMPARED TO OTHER CIVIL RIGHTS

The combined effect of *Williamson County*, and the application of issue and claim preclusion, is to drive out of Federal court virtually all Federal claims for just compensation for takings of private property by local governments. This result is a stark anomaly in light of the Supreme Court's firm refusal, with respect to other Federal claims brought pursuant to 42 U.S.C. § 1983, to "require[] exhaustion of State judicial or administrative remedies, recognizing the paramount role Congress has assigned to the Federal courts to protect constitutional rights." *Steffel* v. *Thompson*, 415 U.S. 452, 472–73 (1974) (emphasis added), quoted in *Patsy* v. *Board of Regents*, 457 U.S. 496, 500 (1982). Indeed, the general rule, as outlined in *Monroe* v. *Pape*, 365 U.S. 167 (1961), is that exhaustion of State administrative or judicial remedies is not necessary before a case can be brought under § 1983. See *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961) ("The Federal remedy [§ 1983] is supplementary to the State remedy, and the latter need not be first sought and refused before the Federal one is invoked."). This principle has been reiterated in *Ellis* v. *Dyson*, 421 U.S. 426, 432 (1975) ("Exhaustion of State judicial or administrative remedies in Steffel [v. Thompson, 415 U.S. 452 (1974)] was ruled not to be necessary, for we have long held that an action under § 1983 is free of that requirement."). See also *Board of Regents of the University of the State of New York* v. *Tomanio*, 446 U.S. 478, 491 (1980) ("This Court has not interpreted § 1983 to require a litigant to pursue State judicial remedies prior to commencing an action under this section.").[3]

[3] In holding that exhaustion of State administrative remedies was not required in a case brought under § 1983, the Supreme Court examined the legislative history of § 1983 and stated "The Civil Rights Act of 1871, along with the 14th amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our Federal system accomplished during the Reconstruction Era. During that time, the Federal Government was clearly established as a guarantor of the basic Federal rights of individuals against incursions by State power. As we recognized in *Mitchum* v. *Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 676 (1880)), '[t]he very purpose of § 1983 was to interpose the Federal courts between the States and the people, as guardians of the people's Federal rights—to protect the people from unconstitutional action under color of State law, whether that action be executive, legislative, or judicial' . . . [I]n passing § 1, Congress assigned to the Federal courts a paramount role in protecting constitutional rights . . . Based on [the legislative history of § 1983], we conclude that exhaustion of State administrative remedies should not be

Continued

Other Federal constitutional claims are not subject to prudential hurdles before they can be brought in Federal court. In the first amendment area, obscene material, for example, is not protected. Whether an artistic or literary work is obscene is determined by Federal courts who assess "contemporary community standards" and definitions under "applicable State law." See *Miller* v. *California*, 413 U.S. 15, 24 (1973). In the first amendment area, there is no requirement that a plaintiff litigate such "local" matters in State court first before they have access to Federal court. Many other Federal cases have analyzed State laws and local land use ordinances to determine if they pass first amendment muster. See, e.g., *City of Renton* v. *Playtime Theatres. Inc.*, 475 U.S. 41, 50 (1986) ("[t]he appropriate inquiry . . . is whether the . . . [local] ordinance is designed to serve a substantial government interest . . ."); *Members of the City Council of the City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) (assessing free speech implications of ordinance prohibiting posting of signs on public property); *Young* v. *American Mini Theatres*, 427 U. S. 50, 71–72 (1976) (assessing constitutionality of local movie theater zoning ordinance under the first amendment). In *none* of these cases was there a mandate for State court litigation to ripen the Federal constitutional claim.

The Federal courts also entertain land use cases that potentially impact the first amendment's religious freedom protections. See, e.g. *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982) (Massachusetts statute violated first amendment establishment clause because it vested the governing bodies of religious institutions with authority to veto applications for liquor licenses within a 500-foot radius of a church); *First Assembly of God of Naples* v. *Collier County*, 20 F.3d 419 (1994), *cert. denied*, 115 S.Ct. 730 (1995) (county enforcement of zoning ordinance against religious institution operating a homeless shelter on church property did not violate first amendment free exercise clause); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (addressing constitutionality of zoning ordinance prohibiting churches in residential districts). In none of these "local land use" cases were plaintiffs required to first litigate, in State court, their religious freedom claims under the first amendment.

Similarly, Federal courts have not hesitated to address property issues to determine the scope of the fourth amendment. For example, "the curtilage concept [that] originated at common law to extend to the area immediately surrounding a dwelling house . . . plays a part in determining the reach of the fourth amendment," and is decided by Federal courts in the first instance. *United States* v. *Dunn*, 480 U.S. 294, 300 (1987) (barn located 60 yards from home, not enclosed by a fence, was not within curtilage and thus not protected by the fourth amendment).

H.R. 2372 simply affords equal access to Federal courthouses to those with Federal fifth amendment claims, recognizing that "the Takings Clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First or Fourth Amendment, [and] should not

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required as a prerequisite to bringing an action pursuant to § 1983." *Patsy* v. *Board of Regents*, 457 U.S. 496, 503 (1982).

be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994). See also *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.") (holding a woman's due process rights were violated when her savings account was garnished under State law for alleged nonpayment of a loan, and she received no notice and no chance to be heard).

H.R. 2372 LEVELS THE PLAYING FIELD AND ALLEVIATES THE DISPROPORTIONATE FINANCIAL BURDENS CURRENTLY FACED BY SMALL AND MIDDLE CLASS PROPERTY OWNERS

The expense of bringing a Federal takings claim through the labyrinthine procedures in place today is disproportionately borne by private citizens, who unlike local governments, cannot draw on the public treasury to defend their rights. Hence, the current system tends to deter individuals from protecting their rights, uniquely guaranteed by the Bill of Rights, far more than it deters local governments from defending their actions.

H.R. 2372, more than helping any big developer, helps small developers—the middle class—whose finances are particularly strained by the costs of defending their fifth amendment property rights. The current procedural rules favor the *wealthiest* developers. Indeed, where, as is often the case, people invest in property early in their lives in the hopes of developing it when they retire and earning their retirement income from it, an efficient resolution of property development issues regarding their property is especially important. H.R. 2372 provides for such efficient resolutions of Federal takings claims.

H.R. 2372 REDUCES THE COSTS OF TAKINGS LITIGATION FOR BOTH INDIVIDUALS AND LOCAL GOVERNMENTS

Some argue that H.R. 2372 will increase the costs of takings litigation borne by local governments. To the contrary, by streamlining the procedures that get both parties to the merits of their cases, local governments will save the resources they would have to spend, and which they do spend now under current procedural rules, litigating the forum in which the merits of a Federal rights case should be heard.

Further, in a December, 1998, report, the Congressional Budget Office had the following to say about the impact of efforts to reduce procedural barriers to Federal courts in takings claims on the workload of the Federal bench:

> "Too little is known about the volume of takings litigation in the State courts to reliably forecast the number of those claims that might enter the Federal courts as a result of enacting any of the proposals [reducing barriers to Federal courts in takings cases]. The effect of the change

> might be quite small. *The courts would continue to evaluate claims according to the existing Federal constitutional takings jurisprudence, which in many cases presents a difficult path for property owners seeking compensation. Thus, even if such claims were heard in Federal courts, the prospects of success for property owners would remain poor*; combined with the cost and complexity of litigating in a Federal court, they might continue to discourage owners from bringing takings claims against State and local government in Federal courts."
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> CBO Study, "Regulatory Takings and Proposals for Change" (December 1998), at 40 (emphasis added).

Takings cases are not filed lightly, in State or Federal court, because of the heavy burden of proof faced by property owners, a burden passage of H.R. 2372 would not alleviate. However, even if, following passage of H.R. 2372, there were some increase in frivolous takings claims brought in Federal court under § 1983 against local government, prevailing local governments in takings cases can be awarded attorney fees under 42 U.S.C. § 1988(b) and expert fees under 42 U.S.C. § 1988(c) at the discretion of the court. See *Hughes* v. *Rowe*, 449 U.S. 5, 14–16 (1980) (per curium) (applying standard of award of attorneys' fees under § 1988 where the action was "frivolous, unreasonable, or without foundation"). See also *Desisto College, Inc.* v. *Town of Howey-in-the-Hills*, 718 F.Supp. 906 (M.D.Fla. 1989) (town awarded $203,279.27 in attorney fees and $17,194.12 in costs where plaintiff's claim was frivolous because it had no basis in law, plaintiff rejected reasonable offer to settle, trial court dismissed case without trial, and plaintiff did not offer novel legal theories); *Carter* v. *Rollins Cablevision*, 634 F.Supp. 944 (D.Mass. 1986) (town awarded $35,514.40 in attorney fees where plaintiff's claims were frivolous).

By saving local governments the costs and time investments currently entailed in litigating the proper forum for takings cases, H.R. 2372 frees those resources for use in defending and articulating the local government's land use plans and regulations.

BY ALLOWING MORE TAKINGS CASES TO REACH THE MERITS IN FEDERAL COURT, H.R. 2372 WILL LEAD TO THE CLARIFICATION OF AMBIGUITIES IN TAKINGS LAW, AND IN SO DOING REDUCE FUTURE LITIGATION

In addition, the number of takings cases and the costs of their prosecution and defense will be reduced as courts further clarify substantive takings law following hearings on the merits. For a society to enjoy a rule of law, it must first have a law of rules, and, as Loren Smith, Chief Judge of the U.S. Court of Federal Claims, has observed, the current state of takings law "is really the antithesis of law . . . every case is its own law." Richard Miniter, You Just Can't Take It Anymore, 70 Pol'y Rev. 40, 44 (No. 70, Fall 1994) (quoting Chief Judge Smith). Increasing the number of takings cases *that reach the merits* will have the beneficial effect of allowing Federal courts to further clarify the contours of takings law, a particularly complex field of law. Where the law is more clearly defined, less litigation is likely to follow because the rules will be easier for all to see, leaving less room for differing interpre-

tations of the law and therefore less cause to litigate. The mere fact that further cases will reach the merits, therefore, should over the long term reduce the amount of takings litigation generally.

H.R. 2372 SHOWS DEFERENCE TO THE LOCAL LAND USE APPROVAL PROCESS

H.R. 2372 does not shift authority over local land use issues to Federal courts. Federal judges will not issue building permits or decide zoning issues. These decisions will remain, as always, strictly the province of local government entities. Under H.R. 2372, the purpose of Federal courts would remain as it is today, including their purpose to insure that the actions of local governments comport with Constitutional standards and do not improperly restrict the rights of citizens who happen to be landowners.

Neither would H.R. 2372 allow landowners to circumvent local authority or procedures. Under this legislation, before a landowner could proceed to Federal court with a takings claim, she would have to obtain clear decisions from local land use agencies in order to receive a "final decision" which would be ripe for judicial review.[4] These decisions would have to include a decision on an initial application, a decision on an appeal of a denial of that application to the local planning board, a decision on an application to the local zoning board for a waiver, and a decision on an appeal to a body of elected officials such as a local governing board, if available under applicable local law. Further, if an initial application is denied by a locality with a written explanation that clarifies the use, density, or intensity of development of the property that would be approved, the property owner must resubmit another meaningful application taking into account the terms of the disapproval.

H.R. 2372 also does not provide takings plaintiffs with an unfair advantage in their ability to "forum shop" by making Federal forums more available to them in their defense of their Federal rights. In *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156 (1997), the Supreme Court held that when constitutionally aggrieved landowners properly file their takings actions in State courts, municipal defendants can routinely remove those cases to Federal court. H.R. 2372 simply levels the playing field by affording the same choice of forum to takings victims.

In addition, H.R. 2372 provides for Federal courts to retain their ability to refer unsettled issues of State law necessary to the reso-

[4] H.R. 2372 also provides that, where the government fails to act within a reasonable period of time on any application, reapplication, appeal, waiver, or review of the case, such failure to act will be considered a disapproval. This provision is supported in the case law. Where regulators may delay action on a land use application for an unreasonable period of time, the municipality's land use approval procedures may be inadequate, and the owner may have a claim arising out of those procedures. The United States Court of Appeals for the Federal Circuit, the Federal appeals court with the most experience in regulatory takings cases, has stated that "[O]nly after the delay becomes unreasonable would a taking begin, albeit such date may occur before the challenged regulation or regulatory action 'has ultimately been held invalid.'" *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 803 (Fed. Cir. 1993) (quoting *First English*, 482 U.S. 304, 320 (1987)). This principle is also supported by language in *First English*, in which the Supreme Court distinguished regulatory takings from "the quite different questions that would arise in the case of *normal* delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 321 (1987) (emphasis added). Claims arising out of inadequate land use approval procedures may also give rise to claims under the Due Process Clause or the Equal Protection Clause. See U.S. Const. Amend. XIV, § 1. Such claims may arise even if the permit or variance is ultimately granted.

lution of the Federal civil rights claims to State courts. Also, H.R. 2372 will have no effect on cases involving takings by State governments, in accordance with existing law on sovereign immunity.[5]

CONGRESS HAS THE AUTHORITY TO PASS H.R. 2372

Congress has the authority to enact H.R. 2372 into law. It is clear that "Congress has undoubted power to regulate the practice and procedure of Federal courts." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1940). See also *Hanna* v. *Plumer*, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a Federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."); *Willy* v. *Coastal Corp.*, 503 U.S. 131, 137 (1992) ("Article I, § 8, cl. 9 authorizes Congress to establish the lower Federal courts. From almost the founding days of the country it has been firmly established that Congress acting pursuant to its authority to make all laws necessary and proper to their establishment may also enact laws regulating the conduct of those courts"). For example, Congress has the last word in approving the Federal Rules of Civil Procedure, which among other things, contain specific rules relating to Federal court jurisdiction. Further, the Supreme Court, in *Suitum* v. *Tahoe Regional Planning Agency*, stated that "We

[5] It is clear under Supreme Court precedent that States—unlike local governmental units—could not be sued under H.R. 2372. H.R. 2372 does not alter § 1983 precedent regarding sovereign immunity. The Supreme Court has established that, while § 1983 contemplates lawsuits against those acting "under color of State law," the 11th amendment renders State officials, acting in their official capacities, immune from suit in Federal court. See *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 66, 71 (1989) ("Section 1983 provides a Federal forum to remedy many deprivations of civil liberties, but it does not provide a Federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the Federal-State balance in that respect was made clear in our decision in *Quern* [*Quern* v. *Jordan*, 440 U.S. 332 (1979) (holding by implication that a State is not a person under § 1983)] . . . We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983.") (citations omitted).

However, municipalities and counties are not immune from suit under § 1983. See *Owen* v. *City of Independence*, 445 U.S. 622, 636–37 (1980); *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.").

The Supreme Court jurisprudence that defines the limits of sovereign immunity in the context of claims brought under § 1983 has done so by holding that the word "person" as it appears in § 1983 does not include States of the Union. See *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 71 (1989). H.R. 2372 does not in any way alter the definition of "person" in § 1983. Indeed, H.R. 2372 reproduces exactly the phrase that appears elsewhere in § 1983, and which the Supreme Court has already interpreted. That phrase is any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Under the canons of statutory construction, and common sense, if Congress uses the same phrase again in the same statute, it is determined to give that phrase the same meaning. Cases utilizing this canon include *Washington Metropolitan Transit Authority* v. *Johnson*, 467 U.S. 925, 935–36 (1984); *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 129 (1983); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980); *Northcross* v. *Board of Educ. of Memphis*, 412 U.S. 427, 428 (1973); and *Erlenbaugh* v. *United States*, 409 U.S. 239, 243–44 (1972).

Under these clear precedents, H.R. 2372 would not be interpreted by courts to allow suits against States.

have noted that ripeness doctrine is drawn both from article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," 520 U.S. 725, 734 n.7 (1997) (quoting *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 57 n. 18).

Insofar as there are article III aspects to ripeness considerations, a "case or controversy" under article III is established upon the proposition, as stated by the Supreme Court, that "the interference that effects a taking might begin much earlier [than the point at which the local government refuses to pay compensation], and compensation is measured from that time [the time at which the initial 'interference' occurs]." *First English*, 482 U.S. 304, 320 n. 10 (1987).[6] And apart from article III considerations, mere prudential ripeness procedural hurdles can be remedied by Congress under its authority to regulate the practices and procedures of Federal courts. Abstention, too, is not an article III requirement, but rather another court-created prudential requirement.[7]

That the ripeness requirements applicable to takings claims are prudential, and not jurisdictional, is clear from the language of the Supreme Court's own decisions. In *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), for example, the Court refused to insist upon strict adherence to the "prudential ripeness" of the plaintiff's claim. In that case, a South Carolina law had barred the plaintiff from developing a beachfront parcel of property, and he filed suit in State court seeking compensation. The trial court held that the law affected a taking of the plaintiff's property and ordered the State to pay compensation. See *id.* at 1009. The State appealed the decision to the South Carolina Supreme Court, which reversed the trial court's decision, holding that no taking had occurred. Before the case was decided by the South Carolina Supreme Court, however, the State amended the law to allow for special permits for construction on property affected by the law. See *id.*

The United States Supreme Court granted *certiorari* and reversed. Before reaching the merits, however, the Court had to decide whether the ripeness doctrine would bar review of the plaintiffs' claim because, with the new procedure available under State law for obtaining exemptions from the restrictions in the future, the plaintiff had not yet obtained a final decision regarding how the property could be developed. The Court agreed to review the property owner's permanent takings claim, despite the fact that it

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[6] It is also worth noting that in First English, the takings issue was deemed ripe before a taking was ever established by a lower court.

[7] The abstention provisions of H.R. 2372 are well supported in the case law allowing Federal courts to review Federal takings claims prior to review in State court. In *City of Chicago* v. *International College of Surgeons*, the Supreme Court concluded, "a case containing claims that local administrative action violates Federal law . . . is within the jurisdiction of Federal district courts." 522 U.S. 156, at 528–29. Indeed, on remand, the seventh circuit had no difficulty finding that it could appropriately resolve the merits of the takings claim without State court review. The seventh circuit recognized that "the doctrine of abstention is 'an extraordinary remedy and narrow exception to the duty of a District Court to adjudicate a controversy properly before it' and may be invoked only in those 'exceptional circumstances' in which surrendering jurisdiction 'would clearly serve an important countervailing interest.'" *City of Chicago* v. *International College of Surgeons*, 153 F.3d 356, 360 (7th Cir. 1998). While the ordinance at issue "reflect[ed] important local policy concerns regarding the development and preservation of . . . real estate," *id.* at 362, the seventh circuit easily found that the matter before it could be decided on the merits. Thus, the *City of Chicago* decision on remand confirms H.R. 2372's fundamental proposition that Federal courts have an obligation to hear Federal takings cases premised on the conduct of local officials.

was not technically ripe, because the lower court had decided the case on the merits, not on ripeness grounds, and the plaintiff's temporary takings claim would otherwise not be subject to review. The Court concluded that

> it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged article III injury in fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act. That there is a discretionary "special permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.
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> *Id.* at 1012–13 (emphasis added).[8]

Similarly, in *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), the Court noted that the only question it was addressing in that case was "whether Suitum's claim of a regulatory taking of her land . . . is ready for judicial review under *prudential* ripeness principles." *Id.* at 733 (emphasis added); see also *id.* at 734 (noting that "[t]here are two independent *prudential* hurdles to a regulatory taking claim brought against a State entity in Federal court") (emphasis added). Like the *Lucas* Court, the *Suitum* Court explicitly acknowledged the distinction between the question of whether an article III justiciable controversy exists and the question of whether a property owner's "action fails to satisfy our prudential ripeness requirements." *Id.* at 733.

Because the ripeness requirements applicable to takings claims are prudential procedural requirements, Congress has the authority to alter those requirements under its well-established authority to regulate Federal court procedures. See, e.g., *Sibbach* v. *Wilson*, 312 U.S. 1, 10 (1941) ("Congress has undoubted authority to regulate the practice and procedure of Federal courts . . ."). H.R. 2372 rests upon this authority and regulates only the procedures by which takings claims are brought in Federal court; it does not alter the substantive law governing takings claims in any way.

Some have argued that because the Supreme Court, in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), discussed takings ripeness requirements in the context of the fifth amendment's reference to "just compensation," takings ripeness requirements are "constitutional" in nature, and beyond the authority of Congress to regulate, rather than purely prudential. However, in *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156 (1997), the Supreme Court held that when constitutionally aggrieved landowners properly file their takings actions in State courts, the municipal defendants can routinely remove those cases to Federal court. The decision relied on 28 U.S.C. § 1441(a), which permits removal of State

[8] With respect to whether a justiciable case or controversy existed for article III purposes, the Court noted that "Lucas properly alleged injury in fact in his complaint . . . (asking 'damages for the temporary taking of his property' from the date of the 1988 Act's passage to 'such time as this matter is finally resolved'). No more can reasonably be demanded." *Id.* at 1012 n.3.

court actions to Federal courts only where the *plaintiff* could have initially filed the action in Federal court. In that case, the aggrieved property owner could not have filed its action in the Federal courts under the reasoning of *Williamson County*, if that reasoning is understood to declare takings ripeness requirements "constitutional" in nature, and also the seventh circuit's opinion in *Coniston Corp.* v. *Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) ("[T]he suit for just compensation is not ripe until it is apparent that the State does not intend to pay compensation."). Yet the Supreme Court ruled as it did. Claims that ripeness requirements are somehow "constitutional" in nature, rather than prudential, cannot withstand the holding in *College of Surgeons*.

Precedent supporting Congress' use of its rulemaking power to eliminate the exhaustion requirement can also be found in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), in which the Supreme Court held that Federal district courts can grant declaratory judgments in connection with some takings claims. *Id.* at 71, n.15. In that case, the Supreme Court upheld the constitutionality of the Declaratory Judgment Act as an exercise of Congress' rulemaking power. As the Court interpreted the Act, it does not allow a Federal court to decide a taking claim when compensation for the alleged taking is available. *Id.* at 94, n.39. The Court, however, did not base that interpretation on any intrinsic limits on Congress' rulemaking powers,[9] and therefore it would not prevent Congress from amending the Declaratory Judgement Act to permit Federal courts to issue declaratory judgments deciding takings claims without regard to whether the claimant met an exhaustion requirement. Such an amendment would not change the nature of the Act or of the proceedings currently authorized under the Act, but would only expand the circumstances under which Federal courts could address takings claims by allowing the courts to address takings claims by plaintiffs who have not met an exhaustion requirement. If Congress can use its rulemaking authority to allow Federal courts to issue declaratory judgments resolving such claims, then it may use those powers to authorize Federal courts to award just compensation on those claims.

Further, a plain reading of the text of the fifth amendment itself, providing that "nor shall private property be taken for public use, without just compensation," indicates that it simply creates a Federal remedy for a taking, not a requirement that just compensation be sought in State court before a Federal remedy may be ordered by a Federal court for a taking under Federal law. It makes little sense to require suit in State court for just compensation before liability for a taking under the Federal Constitution has been determined by a Federal court.

Some have also argued that the results of a denial of both the application and the waiver provided for in the bill would not give courts, in the absence of a concrete description by the local government of exactly how they would allow the property to be used, suf-

[9] See also *Aetna Life Insurance Co.* v. *Hayworth*, 300 U.S. 227, 240 (1937) ("The operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the Federal courts which the Congress is authorized to establish.").

ficient information concerning precisely what had been "taken." However, H.R. 2372 would do nothing to alter the existing burden of proof takings plaintiffs bear in prosecuting takings cases. Property owners would continue to assume all risks to his or her legal claim due to any ambiguity regarding the exact contours of the taking.

SUMMARY

H.R. 2372 simply allows both individuals and local governments the chance to reach the merits of cases brought under the fifth amendment more expeditiously and economically. Just as Justices William Brennan and Thurgood Marshall have said, "After all, a policeman must know the constitution, then why not a [local] planner?" *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting). Nothing in H.R. 2372 does anything to prevent local governments from protecting the local health, safety, and environment in any way such governments see fit within the bounds of the Constitution. H.R. 2372 also does nothing to alter substantive law under the fifth amendment. As always, it will be up to the courts, both State and Federal, to ensure that local actions do not violate constitutionally guaranteed individual rights.

HEARINGS

The committee's Subcommittee on the Constitution held 1 day of hearings on H.R. 2372 on September 15, 1999. Testimony was received by the following witnesses: Richard Reahard, Bonita Springs, Florida; Dick Goodwin, Goodwin Enterprises; Joseph Barbieri, Deputy Attorney General of California; Diane S. Shea, Associate Legislative Director, National Association of Counties and National League of Cities; and Daniel R. Mandelker, Howard A. Stamper Professor of Law, Washington University.

COMMITTEE CONSIDERATION

On February 2, 2000, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 2372, as amended, by voice vote, a quorum being present. On March 9, 2000, the committee met in open session and ordered favorably reported the bill H.R. 2372 with amendment in the nature of a substitute by a recorded vote of 14 to 7, a quorum being present.

VOTES OF THE COMMITTEE

1. An amendment offered by Mr. Conyers and Mr. Watt would strike the phrase "in which the operative facts concern the use of real property" and other references to property where they appear in the bill. The amendment was defeated by a 8–12 rollcall vote.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Coble		X	
Mr. Smith (Tx)		X	
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins			
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan			
Mr. Graham		X	
Ms. Bono			
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin			
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	8	12	

2. An amendment offered by Mr. Canady would clarify that a plaintiff can take advantage of clause (ii)(I) to get into Federal court only if a locality does not explain its disapproval of an application, as set out in subclause (II). The amendment would also, at page 3, line 6, and at page 4, line 3, replace the word "or" with "and one." This change would require applicants to pursue both an appeal of a denial of an application and to apply for a waiver before a case would be made ripe for Federal adjudication. The amendment passed favorably by voice vote.

3. An amendment offered by Mr. Nadler would provide that the provisions of the bill would not apply in cases in which the locality engaged in an alleged taking "to protect health and safety." The amendment was defeated by a 7–16 rollcall vote.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Tx)		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan			
Mr. Graham		X	
Ms. Bono			
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman		X	
Ms. Baldwin			
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	7	16	

4. An amendment offered by Mr. Watt would delete those portions of the bill that would allow property owners to proceed to Federal court if their pursuit of land use decisions would be "futile." The amendment was defeated by a 7–14 rollcall vote.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)			
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan			
Mr. Graham			
Ms. Bono			
Mr. Bachus			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman		X	
Ms. Baldwin			
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	7	14	

5. An amendment was offered by Ms. Jackson Lee that would provide that all the provisions of Section 1 would not apply if the relevant State or territory provides a facially adequate procedure for obtaining just compensation for the taking of property. The amendment was defeated by a 7–14 rollcall vote.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Sensenbrenner		X	
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham			
Ms. Bono			
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank			
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler			
Mr. Scott			
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman		X	
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	7	16	

6. The amendment in the nature of a substitute as ordered reported by the subcommittee passed favorably by voice vote.

7. Final Passage. Motion to report favorably to the House H.R. 2372 as amended by the amendment in the nature of a substitute, as amended, passed favorably by a 14–7 rollcall vote. Mr. Goodlatte was unavoidably detained during the vote, but would have voted "aye."

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Sensenbrenner	X		
Mr. McCollum			
Mr. Gekas			
Mr. Coble	X		
Mr. Smith (TX)	X		
Mr. Gallegly	X		
Mr. Canady	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Barr			
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan	X		
Mr. Graham			
Ms. Bono			
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter	X		
Mr. Conyers		X	
Mr. Frank			
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler			
Mr. Scott			
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Hyde, Chairman	X		
Total	14	7	

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

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

CONGRESSIONAL BUDGET OFFICE 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. 2372, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 13, 2000.

Hon. HENRY J. HYDE, *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. 2372, the Private Property Rights Implementation Act of 2000.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Keith (for Federal costs), who can be reached at 226–2860, and Leo Lex (for the State and local impact), who can be reached at 225–3220.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Democratic Member

H.R. 2372—Private Property Rights Implementation Act of 2000.

SUMMARY

Enacting H.R. 2372 would give greater access to Federal courts to plaintiffs making claims based on property owners' rights secured by the Constitution. As a result, the bill is likely to impose additional costs on the U.S. court system. While some of the affected cases could be time-consuming and costly, CBO cannot pre-

dict the number or cost of such cases. Enactment of H.R. 2372 would not affect direct spending or receipts of the Federal Government, and therefore, pay-as-you-go procedures would not apply. H.R. 2372 may be excluded from application of the Unfunded Mandates Reform Act (UMRA). In any event, the bill would not impose an enforceable duty on State, local, or tribal governments, or the private sector.

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. H.R. 2372 would affect takings claims directed at the regulatory decisions of Federal, State, and local governments. First, this bill would prohibit a Federal district court from exercising its current right to abstain from hearing certain takings claims. H.R. 2372 also would define "final decision" for these property rights claims, thereby relaxing the standards by which such claims are found ripe for adjudication in Federal district courts, or the U.S. Court of Federal Claims.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Most takings cases affected by this bill would originate from a dispute over a State or local land use regulation. When local regulation is at issue, a number of appeals to local governing boards may occur. When those venues are exhausted and when the claim asserts a taking, Federal courts often defer to State courts by refusing jurisdiction in such matters.

The Federal courts often argue that such cases are not ripe for Federal adjudication because plaintiffs have not exhausted their opportunities to obtain compensation through the State courts. CBO expects that enacting the jurisdictional changes under H.R. 2372 would give plaintiffs greater access to Federal courts, thus imposing 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 from various legal experts, CBO estimates that only a small percentage of all civil cases filed in State courts involve takings claims. Of these, CBO believes that only a small proportion would be tried in Federal court as the result of H.R. 2372, in part because State and local regulators may have an incentive to settle with plaintiffs in order 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. CBO has no basis for estimating the number of cases that would be affected or the amount of court costs that would result. Any such costs would come from appropriated funds.

CBO does not expect the bill's requirement that Federal district courts and the U.S. Court of Federal Claims hear claims against the Federal Government when a "final decision" exists would have any significant effect on the budget. This provision would not affect the outcome of complaints or cause any material change in the caseload of the Federal court system. It could result in earlier decisions in some proceedings, which may change the timing of Federal

court and agency costs, but we expect that such effects would be minimal.

PAY-AS-YOU-GO CONSIDERATIONS:

None.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

Section 4 of UMRA excludes from application of that act legislative provisions that enforce constitutional rights of individuals. Because the changes to Federal jurisdiction over property rights cases could involve the enforcement of certain individual constitutional rights, H.R. 2372 may be excluded. In any event, because the changes only affect Federal court procedures, the bill would not impose any enforceable duty on State, local, or tribal governments, or on the private sector.

ESTIMATE PREPARED BY:

Federal Costs: Lanette J. Keith (226–2860)
Impact on State, Local, and Tribal Governments: Leo Lex (225–3220)
Impact on the Private Sector: John Harris (226–2618)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

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, clauses 9 and 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1—Short Title

This section provides the short title for the bill as the Private Property Rights Implementation Act of 2000.

Section 2—Jurisdiction in Civil Rights Cases

Section two deals with land use claims brought under 42 U.S.C. § 1983. It prevents a Federal court from abstaining in a case in which only Federal claims are alleged, unless the operative facts cannot be decided without resolution of an unsettled question of State law, and if a State court proceeding arising out of the same operative facts is not pending. If a significant question of State law is unresolved, then the district court may certify the question of law to the highest appellate court of that State. After the State appellate court resolves the question certified to it, the district court shall proceed with resolving the merits of the claim.

Section two also provides that a property right claim is ripe for adjudication when a "final decision is rendered by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or territory of the United States, that causes actual and concrete injury to the party seeking redress." A final de-

cision exists when (1) a definitive decision regarding the extent of permissible uses on the property has been made, as defined in the bill; and (2) when one meaningful application to use property (as defined by the locality concerned within that State or territory) has been submitted and has been disapproved and the party seeking redress has applied for one appeal and one waiver which has also been disapproved where such procedures are provided for by local law; or (3) when one meaningful application to use property (as defined by the locality concerned within that State or territory) has been submitted and has been disapproved, and the disapproval contains a written explanation that clarifies the use, density, or intensity of development of the property that would be approved, with any conditions that might also apply, and the party seeking redress has resubmitted another meaningful application taking into account the terms of the disapproval, and this further application is disapproved, and an appeal and a waiver has been sought but denied, if such procedurese are available under local law.

If the applicable State statute or ordinance provides for review of the application by elected officials, a final decision has only occurred if the party seeking redress has made an application to such officials which has been denied.

Section two also incorporates the doctrine of "futility" and provides that a party seeking redress shall not be required to apply for an appeal or waiver if no such appeal or waiver is available, if local procedures cannot provide the relief requested, or if the application or reapplication would be futile.

Section two also provides that the failure to act within a reasonable time on any application, reapplication, appeal, waiver, or review of the case shall constitute a disapproval.[10]

Nothing in this section alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

Section 3—United States as a Defendant

This section deals with claims in which the United States is the defendant. It amends the statute conferring jurisdiction on the Court of Federal Claims for takings cases by requiring Federal district courts to hear claims when a "final decision exists," as defined by the bill.

A "final decision" exists if the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, one meaningful application to use the property has been submitted and has been disapproved, and the party seeking redress has applied for one appeal or waiver which has been disapproved, if the applicable law provides a mechanism for appeal to or waiver by an administrative agency.

Section three also incorporates the doctrine of "futility" and provides that a party seeking redress shall not be required to apply

[10] Most local land use procedures are governed by absolute time limits. The provisions of H.R. 2372 that provide that localities cannot wait longer than "a reasonable time" to make land use decisions allow courts to consider, in determining what constitutes a "reasonable time," the nature of the process, how many steps the process requires, the length of time similar applications have taken to be decided based on past experience, the complexity and size of the project applications being considered, and the number of ordinances or other regulations involved in the decision.

for an appeal or waiver if no such appeal or waiver is available, if procedures provided by the United States cannot provide the relief requested, or if the application or reapplication would be futile.

Nothing in this section alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

Section 4—Jurisdiction of Court of Federal Claims

This section deals with the jurisdiction of the Court of Federal Claims. It amends the statute conferring exclusive jurisdiction on the Court of Federal Claims for takings in excess of $10,000 by requiring the Court of Federal Claims to hear claims when a "final decision" exists, as defined by the bill.

A "final decision" exists if the United States makes a definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken, one meaningful application to use the property has been submitted and has been disapproved, and the party seeking redress has applied for one appeal or waiver which has been disapproved, if the applicable law provides a mechanism for appeal to or waiver by an administrative agency.

Section four also incorporates the doctrine of "futility" and provides that a party seeking redress shall not be required to apply for an appeal or waiver if no such appeal or waiver is available, if procedures provided by the United States cannot provide the relief requested, or if the application or reapplication would be futile.

Nothing in this section alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

Section 5—Duty of Notice to Owners

This section requires a Federal agency to provide notice to property owners explaining their rights and the procedures for obtaining any compensation that may be due to them whenever that agency takes an action affecting their private property.

Section 6—Effective Date

This section provides that the amendments made by the bill shall apply to actions commenced on or after the date the bill is enacted.

AGENCY VIEWS

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Washington, DC, February 15, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I am writing with regard to H.R. 2372, "The Private Property Rights Implementation Act of 1999," which recently passed out of the House Judiciary Subcommittee on the Constitution. EPA has the same serious concerns with this bill that we had with the bill's predecessor, H.R. 1534, which concerns we expressed to you in our letter of February 6, 1998. Because H.R. 2372 would undermine the ability of local communities to safeguard their environment and quality of life, the Administrator

would recommend that the President veto the bill if passed in its present form.

The bill fundamentally threatens community-controlled land use decisionmaking in two ways. First, it changes the standard for determining when a taking claim is "ripe" for judicial resolution, making it easier for developers to sue local officials in Federal court before the local land use decisionmaking process has an adequate chance to work. Second, it expands the role of the Federal courts in State and local land use decisions by prohibiting Federal courts faced with taking claims against State or local governments from following the long-standing practice of "abstaining" from such cases when issues of State law predominate.

With regard to ripeness, the bill would alter existing requirements that takings claimants defer the filing of a section 1983 action in Federal court until they have obtained from State and local land-use officials a final, definitive decision regarding permissible uses of the property at issue and have exhausted compensation remedies available in State court. The bill would allow a developer to submit a single, ambitious development proposal to a local authority on a "take it or leave it" basis. If the proposal were rejected, the developer could then take one appeal of the rejection—still without modifying the proposal—and then proceed directly to Federal court. This would short-circuit existing, locally-managed processes across the country, which depend on a discussion of the needs of both the developer and the community (including neighboring private property owners) to achieve balanced solutions that accommodate the interests of both the developer and the community.

As passed, H.R. 2372 would do little to soften this "take it or leave it" approach. Under the bill, a local land use authority can forestall Federal litigation only by submitting to the developer an alternative plan that specifies the "use, density, or intensity of development of the property *that would be approved*, with any conditions therefor . . ." [emphasis added]. This would essentially require the local planning body to submit to the developer a pre-approved proposal produced at community expense and would force local authorities to devote tax dollars to writing plans that may never be used. Moreover, a developer determined to proceed with the original plan can easily get back on the road to Federal court by filing a new application "taking into account" the work of the local planning agency. This vague standard might be met by even marginal changes to the plan, without requiring a serious effort to address the most problematic aspects of the original proposal.

We continue to share the concern advanced by State and local government groups that there will be instances where the proposed legislation would allow developers to threaten Federal litigation if they do not get their way in negotiations with local authorities, no matter the merit of any takings claim. The fact remains that big developers may be able to force local communities—out of the fear of immediate and potentially significant costs of litigation—to accept developments or other land uses that will have devastating long-term public health and environmental costs and impacts.

Apart from the bill's ill-advised change to current doctrine concerning administrative finality, the bill would also seek to eliminate the existing requirement that takings claimants exhaust State

court compensation remedies before filing a 1983 action in Federal court. We share the Department of Justice's view, as stated in its September 14, 1999, letter concerning H.R. 2372, that Congress cannot eliminate the constitutionally based requirement that section 1983 takings claimants seek compensation in State court before they can advance a viable claim that State or local authorities have taken their property without paying just compensation.

In addition, the bill takes away the normal discretion of Federal courts to abstain from hearing a takings case, no matter how many State or local regulatory issues may be involved, unless there is a formal claim of a violation of State law. This may be a source of considerable confusion over the effects of H.R. 2372 for those unfamiliar with the bill. Further, while a Federal court can, in some circumstances, refer an unsettled question of State law to a State's highest appellate court, it cannot abstain from hearing such a case, but must ultimately "proceed with resolving the merits." Accordingly, no matter how numerous and difficult the State regulatory issues and no matter how complex and uniquely local the facts, the Federal court would not be able to abstain, except when there is a State law claim or parallel State court proceeding.

Finally, H.R. 2372 aims to provide property owners "some certainty as to when they may file [a takings] claim." However, the bill may actually cloud the ripeness issue with regard to what constitutes a final appeal.

Accordingly, while we appreciate your efforts to improve H.R. 2372, we continue to believe that the bill would seriously threaten environmental protection and the quality of life in America's communities.

The Office of Management and Budget has advised that it has no objection to this letter from the standpoint of the Administration's program.

Sincerely,

GARY S. GUZY, *General Counsel.*

cc: Honorable John Conyers, Jr.

JUDICIAL CONFERENCE
OF THE UNITED STATES,
Washington, DC, February 14, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: On behalf of the Judicial Conference of the United States, I write to share the concerns of the Federal judiciary regarding H.R. 2372, the "Private Property Rights Implementation Act of 2000," as reported by the Constitution Subcommittee on February 2, 2000.

The stated purpose of this bill is to"simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by 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." H.R. 2372, however, would alter deeply-ingrained federalism principles by prematurely involving the Federal courts in regulatory proceedings in-

volving property that have historically been decided by State and local administrative bodies or courts. By relaxing the current requirement of ripeness in takings cases and limiting a Federal judge's ability to abstain from hearing certain cases, the bill may also adversely affect the administration of justice and delay the resolution of property claims. These concerns are more fully explained below.[11]

Section 2 of H.R. 2372 includes a novel concept of finality that would significantly alter Federal court consideration of takings cases. Under the bill, property owners would be allowed to file a Federal suit without having pursued all remedies available at the local and State levels. This definition of "final decision" would offend well-established principles of federalism by prematurely involving the Federal judiciary in traditionally local matters and by depriving local and State officials of a full opportunity to resolve local disputes in a manner consistent with both the Constitution and State or local law.

Moreover, filing would be allowed to occur before it is clear that the property owner cannot derive any economic benefit from the land and before the issue of just compensation has been raised and determined within the appropriate State administrative entities and courts. The Supreme Court has required that these two elements of ripeness be met before a fifth amendment takings claim can be filed in Federal court. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985). Because H.R. 2372 does not require exhaustion of all available remedies at the local and State levels, it would permit Federal court consideration of such a claim before it may be ready for constitutional review.

Furthermore, enactment of H.R. 2372 will not necessarily accelerate judicial resolution of the claim. Once property owners are in Federal court, they may nevertheless find their cases dismissed at the pleading stage for at least two reasons. First, the factual record might not be sufficiently developed for a Federal court to assess whether the government has deprived the property owner of the use of his or her property. Secondly, by expediting a Federal court's consideration of a takings claim before a property owner has been denied compensation, the bill may circumvent the requirement of a cognizable injury in the context of a constitutional taking. See, e.g., *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.7 (1997) (recognizing that the ripeness doctrine has both constitutional and prudential elements). Just last year, the Supreme Court in *City of Monterey* v. *Del Monte Dunes*, 119 S. Ct. 1624 (1999), restated its long-standing view that a constitutional taking does not exist until the property owner is denied just compensation. The Court noted: "When the government repudiates this duty [to provide just compensation], either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution," *Id.* at 1642.

Federalism issues are also raised in the bill's treatment of abstention. H.R. 2372 provides that in an action in which the opera-

[11] The position of the Judicial Conference was adopted on September 23, 1997, in response to a similar bill, the "Private Property Rights Implementation Act of 1997" (H.R. 1534), which was considered during the 105th Congress.

tive facts concern the uses of real property and no claim of a violation of State law is alleged, a Federal court shall not abstain from exercising jurisdiction unless a parallel proceeding arising out of the same operative facts is pending in State court. The abstention doctrine is founded upon principles of federalism and has been used in the Federal courts as an effective tool to balance Federal and State interests. The use of this doctrine, however, is not limited to those circumstances in which a parallel proceeding is pending in State court. Federal courts have sometimes abstained, even where no similar proceeding is pending in the State courts, when more complete consideration of the claim is available in the administrative (or State judicial) arenas. See *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1941); see also, *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 361 (1989).

Although constitutional takings claims are ultimately at issue, the Federal courts' authority to abstain from deciding an action in particular instances protects and preserves a State's opportunity to consider initially, and perhaps to resolve definitively, property or zoning issues arising within its jurisdiction. Such abstention authority promotes comity, preserves federalism, and conserves scarce judicial resources. The bill's limitation on the use of the abstention doctrine, therefore, is of concern.

Another example of the federalism problems raised by H.R. 2372 is found in section 2. That section provides that district courts "may certify" unsettled questions of State law to a State's highest court in certain circumstances. Not all States, however, currently have formal procedures for answering certified questions of law from other courts. Moreover, of those that do, some States permit certification only from the United States Supreme Court and the Federal courts of appeals and do not permit a Federal district court to certify an issue to its highest court. Even where a certification procedure exists, States have varying standards for determining when they will accept a certified question.[12] Furthermore, the standard of certification created under the bill as to when it is appropriate to certify an issue may be at odds with existing practices.[13]

It is unclear whether this bill creates a new Federal mechanism for certification by allowing a Federal district court to certify a legal question to a State's highest court. If it does not provide such authorization, given the absence of certification procedures in some States, and the limitations on the availability of certification in others, H.R. 2372's certification provisions will not help certain district courts that will be faced with unclear questions of State law. If, on the other hand, the bill is interpreted as imposing upon State supreme courts the burden of answering questions certified by Federal courts, it may create friction in those States that do not presently permit certification or in any State that has standards that could result in a State courts denial of a request to decide an unsettled question of State law.

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[12] Jona Goldschmidt, Certification of Questions of Law: Federalism in Practice, American Judicature Society (1995).

[13] The predicate for certification under H.R. 2372 is that the question of State law (1) will significantly affect the merits of the injured party's Federal claim, and (2) is patently unclear.

Lastly, it is important to note that this legislation could sweep large numbers of takings claims into the Federal courts. Such an increase in cue filings, especially if brought prematurely, could raise workload impact concerns and contribute to existing backlogs in some judicial districts.

The Judicial Conference would appreciate your consideration of its comments on H.R. 2372. If you have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, at 202–502–1700.

Sincerely,

LEONIDAS RALPH MECHAM, *Secretary*

cc: Honorable John Conyers, Jr., Ranking Member
Members of the House Judiciary Committee

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 14, 1999.

Hon. CHARLES T. CANADY, *Chairman,*
Subcommittee on the Constitution,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on H.R. 2372, the "Private Property Rights Implementation Act of 1999." On September 25, 1997, the Department testified in opposition to similar legislation, H.R. 1534 in the 105th Congress. Although H.R. 2372 is slightly different from the introduced version of H.R. 1534, the changes do not resolve our concerns and the Department continues to strongly oppose this legislation. As with H.R. 1534, the Attorney General would recommend that the President veto H.R. 2372 if passed in its present form.

H.R. 2372 would increase dramatically the role of Federal courts in supervising decisions that are core responsibilities of State and local officials—where to locate a municipal waste incinerator, whether to grant a building permit to a liquor store, how close a factory can be to homes, or whether a community needs another gas station or fast food restaurant. Because issues such as these directly affect neighborhoods and communities, local land use agencies, historically and properly, have possessed the authority to decide them. H.R. 2372 is designed to take these issues away from local communities, planning commissions and State courts and send them to the Federal judiciary. This is inappropriate and unnecessary.

Under current law, Federal courts faced with challenges to the constitutionality of local land use decisions defer to State and local authorities in two important ways. First, where appropriate, Federal courts abstain from deciding important or complex issues of State law so that State courts can decide them, at least in the first instance. Second, Federal courts require developers and other property owners to make reasonable efforts to resolve land use disputes with State and local officials before proceeding to Federal court. This "ripeness" requirement helps to ensure that land use decisions are made at the State or local level by those most familiar with the

property at issue and who have been duly authorized to represent the local community. It also helps to provide a sufficiently developed factual record for the Federal courts, should they be required to decide whether the local land use decision constitutes an uncompensated taking.

H.R. 2372 would alter this commonsense approach. Instead of empowering State and local officials with more resources and authority—as this Administration has sought to do by means of partnerships with State and local governments and as this Congress has sought to do in various legislation directed toward federalism concerns—H.R. 2372 seeks to shift authority over quintessentially local matters from State and local officials to the Federal courts. It would so do, first, by sharply limiting the discretion of Federal judges to abstain from deciding State law issues that have not been resolved previously by State courts. Second, and more significantly, the bill would deem a property rights challenge to State or local government action "ripe" for Federal court review regardless of whether State and local officials have arrived at a final, definitive position on the land use question before them and before the claimant had sought compensation pursuant to legal procedures available in the State. This is contrary to the Supreme Court's interpretation of the fifth amendment and raises serious constitutional issues. These drastic changes to ripeness doctrine would circumvent and render irrelevant local land use dispute resolution mechanisms, dramatically expand land use litigation in Federal courts, and reduce incentives for property developers to work with State and local planning officials to achieve workable compromises.

We are aware of no significant material evidence that the existing delicate balance between State and Federal courts needs to be altered. We are aware of no evidence that State courts, on the whole, are failing to do an adequate job of protecting property owners in the hundreds, if not thousands, of cases that come before them each year. Guided by recent Supreme Court decisions, State courts are likely to be as sympathetic to local property owners as Federal courts and as competent as Federal courts to decide Federal constitutional claims under the Just Compensation Clause.

The Department's principal concerns with H.R. 2372 are explained in greater detail below.

1. By Placing Strict Limits on Abstention, H.R. 2372 Would Shift Authority over Local Issues from State and Local Tribunals to Federal Courts.

Longstanding abstention doctrines allow a Federal court to decline to exercise its jurisdiction in cases where abstention would allow a State or local tribunal to decide (at least in the first instance) an issue of State or local law. Abstention promotes federalism by enhancing "comity," which the Supreme Court has described as "a proper respect for State functions, a recognition * * * that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). Additionally, abstention reflects a proper respect for State sovereignty and a recognition that State and local tribunals are best positioned to interpret often complex local laws. *New Orleans Pub-*

lic Service, Inc. v. *Council of City of New Orleans*, 491 U.S. 350, 360–61 (1989). Abstention may be particularly appropriate where a State court has not had a previous opportunity to interpret the State law.

Federal courts long have abstained in a wide variety of challenges to local land use planning decisions, including cases involving the application of local annexation laws,[14] the adequacy of public services for residential areas,[15] and eminent domain issues. However, section 2(c) of H.R. 2372 would prohibit Federal courts from abstaining on State issues in cases brought under 28 U.S.C. § 1343 where the claimant asserted no State law claim and there was no parallel proceeding pending in State court. This prohibition against abstention would apply regardless of the importance of the State laws and policies that the case implicated or other factors that often have caused Federal courts to defer to State and local tribunals. And although the bill provides for certification to a State's highest appellate court of unsettled State law questions that are "patently unclear," see H.R. 2372, § 2(d), this standard is far more restrictive than existing abstention doctrine, which generally allows Federal courts to certify any State questions that are uncertain. Combined with this unduly narrow certification provision, the bill's prohibition against abstention would compel Federal courts to intrude more frequently into State law questions that are resolved best by State tribunals. The result would impair State sovereignty, undermine federalism, and increase the likelihood and frequency of conflicting outcomes as Federal and State courts interpret and apply the same laws.

2. H.R. 2372 Would Allow Developers and Others to Sue in Federal Court Without Seeking to Resolve Their Disputes with State and Local Officials

In addition to placing severe restrictions on existing abstention doctrine, H.R. 2372 would revise the two-part test under which Federal courts currently evaluate the ripeness of takings challenges to State and local actions under the Just Compensation Clause of the fifth amendment. Under existing ripeness doctrine, articulated by the Supreme Court in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), a takings claim is not ripe until: 1) State and local authorities have issued a final, definitive decision regarding permissible uses of the property at issue; and 2) the property owner has sought and been denied just compensation in the State court. See also *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1639 (1999); *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997). H.R. 2372 would shift power from State and local officials (including both land use planners and State judges) to Federal judges by altering the existing standard of administrative finality.

[14] *Front Royal and Warren County Indus. Park Corp.* v. *Town of Front Royal*, 945 F.2d 760, 764–65 (4th Cir. 1991) (abstention is proper because the annexation court system is a matter of purely State and local law, and because there may be other State remedies available to plaintiffs), *cert. denied*, 503 U.S. 937 (1992).

[15] *C–Y Development Co.* v. *City of Redlands*, 703 F.2d 375, 378 (9th Cir. 1983) (abstention is appropriate because "[d]elicate issues of local land use planning such as these are precisely the type of issues which should be left to the State courts to decide under the doctrine of abstention.").

Under current law, before a land use claim is considered ripe for Federal court review, a claimant must utilize local decision making processes and the local government's decision must be final and definitive. By not permitting a claimant to litigate immediately in Federal court, these requirements encourage landowners to work with State and local officials to resolve land use conflicts outside of the courtroom. Currently, if a developer files a Federal lawsuit without engaging in good faith negotiations with State and local officials, the locality can immediately move to dismiss the suit on ripeness grounds.

H.R. 2372 would overturn this longstanding ripeness doctrine. It would deem ripe for Federal court adjudication a property rights claim after the claimant has filed a single "meaningful" application that has not been approved. H.R. 2372, § 2(e)(2)(A)(ii)(I). Furthermore, there is no requirement to even complete the application process. Although the bill contains language requiring claimants to apply for an appeal or waiver, this requirement does not apply if no appeal process is available, if the appeal process cannot provide the relief requested, or if the application or reapplication would be futile. H.R. 2372, § (e)(2)(B). Practically speaking, this means that after filing a single development application that has not yet been approved—and approval may just be a matter of time a claimant can file suit in Federal court.[16] Thus, developers and others could sue State and local officials in Federal court far earlier in the land use planning process without adequately seeking to resolve their disputes outside of the courtroom through local procedures.

Through these substantial changes to ripeness doctrine, H.R. 2372, would shift dramatically the balance of power between developers and State and local officials by handing developers a powerful new weapon in their negotiations with community officials: the threat of premature and potentially expensive Federal court litigation. This new weapon could well be used to disrupt State procedures designed to protect public health, safety, public resources and the environment. Confronted with the prospect of a potentially costly and time-consuming Federal court lawsuit, State and local officials would feel new pressure to approve land use proposals to avoid litigation, even if the proposed use might harm neighboring property owners and the community at large.

For example, a property owner might apply for a permit to operate a large commercial hog farm. The local planning commissioner denies the permit because noxious odors and pollution would harm nearby residents. However, the commissioner indicates that a permit might be approved for a smaller operation if the owner agreed to implement safeguards to protect local residents. The owner refuses to compromise and appeals the permit denial to the local land use review board. The review board rejects the appeal. Under H.R. 2372 the owner can sue in Federal court as soon as the application is submitted, claiming that it has not been approved, and that appeal is futile, and thus "ripe" for judicial adjudication even though

[16] This provision could be read to allow a developer to file suit in Federal court immediately after submitting an application by simply alleging that an appeal would be futile. H.R. 2372, § 2(e)(2)(B). There is no requirement that the application process must proceed to a conclusion. The only exception applies where local law provides for review by elected officials, in which case the claim becomes ripe when the "party seeking redress has applied for but is denied such review." H.R. 2372, § 2 (e) (2) (A) (iii).

a compromise might be reached if local processes were allowed to play out prior to litigation.

H.R. 2372 also would allow claimants to sidestep local procedures for waivers and appeals altogether by arguing that the local procedure "cannot provide the relief requested." See H.R. 2372, § 2(e) (2) (B). Local authorities generally are not authorized to award compensation to owners whose land use proposals are denied and property owners typically must pursue

inverse condemnation actions in State court. Section 2 (e) (2) (B) (1) would furnish an attractive means for plaintiffs to gain access to Federal courts far earlier than is allowed under existing law by enabling them to contend that the local procedure does not provide the relief desired.

Sections 3 and 4 of the bill would make virtually identical changes to standards of administrative ripeness in alleging infringements or takings of property rights by the United States and would therefore disrupt the administration of Federal programs designed to protect public health and safety, public resources, and the environment.

3. H.R. 2372 Would Allow Developers and Others to Sue in Federal Court Without Seeking Compensation in State Court.

H.R. 2372 also would deem ripe for Federal court adjudication a property rights claim before the claimant had sought compensation in State court. H.R. 2372, § 2(e)(3). This provision raises serious constitutional concerns. As the Supreme Court held in *Williamson County* and recently reaffirmed in *Del Monte Dunes*, a property owner cannot establish that a State or local government has violated the Just Compensation Clause unless and until that property owner first requests, and is denied, compensation in State court. *Williamson County*, 473 U.S. at 19497; *Del Monte Dunes*, 119 S.Ct. at 1639. The obligation to pursue compensation derives not from prudential considerations, but from the nature of the fifth amendment itself. *Williamson County*, 473 U.S. at 195 n.13. The nature of the constitutional right at issue, which operates not as a protection against takings but as a protection against *uncompensated* takings, requires that a property owner utilize a State procedure for obtaining compensation before bringing an action under 42 U.S.C. § 1983.

H.R. 2372 would purport to allow Federal courts to adjudicate the merits of takings claims even if the plaintiff had failed to pursue available State compensation procedures. This could lead to an anomalous and self-defeating result. To the extent that State and local officials continued to disallow land uses that they regarded as harmful to their communities, notwithstanding the enhanced threat of Federal-court litigation under H.R. 2372, many of the resulting Federal-court takings claims would be subject to dismissal on substantive grounds where the claimant failed to seek compensation in State court. As the Supreme Court held in *Williamson County* and *Del Monte Dunes*, a property owner cannot establish that a State or local government has violated the Just Compensation Clause unless that property owner first demonstrates the inadequacy of State-court compensation remedies. The bill would thus offer many property owners the false hope of avoiding State court

litigation and it would result in confusion and wasteful litigation as claimants are shuttled back and forth between State and Federal courts.

4. The Bill Would Impose an Onerous Notice Requirement on the Federal Government.

Section 5 of H.R. 2372 would impose a sweeping notice requirement, applicable whenever Federal agency action "limits" the use of private property. Section 5 states that whenever a Federal agency takes an action limiting the use of private property (not just real property), that agency must give notice to the owners of that property explaining the owners, rights and the procedures for obtaining any compensation that may be due them. If construed literally, this mandate could apply to countless Federal programs and regulatory actions that prohibit illegal activity or control potentially harmful conduct. For example, a Federal prohibition on flying an unsafe airplane "limits" the use of the plane, emission controls for a hazardous waste incinerator "limit" the use of the incinerator, and so on. It is uncertain how courts would apply section 5, but those who challenge Federal protections undoubtedly would argue for the broadest reading. Additionally, it is unclear how property owners could be identified, let alone notified, in the case of many Federal actions of broad applicability. Because the provision's notice trigger is far broader than the constitutional standard for compensation, it would cause confusion among property owners by raising false expectations of success if they were to bring a property claim against the United States.

5. H.R. 2372 Would Cause a Substantial Increase in Litigation in the Already Crowded Federal Docket.

H.R. 2372 would burden the Federal docket further in several ways. First, because the bill would allow claimants to circumvent existing State and local procedures for resolving land use disputes, the bill inevitably would result in substantially more claims being filed in Federal courts against public officials and local governments. The bill not only would redirect claimants from State courts to Federal courts but also would generate new cases in situations that currently are resolved through local procedures without litigation. Therefore, the number of new Federal cases spawned by the bill might even exceed the number of Federal property rights claims currently filed in State courts on an annual basis. The bill's prohibition against abstention also would significantly limit the ability of Federal courts to shift cases to State courts where appropriate. Finally, sections 3 and 4 of the bill would allow premature claims to proceed against the United States. These would be the very kinds of cases Federal courts have deemed unfit for adjudication.

6. Federal Courts are not Necessarily a Better Forum for Resolving Local Land Use Disputes.

A key premise that appears to underlie H.R. 2372 is that Federal courts provide property owners with a better and perhaps more sympathetic forum for resolving their local property rights claims than do local land use agencies and State courts. This assumption

may not be accurate. Local land use agencies are likely to be more sensitive to local land use concerns, they normally give parties affected by the land use dispute a chance to voice their opinions, and they generally settle land use disputes without expensive and time-consuming litigation. The Supreme Court has emphasized that local land use agencies "are singularly flexible institutions" that are well suited to resolving land use conflicts in a reasonable way. *Suitum*, 520 U.S. at 738 (quoting *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 350 (1986)).

Similarly, State courts review local land use disputes far more frequently than do Federal courts and therefore are far more familiar with local land use procedures. For this and other reasons, the fourth circuit reasoned that State courts are as capable as Federal courts in adjudicating local land use cases.

> Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the Federal courts. There is no sanction for casual Federal intervention in what "has always been an intensely local area of the law." . . . "Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors" that are inherent in municipal land-use decisions. . . . Further, allowing "every allegedly arbitrary denial by a town or city of a local license or permit" to be challenged under § 1983 would "swell[] our already overburdened Federal court system beyond capacity." . . . Accordingly, Federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every "run of the mill dispute between a developer and a town planning agency." . . . In most instances, therefore, decisions regarding the application of subdivision regulations zoning ordinances, and other local land-use controls properly rest with the community that is ultimately—and intimately—affected. *Gardner* v. *Baltimore Mayor and City Council*, 969 F. 2d 63, 67–68 (4th Cir. 1992).[17]

[17] The decisions of the United States Supreme Court on constitutional issues, of course, guide State courts as well as Federal courts. It is worth noting that over the last decade, the Supreme Court has invested considerable time and effort in helping to explicate the relationship between the Just Compensation Clause and the actions of State and local officials in administering local land use programs. Several of the Court's decisions have increased protections for developers and other property owners. For example, in *First English* v. *County of Los Angeles*, 482 U.S. 304 (1987), the Court recognized that local governments might rescind earlier regulatory action and held that, even in such circumstances of "temporary" regulation, State and local governments must pay financial compensation for the period during which the regulation was in effect. In *Nollan* v. *California Coastal Commission*, 438 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), the Court decreed that a community can impose certain conditions on new development only if there is an "essential nexus" between those conditions and legitimate regulatory objectives and a "rough proportionality" between the extent of the conditions and the public burdens imposed by the development. These holdings circumscribe the ability of local governments to require developers to fund infrastructure investments to counterbalance the public costs of new development. In *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court struck down a State coastal protection law enacted to govern new development along the State's deteriorating coastline. The decision established a rule that a taking will be found when a law eliminates all of a property's economic value. Decisions such as these suggest that, where necessary, the Supreme Court is ready to provide instructions to lower courts and local governments that protect property owners and their rights. This readiness suggests that there

In short, one of the key premises that underlie H.R. 2372 is flawed. In most circumstances, local property rights disputes are best decided at the local level by those State and local officials and State judges with the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors inherent in municipal land-use decisions. *Id.*

Some might argue that H.R. 2372 is appropriate because developers and others are singled out for unfair treatment under our laws, but this is not true. By and large, the current local land use planning process in conjunction with State court review of local decisions works well and has benefitted the vast majority of property owners greatly. If land use procedures and standards in particular areas are in need of reform, those local laws should be revised. But we should not pass Federal legislation that would substantially shift the balance between local and Federal authority on inherently local issues, as H.R. 2372 would do. We should not force Federal courts to serve as local zoning boards of appeal. We should not pass Federal legislation that, by allowing claimants to file suit in Federal court before seeking compensation in State court, is contrary to the Supreme Court's interpretation of the Fifth and 14th amendments. And we should not inundate the Federal courts with land use claims that the Federal courts themselves traditionally have deemed unripe for decision.

Because H.R. 2372 would undermine the vital role State and local officials play in local land use planning, the Justice Department strongly opposes it. As noted above, the Attorney General would recommend that the President veto the bill if passed in its present form.

Thank you for the opportunity to present our views. The office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

JON P. JENNINGS, *Acting Assistant Attorney General*

cc: The Honorable Melvin Watt
Ranking Minority Member
Subcommittee on the Constitution
Committee on the Judiciary

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary

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 (existing law proposed to be omit-

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is no the need for legislation—such as H.R. 2372—that seeks to expand the property rights of developers under Federal law.

ted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS; JURISDICTION

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§ 1343. Civil rights and elective franchise

(a) * * *

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(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 in an action in which no claim of a violation of a State law, right, or privilege is alleged, if a parallel proceeding in State court arising out of the same operative facts as the district court proceeding is not pending.

(d) 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 certified to it, 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) will significantly affect the merits of the injured party's Federal claim; and

(2) is patently unclear.

(e)(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, that causes actual and concrete injury to the party seeking redress.

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

(i) 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, as described in clauses (ii) and (iii), regarding the extent of permissible uses on the property that has been allegedly infringed or taken;

(ii)(I) one meaningful application, as defined by applicable law, to use the property has been submitted but has been disapproved without a written explanation as described in sub-

clause (II), and the party seeking redress has applied for one appeal and one waiver which has been disapproved, in a case in which the applicable statute, ordinance, custom, or usage provides a mechanism for appeal to or waiver by an administrative agency; or

(II) one meaningful application, as defined by applicable law, to use the property has been submitted but has been disapproved, and the disapproval explains in writing the use, density, or intensity of development of the property that would be approved, with any conditions therefor, and the party seeking redress has resubmitted another meaningful application taking into account the terms of the disapproval, except that—

(aa) if no such reapplication is submitted, then a final decision shall not have been reached for purposes of this subsection, except as provided in subparagraph (B); and

(bb) if the reapplication is disapproved, or if the reapplication is not required under subparagraph (B), then a final decision exists for purposes of this subsection if the party seeking redress has applied for one appeal and one waiver with respect to the disapproval, which has been disapproved, in a case in which the applicable statute, ordinance, custom, or usage provides a mechanism of appeal to or waiver by an administrative agency; and

(iii) if the applicable statute or ordinance provides for review of the case by elected officials, the party seeking redress has applied for but is denied such review, or is allowed such review and the meaningful application is disapproved.

(B) The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (A) if no such appeal or waiver is available, if it cannot provide the relief requested, or if the application or reapplication would be futile.

(3) For purposes of clauses (ii) and (iii) of paragraph (2), the failure to act within a reasonable time on any application, reapplication, appeal, waiver, or review of the case shall constitute a disapproval.

(4) For purposes of this subsection, a case is ripe for adjudication even if the party seeking redress does not exhaust judicial remedies provided by any State or territory of the United States.

(f) Nothing in subsection (c), (d), or (e) alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

* * * * * * *

§ 1346. United States as defendant

(a) * * *

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(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, that 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, as defined in subparagraph (B), regarding the extent of permissible uses on the property that has been allegedly infringed or taken; and

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

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if application or reapplication to use the property would be futile.

(3) For purposes of paragraph (2), the United States' failure to act within a reasonable time on any application, appeal, or waiver shall constitute a disapproval.

(4) Nothing in this subsection alters the substantive law of takings of property, including the burden of proof borne by the plaintiff.

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CHAPTER 91—UNITED STATES COURT OF FEDERAL CLAIMS

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

(a)(1) * * *

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(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, as described in subparagraph (B), regarding the extent of permissible uses on the property that has been allegedly infringed or taken; and

(B) one meaningful application, as defined by applicable law, to use the property has been submitted but has been disapproved, and the party seeking redress has applied for one appeal or waiver which has been disapproved, in a case in which the applicable law of the United States provides a mechanism for appeal or waiver.

The party seeking redress shall not be required to apply for an appeal or waiver described in subparagraph (B) if no such appeal or waiver is available, if it cannot provide the relief requested, or if application or reapplication to use the property would be futile. For purposes of subparagraph (B), the United States' failure to act within a reasonable time on any application, appeal, or waiver shall constitute a disapproval. Nothing in this paragraph alters the sub-

stantive law of takings of property, including the burden of proof borne by the plaintiff.

DISSENTING VIEWS

We strongly dissent from H.R. 2372. As the bill is written, it is opposed by the Administration and invites a veto by the President.[1] The legislation is also opposed by a wide variety of groups who represent State and local governments[2] as well as groups who are concerned about the environment.[3] In addition, the Judicial Conference of the United States and the Conference of Chief Justices have expressed serious reservations with the bill.

H.R. 2372 is virtually identical to H.R. 1534 that was considered in the 105th Congress. It purports to address a perceived imbalance between developers and municipalities with respect to land use decisions. Essentially, the bill permits landowners to forum shop between State and Federal courts when they pursue takings claims against the government. This proposal is ill-advised for several reasons.

H.R. 2372 forces premature Federal involvement in local land use disputes by attempting to unconstitutionally narrow the judicial doctrine of ripeness and by significantly paring back the doctrine that Federal courts generally abstain from resolving sensitive State political and judicial controversies. These changes are being made for the benefit of 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.

Although H.R. 2372 has been characterized as purely "procedural," it will have a significant impact on takings cases and will severely tilt the playing field in favor of developers and landowners. In addition to encouraging forum shopping between Federal and State courts, the legislation tells the States and municipalities that they are not competent to adjudicate their land disputes, and that a Federal court should be brought in at the earliest possible point in the litigation to save localities from their alleged biases. This legislation represents an effort to specifically target

[1] See Letter from Jon P. Jennings, Acting Assistant Attorney General, to Rep. Charles T. Canady, Chairman, Subcommittee on the Constitution, Committee on the Judiciary (Sept. 14, 1999); Letter from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency, to Rep. Henry J. Hyde, Chairman, Committee on the Judiciary (Feb. 15, 2000); Letter from Bruce Babbitt, Secretary of the Interior, to Rep. John Conyers, Jr., Ranking Member, Committee on the Judiciary (Feb. 15, 2000); Statement of Administration Policy on H.R. 1534 (Oct. 21, 1997) (regarding virtually identical bill in 105th Congress, the Clinton Administration stated, *"The Attorney General, the Secretary of the Interior, the Administrator of the Environmental Protection Agency, and the Chair of the Council on Environmental Quality would recommend [that] the President veto H.R. 1534 as reported by the House Judiciary Committee."*)

[2] These include National Conference of State Legislators, National Association of Attorneys General, National Association of Counties, National League of Cities, and National Association of Towns and Townships.

[3] These include National Wildlife Federation, League of Conservation Voters, Scenic America, National Parks Conservation Association, Defenders of Wildlife, Center for Marine Conservation, Sierra Club, American Rivers, Endangered Species Coalition, National Environmental Trust, American Oceans Campaign, Friends of the Earth, Coast Alliance, Earthjustice Legal Defense Fund, U.S. Public Interest Research Group, Izaak Walton League of America, Environmental Defense, and National Resources Defense Council.

our State and local governments and to force the Federal bench into their decisionmaking processes.

Furthermore, there is no reliable data that supports this ill-considered intrusion into the law of takings. To the contrary, the evidence suggests that in the vast majority of cases, State courts quickly and fairly resolve takings cases before there is a need to resort to Federal judicial intervention. Moreover, this legislation will disempower citizens and neighborhoods that oppose environmental abuse, overdevelopment, and sprawl.

H.R. 2372 is also likely unconstitutional. The bill would make cases prematurely—and unconstitutionally—"ripe" for review, even if the claimant had not pursued available State remedies. Because such actions may not meet the constitutional standard of "finality," such claims would be dismissed by the courts.

BACKGROUND ON PRIVATE PROPERTY RIGHTS

Summary of Takings Jurisprudence

The Just Compensation Clause of fifth amendment to the Constitution prohibits the taking of "private property . . . for public use without just compensation."[4] "As its language indicates, . . . this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."[5] Thus, the government is permitted under the terms of the fifth amendment to take private property so long as the taking is (1) for a public use and (2) accompanied by just compensation.

Under Supreme Court precedents, the scope of the government's latitude to define public purpose is quite broad, and has been described as "coterminous with the scope of a sovereign's police powers."[6] To be considered a public purpose, the challenged State action must simply have a "conceivable public character."[7]

Once an action satisfies the constitutional prerequisite of "public use," the government activity is then analyzed as either a so-called "*per se* taking" or "regulatory taking." The term *per se* taking generally refers to those government takings based solely on the nature of the government action without application of a balancing test considering various factors.[8] In other circumstances, however, when a regulatory imposition is alleged to have caused a taking because of its severe impact on the value of property rights, the Supreme Court considers whether the land use regulation "'substantially advance[s] legitimate State interests' and does not 'den[y] an owner economically viable use of his land.'"[9]

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[4] U.S. Const. amend. V.

[5] *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 314–15 (1987) (emphasis in original) (citations omitted).

[6] *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 230 (1978).

[7] *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1014 (1984).

[8] See, e.g., *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[9] *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (citations omitted).

Takings cases are subject to both the ripeness and abstention doctrines. H.R. 2372 seeks to narrow both these doctrines with respect to takings law.

The Ripeness Doctrine

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. As discussed below, the ripeness doctrine in takings cases is also rooted in the nature of the constitutional right protected by the Just Compensation Clause. Ripeness in the takings context raises issues of finality and compensation.

The finality requirement is concerned with whether the decision-maker has arrived at a "final, definitive position on the issue that inflicts an actual, concrete injury."[10] The Supreme Court's reluctance to examine takings claims until a final decision has been made is "compelled by the very nature of the inquiry required by the Just Compensation Clause."[11] In assessing the merits of a takings claim, the court must examine "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations."[12] The Supreme Court has stated that these factors "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."[13]

The finality requirement also "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer."[14] In other words, because local planning agencies are "singularly flexible institutions," courts must await a truly final local decision before they can determine the nature of the local restrictions on a parcel of land.[15] Moreover, a landowner might be required to pursue more than one land use application to ripen a takings claim because rejection of a grandiose, profit-maximizing proposal does not mean that local officials would reject a more reasonable development plan.[16]

The compensation component of the ripeness inquiry is also premised on the fifth amendment, which does not proscribe the taking of property—only the taking of property *without just compensation*. Moreover, the fifth amendment does not require that compensation be paid in advance of, or contemporaneously with, the taking. "[A]ll that is required is that a reasonable, certain and adequate provi-

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[10] *Williamson County Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 193 (1985). The element of finality should be distinguished from the concept of exhaustion of remedies. Although the policies underlying finality and exhaustion overlap, the doctrines are conceptually different. The exhaustion requirement refers to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* at 193. Thus, although there is no requirement that a plaintiff exhaust administrative remedies before bringing a Section 1983 action, *Patsy* v. *Florida Bd. of Regents*, 457 U.S. 496 (1982), this does not eliminate the need for finality in takings claims brought pursuant to section 1983. *Williamson County*, 473 U.S. at 192–93.

[11] *Williamson County*, 473 U.S. at 190.

[12] *Id.* at 191.

[13] *Id.*

[14] *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 740 (1997).

[15] *MacDonald, Sommer & Frates* v. *Yolo County*, 447 U.S. 340, 350 (1986).

[16] *Id.* at 353 n.9.

sion for obtaining compensation exist at the time of the taking."[17] Thus, so long as the government provides an "adequate postdeprivation remedy" for obtaining compensation, and if that process yields just compensation, the property owner does not have a takings claim.[18] Similarly, if a State provides an "adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[19]

There is a "futility" exemption to the ripeness doctrine, however. A takings case is ripe despite the owner's failure to satisfy the above prerequisites if pursuing them would, under the circumstances, be futile.[20]

The Abstention Doctrine

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. The two most relevant types of abstention for takings purposes are "Pullman" abstention and "Burford" abstention.

Pullman abstention arises where the need to resolve a Federal constitutional question might be eliminated if the State courts were given the opportunity to interpret ambiguous State law.[21] Under this doctrine, the Federal court retains jurisdiction over the case, but sends the litigants to State court for a determination of the State law question. Under a more modern approach, the Federal court can simply "certify" the State-law question to the highest State court for its views of the matter.[22]

In Burford abstention, the Federal court will dismiss an action on grounds of comity when the exercise of Federal jurisdiction would disrupt a complex State administrative process.[23] This doctrine was narrowed recently, when the Supreme Court held that Burford abstention does not support a dismissal or remand in actions seeking monetary damages, as opposed to equitable or other discretionary relief. Rather, the case should be stayed in such circumstances.[24]

H.R. 2372 WILL ENCOURAGE FEDERAL INTERFERENCE IN LOCAL LAND USE DECISIONS

A central problem with H.R. 2372 is its blatant attack on the primacy of local officials in land use matters. Land use is a local matter—it has been under State and local control since the beginning

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[17] *Williamson County*, 473 U.S. at 194 (internal citations and quotations omitted).

[18] *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1639 (1999); *id.* at 194–95.

[19] *Williamson County*, 473 U.S. at 195; see *Del Monte Dunes*, 119 S. Ct. at 1639.

[20] *MacDonald, Sommer & Frates*, 477 U.S. at 350 n.7 ("property owner is of course not required to resort to . . . unfair procedures . . .").

[21] *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496 (1941).

[22] See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75–76 (1997).

[23] *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 725 (1996).

[24] *Id.* at 731. A series of rulings in the 1980's leveled the playing field between Federal and State courts for takings claims, and increased Federal court caseloads, as a result. In the view of some scholars, this has caused the Federal courts to invoke abstention more often. See, *inter alia*, Letter to Hon. Patrick Leahy, Issues Raised by H.R. 1534, the "Private Property Rights Implementation Act," American Law Division, Congressional Research Service, Aug. 15, 1997.

of the Republic. Planning and zoning questions are a central responsibility for local government boards and officials, and have never been regarded as an appropriate subject for Federal interference.

Yet H.R. 2372 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 decisionmaking at the local level at the risk of engaging in a protracted Federal court fight.

In this regard, it severely diminishes the negotiating posture of municipalities, by allowing developers and polluters to threaten to bring them into Federal court on an expedited basis. For example, under the bill, a developer could threaten to bring a local government into court and incur substantial legal and other resources whenever a zoning or development dispute arises.

The impact would be especially severe on smaller cities and towns in the United States. In testimony before the Constitution Subcommittee of the Committee on the Judiciary, Diane S. Shea, Associate Legislative Director of the National Association of Counties, testified that 97% of the cities and towns in America have populations under 10,000, and 52% have populations less than 1,000. Similarly, out of 3,066 counties, 24% have populations less than 10,000. She stated, "Virtually without exception, counties, cities and towns with populations under 10,000 have no full time legal staff. These small communities are forced to hire outside legal counsel each time they are sued, imposing large and unexpected burdens on small governmental budgets."[25]

In addition, the bill undermines the ability of locally elected officials to protect public health and safety, safeguard the environment, and support the property values of all the residents of the community. Because a large developer can threaten a local community with Federal court litigation, local officials may be forced into the position of either having to approve its project or face daunting legal expenses. Developers would have less incentive to resolve their disputes with neighbors or negotiate for a reasonable out-of-court settlement. The costs of defending unjustified Federal takings litigation would threaten local community fire, police, and environmental protection services. In short, local governments would be less able to protect the average property owner against poorly planned mega-malls, factory farms, or sprawl-producing subdivisions.

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. Under the bill, if that zoning board is elected, the matter is then ripe for Federal district court. Without any determination of what would be a permissible use of that land short of the denied use, the case could be brought before

[25] *Hearing on H.R. 2372, the "Private Property Rights Implementation Act of 1999" Before the House Subcomm. on the Constitution, Comm. on the Judiciary.*, 106th Congress (Sept. 19, 1999) (testimony of Diane S. Shea, Associate Legislative Director, National Association of Counties). Constitution Subcommittee, Committee on the Judiciary, Hearing on H.R. 2372.

a Federal district court. Currently, such an issue might be deferred, dismissed or stayed while a State administrative agency or court reconsiders the claim. H.R. 2372 gives claimants a "fast track" to the Federal courts, potentially burdening both the Federal judiciary and the land use procedures of States and localities.

Concerns about Federal interference in local land use issues is reflected in the strong, widespread opposition from State and local governments. For example, compelling subcommittee testimony against H.R. 2372 was presented on behalf of the National Association of Counties and National League of Cities, and the California State Attorney General. Other opponents include the U.S. Conference of Mayors, Council of State Governments and International City/County Management Association, National Association of Towns and Townships, the National Conference of State Legislatures, and 40 State Attorneys General. The Administration has also threatened to veto the bill. The Judicial Conference of the United States also disapproves of the bill and has stated that H.R. 2372 "would alter deeply-ingrained federalism principles by prematurely involving the Federal courts in regulatory proceedings involving property that have historically been decided by State and local administrative bodies or courts."[26]

H.R. 2372 would also minimize local citizens' ability to effectively participate in the land use process. At the local level, neighbors can participate without hiring a lawyer. Neighboring 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. 2372 will have by prematurely allowing takings claims to be brought into Federal court.

Major religious denominations, including the U.S. Catholic Conference (the Catholic Bishops) and National Council of Churches of Christ and Jewish and Evangelical groups oppose the bill because of concerns that it will harm neighbors' ability to protect their property and other rights and to participate in decisions that affect them. Conservation and environmental groups also strongly oppose H.R. 2372 because of its impact on smart growth and other local initiatives to protect neighboring property and the environment.

It is ironic, indeed, that the Majority purports to respect "States' rights" yet supports legislation that would undermine local decisionmaking and authority in an area traditionally left to local control. Enactment of H.R. 2372 would certainly have the exact opposite result from what supporters claim. Inevitably, it would result in expensive, lengthy procedural litigation that would delay deci-

[26] 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 1 (hereinafter, "Judicial Conference Letter").

sions on whether a compensable taking has occurred. Federal courts would first have to decide whether there was a final administrative decision and whether claimants could bypass State courts. Recently reaffirmed Supreme Court holdings are clear: the Constitution requires that premature Federal claims filed under the bill against localities would ultimately have to be dismissed or transferred to State court.

THERE IS NO DEMONSTRATED NEED FOR H.R. 2372

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. 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. NAHB arrived at this statistic by using only 14 Federal appellate court cases over a 9-year period (1990–1998). 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.

Supporters also allege that Federal courts are hostile to property rights because they dismiss 83% of takings cases without reaching the merits. 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. The Supreme Court repeatedly has ruled that the Constitution requires takings claimants to follow State compensation procedures first.[27] 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 9-year period) occasionally lose when their attorneys ignore the rules that apply to everyone.

The truth is that the vast majority of cases get resolved at the local administrative level or in State court, without the need to resort to Federal litigation. And where there is a long court battle, it is often because the land owner ignored the rules and failed to follow State procedures for seeking compensation before suing in Federal court.

H.R. 2372 CREATES AN UNDUE IMPOSITION ON THE FEDERAL COURTS

In the aggregate, the changes wrought by H.R. 2372 are likely to result in a significant increase in the Federal judicial workload. This is a particular problem given the high number of vacant judgeships and the increasing wholesale federalization of other traditional areas of State law (such as criminal law enforcement). According to a recent Congressional Research Report of similar legis-

[27] See *Del Monte Dunes*, 119 S. Ct. at 1639 (takings claimants "suffer no constitutional injury" until the State court denies compensation).

lation introduced in the 105th Congress, "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."[28] The Judicial Conference of the United States further commented, "[T]his 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."[29]

H.R. 2372 creates a scheme that one would think would be untenable to conservative Republicans: the massive transfer of power over local land use decisions to the Federal judiciary. It is curious that this legislation—which greatly increases the workload and authority of Federal judges—would meet with almost unanimous approval by the Majority.

H.R. 2372 IS LIKELY UNCONSTITUTIONAL

In a 7–1[30] 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.[31] Importantly, the Court held that these requirements inhere in the nature of the Just Compensation 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.[32]

Supreme Court authority indicates that H.R. 2372 unconstitutionally attempts to circumvent these constitutionally mandated ripeness requirements through a statutory mechanism. The Supreme Court has stated that for an "as applied" takings challenge to become ripe, the government entity charged with implementing the statute, regulation, or ordinance at issue must have reached a "final decision" regarding its application to the property at issue.[33] 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."[34]

Significantly, the Supreme Court in 1999 reaffirmed this principle and held that the Constitution requires that persons with

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

[29] Judicial Conference Letter, at 3.

[30] Justice Powell took no part in the decision.

[31] 473 U.S. at 186.

[32] *Id.* at 191–95.

[33] See *Suitum*, 520 U.S. at 734; *MacDonald*, 477 U.S. at 348–49; *Williamson County*, 473 U.S. at 186.

[34] *Williamson County*, 473 U.S. at 190–91; see also *MacDonald*, 477 U.S. at 350 ("Whether the inquiry asks if a regulation has '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. ").

takings claims against localities must first seek compensation in State court. 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 postdeprivation 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."[35]

H.R. 2372 would therefore appear to make cases prematurely—and unconstitutionally—"ripe" for review, if the claimant had not pursued available State remedies. Because such actions may not meet the constitutional standard of "finality," such claims would be dismissed by the courts. In essence, then, although this legislation attempts to prevent litigants from being bounced back and forth between State and Federal courts, that would be the very result of this legislation. Due to the serious constitutional issues raised by the bill, among other reasons, the Attorney General would recommend a veto of H.R. 2372.

H.R. 2372 ELEVATES PROPERTY RIGHTS OVER OTHER CONSTITUTIONAL RIGHTS

H.R. 2372 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.

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. This has occurred, for example, in cases involving constitutional challenges to the termination of parental rights,[36] detention in violation of the sixth amendment right to counsel,[37] confinement for juvenile offenders in violation of the eighth amendment,[38] denial of Medicaid benefits in violation of first amendment religious protections,[39] and many others.[40] 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.

Singling out takings claimants for special treatment—as H.R. 2372 does—turns the very purpose of Section 1983 actions completely on its head. Section 1983 was adopted as part of the Civil Rights Act of 1871 in the wake of the Reconstruction Amendments to the Constitution. Known as the "Ku Klux Klan Act," it was specifically designed to halt a wave of lynchings of African-Americans that had occurred under the guise of State and local law. Thus, ironically, the bill elevates real property rights over the very civil rights Section 1983 was enacted to protect.

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[35] 119 S. Ct. at 1644.

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

[37] See, e.g., *Mann* v. *Jett*, 781 F.2d 1448 (9th Cir. 1985).

[38] See, e.g., *Manney* v. *Cabell*, 654 F.2d 1280 (9th Cir. 1990), *cert. denied*, 455 U.S. 1000 (1982).

[39] See, e.g., *Winters* v. *Lavine*, 574 F.2d 46 (2d Cir. 1978).

[40] See, e.g., *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (action for damages against a government official for abuse of his or her office that infringed upon plaintiff's constitutional rights); *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).

H.R. 2372 CREATES ADDITIONAL PROBLEMS

H.R. 2372 has several other adverse consequences. For example, the legislation increases plaintiffs' ability to forum shop. Under the regime of H.R. 2372, 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.

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.

In addition, Section 5 of the bill would impose an onerous notice requirement on the government. The bill requires that whenever a Federal agency takes an agency action "limiting" the use of private property, the agency is required to give notice to the owners of that property explaining their rights and the procedures for obtaining compensation. The Department of Justice has stated, "If construed literally, this mandate could apply to countless Federal programs and regulatory actions that prohibit illegal activity or control potentially harmful conduct. For example, a Federal prohibition on flying an unsafe airplane 'limits' the use of the plane, emission controls for a hazardous waste incinerator 'limit' the use of the incinerator, and so on." It is also unclear how property owners could be identified—let alone notified—in cases where Federal action affects large numbers of people.

CONCLUSION

In summary, H.R. 2372 is a step backwards in our public policy. It invites Federal court interference in local land use decisions, thereby stripping State and local governments of their traditional authority in this area. It does so despite the lack of any real evidence that there is a problem in adjudicating takings cases, and despite the fact that such an attempt is likely unconstitutional. Furthermore, the bill improperly elevates property rights over other civil and constitutional rights by letting property claimants cut the line into Federal court ahead of other plaintiffs. For these reasons, we dissent from H.R. 2372.

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