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"Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534

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ABSTRACT

In the 105th Congress, the property rights agenda has shifted from "compensation" to "process" bills. While the former would ease the standards for when property owners harmed by government action are compensated, the new approach simply streamlines how federal courts handle such claims. This report examines the three leading process bills -- H.R. 992, House-passed H.R. 1534, and Senate-reported H.R. 1534. The bills embody two process approaches: allowing property owners suing the United States to bring invalidation and compensation claims in the same court, and lowering abstention and ripeness barriers when suing local governments in federal court for property rights violations.

"Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534

Summary

A new breed of “property rights” bills in the 105th Congress seeks to abbreviate the judicial process used by property owners to assert claims based on adverse impacts of government actions to their property. The bills purport to alter only the judicial process, rather than the standards for judging the claims. In adopting this approach, bill supporters hope to avoid the controversy sparked by the leading “property rights” bills of recent Congresses — in particular, by bills affording property owners monetary compensation on easier-to-meet standards than those of the Fifth Amendment Takings Clause.

H.R. 992 and H.R. 1534 (Senate-reported version) take aim at the current division of jurisdiction between the federal district courts and the U.S. Court of Federal Claims (CFC) — as that division affects property-rights-related suits against the United States. Consider a landowner facing a federal property-use restriction. He or she wishes to attack the restriction’s validity and also seek compensation under the Takings Clause. To pursue both remedies, the owner must now file in two courts: the district court has jurisdiction over the invalidation claim; the CFC, under the Tucker Act, must hear the compensation claim. Responding to this jurisdictional split, these bills give each court some jurisdiction of the kind it now lacks.

Issues raised by these bills include: How serious and frequent is the current “shuffle” between district court and CFC? Should the CFC be shifted away from its historical identity as a court that hears chiefly monetary claims against the United States? May an Article I court such as the CFC invalidate acts of Congress?

H.R. 1534, in both House-passed and Senate-reported versions, focusses additionally on two threshold issues often used by courts to decline reaching the merits of the property owner’s constitutional claims. These issues, “abstention” and “ripeness,” have been developed by federal courts to avoid adjudication of certain matters deemed not properly before them. However, supporters of these bills point out that as a result of them, the large majority of landowner-filed constitutional challenges are dismissed by federal courts. Though the state courts are available to hear such claims, bill supporters argue that such courts are often pro-regulator, and in any event, federal courts have a responsibility to adjudicate federal claims.

The response of H.R. 1534 (both versions) is to limit the ability of federal judges to apply these threshold hurdles, with the result that such judges will have to adjudicate more constitutional claims on the merits. Issues raised by the bills include: Is the present system unfair? What are the federalism implications of having more federal-court decisions on local government decisions as to land use? Will the bills simply result in federal judges dismissing cases on the merits, rather than for lack of ripeness?

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"Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534

A new breed of “property rights” bills has appeared on the congressional horizon. These bills seek to abbreviate the federal judicial process now used by property owners to assert claims based on adverse impacts of government actions on their property. The bills purport to alter only the judicial process, rather than the standards for judging the claims. In adopting this approach, bill supporters hope to avoid the controversy generated by the leading property rights bills of recent Congresses — in particular, by bills affording property owners monetary compensation on easier-to-meet standards than those of the Fifth Amendment Takings Clause.¹

Property rights bills have been introduced in every Congress since 1990.² Indeed, the very first generation of such bills took a process approach, seeking to require federal agencies to do written “takings impact assessments” of their proposed actions. In the period from 1993 to 1996, however, the emphasis shifted to the aforementioned compensation approach. During 1995, the House passed a compensation bill as part of the House Republicans’ Contract with America. In the Senate, the Republican majority leader and Senate Judiciary Committee chairman sponsored multifaceted property rights bills, which attracted attention chiefly to their compensation components. None of these assessment and compensation bills was enacted.

During the later part of the 104th Congress, and early in the 105th, the belief emerged among congressional supporters of property rights legislation that compensation bills were too much of a lightning rod, and might not be enactable in the foreseeable future. Thus, eyes turned toward arguably more moderate approaches whose political prospects might be better. Enter the judicial process bills — H.R. 992 (Lamar Smith), H.R. 1534 (Gallegly), S. 1204 (Coverdell), and S. 1256 (Hatch).

The House passed H.R. 1534 on October 22, 1997, and H.R. 992 on March 12, 1998. In the Senate, the Committee on the Judiciary reported H.R. 1534 on February 26, 1998 with substituted text that combines the approaches of the two House-passed bills. This report examines — H.R. 992 as passed by the House (“Tucker Act Shuffle Relief Act”), H.R. 1534 as passed by the House (“Private Property Rights Implementation Act”), and H.R. 1534 as reported by the Senate Committee on the

¹U.S. Const. Amend. V: “[N]or shall private property be taken for public use, without just compensation.”

²To be precise, the first property rights “bill” was a floor amendment. 136 Cong. Rec. 10909 (daily ed. July 27, 1990) (floor amendment of Sen. Steve Symms).

Judiciary ("Citizens Access to Justice Act"). The first generation of process bills, of the assessment genre, is examined in an earlier CRS report.³

Note: At the Senate Committee on the Judiciary markup of H.R. 1534, several Republican members expressed doubts about the bill, even while voting to send it to the floor. The express understanding was that changes in the bill would be sought before it came to the floor. Thus, the Senate-reported version of H.R. 1534 discussed in this report may not be the vehicle on which the full Senate acts.

H.R. 992 and Senate-reported H.R. 1534: expanding court jurisdiction

H.R. 992 and Senate-reported H.R. 1534 take aim at the current division of jurisdiction between the federal district courts and the U.S. Court of Federal Claims (CFC) — as that division affects property-rights-related suits against the United States. This approach first saw the light of day in S. 135 of the 104th Congress (Sen. Hatch), and was later folded into various Senate “omnibus” property rights bills of the 104th and 105th Congresses.⁴

Background

Historically, the district courts and the CFC, for the most part, hear different types of suits against the federal government. The district courts have jurisdiction over suits seeking to *invalidate* federal actions, often under the Administrative Procedure Act (APA). They also hear tort suits against the United States. By contrast, the CFC, under the Tucker Act,⁵ hears almost exclusively *money claims* against the United States (other than torts and admiralty). This jurisdictional split often means that the property owner aggrieved by a federal restriction on land use must, if it wishes to pursue all remedies, file lawsuits in two separate courts. The suit seeking judicial invalidation of the regulatory act must be filed in the district court, while the Fifth Amendment “taking” action, asking for monetary compensation, must be lodged with the CFC.

The reasons for this jurisdictional split go back to the mid-nineteenth century. Prior to 1855, Congress dealt with requests for private bills by itself investigating the merits of each claim. In that year, the predecessor of the CFC, the Court of Claims, was created “primarily to relieve the pressure on Congress caused by the volume of

³Robert Meltz, *The Property Rights Issue* 16-19 (CRS Report No. 95-200 A, 1995).

⁴S. 605 (Sen. Dole) and S. 1954 (Sen. Hatch) of the 104th Congress, and S. 781 (Sen. Hatch) of the 105th Congress.

⁵Act of March 3, 1877, ch. 359, § 1, 24 Stat. 505 (1887), codified at 28 U.S.C. § 1491.

private bills.”⁶ Originally, its power extended only to hearing such claims and preparing bills for submission to Congress. In 1887, however, the enactment of the Tucker Act greatly expanded the court’s jurisdiction to include virtually all monetary claims against the United States except those sounding in tort or admiralty. The Act has changed little in relevant respects to this day.

Among other things, the Tucker Act gave the Court of Claims power over money claims against the United States “founded ... upon the Constitution.” Ultimately, almost all takings lawsuits against the Federal Government, being money claims “founded ... upon” the Fifth Amendment Takings Clause, were seen to belong exclusively in the CFC.⁷ A small exception is made by the “little Tucker Act,” which gives district courts jurisdiction concurrent with the CFC over a variety of money claims, including takings claims, against the United States when the amount in controversy does not exceed \$10,000.⁸

While concentrating money claims against the United States in the CFC, however, Congress left other claims against the United States — for injunctive and declaratory relief -- largely in the domain of the U.S. district courts. Thus was created a bifurcation of jurisdiction not typically encountered in property rights suits against local governments, whether brought in state or federal court.

Description of bills

Responding to this split jurisdiction, H.R. 992 and Senate-reported H.R. 1534 give each court some jurisdiction of the type it now lacks — but only for those suits against the United States that involve property rights. The CFC is given some jurisdiction to invalidate acts of Congress and agency regulations, and, as to any action within its jurisdiction, to issue injunctive and declaratory relief. The district courts, for their part, are given jurisdiction to hear Fifth Amendment compensation claims based on such acts and regulations, without the current \$10,000 cap on such claims. In effect, two court systems of concurrent jurisdiction are created for challenges to federal actions adversely affecting property rights.

Other provisions found in both H.R. 992 and Senate-reported H.R. 1534 would: give the plaintiff sole power to choose between the CFC and district court, direct appeals from actions under the bill in either court to the U.S. Court of Appeals for the Federal Circuit, and repeal a current restriction on CFC jurisdiction in 28 U.S.C. § 1500.

Provisions in Senate-reported H.R. 1534, but not H.R. 992, include: a 6-year statute of limitations; a directive that courts award attorneys’ fees and other litigation costs to prevailing plaintiffs; and a clarification that in CFC proceedings constituting judicial review of federal agency action, the Administrative Procedure Act applies.

⁶Glidden Co. v. Zdanok, 370 U.S. 530, 552 (1962).

⁷See, among recent cases, Preseault v. ICC, 494 U.S. 1 (1990); Bay View, Inc. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997).

⁸28 U.S.C. § 1346(a)(2).

Provisions in H.R. 992, but not Senate-reported H.R. 1534, include: a bar on involuntary joinder in the CFC (an Article I court) of third parties entitled to an Article III court; and a disclaimer specifying that the bill's grant of jurisdiction to the CFC and district courts does not extend to matters over which exclusive jurisdiction is now vested in a U.S. court of appeals.

Issues raised by bills

Plainly, it is more efficient of both litigant and judicial resources if claims arising from the same set of facts can be adjudicated in the same court. The particular way that H.R. 992 and Senate-reported H.R. 1534 seek to achieve this goal, however, raises various issues that Congress may wish to consider.

1. The “shuffle” between the CFC and district courts: the Tucker Act and 28 U.S.C. § 1500.

The Tucker Act. The main purpose of H.R. 992 and Senate-reported H.R. 1534 is to consolidate a property owner’s property-rights-related invalidation and compensation claims in one court. This should first be put into perspective. The bifurcation of invalidation/takings jurisdiction in the property rights realm is not an isolated case. There are other situations, not involving takings, where a plaintiff might have to split causes of action arising from the same fact situation between the CFC and district courts — e.g., a breach of contract action and an invalidation action against the United States, or a Contract Disputes Act claim and a tort action. This fact led one witness at the hearing on H.R. 992 to suggest that if the issue of split CFC/district court jurisdiction is to be addressed by Congress, it should not be limited to property-rights-related claims.⁹

Our research reveals no use of the phrase “Tucker Act shuffle” by a court, but in the context of property-rights-related claims it appears to refer chiefly to three scenarios.¹⁰ In the first, a federal agency acts to restrict the use of privately owned land — e.g., through denial of a wetlands permit required for developing the land. The landowner wants both to have the government restriction overturned (i.e., the permit granted) or, if the restriction proves to be lawful, to obtain recompense for an alleged regulatory taking. So the owner files an invalidation action in the district court, and a Tucker Act monetary compensation action in the CFC.¹¹ At this point,

⁹Prepared statement of Prof. Michael F. Noone, submitted at Hearing on H.R. 992 before the Subcomm. on Immigration and Claims, House Comm. on the Judiciary, Sept. 10, 1997.

¹⁰See the House Committee on the Judiciary's report on H.R. 992: H.R. Rep. No. 105-424, at 5-6 (1997).

¹¹The federal permit programs most often drawn into the property rights debate are those under the Endangered Species Act (ESA) and the Clean Water Act section 404 (wetlands) program. Takings case law under the ESA is extremely limited, and so does not permit assessment of how often multiple filings by landowners are occurring. Takings court decisions under the section 404 program, however, are prodigious. Our survey of the more recent section 404/takings decisions shows that in the majority, no district-court invalidation suit is filed. Of course, it is arguable that if landowners are allowed to file invalidation and

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the CFC typically will stay the compensation suit until the validity of the government action is ascertained. This stay is dictated in part by the CFC/Federal Circuit rule that the United States cannot be held liable for a taking based on unauthorized, *ultra vires* government action (if the validity challenge involves such an issue),¹² and in part by the difficulty in assessing the existence or extent of the taking until validity questions and the government's ultimate decision are resolved. Once the district court proceedings are complete (unless the government action is found to be unauthorized), the plaintiff then "shuffles" to the CFC to go forward with the taking action.

In the second scenario, the property owner aggrieved by government action pursues invalidation in the district court *or* compensation in the CFC — one or the other. In defense, the United States may argue, if warranted by the facts of the case, that the invalidation action is really one for compensation and belongs instead in the CFC, or that the compensation action is effectively a collateral attack on the government action and thus should be determined by a district court. If the government's argument prevails, the action will have to be filed in the other court.

A third scenario arises from the legal blur between which government actions constitute takings, adjudicated in the CFC, and which constitute merely torts, adjudicated in the district courts. A typical scenario occurs with the flooding of private property caused by a government dam. A taking? Or a tort such as trespass or negligence? H.R. 992 and Senate-reported H.R. 1534 would allow the plaintiff to remain in the court where the action was originally filed, CFC or district court, if the court determined that the government action was not as characterized by the plaintiff.

28 U.S.C. § 1500. The "Tucker Act shuffle" is to be distinguished from a different "shuffle" that has been largely eliminated in the context of simultaneous invalidation and monetary compensation suits. The latter shuffle used to arise under an old, Reconstruction Era jurisdictional statute of the CFC, 28 U.S.C. § 1500. Section 1500, which H.R. 992 and Senate-reported H.R. 1534 would repeal, bars the CFC from exercising jurisdiction over "any claim for or in respect to which the plaintiff ... has pending in any other court any suit or process against the United States."¹³ At first blush, then, section 1500 seems to force an election between

¹¹(...continued)

compensation suits in the same court, the frequency with which they press both claims might increase.

¹²Del-Rio Drilling Programs, Inc. v. United States, 1998 WL 321272 (Fed. Cir. June 18, 1998); Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

¹³According to the Supreme Court:

The lineage of [section 1500] runs back more than a century to the aftermath of the Civil War, when residents of the Confederacy who had involuntarily parted with property (usually cotton) during the War sued the United States for compensation in the Court of Claims [today's CFC], under the Abandoned Property Collection Act When these cotton claimants had difficulty meeting the statutory condition that they must have given no aid or comfort to participants in the rebellion, ... they resorted to separate suits in other courts seeking

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challenging the validity of a federal action in district court, or filing a taking claim based on that action in the CFC — one or the other, but not both. This “either/or” raised the awkward possibility that the six-year statute of limitations for the filing of CFC actions would expire before the district court litigation was concluded.

However, in the chief situation addressed by the bills — the plaintiff pursuing invalidation and monetary remedies — there is no forced election. The reason: a CFC predecessor court announced in 1956 that the jurisdictional bar of section 1500 does not apply when the plaintiff asks for *different types of remedy* in the two courts.¹⁴ At a minimum, this different-remedy exception has been held to mean that when the district court suit is for invalidation or other equitable relief, the CFC suit — almost always, for monetary relief -- may proceed.¹⁵ Though eliminated by the Federal Circuit in 1992,¹⁶ the different-remedy exception was reinstated by the same court in 1994.¹⁷ Thus, a plaintiff today may simultaneously maintain an invalidation action in the district court and a compensation action in the CFC.¹⁸

In light of the reinstatement of the different-remedy exception, the primary change made by the bills’ repeal of section 1500, at least in the property rights area, seems to be the relatively modest one of increasing the permanence of the exception by embodying it in a statutory prescription rather than a court-created one. Situations relevant to the bills’ property rights focus do arise occasionally, however, where the different-remedy exception (or other section 1500 exceptions) does not apply to lift the bar on CFC jurisdiction. In such situations, the repeal of section 1500 still would have consequences.¹⁹

¹³(...continued)

compensation not from the Government as such but from federal officials, and not under the statutory cause of action but on tort theories such as conversion. It was these duplicate lawsuits that induced Congress to [enact section 1500].

Keene Corp. v. United States, 508 U.S. 200, 206 (1993).

¹⁴Casman v. United States, 135 Ct. Cl. 647 (1956).

¹⁵See, e.g., Marks v. United States, 34 Fed. Cl. 387 (1995), *affirmed without published opinion*, 116 F.3d 1496 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 852 (1998).

¹⁶UNR Industries, Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992) (en banc), *affirmed sub nom.* Keene Corp. v. United States, 508 U.S. 200 (1993).

¹⁷Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc).

¹⁸Senate-reported H.R. 1534 appears to be unaware of this fact. Section 2(3)(C) of the bill contains a finding seemingly based on a belief that under current law a plaintiff may not simultaneously maintain an equitable action in the district court and a compensation action in the CFC, based on the same operative facts.

Possibly, section 2(3)(C) reflects a reading of *Loveladies Harbor* as confined to its facts. Case law subsequent to *Loveladies Harbor*, however, discloses no such narrow interpretation. See, e.g., Creppel v. United States, 41 F.3d 627, 633 (Fed. Cir. 1994).

¹⁹See, e.g., Dico, Inc. v. United States, 48 F.3d 1199 (Fed. Cir. 1995). Under section 1500, said *Dico*, the CFC lacked jurisdiction over a manufacturer’s taking claim for Superfund Act response costs it incurred cleaning up groundwater under federal order. The manufacturer had earlier filed a Superfund Act section 106(b) claim in district court against EPA for

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2. The shift away from the CFC's historical jurisdiction, which has been limited almost exclusively to money claims.

The CFC has limited jurisdiction to grant equitable and other non-monetary relief — always in statutorily specified situations, and often when such relief is appropriate as an adjunct to securing monetary relief. In the large majority of its cases, however, CFC plaintiffs seek money as the primary remedy. Indeed, the resolution of monetary claims against the United States has been the prime thrust of the court ever since its creation in 1855.

Under H.R. 992 and Senate-reported H.R. 1534, the number of cases where non-monetary relief is sought from the CFC would be likely to increase substantially over current levels, owing to the general perception that the CFC is a plaintiff-friendly court. To be sure, H.R. 992 premises CFC jurisdiction over the non-taking claim on plaintiff's alleging a taking, and the Senate bill demands that the federal action be one "affecting" plaintiff's property. Both standards, however, are broad and easily met. The H.R. 992 precondition of a taking claim may only require plaintiff to meet "Rule 11," a rule of the CFC (and district courts) under which plaintiff's attorneys avoid sanctions for frivolous claims by showing that the claim was justified under existing law or reasonable extension of existing law. Given the vagueness and fluidity of takings law, this will arguably prove readily satisfied.

3. Consequences of having district courts, in addition to the CFC, rule on claims of federal takings.

Under H.R. 992 and Senate-reported H.R. 1534, the law of federal takings would develop in district courts in addition to the CFC, not (as now) almost exclusively in the CFC.²⁰ The prospect that such multiple forums would yield inconsistent rulings is reduced in both bills by provisions that channel appeals from district court decisions under the bills to one appellate court: the U.S. Court of Appeals for the Federal Circuit. This is no different than under current law — right now, the Federal Circuit hears appeals from the CFC and from the district courts (takings claims seeking up to \$10,000).²¹ Almost certainly, however, the number of cases arriving at the Federal Circuit from the district courts will be much greater if the bills are enacted, swelling the workload of that court. In part, such a result might be caused by the reputation of the Federal Circuit as a plaintiff-friendly court.

Another issue raised by allowing the same claim to be pursued in more than one court, as the bills do, is that of "forum shopping" — a practice decried by some but

¹⁹(...continued)

reimbursement of the same costs. Although the legal theories in the two actions were different, observed the court, the factual allegations and claims for monetary and injunctive relief were essentially the same. Thus, the different-remedies exception to the section 1500 jurisdictional bar was inapplicable.

²⁰Because of the \$10,000 jurisdictional limit in the little Tucker Act and the restriction of takings actions to compensation remedies, few district courts today render takings decisions. *See supra* text accompanying note 8.

²¹28 U.S.C. §§ 1295(a)(2), (a)(3), respectively.

seen as relatively harmless by others. Note in this regard that the bills give the plaintiff the choice of both trial court and appellate court. The choice of trial court is explicit in the bills.²² The choice of appellate court is made by plaintiff's decision whether to attach the requisite property rights allegations to the invalidation claim — property rights allegations attached, the appeal goes to the Federal Circuit; no such allegations, appeal goes to the circuit in which the district court is located.

The concurrent CFC-district court jurisdiction contemplated by the bills is nothing new. Congress has established duplicative jurisdiction between the CFC and other courts in a number of settings, so arguably it has a certain tolerance for forum shopping.²³

4. Constitutionality of CFC, as an Article I court, invalidating acts of Congress.

Generally, the judicial power of the United States is exercised by lower courts created by Congress under the judicial article (Article III) of the Constitution. These include the federal district courts and the U.S. Court of Appeals. From time to time, however, Congress has created courts under the legislative article (Article I) of the Constitution. These include the territorial courts, District of Columbia courts, bankruptcy courts, federal magistrate judges, military courts, and, of interest here, the CFC.²⁴

An old and still unresolved debate exists as to whether Article I forums, like the CFC, may be vested with jurisdiction to do many or all of the things that Article III

²²H.R. 992 § 2(a)(2); Senate-reported H.R. 1534 § 5(c).

²³We noted earlier the overlap between CFC and district court jurisdiction as to money claims against the United States for \$10,000 or less, under the Tucker Act and little Tucker Act. In addition, there is concurrent jurisdiction between the CFC and district courts under 28 U.S.C. §§ 1491(a) and 1346(a)(1) (tax refund cases), 5 U.S.C. § 8715 (life insurance claims by government employees and others), 5 U.S.C. § 8912 (health insurance claims by government employees and others), 22 U.S.C. § 2356 (certain patent claims), 26 U.S.C. § 6226(e) (petition for readjustment of partnership items), and 28 U.S.C. § 1479 (excessive injury from U.S. action to prevent coastline damage from offshore pollution).

Yet another instance may be temporary. Until recently, the CFC had jurisdiction over challenges to federal contract bid procedures only until the contract was awarded. Once awarded, jurisdiction shifted to the district courts to hear APA challenges to the award's validity. In 1996, Congress gave each court the jurisdiction it lacked — the CFC, over post-award challenges; the district courts, over pre-award challenges. Pub. Law No. 104-320 § 12; 28 U.S.C. § 1491(b)(1). The effect was to create a system of two courts with identical jurisdiction over a category of lawsuits, just as H.R. 992 and Senate-reported H.R. 1534 propose for property-rights-related litigation. However, Congress also decided to sunset the district-court's entire authority over bid protest actions as of January 1, 2001, while requiring the General Accounting Office to do a study on whether concurrent CFC/district court jurisdiction in this area was "necessary." Pub. Law No. 104-320 § 12(c)-(d). Legislative history shows that Senator Cohen, the chief proponent of the jurisdictional change, was concerned about the possibility that dual jurisdiction would invite forum shopping and might produce "disparate bodies of law." 142 Cong. Rec. S11848 (daily ed. Sept. 30, 1996) (remarks of Senator Cohen).

²⁴28 U.S.C. § 171(a).

forums can.²⁵ Today it is clear that there is considerable overlap, the Supreme Court's criteria for the outer bounds of Article I judicial functioning being quite broad. Nonetheless, observers have raised the issue whether an Article I forum may be empowered to invalidate acts of Congress, which H.R. 992 and Senate-reported H.R. 1534 would empower the CFC to do. The argument against such power invokes separation of powers concerns and the theoretically greater independence of Article III judges.²⁶

A full development of the arguments as to whether the CFC, as an Article I court, can be constitutionally empowered to invalidate congressional enactments is beyond the scope of this report. Sharply opposing views have been articulated recently by the U.S. Department of Justice (unconstitutional) and by Republican members of the House Committee on the Judiciary (constitutional).²⁷ Here, we merely note that the Supreme Court has never directly addressed the question.

Should Congress determine that the above constitutionality concern argues against granting invalidation authority to the CFC, it may be noted that the bills' claims-consolidation purpose can be achieved solely by the jurisdictional expansion effected by the bill in the district courts. Such a district-court-only approach was espoused by an amendment offered by Representative Melvin Watt during full-committee markup and floor consideration of H.R. 992, but rejected.²⁸

5. Effect on "preclusive review" provisions in existing regulatory statutes.

Congress may wish to clarify the extent to which the bills, particularly Senate-reported H.R. 1534, override the "preclusive review" provisions contained in many federal regulatory statutes. These provisions were designed to, among other things, put an early end to legal disputes over new agency rulemakings, allowing both agency and regulated community to commit the necessary resources with confidence that the rule has some permanence. An example of a preclusive review provision is found in

²⁵See generally RICHARD H. FALLON, DANIEL J. MELTZER, AND DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 387-444 (4th ed. 1996) (hereinafter FEDERAL COURTS).

²⁶Such greater independence is thought to result from the fact that Article III judges have, by the terms of that article, lifetime tenure (save for impeachment) and security against reductions in pay. Article I judges have neither. For example, the judges of the CFC are appointed for fifteen-year terms, not for life. 28 U.S.C. § 172(a).

An interesting counter-argument to the theoretically lesser independence of the article I judges on the CFC has been made by the chief judge of that court, in testimony on H.R. 992. He asserted that since each CFC active-status judge has the option of taking lifetime senior status at the end of his or her fifteen-year term (if not reappointed), CFC judges are likely to have the same independence of judgment as Article III judges. Oral testimony of Loren Smith, Chief Judge of the CFC, at Hearing on H.R. 992 before the Subcomm. on Immigration and Claims, House Comm. on the Judiciary, Sept. 10, 1997.

²⁷Letter from Andrew Fois, Ass't Att'y General, U.S. Dep't of Justice, to Rep. Lamar Smith (Sept. 8, 1997); majority views in H.R. Rep. No. 105-424, at 7-11 (1997).

²⁸Rejection of the Watt amendment on the House floor was on a tie vote of 206-206. 144 Cong. Rec. H1138 (daily ed. March 12, 1998).

the Clean Air Act, which limits judicial review of nationally applicable regulations under the act to the U.S. Court of Appeals for the District of Columbia, requires that petitions for judicial review be filed within 60 days of Federal Register notice, and provides that after such 60 days a regulation may not be challenged in an enforcement action.²⁹

The issue whether preclusive review provisions are overridden arises more clearly under Senate-reported H.R. 1534, since that bill's provisions apply "[n]otwithstanding any other provision of law."³⁰ Such override, if found, would make several changes. Where a preclusive review provision would have channelled all petitions for review to a single court (example above), the bill increases the chance of multiple, inconsistent rulings from the district courts as to an agency action. Also, agency actions for which original review jurisdiction now lies in the circuit courts would be heard initially by district courts, enhancing the likelihood that more time will be used in appeals. Finally, the six-year limitations period in Senate-reported H.R. 1534 arguably allows challenges to be filed long after the deadlines in existing preclusive review provisions, which range between 45 and 120 days after the agency rulemaking.

By contrast, H.R. 992 lacks the "[n]otwithstanding any other provision of law" phrase. Moreover, it stipulates that its grant of jurisdiction to the CFC and district courts "does not extend to matters over which other Federal law has granted exclusive jurisdiction to one or more United States courts of appeals."³¹ This provision shrinks the issue of a possible override to those preclusive review provisions conferring jurisdiction on federal district courts.³²

Note that invalidation challenges under the bills could take the form of either petitions for review of agency rulemaking, or counterclaims in a federal enforcement action.

6. Other issues.

Effect of court's finding no taking. H.R. 992 conditions the expansion of CFC and district court jurisdiction on plaintiff's allegation that the agency action at issue is a taking. (The district courts have jurisdiction over such claims independent of

²⁹Clean Air Act § 307(b); 42 U.S.C. § 7607(b). Other preclusive review provisions in environmental statutes are: Clean Water Act, 33 U.S.C. § 1369(b); Safe Drinking Water Act, 42 U.S.C. § 300j-7; Resource Conservation and Recovery Act, 42 U.S.C. § 6976; Superfund Act, 42 U.S.C. § 9613(a); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2618; Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136n, and Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276. Non-environmental examples include the Occupational Safety and Health Act, 29 U.S.C. § 660, and Consumer Product Safety Act, 15 U.S.C. § 2060.

³⁰Sec. 5(b).

³¹Sec. 2(a)(4).

³²*See, e.g.,* Safe Drinking Water Act § 300j-7(b); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276.

H.R. 992.) In the large majority of cases, it is likely that the taking claim will be rejected by the CFC — this is the historical pattern in takings cases, one which H.R. 992 is likely to heighten by encouraging the filing of marginal takings claims to establish the expanded jurisdiction over the non-taking claim. If the taking claim is rebuffed, does the court retain jurisdiction over the non-taking claim? It would seem likely, though Congress may wish to clarify the matter.

Scope of CFC's new equitable powers. H.R. 992 grants the CFC power to grant equitable and declaratory relief only in connection with actions brought under H.R. 992. In contrast, Senate-reported H.R. 1534 grants the CFC such powers "in any case within its jurisdiction." Both bills would allow invocation of equitable powers on a "when appropriate" standard, a phrase one assumes refers to traditional principles of equity and does not allow the court to invalidate federal action *solely* because it is adjudged a taking.³³ Also raising this issue is a provision in Senate-reported H.R. 1534 declaring that "[a]n owner may file a civil action under this section to challenge the validity of any Federal agency action as a violation of the fifth amendment"³⁴

House-passed H.R. 1534 and Senate-reported H.R. 1534: lowering abstention and ripeness hurdles

A "process" approach quite different from the Tucker Act-related provisions above is taken by the House-passed version of H.R. 1534 and almost identical provisions in the Senate-reported version of H.R. 1534. These bills would lower certain threshold barriers to assertion of federal takings claims in federal courts, so that more such cases are resolved on the merits, rather than dismissed on preliminary grounds. This threshold-lowering approach is entirely independent of the earlier-discussed jurisdictional approach. Indeed, the two approaches largely affect different entities: the Tucker Act shuffle approach aims exclusively at suits against the federal government; the threshold-lowering approach, mostly suits against local government.

The two threshold barriers targetted by the bills are "abstention" and "ripeness," concepts that have been developed by federal judges to avoid adjudication of certain matters deemed not properly before federal courts. A basic understanding of these sentries at the courthouse door is required at the outset.

³³Under well-settled law, invalidation is not available as a remedy for a Fifth Amendment taking in the usual case; "just compensation" is deemed sufficient. *See, e.g.,* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984). *See also* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987) (Takings Clause "does not prohibit the taking of private property, but instead places a [compensation] condition on the exercise of that power").

³⁴Sec. 5(a).

The existing law of abstention and ripeness

*Abstention*³⁵

Abstention is a discretionary doctrine under which federal judges may decline to decide cases that are otherwise properly before the federal courts. Grounded in principles of comity and cooperative federalism, abstention is based on the notion that federal courts should not intrude on sensitive state political and judicial controversies unless necessary. Rather, say proponents of abstention, those controversies should be settled in the state courts. Thus, abstention is an exception to the otherwise “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”³⁶

Several varieties of abstention exist, named after the Supreme Court decisions in which they were announced. The two varieties most relevant to H.R. 1534 are *Pullman* abstention and *Burford* abstention.³⁷ *Pullman* abstention,³⁸ in its classic use, arises in federal-court challenges to state action in which resolution of an unsettled state law issue could eliminate the need to decide, or could narrow, a difficult federal question.³⁹ It has been held applicable to section 1983 actions,⁴⁰ a frequently used basis for challenging local action in federal court.⁴¹ Typically, the federal court sends the litigants to state court for a determination of the state law question, or, in the speedier, more modern approach, simply “certifies” the state-law question to the high

³⁵Portions of the abstention discussion here are adapted from a draft of a forthcoming book on the takings issue. The relevant portion of the book was written by Richard M. Frank, a Senior Assistant Attorney General with the State of California.

³⁶*Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1970).

³⁷*See generally* Julie A. Davies, *Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. Davis L. Rev. 1 (1986).

³⁸Announced in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

³⁹A leading treatise asserts that the Supreme Court’s enthusiasm for *Pullman* abstention appeared to wane during the 1960s, the Court pointing to the delays that often result from remitting plaintiff to a different court. More recently, however, the Burger Court resuscitated the doctrine to some degree, and despite the small number of recent supportive cases in the Supreme Court, the doctrine continues to be invoked in the lower federal courts. FEDERAL COURTS, *supra* note 25, at 1237.

⁴⁰*Harrison v. NAACP*, 360 U.S. 167 (1959).

⁴¹Section 1983, 42 U.S.C. § 1983, is the most often used provision of the Civil Rights Act of 1871. It creates a federal cause of action on behalf of any person deprived of federal rights “under color of” state law. Though the original motivation for section 1983 was to ensure that the freedoms granted to southern blacks after the Civil War would not be at the mercy of unfriendly state courts, the language of the provision admits of far broader usage. Today, section 1983 remains a popular basis for assertion of federal rights in federal (and state) court, in part because of a companion provision, 42 U.S.C. § 1988, allowing for the award of attorneys fees to prevailing parties.

court of the state for its views on the matter.⁴² Meanwhile, the federal court retains jurisdiction over the case, to resolve the federal question if a decision ultimately proves necessary.

Burford abstention⁴³ counsels against federal adjudication in cases touching on a complex state regulatory scheme concerning important matters of state policy more properly addressed by state courts.⁴⁴ By contrast with *Pullman* abstention, the typical remedy is to dismiss the action. Recently, however, the Supreme Court held in *Quackenbush v. Allstate Ins. Co.* that abstention does not support outright dismissal or remand in actions seeking monetary damages, as opposed to equitable or other discretionary relief.⁴⁵ Owing to the more common use of dismissal in *Burford* abstention, *Quackenbush* would seem to affect chiefly those cases. Important here, its holding seems to limit the federal court addressing a takings-based section 1983 action to staying, rather than dismissing, the claim. This raises the question whether *Quackenbush* will cause federal judges to lose interest in the use of abstention in takings cases.

At least until *Quackenbush*, federal courts had been abstaining in regulatory takings cases with greater frequency than a decade ago — the apparent result of two Supreme Court developments. The first is the Court’s 1987 ruling that when a regulatory taking is found, the Fifth Amendment requires a remedy of monetary compensation, not merely invalidation of the land use restriction.⁴⁶ Formerly, some state courts had permitted only invalidation. Thus, the ruling deprived property owners of the argument that the remedies available in state court were inferior to those in federal court. Second, in 1985 the Supreme Court announced two stringent ripeness rules for Fifth Amendment “takings” claims advanced in federal court — discussed immediately below. These rules have further encouraged increasingly overburdened federal judges to apply abstention principles to deflect many takings cases (involving state and local agency defendants) to the state courts.

Abstention is only relevant where a *federal* court has before it a suit challenging *state or local* action. If the venue is a state court, or the defendant is the United States, abstention doctrine has no application.

⁴²There appears to be broad consensus that certification allows resolution of state law questions more expeditiously than by the traditional method of requiring a party to file a declaratory judgment action in the state trial court and possibly have to appeal up to the state high court. *See generally* CHARLES A WRIGHT, LAW OF FEDERAL COURTS 334-335 (5th ed. 1994).

⁴³Announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

⁴⁴The key follow-up case to *Burford* is *Alabama Public Service Comm’n v. Southern Ry.*, 341 U.S. 341 (1951), holding that “[a]s adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights.” While the Supreme Court has not invoked *Burford* abstention since this decision, its recent references to the case suggest its latter-day viability.

⁴⁵517 U.S. 706 (1996).

⁴⁶*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

Ripeness

Ripeness is another threshold hurdle in litigation. If a claim is not ripe, the court lacks subject matter jurisdiction and may not decide the merits of the case. Ripeness seeks to ensure that issues adjudicated by courts are “mature” — i.e., that developments in the plaintiff’s dispute with the defendant have reached a sufficient level of definition and finality that judicial intervention is appropriate. In the federal courts, the doctrine is rooted in both constitutional text (the Article III requirement that federal courts adjudicate only “cases” and “controversies”) and the judiciary’s inherent discretion, absent statutory proscription, to implement certain “prudential” concerns as to the proper use of judicial resources.⁴⁷

The Supreme Court has been at pains to spell out what general ripeness principles require in the specialized context of Fifth Amendment takings actions.⁴⁸ Indeed, beginning with *Agins v. City of Tiburon*⁴⁹ in 1980, the Court’s effort to define what constitutes a ripe taking claim became a key theme of its takings decisions. Two decisions dominate the field: *Williamson County Regional Planning Comm’n v. Hamilton Bank* (1985)⁵⁰ and *MacDonald, Sommer & Frates v. Yolo County* (1986).⁵¹ The takings-ripeness precepts set out in these opinions reflect not only the broad judicial desire that only mature issues (particularly when they are constitutional) be adjudicated. More specifically, they are seen by the Court to emanate directly from the Fifth Amendment Takings Clause. (Notwithstanding their Takings Clause roots, some of these precepts also have been applied by certain courts to the substantive due process and equal protection claims commonly made in local land-use litigation.⁵²)

⁴⁷*Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665 n.7 (1997), quoting *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993).

⁴⁸For a general treatment of takings ripeness doctrine in the federal courts, see DANIEL R. MANDELKER, JULES B. GERARD, AND THOMAS E. SULLIVAN, *FEDERAL LAND USE LAW* § 4A.02 (1997).

⁴⁹447 U.S. 255 (1980). Some argue that the era of takings-ripeness concern in the land use area actually began two years earlier, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). That decision raised several ripeness-like concerns, though it did not mention ripeness by name.

⁵⁰473 U.S. 172 (1985).

⁵¹477 U.S. 340 (1986).

⁵²*See, e.g., Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). Later cases suggest that courts are most likely to impose takings-ripeness in nontaking claims when the arguments underlying the taking and nontaking claims are similar. Thus far, it appears that principally finality ripeness, and only rarely compensation ripeness, has been applied to substantive due process and equal protection challenges to local land use controls. *See Note, The Applicability of Compensation to Substantive Due Process Claims*, 100 Yale L. J. 2667 (1991).

The first ripeness element that a taking plaintiff must satisfy is “*finality ripeness*.”⁵³ Finality ripeness insists that before the court can reach the taking claim, the property-regulating government body must have arrived at a “final, definitive position” as to the type and degree of development allowed on the property.⁵⁴ The Court’s reasoning is straightforward: the factors that the Court has articulated for determining whether a government restriction constitutes a taking — in particular, the economic impact of the government action and the degree of interference with the owner’s investment-backed expectations — require courts to know with some exactness what uses can still be made of a property.

To be ripe, it is generally held that local regulators must be given an opportunity to review at least one “meaningful” development proposal.⁵⁵ Submission of “exceedingly grandiose development plans” (see below) is deemed not meaningful, and will likely lead to the need for additional, scaled-down or reconfigured proposals to establish ripeness. The meaningful application requirement also requires that the landowner thoroughly pursue its application for approval of its development proposal, and not “abandon it at an early stage.”⁵⁶

Herein lies a major element of the developers’ complaint. The judicial need for a clear delineation of what is still allowed on a tract, embodied in the “final, definitive position” requirement, may create significant burdens for the landowner/developer. Local land use agencies often do not issue declarations as to the maximum degree of development they will allow on a tract. The usual pattern is that they simply approve or disapprove specific development proposals put before them by the landowner/developer. This thumbs-up or thumbs-down mode of responding means that to satisfy the Supreme Court’s demand for a final, definitive position as to allowed development, the landowner, following denial of its initial proposal, may have to reapply with modified or scaled-down versions. As the Supreme Court put it:

⁵³The finality ripeness prerequisite applies only to *as-applied* takings claims — the large majority of takings suits. It does not apply to the far less frequent instance of *facial* takings challenges. See *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1666 n.10 (1997). In addition, finality ripeness is *per se* satisfied in takings claims based on physical invasions of property, rather than restriction of use. “A physical taking ... is by definition a final decision” *Sinaloa Lake Owners Ass’n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

⁵⁴*Williamson County*, at 191. Or as the Court put it in *MacDonald*, at 348: “a final and authoritative determination of the type and intensity of development legally permitted.”

⁵⁵In *MacDonald*, the Supreme Court appeared to endorse a state-court requirement that a “meaningful” application is a ripeness prerequisite. 477 U.S. at 353 n.8. Lower courts have turned the implied endorsement into an established pillar of takings finality ripeness. See, e.g., *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1992). In the alternative phrase, there must be at least one “reasonable” application. *Id.*

⁵⁶*Southern Pacific*, 922 F.2d at 503.

“rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.”⁵⁷

But how many reapplications will be necessary before a "final, definitive position" can be judicially discerned? If a 200-unit subdivision is rejected, then a 150-unit version, then 100 units — will *that* be enough? Unsurprisingly, the courts have declined to state an absolute-number maximum, raising concerns among developers that the expensive process of preparing reapplications may be prolonged by local government without fear of creating a ripe claim. Court decisions do indeed reveal that on occasion a large number of reapplications is required, and seemingly not in good faith.⁵⁸ Importantly, though, our research reveals no evidence of a judicial tendency to deny takings ripeness after such multiple reapplications.⁵⁹

As part of securing a final, definitive position from the local agency, the landowner also must exhaust any avenues for a variance, waiver, or other exemption from the land use restriction at issue, and may be required to seek rezoning.

The second takings-ripeness element is “*state compensation ripeness*.”⁶⁰ State compensation ripeness demands that filers of federal-court takings actions against state and local regulators first seek compensation from appropriate state forums, if that remedy is available and “adequate.” This requirement is seen to stem from Takings Clause text. The Clause, says the Supreme Court, bars not the taking of property, but rather the *uncompensated* taking of property. It follows, the Court says, that there is no violation of the Takings Clause, hence no basis for federal jurisdiction, until a local regulation takes property *and* the property owner has been denied compensation.⁶¹

Issues raised in federal court in connection with the state-compensation requirement often revolve around whether the state’s compensation remedy is available and “adequate.” For example, federal courts split over whether, to declare the federal action unripe, state courts must have affirmatively declared the availability of a compensation remedy, or whether it is enough that such availability be unclear. Another recurring issue has been whether, having pursued his or her compensation

⁵⁷*MacDonald*, at 353 n.9. The “reapplication requirement” in the law of finality ripeness is generally drawn from this decision.

⁵⁸*See, e.g., Del Monte Dunes*, 920 F.2d 1496 (four reapplications for progressively smaller residential developments denied, despite prior signals from city they would be received favorably); *Schulz v. Milne*, 849 F. Supp. 708 (N.D. Cal. 1994), *aff’d in part, reversed in part on other grounds*, 98 F.3d 1346 (9th Cir. 1996) (remodeling permit granted after thirteen reapplications “in compliance with all applicable zoning laws” denied).

⁵⁹In *Del Monte Dunes*, for example, the court found that “[r]equiring appellants to persist with this protracted application process to meet the final decision requirement would implicate ... concerns about disjointed, repetitive, and unfair procedures” Accordingly, it found the taking claim ripe. 920 F.2d at 1506.

⁶⁰Compensation ripeness clearly applies to as-applied takings claims. Courts have split, however, on whether it applies to the rarer, facial type of taking claim.

⁶¹*Williamson County*, at 194-195.

remedy in the state courts, the landowner is barred by res judicata or collateral estoppel from litigating the federal taking claim in federal district court⁶². While some federal cases suggest that *Williamson County* may almost always result in preclusion of federal claims,⁶³ other courts have said or suggested that if plaintiff "reserves" his or her federal claim in state court, the claim is preserved for later litigation in the federal court.⁶⁴

Both prongs of the takings-ripeness doctrine must be met for a claim to be ripe. As to either prong, however, the landowner has a "futility exemption." The exemption stipulates that a taking case is ripe despite the owner's failure to satisfy the above prerequisites if pursuing them would, under the circumstances, be futile.⁶⁵

A decision by the Supreme Court in December, 1997, has ignited a vigorous debate over the continued vitality of the *Williamson County* ripeness prongs. In *City of Chicago v. International College of Surgeons*,⁶⁶ the Court addressed a suit alleging state and federal law claims (including Fifth Amending taking) based on the city's denial of a demolition permit for historic properties owned by the plaintiff. The suit had been filed in state court, but was removed to federal court at the request of the city defendant. The Court held that the federal court could exercise supplemental jurisdiction over the state law claims, even though they called for deferential on-the-record review of state agency findings. This expansive view of federal court jurisdiction in a challenge to local land use control has led some to see *City of Chicago* as undermining *Williamson County* and highlighting the need for enactment of H.R. 1534. Others, however, point out that the decision makes no mention of ripeness doctrine, and that the Supreme Court reaffirmed *Williamson County* only last year in its unanimous *Suitum* decision.⁶⁷

Asserted need for bills

Supporters of H.R. 1534 outside Congress (principally the National Association of Home Builders) assert that the need for the bill flows from the confluence of two

⁶²The judicially created doctrines of res judicata and collateral estoppel are said to promote judicial efficiency by preventing multiple lawsuits over the same matter, and to enable parties to rely on the finality of adjudications.

⁶³*See, e.g.,* *Wilkinson v. Pitkin County*, 1998 WL 216085, *7n.4 (10th Cir. May 4, 1998); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (res judicata bars federal court adjudication of categorical taking claim), 136 F.3d 1219 (9th Cir. 1998) (collateral estoppel bars federal court adjudication of same claim).

⁶⁴*Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir. 1992); *Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

⁶⁵*See, e.g., MacDonald*, 477 U.S. at 350 n.7 ("property owner is of course not required to resort to ... unfair procedures ..."); *id.* at 359 (White, J., dissenting) (takings ripeness does not require landowner to take "patently fruitless measures").

⁶⁶118 S. Ct. 523 (1997).

⁶⁷*See, e.g.,* Letter from Andrew Fois, Ass't Att'y General, U.S. Dep't of Justice, to Hon. Patrick J. Leahy (Feb. 25, 1998).

factors. The first is the perceived pro-land-use-regulator leaning of some state courts, and the belief of the bill's supporters that particularly in those states, the landowner should have the option of having its federal claims heard in federal court. The second factor is the high barriers erected by the Supreme Court to reaching takings and substantive due process claims on the merits — barriers that, in the view of bill supporters, have been too vigorously implemented by the lower courts. Of these hurdles, the most important are the ripeness prerequisites to adjudication of the taking claim (in federal and state courts) and the abstention doctrine (in federal courts only).

The combined effect of these judicial leanings and threshold barriers, say bill supporters, is that neither federal nor state forum may allow for a full and fair adjudication of the landowner's constitutional claims. In some state courts, there is a pro-regulator mindset (assertedly) and the finality ripeness hurdle. In the federal courts, the landowner/developer encounters finality and compensation ripeness, abstention, and an institutional resistance to becoming involved in local affairs. (And, if the landowner heeds the compensation requirement by litigating in state court first, it is likely to find itself locked out of federal court by doctrines of res judicata and collateral estoppel.)⁶⁸

A comprehensive study of the seriousness of these claimed obstacles confronting the land developer is well beyond the scope of this report. However, a few observations can be made. As to the asserted unreasonableness of takings ripeness barriers, one can at least note that some law review articles are in agreement. These articles generally fault the lower courts for their assertedly misguided implementation of the Supreme Court's criteria, more than the criteria themselves.⁶⁹

The charge that federal courts decline to reach the merits in most takings-based section 1983 claims is empirically supported. One article surveyed federal-court takings cases from 1983 to 1988 and found that 94% (34 out of 36) of "ripeness decisions concerning land use" found lack of ripeness.⁷⁰ A survey of a similar universe of cases from 1990 to 1997, done by counsel for the National Association of Home Builders, found that 81% (25 out of 31) of district court cases and 55% (15

⁶⁸See, e.g., Gideon Kanner, *Federal Reserve: Landowners are Proceeding to Congress to Get Their Cases Heard*, S.F. Daily J. at 4 (March 11, 1998).

⁶⁹Brian W. Blaesser, *Closing the Federal Courthouse Door to Property Owners: The Ripeness and Abstention Doctrine in Section 1983 Land Use Cases*, 2 Hofstra Prop. L. J. 73 (1988); Timothy v. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1 (1992); 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 Cases*, 10 J. Land Use & Envtl. L. 91 (1994); Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation (Part II)*, 20 Zoning and Planning Law Report 25 (April, 1997).

⁷⁰Brian W. Blaesser, *Closing the Federal Courthouse Door to Property Owners: The Ripeness and Abstention Doctrine in Section 1983 Land Use Cases*, 2 Hofstra Prop. L. J. 73, 91 (1988). The study does not include land-use takings cases against the federal government, where ripeness is much less frequently an obstacle to the plaintiff.

out of 27) of appellate decisions held the takings claims unripe.⁷¹ Opponents of H.R. 1534 argue that given the expressed preference of federal courts for having local land-use cases adjudicated in the state courts, and the assertedly stubborn refusal of some takings plaintiffs to take the *Williamson County* requirements seriously, these high percentages are quite understandable. Moreover, other law review articles find the lower courts' application of the High Court's doctrine to be reasonable, and to perform an essential gatekeeping function in the management of the federal docket.⁷²

As to the perceived regulator-friendly tilt of some state courts, suffice it to make two points. First, one person's "anti-developer bias" may be another's enlightened attitude toward the harmful consequences of unrestricted growth. To be sure, however, a leading treatise does support the existence of a wide spectrum of state-court leanings in landowner-regulator disputes.⁷³ Second, looking at how section 1983 claims generally are treated, the studies contradict.⁷⁴ One commentator reasons that federal judges would be expected to decide section 1983 suits more fairly than their state counterparts.⁷⁵ An empirical study, however, concludes that section 1983 suits are treated no differently in state courts than in federal ones.⁷⁶

Turning from the H.R. 1534 provisions directed at local governments to those aimed at the United States, the need for lowering takings-ripeness hurdles appears less compelling. Neither state-compensation ripeness nor abstention are applicable to the federal defendant. And finality ripeness (at least those aspects of it addressed by H.R. 1534) has not been a major obstacle in takings claims against the United States.⁷⁷

⁷¹Memorandum to House Judiciary Committee, Subcomm. on Courts and Intellectual Property, from Linowes and Blocher L.L.P. (Sept. 22, 1997).

⁷²Michael Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 *Urban Lawyer* 13 (1997); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 *J. Land Use & Envtl. L.* 101 (1994).

⁷³This treatise asserts that 13 states have heavily dominated the zoning case law. The "pro-zoning states," as it calls them, are California, New Jersey, Massachusetts, Maryland. "Erratic states" are Michigan, Ohio, Florida, New York, and Pennsylvania. "Good gray middle" states are Connecticut and Texas. "Strongly developer-minded states" are Illinois and Rhode Island. NORMAN WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* ch. 6 (1988 rev.).

⁷⁴Longtime students of judicial federalism issues will recognize this as but one more manifestation of the "parity" debate — whether state courts are as fair or as competent as the federal courts to resolve federal claims. *See generally* FEDERAL COURTS, *supra* note 25, at 351-353.

⁷⁵Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 *Hofstra Prop. L. J.* 73, 74 (1988).

⁷⁶Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 *Univ. Pitt. L. Rev.* 383, 418 (1991) (surveys section 1983 decisions during 1987 and concludes that "state courts are dealing with section 1983 much as are their federal counterparts").

⁷⁷*See, e.g., Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988) (Corps of Engineers' reasons for denying wetlands fill permit make further applications under (continued...))

Perhaps the federal-defendant portion of H.R. 1534 was inserted simply for the sake of treating federal and state/local defendants alike.

Description of bills

To address the foregoing issues, the H.R. 1534 bills lower the abstention and ripeness barriers in federal court. (Congress may be prohibited constitutionally from lowering them in state courts.) At the same time, they expressly disavow any intent that their key provisions alter the substantive law of takings. As noted, H.R. 1534 applies to federal-court suits against both local governments and the United States.⁷⁸

Claims against local governments: abstention. H.R. 1534 instructs that in actions under the jurisdictional provisions of 28 U.S.C. § 1343(a) — which applies to “section 1983” and other civil rights statutes — a federal district court may not abstain from exercising its jurisdiction if the use of real property is involved, no state-law claim is alleged, and no parallel state-court proceeding is pending. Where such an action cannot be decided without resolution of an unsettled question of state law, the court may certify the question to the highest appellate court of the state. Certification to a state high court can be used only when the state law question will significantly affect the federal claim, and is “patently unclear.”

Claims against local governments: ripeness of property rights claims. The bill declares that section 1983 actions for “deprivation of a property right or privilege secured by the Constitution” shall be ripe when a local agency “final decision” occurs.⁷⁹ A “final decision” exists if -- (1) the official makes a “definitive decision regarding the extent of permissible uses on the property that has been allegedly infringed or taken”; (2) one “meaningful application,” as defined by the locality, to use the property has been submitted “but has not been approved” and one appeal or waiver has been applied for and “not been approved” (unless unavailable, incapable of providing the relief requested, or futile); and (3) if the local government's disapproval explains in writing the development that would be approved, the landowner has submitted a new proposal “taking into account” that explanation, which “has not been approved,” and one variance or appeal has been applied for and “not been approved” (if available). Finally, where review of the case by elected officials is offered, the landowner must have been denied such review.

⁷⁷(...continued)

MacDonald unnecessary).

⁷⁸From this point on, we refer only to local, rather than local and state, governments. The portion of H.R. 1534 dealing with nonfederal defendants operates by amendment of the jurisdictional provision for the Civil Rights Act of 1871. Section 1983, the most frequently used provision in that statute, is chiefly employed in suits against local governments. Municipalities have been held subject to suit under section 1983. *Monell v. Dep’t of Social Services*, 436 U.S. 658 (1978).

⁷⁹The majority of takings actions against nonfederal defendants are brought under section 1983.

In the usual circumstance, the effect of these provisions is to allow the local land use agency at least two and up to four opportunities to rule on development applications.

To constitute a “final decision,” the party seeking redress need not exhaust state judicial remedies.

These provisions lower the hurdles of existing takings/ripeness law in two key ways. *First*, H.R. 1534 imposes an absolute limit on the procedural steps a landowner must take before takings ripeness is established, in contrast with the current case-by-case approach. The bill thus places a bound on *Williamson County* finality ripeness.⁸⁰ *Second*, the bill eliminates entirely the other *Williamson County* ripeness test: its demand that the landowner exhaust possibilities for obtaining state-forum compensation before coming to federal court.

Claims against the United States: ripeness of property rights claims. The H.R. 1534 bills declare that claims founded upon a property right or privilege secured by the Constitution, that was allegedly “infringed or taken” by the United States, shall be ripe when a “final decision” occurs.⁸¹ “Final decision” is defined as above, except that in the case of the federal government, no provision is included for written explanations of what the land use-restricting agency will accept.

The federal-defendant provisions do not address the compensation-ripeness requirement, since it applies solely to suits against local governments.

Notice by federal agencies. H.R. 1534 requires that whenever a federal agency takes action “limiting” the use of private property, it shall notify the property owner of his or her rights under H.R. 1534. No exceptions are stated.

Issues raised by the bills

1. Federalism: congressional implications

Recent years have seen increasing congressional insistence that the federal presence in various fields be reduced, leaving matters to the states. H.R. 1534 arguably goes in the opposite direction, by requiring federal judges to rule on takings and other claims against local government that formerly could have been deflected to the state courts or postponed pending further local proceedings. This point draws

⁸⁰In one minor respect, the bill may represent an expansion of the existing finality-ripeness rule. It is beyond our scope here to research whether existing takings-ripeness law requires the landowner, following denial by the initial decisionmaker and denial of any variance application, to additionally be denied on appeal to any separate review body within the local government, such as a zoning board of appeals. If takings-ripeness law does not require such a “vertical” appeal, but H.R. 1534 is held to do so, the bill would add a new ripeness requirement for the takings plaintiff.

⁸¹H.R. 1534 provisions make this rule applicable regardless of whether the claim is brought in the district court under the “little Tucker Act” (28 U.S.C. § 1346(a)) or in the U.S. Court of Federal Claims under the regular Tucker Act (28 U.S.C. § 1491(a)).

particular importance from the historically local nature of most land use regulation in the United States and its sensitivity to local needs and priorities. Perhaps for that reason, H.R. 1534 is the only property rights bill in the 8-year history of congressional involvement with this issue to address primarily local, rather than federal, regulation of property use.

On the other hand, an enacted H.R. 1534 would not be alone in its seeming inconsistency with current devolution rhetoric. Simultaneous with such policy statements, Congress has fostered greater federal-court involvement in formerly state-court matters by creating new federal causes of action in several areas, such as product liability law and criminal law.

Another congressional implication flows from the argument that to the extent land developers are suffering unfair burdens at the hands of local government regulators, H.R. 1534 relieves only a symptom (takings actions dismissed on threshold issues), not the underlying problem. That problem, assertedly, is the local-government development approval process and its inability to produce expeditiously a decision that meets finality-ripeness requirements. Observers charge further that some local land regulators deliberately draw out the development approval process in the hope that the developer will lose interest. By avoiding a final decision, the regulator hopes that finality ripeness doctrine will bar the landowner from maintaining a taking action. Therefore, it has been argued, the more direct solution to the landowners' woes is to reform how local jurisdictions deal with development proposals. And *that* solution, it has been contended, should come from the states themselves, not the Congress.⁸²

2. *Federalism: judicial implications*

H.R. 1534 runs counter to the often-expressed view of federal judges that federal courts should minimize their presence in local land-use affairs, as a matter of intergovernmental comity.⁸³ Bill supporters respond that because a federal

⁸²*See, e.g.*, Permit Streamlining Act, Cal. Gov't Code § 65920 *et seq.* The PSA applies to decisions by California's state and local agencies on the completeness of applications for development permits, and on their approval or disapproval. Under the statute, failure of the agency to act on the application within the prescribed time limits must be deemed approval of the development project.

⁸³*See, e.g.*, *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) ("Courts of Appeals were not created to be `the Grand Mufti of local zoning boards'), quoting from *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989); *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989) ("federal courts do not sit as zoning boards of review"); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986) ("We are concerned that federal courts not sit as zoning boards of appeals"); *Golemis v. Kirby*, 632 F. Supp. 159, 163 (D.R.I. 1985) ("So long as a state provides meaningful legal remedies for [land-use-related takings], the state must be given first crack at keeping its own house in order"); *City of Oak Creek v. Milwaukee Metro. Sewerage Dist.*, 576 F. Supp. 482, 487 (E.D. Wis. 1983) ("Section 1983 was never intended as a vehicle for federal supervision of land use policy").

One federal court based its reluctance to decide a local land-use taking case not on lofty concerns of comity, but rather on pragmatics. *Scudder v. Town of Glendale*, 704 F.2d 999,

(continued...)

constitutional right (the Takings Clause) is involved, the federal courts should be as open to deciding the case as when any other federal constitutional right is sought to be vindicated. When a local government erects a nativity scene in front of the town hall, or is alleged to engage in racial discrimination, federal courts assertedly do not defer to their state counterparts. Neither, it is said, should they with regard to property rights.⁸⁴

3. Effect on the workload of the federal courts

H.R. 1534 may well increase the workload of the federal courts, particularly from takings litigation. Congress may wish to consider this possible effect in the context of current debate over existing vacancies on the federal bench and whether the federal judiciary is overburdened.

The increase in federal-court section 1983 filings is likely to be most pronounced at the outset. Landowners' and developers' counsel, long frustrated by existing ripeness and abstention barriers, doubtless will want to test at the earliest opportunity the extent to which H.R. 1534 has improved their prospects. The early rush to the courthouse may subside a bit if landowners simply get ushered out on takings grounds rather than ripeness/abstention grounds. H.R. 1534 supporters dispute claims of increased filings, asserting that most builders are small operations that could ill afford to maintain a taking action, particularly since H.R. 1534 does not ease the rigorous substantive criteria for proving a taking.

Not as easily called into question, however, is the prediction of increased federal-court workload as a result of the land-use-based section 1983 litigation that, in the absence of H.R. 1534, would have been filed in the state courts.⁸⁵ As we have seen, H.R. 1534 lowers the ripeness hurdle only in federal court; it does not apply to section 1983 actions in state court. That being so, it is likely that following enactment of H.R. 1534, far fewer property-rights-related section 1983 takings claims will continue to be filed in the courts of most states.

4. Ripeness: effect of requiring federal judges to decide takings issues without an adequate record.

⁸³(...continued)

1003 (7th Cir. 1983) (“availability of federal review of every zoning decision would only serve to further congest an already overburdened federal court system”).

⁸⁴This argument of bill supporters is somewhat undermined to the extent it refers to the ripeness, as opposed to abstention, hurdles in federal court. As noted, takings-ripeness precepts are deemed to flow from the very text of the Takings Clause. If they are different than the ripeness hurdles interposed in First or Fourth Amendment-based section 1983 actions, that is because the underlying constitutional language is different.

⁸⁵It would be useful to get a handle on the number of such land-use-based section 1983 filings in state court. All that can be put forth now, however, is one treatise writer's assertion that the annual number of all section-1983 reported appellate decisions from state courts is “rapidly expanding.” STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 2.7 (1994).

As noted, H.R. 1534 explicitly disclaims any change to the judicial standards for determining which government regulations effect takings. Thus, after being helped over the ripeness hurdle by H.R. 1534, the landowner still has to make a traditional takings case.⁸⁶

Therein lies a problem. The Supreme Court's finality ripeness hurdle, which H.R. 1534 would abridge, was crafted with a clearcut purpose. It was designed, said the Court, to ensure that once met, a court would have the critical information it needs to apply certain takings factors. In particular, a court can't determine whether the "economic impact" and "interference with investment-backed expectations" factors of the *Penn Central* regulatory takings test point to the existence of a taking without knowing exactly what uses the local agency proposes to permit on the property.

As noted, the process of finding out exactly what uses the local agency will permit can be a prolonged one, and lies at the very heart of the developers' grievance. But also as noted, it is arguably a necessary process in many cases if the economic impact and interference-with-expectations factors are to be applied in an informed way. By limiting how long the landowner must pursue the approval process, H.R. 1534 will in many instances ask the federal judge to rule on the taking issue with less information than he or she would have demanded without the bill. Since the burden of proving a taking is on the landowner, a judge who feels there is an inadequate factual basis to apply the takings factors will be constrained to rule against the landowner.

So does H.R. 1534 merely substitute a judgment that there is no taking for what would have been, in the absence of H.R. 1534, a dismissal for lack of ripeness? Does the plaintiff simply lose on a different legal theory? In many cases, probably yes. Lack of the necessary record for applying the takings factors will dictate a ruling on the merits against the plaintiff, even though he or she has been pushed over the ripeness threshold by H.R. 1534. In other cases, however, H.R. 1534 proponents argue that the bill will compel federal judges who are using ripeness disingenuously — that is, dismissing cases when there *is* adequate information to apply the takings factors — to confront the takings question. Concededly, many of these court decisions ultimately may find no taking. But some will hold for the landowner, and either way, the argument runs, the taking issue in the case will have been resolved.

5. Ripeness: effect of bill on the local agency/developer relationship.

To be sure, H.R. 1534 imposes no direct federal controls on the discretion of local land use agencies. The argument is pressed, however, that if H.R. 1534 were

⁸⁶A traditional takings case generally involves showing that most or all of the three factors announced by the Supreme Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) point to a taking. Those factors are: (1) the economic impact of the government action; (2) its interference with reasonable investment-backed expectations; and (3) the character of the government action. As a practical matter, courts require the landowner to show that the government action has eliminated all or substantially all use or value of the property.

enacted, its inflexible limit on the procedural steps the landowner must take would change fundamentally the dynamics of how developers and local planning commissions arrive at mutually acceptable development projects. Developers, it is said, would have less incentive to negotiate with local land regulators over creative, alternative development scenarios. Rather, the developer will be tempted to insist on its initial, presumably profit-maximizing proposal, knowing that the local jurisdiction is unlikely to disapprove because it can ill afford to defend the resulting taking suit which, owing to H.R. 1534, is likely to be on the merits.⁸⁷

This argument rests on the assumption that the cost/time in defending a taking action on the merits, possibly all the way through a full trial, is significantly greater than the cost/time in defending one dismissed on a threshold ripeness issue (usually by pretrial motion). Those who take this position also suggest that the increased number of takings claims likely if H.R. 1534 is enacted will make local regulators reluctant to rein in developers.

In response to criticism that H.R. 1534 would chill local zoning boards in the exercise of their police-power duties, the introduced bill was amended in the House to add additional steps the landowner must take to establish ripeness. As amended (and adopted in the Senate version), if the local agency's first disapproval includes a written explanation of the development that would be approved, the landowner must reapply "taking into account" the explanation and not be approved again, and have a variance or appeal not be approved. How much this new provision will abate any chilling effect H.R. 1534 may have is speculative. In the absence of any legislative history on how detailed and complete the written explanation must be, it is unclear whether small local governments (the large majority of local governments) would have the planning resources to prepare them. Currently, the burden of preparing development proposals falls on the developer. Nor is it clear how courts will construe the phrase "taking into account," so it is hard to predict how far the developer must go in adjusting its first proposal in the direction of the written explanation.

6. Ripeness: whether aspects of the current Supreme Court takings-ripeness test that the bill would eliminate are constitutionally required.

As mentioned, ripeness requirements in the federal courts originate in either Article III of the Constitution or the inherent "prudential" power of the judiciary to refuse to exercise jurisdiction where inappropriate. For some purposes, it makes little difference into which category a given ripeness prerequisite falls. But where, as in H.R. 1534, Congress proposes to do away with a ripeness hurdle, the category becomes quite important. An Article III court, such as a federal district court, has subject matter jurisdiction only over "cases" and "controversies." If a ripeness element is constitutionally based, this is equivalent to saying that it must be satisfied to make out a case or controversy. Congress cannot dispense with the need for

⁸⁷See, e.g., Sharon Buccino, *Turmoil over "Takings": How H.R. 1534 Turns Local Land Use Disputes into Federal Cases*, 28 *Env'tl. L. Rptr.* 10083 (1998).

plaintiffs to satisfy such an element and still leave an Article III court with jurisdiction.⁸⁸

Raising this issue is a lot easier than resolving it. The Supreme Court has been in flux as to which ripeness elements are constitutional (statutes may not eliminate) and which are prudential (statutes may eliminate). In particular, it has sent mixed signals as to the compensation ripeness doctrine announced in *Williamson County*.⁸⁹ Some legal commentators have regarded compensation ripeness, and even finality ripeness, as constitutionally based.⁹⁰ This takings-specific ripeness debate is playing out against the backdrop of a broad Supreme Court trend toward regarding ripeness as largely, though not exclusively, prudential.

7. Ripeness: tension between bill's elimination of state-compensation ripeness and the terms of section 1983.

By its terms, the nonfederal provisions of the bill purport to amend only 28 U.S.C. § 1343, a provision that gives federal district courts jurisdiction over section 1983 claims, among others. However, by eliminating the state-compensation requirement of *Williamson County*, H.R. 1534 is in tension with, and arguably amends by implication, section 1983 itself.

The reasoning runs as follows. Section 1983 creates a federal cause of action for state action depriving persons of “rights ... secured by the Constitution.” But the Supreme Court holds that “a property owner has not suffered a violation of the [Constitution’s] Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the

⁸⁸This is not an issue in the U.S. Court of Federal Claims, the focus of the federal-defendant provisions of H.R. 1534. “Although established under Article I, the [U.S. Court of Federal Claims] traditionally has applied the case or controversy requirement *unless jurisdiction conferred by Congress demands otherwise*.” *Massachusetts Bay Transp. Auth. v. United States*, 21 Cl. Ct. 252, 257-258 (1990) (emphasis added). The issue, however, would emerge on appeal of the action to the U.S. Court of Appeals for the Federal Circuit, which is an Article III court.

⁸⁹In *Suitum*, 117 S. Ct. At 1664, the Supreme Court declared that “[t]here are two independent *prudential* hurdles to a regulatory taking claim brought against a state entity in federal court.” (Emphasis added.) Follow-on text makes clear that the reference is to the finality and state-compensation prongs of *Williamson County*. However, in the same paragraph the Court contradictorily seemed to say that state-compensation ripeness is constitutionally based — more exactly, that it “stems from” the Takings Clause. In an earlier assertion of constitutional basis, the Court in *Williamson County* recognized that “a property owner *has not suffered a violation of the Just Compensation Clause* until the owner has unsuccessfully *attempted* to obtain just compensation through the procedures provided by the State” 473 U.S. at 195 (emphasis added). If the state-compensation prong is constitutionally based, how can it be only prudential (discretionary)?

⁹⁰*See, e.g.*, Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 16 (1995) (finality ripeness is prudential; compensation ripeness is constitutional); 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 Cases*, 10 J. Land Use & Envtl. L. 91 (1994) (both are constitutional).

State.”⁹¹ That being so, a property owner who presents a taking-based 1983 claim without having gone first to the state courts, a prerequisite eliminated by H.R. 1534, alleges no deprivation of a federal constitutional right. Lacking such a deprivation, what would be the basis of the section 1983 claim?

8. Ripeness: intent of bill's references to property rights grievances other than Fifth Amendment takings.

The ripeness provisions in the two H.R. 1534 bills refer not only to takings-based section 1983 claims and takings claims against the United States. The bills speak of section 1983 claims “to redress the deprivation of a property right or privilege secured by the Constitution” and claims against the United States “founded upon a property right or privilege secured by the Constitution, but [sic] was allegedly *infringed* or taken” (Emphasis added.) For both nonfederal and federal defendants, the bill defines “final decision” to mean “a definitive decision regarding the extent of permissible uses on the property that has been allegedly *infringed* or taken” (Emphasis added.)

Courts would be likely to give “infringed” some meaning beyond “taking.”⁹² At the very least, this bill language could be read to include property-based due process claims. This view makes sense in the larger bill context, since the finality and state-compensation ripeness requirements that the bill targets have been applied by some courts to substantive due process claims, as well as takings claims, against local land-regulating agencies.

Alternatively, one could argue that the term has a broader meaning — that it even creates a new cause of action for interferences with property that fall short of takings and due process violations. Such a reading, however, seems to contradict the bill text generally, which appears to confine itself to defining when ripeness occurs. Congress may wish to clarify these matters.

9. Ripeness: implications of the bills' exemption from applying for an appeal or waiver.

H.R. 1534 declares that ripeness exists once the landowner applies for, but is denied, one appeal or waiver from (1) the initial “definitive decision,” and (2) disapproval of a reapplication by the owner that takes into account the local government's written explanation of what it will accept (if one is prepared). The bill, however, excuses the landowner from obtaining these denials where “no such appeal is available, if it cannot provide the relief requested, or if the application or reapplication would be futile.”

⁹¹*Williamson County*, 473 U.S. at 195.

⁹²Statutes are generally construed “so as to avoid rendering superfluous” any statutory language. *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). *See esp.* *Bailey v. United States*, 516 U.S. 137, 146 (1995) (“we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning”).

Some debate has been sparked by the phrase "if it cannot provide the relief requested." Read literally, the phrase appears susceptible of a reading whereby the large majority of property owners could establish ripeness without appealing or applying for a variance, by arguing that they desire relief of extreme degree or nonregulatory nature. For example, the property owner could say that the relief he or she desires from the regulatory restriction is monetary, that the local agency with whom the appeal or variance application would be lodged has no power to grant compensation, and therefore no appeal or variance application is necessary under H.R. 1534. A narrower interpretation of "cannot provide the relief requested" would presumably assert that the phrase is implicitly limited to relief in the form of easing the challenged restriction — that is, the sort of relief that disappointed landowners typically seek from appeals or waivers.

10. Abstention: various issues.

1. The limitation of the abstention provisions of H.R. 1534 to claims involving real property has prompted some members to contend that other section 1983 claims in federal court, such as those based on race discrimination, are effectively demoted in importance. Abstention is indeed invoked by federal courts to dismiss or stay non-real-property-related section 1983 claims,⁹³ though it is not clear that the practice occurs in as great a proportion of cases as with property-based claims.

2. H.R. 1534 instructs a federal judge not to abstain in actions covered by 28 U.S.C. § 1343(a), in specified circumstances. Existing federal statutes generally run in the contrary direction — authorizing or requiring abstention (though usually not by that name), rather than prohibiting it. The most frequently invoked is the Anti-Injunction Act.⁹⁴

3. Recall the certification provisions in the abstention part of H.R. 1534. Almost all states have now enacted laws or judicially adopted rules allowing the highest court of the state to answer questions of state law that have been “certified” to them by federal (and other state) courts.⁹⁵ A few, however, have not. In addition, in those

⁹³For example, abstention has been held appropriate in section 1983 actions involving the Sixth Amendment right to counsel, *Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1986); conditions of confinement at a juvenile facility, *Manny v. Cabell*, 654 F.2d 1280 (9th Cir. 1980); the denial of medicaid benefits, *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978); gender-based discrimination, *Tiger Inn v. Edwards*, 636 F. Supp. 787 (D.N.J. 1986); and a non-real-property taking claim, *Firemen's Fund Ins. Co. v. Garamendi*, 790 F. Supp. 938 (N.D. Cal. 1992), *affirmed*, 87 F.3d 290 (9th Cir. 1996).

⁹⁴28 U.S.C. § 2283. Other examples are 28 U.S.C. § 1334 (bankruptcy proceedings), 28 U.S.C. § 1341 (collection of state taxes, where adequate remedy exists in state courts), and 28 U.S.C. § 1342 (state utility rate orders, where adequate remedy exists in state courts).

⁹⁵17 CHARLES A. WRIGHT, ARTHUR R. MILLER, AND EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4248 (1988 and 1997 supp.) (listing 44 states, plus Puerto Rico and the District of Columbia). In one of these states, however, the certification statute was held unconstitutional. *Zeman v. V.F. Factory Outlet, Inc.*, No. 72613 (Mo. July 13, 1990).

Since the cited supplement to the foregoing treatise, California adopted a certification (continued...)

states having certification procedures, not all will accept certified questions from federal district courts, as opposed to the federal courts of appeal or Supreme Court.⁹⁶ Thus, there may be occasions under H.R. 1534 when state high courts cannot accept a federal-court request to resolve a state law question. H.R. 1534 appears not to seek any change in state certification procedures, nor to compel those few states lacking such procedures to adopt them.

Brief comparison of the two process approaches in the bills

The two approaches employed by H.R. 992 and H.R. 1534— (1) expanding the jurisdiction of the CFC and district courts; (2) lowering abstention and ripeness hurdles — both modify judicial process. Yet this report shows that they treat very different aspects of that process. Some obvious contrasts:

Principal purpose: The jurisdiction expansion approach targets a jurisdictional split that now requires property-owner plaintiffs to pursue their remedies against the United States in two federal courts. In contrast, the abstention/ripeness approach aims to lower the threshold hurdles of abstention and ripeness, principally invoked by federal district-court judges seeking not to reach the merits of property-owner actions against local land-use agencies.

Beneficiaries: The jurisdiction expansion approach benefits only property owners suing federal agencies. The abstention/ripeness approach primarily benefits property owners suing municipalities and counties, where these hurdles are typically invoked.

Types of property covered: The jurisdiction expansion approach applies to legal actions against government conduct that affects any type of property — real, personal, tangible, intangible. Similarly, the ripeness provisions of the bills are not by terms limited to any one type of property, though they fit comfortably only when applied to real property. The abstention provisions are confined expressly to real property.

There are also differences between the bills as to whether the term "property" is used in the Takings Clause sense only or in both the Takings Clause and Due Process Clause senses.

⁹⁵(...continued)

procedure by rule of court. Cal. R. Ct. No. 29.5, effective Jan. 1, 1998.

⁹⁶See, e.g., Cal. R. Ct. No. 29.5.