Dr. Strangebill or How the Last Congress Learned to Stop Worrying and Love Substantive Due Process

By John M. Baker

Last year, conservatives on Capitol Hill secured the approval of the House of Representatives for a statutory amendment directing judges to expand the meaning of "substantive due process" in suits involving property rights. When the 2006 legislative session ended, the bill died awaiting Senate consideration. But how did such a bill get so far without setting off alarms—and with the support of strict constructionists?

Congress has little institutional experience or expertise in local zoning matters. Aside from a few scattered specific exceptions (for uses such as telecommunications towers, low-income housing, flood plains and places of worship),[1] Congress has generally deferred to the judgment of city council members, county commissioners, the state legislatures that provide them with statutory planning authority, and the state courts that review the exercise of that authority.

Yet that trend nearly came to an abrupt end in 2006. Conservative House members, sensing an opportunity created by the backlash caused by opposition to the U.S. Supreme Court's decision in *Kelo v. City of New London*, advanced legislation that would have dramatically increased the number and types of zoning and land use decisions that would violate the U.S. Constitution.[2] The legislation would have amended the Ku Klux Klan Act of 1871, codified at 42 U.S.C. § 1983, to explicitly direct judges to adopt an interpretation of substantive due process under U.S. Constitution that was more expansive than any adopted by any federal appellate court since the *Lochner* era.[3] Specifically, the bill would have required that, if a claim is brought seeking to redress the deprivation of a property right or privilege under § 1983 "that is secured by the Constitution by asserting a claim that concerns … alleged deprivation of substantive due process, then the action of the person acting under color of state law shall be judged as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[4] The bill containing this provision passed the Republican-controlled House with many votes to spare. [5]

This effort ultimately died, however, when the curtain came down on the 109th Congress before the Senate had taken up the bill, and no member of Congress has reintroduced it in the 110th legislative session. But it remains worthwhile to reflect on how a provision so extreme—and so inconsistent with the espoused judicial philosophy of its sponsors[6]—failed to set off alarms among other conservatives on Capitol Hill, and how the measure could be approved by the House Judiciary Committee and a solid majority of House members so easily.

Money is an unavoidable part of this story, as it is in so many others. In this instance, that money consisted of the attorneys' fees and expenses that developers incur when suing local governments over zoning and land use disputes. In general, these expenses are not recoverable absent proof of a constitutional violation.

In 1976, a very different Congress passed the Civil Rights Attorney's Fees Awards Act,[7] a statute that entitled plaintiffs whose federal constitutional rights had been violated to make losing defendants pay their attorneys' fees.[8] But that statute quickly produced an unintended side effect. Federal courts were flooded with lawsuits in which plaintiffs' attorneys were literally trying to make federal cases out of disputes involving state laws in order to force the public

to pay their legal fees.[9] Most often, those plaintiffs brought their cases to federal court by labeling violations of state or local law as violations of "substantive due process."

That flood of federal lawsuits over disputes over state laws began to subside in the 1980s, when Republican appointees began to outnumber Democratic appointees on the federal bench.[10] The increasingly conservative federal judiciary made it clear that a local government's enforcement of local law must be extraordinarily bad before the action will violate a person's right to substantive due process.[11] It was not enough to complain that such decisions were unreasonable, poorly founded, beyond statutory authority, or even arbitrary, because such allegations did not rise to the level required to violate substantive due process.[12] As a result, other claims that public officials failed to follow state law or abused their discretion were left to those best suited to consider them—state judges.[13]

Two classes of plaintiffs persisted with efforts to make a constitutional case out of ordinary disputes over state laws. The first class consisted of prisoners, who understandably had little appreciation for the differences between state and federal law.[14] Congress eventually curtailed the ability of this class to sue.[15] The second class was made up of property owners—usually developers. These plaintiffs kept turning run-of-the-mill disputes about zoning into federal lawsuits—to the exasperation of judges across the spectrum.[16] As Judge Frank Easterbrook, a celebrated Reagan appointee, wrote in a 1994 decision, "Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they believe this we haven't a clue, none has ever prevailed in this circuit, but state courts often afford relief on facts that do not support a federal claim."[17]

The lure of being awarded attorneys' fees is the most plausible explanation for developers' lemming-like behavior (that is, taking legitimate disputes over state laws and bringing suit based on failed constitutional claims). However, in general, under the Civil Rights Attorney's Fees Awards Act of 1976 and 42 U.S.C. § 1983, monetary awards and attorneys' fees are available only to parties whose constitutional rights had actually been violated. Thus, so long as the federal courts continued to set a high bar for substantive due process claims, the strategy would continue to fail.

Meanwhile, on a completely separate front—one involving the takings clause—property rights activists had made two separate legislative attempts to improve their access to federal courts.[18] Complaining about the high percentage of land use disputes dismissed by federal judges in 1997 and again in 2000, developers lobbied hard for bills designed to nullify U.S. Supreme Court decisions requiring plaintiffs suing under the takings clause to first try to obtain compensation as a matter of state law before filing a takings claim under the U.S. Constitution.[19] Although such legislation passed the U.S. House twice, the measures repeatedly failed to pass in the U.S. Senate.[20] One of the chief proponents of that effort was Rep. Steven Chabot (R-Ohio). Each such bill rested on the dubious premise that Congress could use ordinary legislation to change the way in which federal judges interpreted a constitutional right.[21]

Six years later, Rep. Chabot and his colleagues made a third attempt to enact the same provisions; this time, they attempted to change the meaning not only of the Takings Clause but also of the Due Process Clause. In February 2006, Chabot introduced the oddly dated Private Property Rights Implementation Act of 2005.[22] Perhaps by coincidence, this title was confusingly similar to Private Property Rights *Protection* Act of 2005,[23] which was the House's principal legislative response to the Supreme Court's controversial decision involving eminent domain in the case of *Kelo v. City of New London*. The House of Representatives passed the Private Property Rights Protection Act the previous year by an overwhelming margin.[24] In a clear attempt to hop on the anti-*Kelo* bandwagon, the sponsors of the Private Property Rights Implementation Act incorrectly asserted that it was needed to open the federal courthouse doors to plaintiffs like Susette Kelo—regardless of the fact that federal courts *already* allowed plaintiffs alleging a taking by the government for a private use to sue first in federal court.[25]

The novel sections in Chabot's 2006 bill, H.R. 4772, purported to "clarify" the meaning of the U.S. Constitution in three areas, which happened to be issues on which courts had frequently rejected constitutional interpretations advanced by plaintiffs who were developers. One such "clarification" purported to nullify interpretations of the takings clause that limited the reach of the Supreme Court's *Nollan* and *Dolan* standards to adjudicative exactions of real property.[26] The second such "clarification" attempted to curtail the reach of the "parcel as a whole" rule in jurisprudence related to takings.[27] But the breathtaking "clarification" in the bill was the directive to judges to extend the doctrine of substantive due process in property rights cases to instances in which the decision was "arbitrary, capricious, *an abuse of discretion, or otherwise not in accordance with law*."[28] If that phrase sounds familiar to federal lawyers, it is because it appears, word for word, in the Administrative Procedure Act—a statute that has no application to review under the Constitution or to federal court review of state or local government actions.[29] No court had ever held that the standard for substantive due process under the U.S. Constitution should match the words chosen in 1946 when the Administrative Procedure Act was adopted.

Under these circumstances, one would think that the sponsors of H.R. 4772 would have much explaining to do. As Richard Fallon, a professor at Harvard University's Law School, has observed, "substantive due process is widely viewed as the most problematic category in constitutional law."[30] Substantive due process is particularly notorious among conservative jurists who view it as an oxymoron that embodies the worst of judicial activism.[31] Yet the legislative history of this bill includes incredibly few references to the language purporting to extend substantive due process; and the few references that the sponsors of the provision included blatantly misrepresented the actual wording in the bill by omitting the most extreme terms used in the

relevant sentence. For example, during the subcommittee hearing at which the bill was discussed and again during floor consideration, Rep. Chabot described the substantive due process provision of his bill by stating that "the bill would clarify that due process violations involving property rights should be found when the [g]overnment has been found to have acted *in an arbitrary and capricious manner*."[32] Such a characterization does not begin to disclose that the bill would *also* make an abuse of discretion or an action not in accordance with law into a substantive due process violation. And the legislative history of the bill is completely silent on the equally interesting question of *why* Chabot and his colleagues included such words in their bill.

Nor does the "clarification" label begin to explain the chosen standard. When the bill was being considered on the floor, Rep. Lamar Smith (R-Texas) argued that "the legislation clarifies that the standard for due process claims in a takings case is 'arbitrary and capricious' *and not the much higher 'shocks the conscience' standard that some courts are using* and that almost no property rights case can meet."[33] In fact, no federal circuit court was requiring plaintiffs in property rights cases to satisfy a "shocks the conscience" standard to prove a substantive due process claim.[34] In the few circuits in which the court of appeals referred to conduct that "shocks the conscience" when stating the substantive due process standard in land use cases, the "shocks the conscience" test was simply one of several ways that such a claim could be proven.[35]

Moreover, the bill's supposed "clarification" was far more favorable to plaintiffs in cases involving property rights than was the standard in any circuit.[36] Indeed, in at least two respects the proposed language would write into law exactly the kind of slippery slope that well-respected conservative jurists were trying to prevent. A long line of conservative federal judges—including Samuel Alito—had articulated or repeated a criticism of a standard for substantive due process that would turn on whether the local authority had abused its discretion, because "*every* appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority."[37] Yet the bill would have made an abuse of discretion regarding property, by itself, a constitutional violation. Moreover, as conservative jurist Richard Posner of the Seventh Circuit observed, substantive due process must involve more than whether local law was violated. As Posner warned in one case, "[i]f the plaintiffs can get us to review the merits of the Board of Trustees' decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude."[38]

One could surmise from the circumstances that some unidentifiable person—a staff member, a developer, a lobbyist, or perhaps even a member of Congress—had included this language in the takings bill prior to its re-emergence in 2006, hoping that the unusual political dynamics created by the *Kelo* backlash and an election year, plus the congressional Republicans' renowned party discipline, created a once-in-a-lifetime opportunity to pull a fast one. Indeed, the failure of this provision to attract any flak from any member of the majority party during the subcommittee hearing or floor consideration[39]—and the unwillingness of any member of any party to offer any amendments to the bill on the House floor—make such a strategy seem brilliant.

It is impossible to tell whether these excesses played a role in the bill's failure to advance in the U.S. Senate. Editorials in the *Washington Post*, *New York Times*, and *Sacramento Bee* singled out the substantive due process section of the bill for particular criticism.[40] Immediately after the House passed the bill, Rep. Earl Blumenauer (D-Ore.) correctly predicted that members of the Senate would not adopt the bill, explaining that "those people aren't crazy."[41]

Even if H.R. 4772 had become law, it is almost certain that its key provisions would never have taken effect, because its authors attempted to use ordinary legislation to change the meaning of the U.S. Constitution. Congress can usually pass statutes that create new rights,[42] but this bill did not attempt to do that. Instead, the bill took the path of greater legal resistance by directing federal judges on how they must read existing language in the U.S. Constitution.[43] The one constitutional way for legislators to change the meaning of the Constitution is to amend it,[44] and, as we all should have learned before high school, that requires supermajorities in both houses as well as the participation and support of 38 states.[45]

The story of H.R. 4772 provides a wonderful example of why the legislative branch should not try to perform the responsibilities that the framers of the Constitution assigned to the judiciary. The appropriate test for substantive due process in the land use context had been addressed in hundreds of pages of judicial opinions, and those judicial opinions had, in turn, been the subject of substantial scholarly analysis and debate. Because such claims were common, federal judges at all levels had become well versed on the test and its meaning. But when the sponsors of H.R. 4772 decided to act, in essence, like a second Supreme Court, purporting to "clarify" the Constitution and taking its meaning in a completely different direction, they showed little interest in understanding—let alone respecting—the judicial branch's voluminous work. In an environment that Norman Ornstein and Tom Mann aptly described as "the broken branch" (which also serves as the title of their recent book)[46] the sponsors of H.R. 4772 tried to enact into law a radical new test, while at the same time misrepresenting to their colleagues what their bill actually said. Because moderating the most extreme aspects of the bill might have made it harder for the Senate to reject it, opponents had a strategic disinterest in amending the bill. Therefore, the bill was passed in the House with its flaws intact. Had the clock not run out on the 109th Congress two months after the House approved it, the flaws might have become law through a repeat of the same sequence of events in the Senate. Had that happened—absent a rare presidential veto—the burden would have fallen to the courts to enforce separation of powers by striking down the law. Then, per-

haps, the supporters of H.R. 4772 would have rediscovered their distaste for judicial activism. **TFL**

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Endnotes

[1]*See* Telecommunications Act of 1996, 47 U.S.C. § 151 et seq.; the Fair Housing Act of 1968, 42 U.S.C. § 3601 et seq.; the National Flood Insurance Act of 1968, 42 U.S.C. § 4001 et seq.; and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, et seq.

[2]H.R. 4772, 109th Cong. (2006), known as The Private Property Rights Implementation Act of 2005.

[3]*Id.*, § 5 (a)(i)(3).

[4]H.R. 4772, § 5 (3), 109th Cong., 2d Sess. (2006) (amending § 1983 to provide that "if the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns … (3) alleged deprivation of substantive due process, then the action of the person acting under color of [s]tate law shall be judged as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). Prior to its approval by the House, H.R. 4772 was amended to include a parallel provision applicable to claims brought against the United States under 28 U.S.C. § 1346, which required that such claims also be "judged" under the same standard when brought against the federal government. *See* H.R. 4772, § 6(a)(i)(3).

[5]H.R. 4772 passed in the House of Representatives on Sept. 29, 2006, by a 231-181 vote. 152 CONG. REC. H 7990 (daily ed. Sept. 29, 2006).

[6]The chief author of the bill was Steve Chabot, co-chair of the House Working Group for Judicial Accountability, whose mission was to root out judicial activism and "take no prisoners." The 36 co-sponsors of the bill included James Sensenbrenner (R-Wis.), then chair of the House Committee on the Judiciary; Tom Feeney (R-Fla.), who called for the impeachment of judges who reference foreign law in their opinions; Lamar Smith (R-Texas), Chabot's co-chair on the House Working Group for Judicial Accountability; John Carter (R-Texas); Steve King (R-Iowa); Joe Wilson (R-SC) and W. Todd Akin (R-Mo.), charter members of that Working Group; and Richard Pombo (R-Calif.) and Virgil Goode (R-Va.), co-authors of the Congressional Accountability for Judicial Activism Act of 2004. *See* thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04772:@@@P.

[7]*See* Pub. L. 94-559, 90 Stat. 2641 (Oct. 19, 1976) (codified at 42 U.S.C. § 1988).

[8]Section 1988(b) (in cases arising under the U.S. Constitution and certain enumerated statutes, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

[9]*See* Figure 1 in Lance Bachmeier, Patrick Gaughman Null, and Norman Swanson, *The Volume of Federal Litigation and the Macroeconomy*, 24 INT'L REV. L. & ECON. 191, 198 (2004) (reflecting a significant increase in the number of federal civil filings between 1976 and 1985).

[10]*Id.* (reflecting the decline in federal civil filings beginning in 1985).

[11]*See* the circuit-by-circuit review summarized in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217–1222 (6th Cir. 1992). "Under the foregoing principles, it is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process." *Id.* at 1222.

[12]Different appellate courts have articulated the high standard for substantive due process violations differently, and some have distinguished between the standards for legislative and adjudicative land use decisions. The Sixth Circuit's 1992 circuit-by-circuit review of the various standards in *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992) remains generally accurate today.

[13]*Pearson*, 961 F.2d at 1222–1223. ("Review of state administrative action is primarily a matter for the state courts, which quite properly have a much broader scope of review under state law.")

[14]*See* Jennifer Puplava, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329, 329–333 (1997).

[15]*See* The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321–1366 (1996) (codified at 42 U.S.C. § 1997e).

[16]*See*, for example, *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004) (per Michael Chertoff, J.); *Tri County Industries Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 2003) (per Stephen Williams, J.); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988) (per Richard Posner, J.); *Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (en banc) (per Patrick Higginbotham, J.); *Creative Environments Inc. v. Estabrook*, 80 F.2d 822, 833 (1st Cir. 1982) (per Levin Campbell, J.).

[17]*River Park Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994).

[18]*See* Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions*, 10 J. LAND USE & ENVT'L LAW 91, 92 (1994); and John Delaney and Duane Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform for Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. at 202–231 (1999).

[19]*See* Private Property Rights Implementation Act of 2000, H.R. 2372, 106th Cong., 2d Sess. (2000). Although the best-known decision imposing such ripeness requirements is *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the requirement that takings plaintiffs first try, and fail, to obtain just compensation as a

matter of state law before a federal takings claim would be complete dates back to the opinions written for the court by the first Justice Harlan in the late 19th century. *See*, for example, *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 658–659 (1890) (per Harlan, J.); *Sweet v. Rechel*, 159 U.S. 380, 400–407 (1895) (per Harlan, J.)

[20]H.R. 1534 and S. 2271 were the main legislative initiatives for the National Association of Home Builders from 1997 to 1998, Delaney and Desiderio, *Who Will Clean Up the "Ripeness" Mess"?* at 195. The House passed H.R. 1534 by a vote of 248 to 178, but the Senate never passed the bill. In 2000, the House passed H.R. 2372 again by a vote of 226 to 182, but again the Senate failed to pass it.

[21]In a clear attempt to force federal courts to treat takings claims as complete regardless of whether just compensation was available as a matter of state law, this legislation would have directed federal courts to exercise jurisdiction over landowners' claims that they had been deprived of property rights regardless of whether state judicial remedies had been available to them.

[22]In a later engrossment, the title of the bill was changed to accurately reflect the year of its introduction and consideration.

[23]H.R. 4128, 109th Cong., 1st Sess. (2005).

[24]The Private Property Rights Protection Act passed on Nov. 3, 2005, by a 376-38 margin.

[25]What sets "public use" disputes apart from regulatory takings claims is that a challenge to a private use taking of property is "complete" regardless of whether or not the government offers just compensation for the taking. Thus, the logic of the Supreme Court's decision in *Williamson County* simply does not apply to "public use" challenges, and, for that reason, federal courts have repeatedly refused to dismiss such claims under *Williamson County*. *See*, for example, *Montgomery v. Carter County, Tennessee*, 226 F.3d 758, 767 (6th Cir. 2000); *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir.1991); *Armendariz v. Penman*, 75 F.3d 1311, 1320–1321 and n. 5 (9th Cir.1996) (en banc); *Theodorou v. Measel*, 53 Fed. Appx. 640, 643 (3d Cir. 2002). In Montgomery, the Sixth Circuit noted that the Seventh Circuit had taken a different view. In a later ruling, however, the Seventh Circuit significantly changed its position by concluding that *Williamson County* does not bar a property owner from seeking to enjoin a taking of his or her property in federal court based on the theory that it is for a private use. *See Daniels v. Area Plan Comm'n v. Allen County*, 306 F.3d 445, 453 (7th Cir. 2003).

[26]Section 5(1) of H.R. 4772 would have amended § 1983 to provide that "If the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns—(1) an approval to develop real property that is subject to conditions or exactions, then the person acting under color of [s]tate law is liable if any such condition or exaction, whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party, is unconstitutional."

[27]Section 5(2) would have provided that "If the party injured seeks to redress the deprivation of a property right or privilege under this section that is secured by the Constitution by asserting a claim that concerns … (2) a subdivision of real property pursuant to any statute, ordinance, regulation, custom, or usage of any [s]tate or territory, or the District of Columbia, then such a claim shall be decided with reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recognized, as an individual property unit by the [s]tate, territory, or the District of Columbia."

[28]*See* note 4, *supra* (emphasis added).

[29]*See* 5 U.S.C. § 706 (2)(A) (The reviewing court "shall … (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law …").

[30]Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314 (1993).

[31]*See*, for example, *U.S. v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia and Thomas, JJ., concurring in the judgment) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation."); *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 524 (6th Cir. 1987) (Nelson, J., concurring in the judgment) ("it is fair to say that at that stage, at least, the plaintiffs' chances of prevailing in a suit based on that 'durable oxymoron,' as Judge Posner has called it, would be next to nonexistent); Robert H. Bork, SLOUCHING TOWARDS GOMORRAH 118–119 (1997) (describing substantive due process review as undesirable and anti-democratic judicial lawmaking).

[32]H. Rep. No. 109-105 at 3 (2006) (transcript of House Subcommittee on the Constitution hearing on H.R. 4772, June 8, 2006) (emphasis added); 152 CONG. REC. H 7921 (daily ed. Sept. 29, 2006). During the subcommittee's hearing, Rep. Tom Feeney also asked a supportive witness: "What we go back to is an arbitrary and capricious standard, is that right?" H. Rep. No. 109-105 at 188. The witness—a professor who perhaps had lost his copy of the bill—answered "yes," then changed the subject. *Id.* at 189.

[33]152 CONG. REC. H 7925 (statement of Rep. Lamar Smith) (emphasis added).

[34]*See SFW Arecibo Ltd. v. Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005); *O'Mara v. Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007); *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006); *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005); *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006); *Richardson v. Township of Brady*, 218 F.3d 508, 513 (6th Cir. 2000); *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992); *Southern Pacific Transp. Co. v. City of Los Angeles*. 922 F.2d 498, 507 (9th Cir. 1990); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 927 F.2d 1111, 1120 (10th Cir. 1991); *Lewis v. Brown*, 409 F.3d 1271, 1273 (11th Cir. 2005); and *Tri-County Industries Inc.*, 104 F.3d at 459.

[35]*See County Concrete Corp.*, 442 F.3d at 169 ("non-

legislative state action violates substantive due process if 'arbitrary, irrational, or tainted by improper motive,' *or* if 'so egregious that it shocks the conscience'") (emphasis added); and *SFW Arecibo Ltd.*, 415 F.3d at 141 ("substantive due process prevents governmental power from being used for purposes of oppression, *or* abuse of government power that shocks the conscience, *or* action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests") (emphasis added). Cf. *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006) (articulating both a "truly irrational" test and a "shocks the conscience" test, notwithstanding the long-standing recognition of the "truly irrational test" in *Chesterfield Dev. Corp.* as "the law of the Circuit").

[36]See authorities at note 34, *supra.*

[37]*United Artists Theatre Circuit Inc. v. Township of Warrington PA.*, 316 F.3d 392, 402 (3d Cir. 2003) (quoting *Estabrook*, 680 F.2d at 833) (emphasis added). *See also* note 16, *supra*.

[38]*Coniston Corp.*, 844 F.2d at 467.

[39]*See* H. Rep. No. 109-105 at 1–6, 182–193, and 152, CONG. REC. H 7916-25, H 7990-91.

[40]Editorial, *Take It Back: The House Moves a Radical Bill to Hobble Local Land-Use Rules*, WASHINGTON POST (Sept. 29, 2006); Editorial, *More Comfort for the Comfortable*, NEW YORK TIMES (Sept. 29, 2006); Editorial, *Regulating Land Use: House Bill Would Be Gift to Developers*, SACRAMENTO BEE (Sept. 29, 2006).

[41]Chrissie Thompson, *House OK's Recourse for Private Property Owners*, WASHINGTON TIMES (Sept. 30, 2006).

[42]*See*, for example, *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964). It is not obvious that Congress had the constitutional authority to create a new statutory scheme of greater property rights. It is plain that they could not have relied upon their authority under § 5 of the Fourteenth Amendment. As the Supreme Court has recognized, "Congress' power under § 5 … extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment, …" and "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

[43]*See City of Boerne v. Flores*, 507, 536 (under the "vital principles necessary to maintain separation of powers and the federal balance," the courts, not Congress, have the authority to interpret the Constitution).

[44]*Id.* at 529. ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, … alterable when the legislature shall please to alter it.'" *Marbury v. Madison*, 1 Cranch, at 177.)

[45]U.S. Constitution, Article V.

[46]Thomas E. Mann and Norman J. Ornstein, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006).

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713 N.W.2d 268 (Mich. 2006).

45[43]*Id.* at 386.

45[44]*Appolo Fuels Inc. v. United States*, 54 Fed. Cl. 717, 735 (2002), *aff'd*, 381 F.3d 1338 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 1188 (2005).

45[45]*Appolo Fuels*, F.3d at 1347.

[46]45*Rith Energy Inc. v. United States*, 44 Fed. Cl. 108 (1999), *aff'd*, 247 F.3d 1355 (Fed. Cir.), *reh'g denied*, 270 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002).

[47]45*Rith Energy*, 247 F.3d at 1361–1362. In a published decision denying Rith Energy's petition for a rehearing, the Federal Circuit also noted, as part of its discussion of the inquiry related to the character of the government action, that the restrictions on mining were "an exercise of the police power directed at protected the safety, health, and welfare of the communities surrounding the Rith mine site by preventing harmful runoff." *Rith Energy*, 270 F.3d at 1352.

[48]*45See Cavin v. United States*, 956 F.2d 1131, 1134 (Fed. Cir. 1992) ("Without undisputed ownership of the [subject] property at the time of the takings, [the plaintiffs] cannot maintain a suit alleging that the [g]overnment took their property without just compensation."); *Maniere v. United States*, 31 Fed. Cl. 410, 420–421 (1994) (holding that the plaintiff had no standing to bring suit for a taking where it failed to meet its burden of proving that it owned the subject property at the time of the alleged taking).

45[49]*Wyatt v. United States*, 271 F.3d 1090, 1096–1097 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002).