Legal Comments on H.R. 4772: The Private Property Rights Implementation Act of 2006

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Summary

H.R. 4772, titled the Private Property Rights Implementation Act of 2006, passed the House in September 2006 and may, if the Senate acts, move forward during the 2006 lame-duck session.

The bill combines process and substance. *The process provisions* would ease or eliminate four current hurdles to a federal takings or substantive due process claim being adjudicated in federal court on the merits—in those cases where government interference with property rights is alleged. Those hurdles are abstention, the takings ripeness requirements that the plaintiff must first obtain a final decision from the land-use control agency and exhaust state court remedies, and certification of state law questions to the state courts. The bill does not affect the property owner's access to state courts, which are also available to vindicate such claims.

The bill's limitations on federal court abstention would allow the plaintiff to preclude abstention by not including any claim of state law violation. The bill's elimination of the current state exhaustion prerequisite for a ripe takings claim may well be beyond Congress's authority if, as sound argument suggests, that prerequisite is constitutionally based. The final decision definition in the bill involves a trade-off between easing the procedural burdens on the property owner on the one hand, and the routine give-and-take of local land-use negotiations and informational needs of courts for applying the takings test on the other.

The substantive provisions of the bill provide "clarification" of takings and substantive due process constraints on government interference with property rights. As for federal takings claims, the bill declares that the Supreme Court's test for when exaction conditions on development constitute takings shall apply broadly—to both exactions and other conditions on development, to both adjudicatory and legislative conditions and exactions, and to both land dedications and monetary fees. Also, when a taking claim involves a subdivided lot recognized as an individual property unit under state law, that lot shall be deemed the "parcel as a whole" in the takings analysis. As for substantive due process claims, the bill says that the criterion is whether the government action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The key issue with the substantive provisions is whether they are constitutional. Suggesting unconstitutionality is the principle that it is the responsibility of the courts, not Congress, to define the substance of constitutional guarantees. But there are plausible counter-arguments—e.g., that the bill is merely a statutory overlay to constitutional guarantees, not a redefinition of them. Leaving aside the constitutionality question, the provisions expand the circumstances in which property owners can prevail on takings and substantive due process claims. For example, in requiring substantive due process claims to be assessed on a "not in accordance with law" standard, the bill significantly lowers the bar relative to existing judicial standards for such violations, which are typically more deferential to government.

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H.R. 4772, styled the Private Property Rights Implementation Act of 2006, combines process and substance. Its *process* provisions would ease or eliminate certain current hurdles to a federal takings or substantive due process claim being adjudicated in federal court on the merits, where government interference with property rights is alleged.[1] Its *substantive* provisions would have the effect of facilitating success on the merits when such claims are brought, through "clarifications" of those same takings and substantive due process constraints. The bill was reported by the House Committee on the Judiciary on September 14, 2006 and passed the House on September 29, 2006 (231-181). This report was prepared on the possibility that the Senate may introduce similar legislation during the lame-duck session of 2006, allowing some version of either bill to move toward enactment.

Although H.R. 4772 has previous incarnations,[2] the current congressional interest in the bill largely stems from the Supreme Court's 2005 decision in *Kelo v. City of New London*.[3] That decision dealt with a related, but very different matter. Although H.R. 4772 seeks to facilitate takings lawsuits by land owners aggrieved by government interference, *Kelo* addressed the permissible public purposes underlying direct condemnation suits by governments seeking to acquire land. Yet to be sure, both Supreme Court decision and bill speak to property rights and aspects of the Fifth Amendment Takings Clause's protection of property rights, and public concerns about property rights kindled by the decision plainly have enhanced interest in the bill.

This report comments only on the legal and legally related policy issues raised by H.R. 4772.

Provisions of the Bill

H.R. 4772's *process* features, as noted, seek to facilitate access to the federal courts by property owners with certain federal constitutional claims. The process features do not affect the property owner's access to *state* courts for adjudicating those federal claims, which courts remain generally available. Rather, they offer the property owner a second forum for federal claims. The key process features of the bill are as follows:

1. *section 2*: in an action under 28 U.S.C. § 1343[4] in which the facts concern the uses of real property, limits when a federal district can *abstain* from deciding the action, requires that the

[1] By way of background, a "federal takings claim" is brought by a property owner against the government under the Fifth Amendment Takings Clause. That clause states: "[N]or shall private property be taken for public use, without just compensation." The property owner alleges that the government's action—either a physical invasion of his property or severe regulation of its use or an exaction condition on development approval—is tantamount to a taking, and thus should be compensated, even though the government has not formally sought to take the property.

A substantive due process claim has a somewhat different focus. It aims to "prevent[] government 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 interest." Torromeo v. Town of Fremont, NH, 438 F.3d 113, 118 (1st Cir. 2006). A substantive due process claim against a state or local government is brought under the Due Process Clause of the Fourteenth Amendment; a similar action against the United States is brought under the Due Process Clause of the Fifth Amendment.

[2] *See* H.R. 1534 in the 105th Congress and H.R. 2372 in the 106th. In each case, the bill passed the House but failed to emerge from the Senate.

[3] 545 U.S. 469 (2005).

[4] 28 U.S.C. § 1343 provides federal district courts with jurisdiction over actions brought under 42 U.S.C. § 1983, explained in the following footnote.

court exercise jurisdiction even if the plaintiff *has not first pursued his state-court remedies*, and limits when the court can *"certify"* a related question of state law to the state courts (asking the state court to clarify a point of state law and report back to the federal court), and

2. *sections 2-4*: provides that takings actions brought under 42 U.S.C. § 1983[5] (against political subdivisions of states[6]) or under the Tucker Acts (against the United States) shall be ripe for adjudication upon a *"final decision,"* which exists if (a) the government makes a definitive decision as to the permissible uses of the property, and (b) one meaningful application to use the property has been denied and the property owner has applied for but been denied one waiver and one appeal, unless unavailable or futile.

These process features closely track approaches used in the earlier bills. There are a host of small changes, however. For example, H.R. 1534 (105th Congress) defines "final decision" to require the property owner to seek, but be denied, one waiver *or* one appeal. In contrast, H.R. 2372 (106th Congress) and H.R. 4772 require one waiver *and* one appeal, seemingly a more demanding ripeness standard.

H.R. 4772's *substantive* features are as follows:

1. *sections 5-6*: takings actions brought under 42 U.S.C. § 1983 (against political subdivisions of states) or under the Tucker Acts (against the United States) are subject to two "clarifications": (1) *conditions or exactions* on land development approvals shall be subject to the applicable takings test regardless of whether legislative or adjudicatory in nature, or whether in the form of a monetary fee or land dedication, and (2) each *subdivided lot* in a subdivision shall be regarded as a separate parcel, if so treated under state law, and

2. *sections 5-6*: substantive due process actions under 42 U.S.C. § 1983 (against political subdivisions of states) or against the United States, where based on property deprivation, are subject to a "clarification": the judgment shall be based on whether the government action is *"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."*

These substantive provisions have no counterpart in the earlier bills.

Both H.R. 2372 (106th Congress) and H.R. 4772 impose a "duty of notice to owners"—requiring federal agencies, when they limit the use of property in a manner that may be affected by the bill, to give notice to property owners explaining their rights under the bill. Finally, only H.R. 4772

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[5] 42 U.S.C. § 1983, the Civil Rights Act of 1871, provides that—

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured ....

Though originally intended to secure federally guaranteed rights for the newly freed slaves, the broad terms of this act have lead to its being used in a wide diversity of situations, such as Fifth Amendment takings claims.

[6] The term "person" in 42 U.S.C. § 1983 has been held to cover municipalities, Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), and other political subdivisions of a state (that are not arms of the state), but not states themselves, Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Thus, H.R. 4772 does not change the situation of property owners when it comes to actions against states. In practice, of course, the large majority of land use controls in the United States are imposed by political subdivisions of states, such as municipalities.

contains a severability clause, stating that if any of the bill's provisions or their applications are held invalid, other provisions and their applications shall not be affected.

Process Provisions

Limitations on Abstention

Abstention is a discretionary doctrine under which federal judges may decline to decide cases that are otherwise properly before them. Grounded in principles of comity and cooperative federalism, abstention holds that federal courts should not intrude on sensitive state issues 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."[7]

Abstention is an option for a federal judge when a local land use regulation is attacked in federal court as a taking.[8] The federal judge may defer to the state courts using any of three types of abstention. *Pullman* abstention[9] 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. *Burford* abstention[10] 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. *Colorado River* abstention instructs federal courts not to dismiss or stay a federal action in deference to a concurrent state proceeding except in "exceptional" circumstances.[11] Courts are known to blend the various types of abstention.

H.R. 4772 directs that federal courts adjudicating civil rights claims involving real property shall not abstain if the plaintiff does not allege a state law violation and no parallel proceeding is pending in state court. This narrows the grounds on which abstention currently may be invoked. Moreover, it is likely that this would preclude abstention in most cases since plaintiff, to ensure that abstention does not occur, would have only to delete any claims of state law violation from his complaint.

Elimination of State Exhaustion Requirement

In 1985, the Supreme Court announced that a Fifth Amendment takings claim against a state[12] is ripe for federal court adjudication only when the plaintiff has exhausted his state court remedies, if available and not futile.[13] The Court reaffirmed this state exhaustion prerequisite in several later

[7] Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 817 (1976).

[8] *See, e.g.*, Kent Island Joint Venture v. Smith, 452 F. Supp. 455 (D. Md. 1978) (collecting land-use abstention decisions).

[9] Announced in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

[10] Announced in Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[11] Announced in Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976).

[12] All references to states in this report should be understood to include political subdivisions of states.

[13] Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

decisions.[14] The requirement has been a perennial bete noir of real estate developers and other property rights advocates, who contend that state courts in many states are less friendly to their interests than federal courts. Some scholars perceive a lesser institutional competence or neutrality in state courts to handle federal constitutional claims, though we are unaware of any authoritative, empirical study on this point.[15] In any event, property owners and developers argue that notwithstanding the availability of state courts for vindicating their Fifth Amendment takings claims, there is a right, given the federal nature of the claim, to being able to file in the first instance in a federal forum as well.

Landowners further complain that once the state exhaustion prerequisite is met, relitigating the takings claim in federal court has been barred under any of several legal doctrines. These doctrines, based on federal-state comity and considerations of judicial economy by avoiding duplicative litigation, are the federal Full Faith and Credit Act,[16] res judicata (claim preclusion), collateral estoppel (issue preclusion), and the Rooker-Feldman doctrine.[17] The net effect of each is the same: the landowner gets no "second bite at the apple" in federal court. Nor, says the Supreme Court, does this offend any notion that persons asserting federal rights must have access to federal courts. In a recent takings case raising this issue, the Court noted that it has "repeatedly held ... that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court," and that "[t]his is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so ...."[18]

H.R. 4772 proposes to eliminate the state exhaustion requirement, so that a takings claimant could go initially to federal court, bypassing the state courts. The question, however, is whether state exhaustion is mandated by the terms of the Fifth Amendment Takings Clause, in which case Congress cannot eliminate it by statute. The alternative is that the requirement is merely "prudential"—imposed as a matter of judicial discretion—in which case Congress can nullify it by statute.

The Supreme Court has come down on both sides of the constitutional versus prudential issue. In the 1985 Supreme Court decision announcing the state exhaustion rule, the Court explained that a property owner aggrieved by a state property use restriction "has not suffered a violation of the Just Compensation Clause" until he unsuccessfully seeks compensation through state procedures,[19] and further that "[t]he nature of the constitutional right" requires state exhaustion first.[20] And in 1999, the Court noted that "had an adequate postdeprivation remedy been available, [the property owner] would have suffered no constitutional injury from the taking alone."[21] In

[14] *See*, most recently, San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).

[15] *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977); 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).

[16] 28 U.S.C. § 1738.

[17] The Rooker-Feldman doctrine, named after the Supreme Court decisions that gave birth to it, bars review of state court judgments by the lower federal courts. It stems from the proposition that district courts lack appellate jurisdiction and therefore cannot hear appeals of state court judgments.

[18] *San Remo*, 545 U.S. at 342.

[19] *Williamson Cty.*, 473 U.S. at 195.

[20] *Id.* at 194 n.13.

[21] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999).

direct contradiction of these statements, the Court in 1997 referred to the state exhaustion requirement in dictum as merely prudential,[22] neglecting to mention contrary precedent. Later in the same opinion, however, the Court arguably suggested the opposite.[23] Most recently, in 2005, a four-justice dissent opined that the Court's adoption of the state exhaustion requirement, whether constitutional or prudential, "may have been mistaken."[24]

On balance, the Court's statements favoring a constitutional rather than prudential basis for state exhaustion may be weightier, raising doubts as to whether H.R. 4772 may validly dispense with it. Concededly, the four-justice dissent in 2005 raises the possibility that a one-justice change in the Court might produce a change in the law someday; this report, however, analyzes the law as it stands right now.

Definition of "Final Decision"

The same Supreme Court decision that debuted state exhaustion in 1985 imposed a second ripeness requirement on federal takings claims: "a claim that the application of government regulations effects a taking ... is not ripe until the government entity ... has reached a *final decision* regarding the application of the regulations to the property at issue."[25] The following year, the Court made clear that obtaining a "final decision" might require the landowner to submit more than one development proposal: "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[26] For example, just because a developer is prohibited from building 100 houses on its tract does not necessarily mean that some lesser, but still profitable, number of houses may not be permitted. Later decisions of the Court appear to relax the requirement of formal development proposals by the land owner, recognizing that in some circumstances it is clear how much development can occur, and thus the taking claim is ripe, without multiple, or indeed any, proposals.[27]

The final decision requirement is seen by courts as essential to the court's ability to adjudicate a taking claim. Evaluation of a taking claim, they note, demands that a court know how much development is being permitted on the property, so that the fact-intensive balancing test applied to most regulatory takings claims can be applied. On the other hand, property owners accuse land-use-control agencies of exploiting the final decision concept to get landowners to abandon politically unpopular or otherwise unpopular development—by requiring multiple submissions from the landowner, each prepared at substantial expense, with no assurance that the proposal will ever be deemed satisfactory.

H.R. 4772, as noted, seeks to define "final decision." It would stipulate that a final decision has occurred when (1) a "definitive decision regarding the extent of permissible uses on the property" has been made, and (2) one "meaningful application" to use the property has been submitted but

[22] Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 733-734 (1997).

[23] The state exhaustion requirement, it said, "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment." Id. at 734.

[24] San Remo v. City and County of San Francisco, California, 545 U.S. 323, 348 (2005).

[25] *Williamson Cty.*, 473 U.S. at 186 (emphasis added).

[26] MacDonald, Sommer & Frates v. Yolo Cty., 477 U.S. 340, 353 n.9 (1986).

[27] Said the Court in Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001): "once it becomes clear that [an] agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."

denied and the property owner has applied for but been denied one waiver and one appeal to an administrative agency, unless unavailable or futile.[28]

The two key concepts in the definition—"definitive decision" and "one meaningful application"—are undefined, and raise the spectre of much litigation before their contours are known. Still, it is clear that the "final decision" definition would benefit landowners and developers by increasing the likelihood that the initial development proposal, unless patently unreasonable, will upon denial (and denial of waiver and appeal) create a ripe taking claim that the court must address. The court would not have the option of sending the landowner back to the land-use agency for further, presumably scaled-back, proposals and/or negotiations. Such give-and-take between developer and regulating authority is currently a routine part of the land use control process in this country. Perhaps for this reason, the standard in the takings-ripeness case law is "*at least* one meaningful application" for development approval, not, as in the bill, "one meaningful application."[29]

H.R. 4772 reduces the possibility that municipal authorities set on discouraging a particular project could drag out the development-approval process and argue that, as a result, the development proponent remains short of a final decision, hence a viable taking claim. There are occasional reports that such bad faith dealing occurs, though again we know of no definitive studies. However, the bill also raises the legal issue of whether a court can competently assess the economic impact of the government's action—a central component of takings analysis—given that an initial denial does not necessarily convey a clear sense of what property uses *will* be allowed. In the Supreme Court's famous phrase: "A court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes."[30] From the municipality's point of view, the bill creates pressure to accept the first-submitted development proposal, knowing that denying it may land the municipality in federal court defending a taking claim.

Substantive Provisions

A Threshold Matter: Congressional "Clarification" of Constitutional Provisions

It is long-settled law that under the Constitution and the separation of powers it embodies, it falls to the judiciary, not the Congress, to set forth binding prescriptions as to what constitutional provisions mean. Plainly, Congress routinely interprets the Constitution in the course of determining what legislation it may enact. But laying down binding rules for the judiciary's use is another matter. In the classic words of Chief Justice John Marshall, "It is emphatically the province and duty of the judicial branch to say what the law is."[31] More recently, the Court has reaffirmed that "[t]he power to interpret the Constitution in a case or controversy remains in the

[28] The "and" between items (1) and (2) arguably makes more sense if read as an "or."

[29] It should also be noted that in almost all the pertinent cases, submitting "at least one meaningful application" for development approval is a prerequisite for invoking the *futility exception* to the final decision requirement for ripeness. In H.R. 4772, the criterion is applied to establishing the final decision itself.

[30] *MacDonald*, 477 U.S. at 348 (internal quotation marks omitted).

[31] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Judiciary"[32] and similarly that "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."[33]

H.R. 4772 arguably lays out such impermissible congressional prescriptions for judicial interpretation of the Constitution. Sections 5 and 6 of the bill do not use the language of mere suggestion. They say, with apparent reference to the Takings Clause, that the government "is liable" if certain circumstances obtain, and that the case "shall be decided" based on a certain parcel as a whole (see below). Those same sections instruct that an alleged deprivation of substantive due process "shall be judged" by a particular review standard. Nor do the above judicial statements appear to leave room for such congressional "clarification," as the bill labels it, when a constitutional provision has not been explicated by the courts. Indeed, there are few if any constitutional provisions that could not benefit from further clarification, so that an exception to the general prohibition where the law is unclear would easily swallow the rule.

The committee report accompanying H.R. 4772 views section 5, addressing section 1983 actions against political subdivisions of states, in a different way.[34] Rather than imposing a reinterpretation of the Constitution as posited above, the committee report notes that 42 U.S.C. section 1983, which section 5 amends, already states that cases can be heard in federal court for ... "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." All that section 5 does, the report says, is further define what is a "deprivation of any rights, privileges, or immunities secured by the ... laws."[35] Further (though not raised by the committee report), a well-settled principle of statutory construction says that where one reading of a statute raises constitutional issues, a court should construe the statute to avoid such problems unless such reading is plainly contrary to the intent of Congress.[36] It is unclear whether the committee report statement would be sufficient to deflect a court from the possibly unconstitutional reading in the preceding paragraphs, given what seems to be the more comfortable fit between that reading and the text of section 5.

Another possible circumvention of the constitutionality issue is offered, with respect to property rights claims against the United States only (section 6), by Congress's constitutional power "to pay the Debts ... of the United States ...."[37] The Supreme Court has held that the term "Debts" includes not only legal obligations of the United States, but also "those debts or claims that rest upon a merely equitable or honorary obligation."[38] Further, "Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States."[39] It would seem possible that a court might regard section 6's expansion of takings and substantive due process claims against the United States as in the nature of, or analogous to, "waiving an otherwise valid defense."

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[32] City of Boerne v. Flores, 521 U.S. 507, 524 (1997).

[33] Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 365 (2001) (citing *City of Boerne*).

[34] H.Rept. 109-658, at 7 n.7 (2006).

[35] It is unclear whether an analogous argument could be made in connection with section 6 of the bill, which applies to claims against the United States.

[36] *See, e.g.*, DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988), *quoting* Hooper v. California, 155 U.S. 648, 657 (1895).

[37] U.S. Const. art. I, § 8, cl. 1.

[38] United States v. Sioux Nation of Indians, 448 U.S. 371, 397 (1980), *quoting* United States v. Realty Co., 163 U.S. 427, 440 (1896).

[39] *Sioux Nation*, 448 U.S. at 397.

Congress's authority under the Fourteenth Amendment, section 5, to "enforce, by appropriate legislation" the guarantees of that amendment does not alter the analysis.[40] As the Court has made clear, Congress's power under section 5 is to "enforce" those guarantees—that is, prevent or remedy violations—not to redefine their substance.[41] Nor has Congress shown a "history and pattern" of unconstitutional actions by the states (here, the state courts)—a predicate for invocation of Fourteenth Amendment section 5.[42]

Nor would it seem that sections 5 and 6 of the bill can be hung on Congress's authority in Article III of the Constitution to define the jurisdiction of courts created under that article. As the titles and text of sections 5 and 6 make clear, those provisions seek to address the meaning of constitutional provisions, not, in any direct sense, the jurisdiction of Article III courts to hear them.

Moving past the constitutionality issue in sections 5 and 6, the following compares the three prescriptions therein with existing takings and substantive due process caselaw, to indicate the degree to which H.R. 4772 changes the law.

"Clarification" of Status in Takings Law of Conditions and Exactions on Development

Local governments in the United States routinely impose conditions on allowing the development of land. Some of these conditions take the form of requiring the proponent of development to transfer something to the public, on the rationale that he has some duty to offset the burdens imposed by the proposed development on the community. Such "exactions" may be either dedications of acreage by the landowner or payment of a monetary equivalent. A typical exaction might require, before a development is approved, that the developer dedicate acreage for public roads or walkways, or open space.

Such exactions, not to be takings, must both (1) have an "essential nexus" to the purpose of the development approval regime to which they are attached,[43] and (2) impose a burden on the landowner that is "roughly proportional" to the impacts of the proposed development.[44] The burden of showing rough proportionality rests with the government, and requires an individualized determination. This Supreme Court test for "exaction takings" is generally considered to be more friendly to the property owner asserting a taking claim than the default

[40] The Fourteenth Amendment is relevant here because among its guarantees, in section one, is that no state shall deprive any person of property without due process of law. This due process requirement includes both substantive due process protections and, by incorporation from the Fifth Amendment, the Takings Clause protection against government taking of property without just compensation.

[41] *City of Boerne*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what the right is."). Prior to *City of Boerne*, Congress's power under section 5 of the Fourteenth Amendment to define the substance of rights guaranteed by section 1 of the Amendment was a closer question. *See id.* at 527-528, discussing Supreme Court's earlier decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), "which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights in § 1 of the Fourteenth Amendment." *City of Boerne*, however, rejected that reading of the decision.

[42] *See, e.g., Board of Trustees*, 531 U.S. at 368 (2001).

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

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

regulatory takings tests. For that reason, the property rights bar has long sought its expansive application.

H.R. 4772 seeks to further this effort by property owners.[45] First, it would apply the exaction takings test to conditions as well as exactions. By contrast, the Supreme Court applies its exaction takings test only to exactions.[46] In bringing in conditions generally, H.R. 4772 makes that landowner-friendly test applicable to a vast array of development prerequisites such as building code requirements.

Second, H.R. 4772 would make the government liable regardless of whether the exaction or other condition was imposed adjudicatively (by a ruling specific to the landowner's parcel) or legislatively (through a generally applicable ordinance). Lower court decisions on whether the Supreme Court's exaction takings test applies only to adjudicatively imposed exactions, or to legislative exactions also, remain divided. However, twice since announcing the test, the Supreme Court has suggested that it is not to be extended beyond the factual context of the cases in which it was announced—i.e., adjudicative exactions.[47] Thus, there is a distinct possibility that future case law may veer toward the adjudicative-only view.

Third, H.R. 4772 would make the government liable regardless of whether the exaction or other condition took the form of a dedication requirement or a monetary assessment. As above, the lower courts are divided on the reach of the exactions takings test here—some saying that only physical dedication exactions are covered, others that monetary assessments are covered also. But also as above, recent Supreme Court caselaw hints at the ultimate resolution if the issue were presented: the Court might exclude monetary assessments.[48]

"Clarification" of Status in Takings Law of Subdivided Lots

Takings law dictates that a court, in deciding whether a regulatory taking has occurred, must look at the property owner's loss *relative to the value she retains*—requiring the court to define the "parcel as a whole" for assessing that residual value. A court's definition of the parcel as a whole in a given case can easily determine whether a taking occurred. When the parcel as a whole is defined tightly around the development-restricted portion of the tract, the relative loss to the takings plaintiff is calculated as quite large (thus, a possible taking); when defined more broadly, the relative loss is calculated as small (almost certainly not a taking).

Property owners and developers often contend that on a subdivided tract of land, each individual subdivided lot should be deemed a separate parcel as a whole. On this view, when a land-use

[45] The language of the pertinent provisions in bill sections 5 and 6 is circular in saying that the government is liable when the condition or exaction is unconstitutional. We overlook this drafting issue in our text comments.

[46] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) ("we have not extended the rough proportionality test of *Dolan* beyond the special context of exactions"); Lingle v. Chevron U.S.A. Ltd., 544 U.S. 528, 546 (2005) ("Both *Nollan* and *Dolan* involved ... adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.").

[47] *See, e.g.*, Wisconsin Builders Ass'n v. Wisconsin DOT, 702 N.W.2d 433, 448 (Wis. 2005).

[48] In Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546 (2006), the Court described *Nollan* and *Dolan* as each "[beginning] with the premise that had the government simply appropriated the easement in question, this would have been a *per se* physical taking." (Emphasis in original.) If limited to physically invasive conditions, the exaction takings test in *Nollan* and *Dolan* plainly would not apply to monetary exactions.

agency bars development on wetlands occupying a portion of the tract, a taking of the subdivided lots within that portion will likely be found, since each such lot suffers a very large percentage of value loss. The tract owner thus would be compensated for the restricted portion. H.R. 4772 adopts this approach, instructing the courts to decide covered takings claims "with reference to each subdivided lot, regardless of ownership ...."

Whether an individual subdivided lot, though surrounded by other lots in common ownership, should be seen as the parcel as a whole in a takings case has not been addressed by the Supreme Court. Indeed, the Court has not elaborated much on the parcel as a whole doctrine at all since it was announced in 1978.[49] On the other hand, every lower court decision of which we are aware on the subdivided-lot question holds that individual subdivided lots are *not* to be regarded as separate parcels as a whole, at least where the landowner is seeking to develop several lots as part of a unified development plan.[50] Thus the bill differs from existing case law.

More generally, the courts, in defining the parcel as a whole in each case, have adopted an ad hoc approach. The effort, said the Court of Federal Claims, "must be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."[51] By contrast, H.R. 4772 makes one single factor, the owner's drawing of subdivision lot lines, conclusive. Of course, this does promote greater certainty than exists under the constitutional ad hoc analysis.

"Clarification" of When Property Deprivation Violates Substantive Due Process

For the most part, federal judges have endorsed a very deferential substantive due process standard for scrutiny of state and local land-use restrictions.[52] An example is a recent decision for the Third Circuit by then-judge Alito adopting the strict "shocks the conscience of the court" test for such challenges.[53] The First Circuit has said that "even an arbitrary denial of a permit in violation of state law—even in bad faith—does not rise above the [due process] threshold ...."[54] Rather, substantive due process should be available to reign in local land use controls only in "truly horrendous situations."[55] These standards appear to be stricter than the classic "arbitrary and capricious" standard.

H.R. 4772 would lower the bar for federal substantive due process claims involving property, facilitating their being brought in federal court. It does this by adopting verbatim the standard for judicial review of federal agency action prescribed by the Administrative Procedure Act:

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[49] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-131 (1978).

[50] *See, e.g.*, Tabb Lakes Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993); Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. 1997) (table entry; for text of opinion, see 1997 Westlaw 428516); District Intown Properties Limited Partnership v. District of Columbia, 198 F.3d 874, 880 (D.C. Cir. 1999).

[51] Ciampitti v. United States, 22 Cl. Ct. 310, 319 (1991).

[52] *See generally* Joseph D. Richards and Alyssa A. Ruge, *"Most Unlikely to Succeed": Substantive Due Process Claims Against Local Government Applying Land Use Restrictions*, 78 Fla. B.J. 34 (2004).

[53] United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa., 316 F.3d 392 (3d Cir. 2003).

[54] Baker v. Coxe, 230 F.3d 470, 474 (1st Cir. 2000).

[55] *Id.* at 474.

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[56] Use of this standard would lower the current unconstitutionality threshold both by adopting "arbitrary, capricious" in lieu of prevalent case law applying more deferential standards, as discussed above, and by adding the criteria "an abuse of discretion, or otherwise not in accordance with law."

As to the last criterion, Congress may opt to consider whether every action of a local land-use agency (or the United States) that is not in accordance with any law, even state and local ones, should be transformed into a federal constitutional violation. True enough, not all courts have adopted hands-off standards in due process challenges to local zoning.[57] Still, our research reveals none that has declared any unlawful action unconstitutional. Moreover, the decisions that are highly resistant to involving the federal courts in local land-use matters are more recent and more numerous.[58] The Supreme Court too has been resistant to expanding the use of substantive due process outside the context of so-called fundamental interests (which currently do not include property interests).

Overarching Issues

H.R. 4772, like its precedents, raises some broad issues of legal policy.

The first arises from the aversion of federal judges, expressed in numerous decisions in recent decades, to inserting themselves into local land-use disputes. For example, the Eighth Circuit cautioned that "We are concerned that federal courts not sit as zoning boards of appeals."[59] The Ninth Circuit has said: "The Supreme Court has erected imposing barriers in [its leading takings ripeness decisions] to guard against federal courts becoming the Grand Mufti of local zoning boards."[60] And the Eleventh Circuit echoed with "federal courts do not sit as zoning boards of review."[61] There are many other such judicial statements. Quite recently, the Supreme Court suggested sympathy with this view, noting that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."[62]

As this report shows, the federal judicial aversion to involvement in local land-use disputes may be manifested through use of several legal devices—abstention, certification of state law questions to state courts in the hope of a clarification that avoids the federal question in the case, declining to find a final decision by the local land-use authority, and most significantly, insisting (per Supreme Court directive) that federal takings claims be litigated first in the state courts, with the consequence that relitigation in federal court generally is barred under various legal theories.

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[56] 5 U.S.C. § 706(2)(A).

[57] *See, e.g.*, La Salle Nat'l Bank v. Cook County, 145 N.E.2d 65 (Ill. 1960).

[58] An example is Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988), where Judge Posner wrote for the court: "Something more is necessary than dissatisfaction with the rejection of a site plan to turn a zoning case into a federal case; and it should go without saying that the something more cannot be merely a violation of state (or local) law. A violation of state law is not a denial of due process of law."

[59] Littlefield v. City of Afton, 785 F.2d 596, 607 (8th Cir. 1986).

[60] Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989).

[61] Spence v. Zimmerman, 873 F.2d 256, 262 (11th Cir. 1989).

[62] San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 347 (2005).

H.R. 4772 embodies the contrary view, long espoused by property rights advocates, that takings claims are entitled to the same unobstructed access to federal courts as other federal constitutional claims, such as those under the First or Fourth Amendment. They argue that a federal court would never turn away a free speech claim under section 1983 on the ground that its constitutionality had not first been tested in state court. And, as noted, they contend that a federal forum should be available for the adjudication of a federal constitutional right, whether or not the Constitution requires it. Whether this equating of the Takings Clause and other constitutional guarantees takes full cognizance of textual differences is another question, however.

The broader issue is federalism and the occasional congressional rhetoric to the effect that the federal government should minimize its involvement in local matters. H.R. 4772 runs contrary to this ideal, but in doing so has much company. Congress in recent decades has fostered greater federal court involvement in formerly state court matters in such areas as product liability, criminal law, and class actions.[63] In the land use area at issue here, Congress has articulated its own standard, enforceable in federal court, for the application of local land use restrictions to religious facilities.[64]

Finally, H.R. 4772 is likely to prompt charges that it will add more cases to an already overburdened federal judiciary. It is beyond the scope of this report to address the merits of this potential criticism, nor has it stopped Congress from approving new avenues for federal court litigation in the past.

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[63] Class Action Fairness Act of 2005, 28 U.S.C. § 2711-2715, 1332, 1453.

[64] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5.