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Bulldozing Their Principles

After developers lobbied, some House members agreed to federalize local zoning disputes.

By John M. Baker

Three years ago, Rep. Steven Chabot of Ohio and a faction of other House Republicans formed the Working Group on Judicial Accountability. Its mandate was to root out judicial activism and—in the words of then-Rep. Tom DeLay (R-Texas)—to "take no prisoners."

Yet Chabot is the author of a bill (recently blessed by the House Judiciary Committee) that would require judges to become judicial activists in cases brought by a favored special interest—land developers.

The proposed Private Property Rights Implementation Act offends every principle of conservative jurisprudence. If it becomes law, judges in such cases who follow Justice Antonin Scalia's approach to constitutional interpretation, with attention to the Constitution's text and original intent, would thereby violate federal law.

The support for this bill among House critics of judicial activism removes any doubt that their criticism has more to do with politics than with principle. The sponsors' efforts to rush this bill to the floor before November, with its many flaws intact, is further proof that the House Judiciary Committee has ceased playing its historic role of preserving the quality of federal law.

LET'S FEDERALIZE ZONING

The story begins 30 years ago, when a very different Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. §1988. That statute entitled plaintiffs whose federal constitutional rights were violated to make losing defendants pay their attorney fees.

But that statute had an unintended side effect. Federal courts were flooded with lawsuits in which plaintiffs' attorneys literally were trying to make federal cases out of state law disputes to force the public to pay their legal fees. Most often, those plaintiffs came to federal court by labeling violations of state or local law as violations of "substantive due process" under the 14th Amendment of the Constitution.

That flood of misguided federal litigation began to subside in the 1980s, when Republican appointees began to outnumber Democratic appointees on the federal bench. The increasingly conservative federal judiciary made it clear that substantive due process forbids only the most extraordinarily bad local decisions. All other claims that public officials failed to follow state law were left to those best suited to consider them: state court judges.

Two classes of plaintiffs didn't seem to get the message. The first was prisoners with too much time on their hands and too little appreciation for the differences between state and federal law. Congress eventually curtailed their ability to sue.

The second class was property owners, usually well-financed developers. They kept turning run-of-the-mill zoning disputes into federal lawsuits, to the exasperation of conservative judges. 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 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."

When a distinct class of plaintiffs files so many lawsuits in the wrong court and makes so many invalid claims of constitutional deprivations, one might expect Congress to curtail its right to file suits. After all, many congressmen have campaigned to rid courts of "junk lawsuits" and save taxpayers' money. Suits of this kind waste the time and the resources of the courts, the public defendants, and the developers themselves.

The development lobby, however, viewed the high failure rate of its federal suits as a reason for Congress to reward them by *improving* their access to federal courts.

Complaining about the high percentage of land-use disputes dismissed by federal judges, developers lobbied hard in 2000 for a bill designed to nullify the U.S. Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton*

Bank of Johnson City (1985), which required plaintiffs in federal takings claims to seek compensation in state court before filing those claims in federal court. Although it passed the House, the bill met a deserved death in the Senate.

COVERING EVERYTHING

Six years later, Rep. Chabot has resurrected his failed 2000 bill and has tacked on a stunning new section. It would amend the Ku Klux Klan Act of 1871, 42 U.S.C. §1983, to require all judges presiding in suits that allege that property rights were taken in violation of substantive due process to judge the defendant's conduct according to "whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

This statutory expansion of substantive due process claims erases the line between constitutional violations and mistakes in the interpretation or application of state land-use statutes and local ordinances. As then-Judge Samuel Alito Jr. recognized in 2003, "every appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority."

Conservative Judge Richard Posner made a similar observation when he wrote, "If the plaintiffs can get us to review the merits . . . 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."

If the bill becomes law, small communities with the courage to say no to developers would find themselves debating the meaning of their own ordinances in federal courtrooms, often located hundreds of miles away. And because any land-use decision "not in accordance with law" would thereby become a constitutional violation actionable under Section 1983, developers would finally achieve their long-standing goal: to make taxpayers foot the bill for attorney fees incurred in fights about the meaning and application of local law.

That supposed conservatives in the House seek to accomplish this goal through an expansion of substantive due process is dripping with irony and hypocrisy. One must go back to the Depression to find opinions by conservative judges that speak kindly of substantive due process. And for this one type of plaintiff, this bill would require federal judges to interpret the doctrine more broadly than ever before.

The test for substantive due process violations that judges would be required to follow under this bill does not come from the text or legislative history of the due process clause of the 14th Amendment or from any federal appellate court's current interpretation of substantive due process. Instead, Chabot appears to have borrowed it, word for word, from the Administrative Procedure Act of 1946—a statute that has nothing to do with constitutional interpretation or federal court review of state and local government decisions.

The notion that "the federal government knows best" has never had a place in conservative jurisprudence, particularly in areas traditionally of local concern, such as zoning. But this bill would federalize nearly every kind of local dispute regarding land-use regulation.

IT'S UNCONSTITUTIONAL

The best thing about Chabot's bill is that he has chosen an unconstitutional means of accomplishing his dubious ends.

Congress has authority to create new rights by statute, but this bill does not attempt to do that. Instead, the bill takes a path of greater legal resistance by directing federal judges on how they must read existing language in the U.S. Constitution. It explicitly instructs judges how they are to interpret the 14th Amendment's due process clause.

The one constitutional way for legislators to change the meaning of the Constitution is to amend it. As any middle-school student knows, that requires supermajorities in both houses of Congress and the participation and support of 38 states. By trying to use ordinary legislation to change the Constitution's meaning, Rep. Chabot may be accomplishing only one thing: dishonoring the very document he purports to enforce.

If Chabot's bill passes and survives the inevitable constitutional challenge, it will help put my kids through college. I defend parties in land-use disputes, especially when the suits involve constitutional claims. Such a law would do wonders for my law firm's bottom line.

But it would do so at the expense of taxpayers, who inevitably end up paying for the defense of public bodies and for the increasing costs of an expanded federal judiciary. Of the many kinds of hypocrisy embodied in Chabot's bill, that may be the most remarkable one.

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