

HEARING BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

ON

THE *KELO* DECISION:
INVESTIGATING TAKINGS OF HOMES AND OTHER PRIVATE PROPERTY

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Mr. Chairman, Senator Leahy, and distinguished members of the Committee:

My name is Steven J. Eagle. I am a professor of law at George Mason University School of Law, in Arlington, Virginia. I testify today in my individual capacity as a teacher of property and constitutional law. My principal research interest is the study of the relationship between private property rights and government regulatory powers. I am the author of a treatise on property rights, *Regulatory Takings* (3d ed. 2005), write extensively on takings issues, and regularly lecture at programs for lawyers and judges. I serve as group vice-chair of the Land Use and Environmental Group of committees of the American Bar Association's Section of Real Property, Probate and Trust Law and co-chair of the Condemnation Committee of the Section of State and Local Government. I thank the Committee for giving me this opportunity to appear.

On June 23, 2005, the United States Supreme Court handed down *Kelo v. City of New London*, 125 S.Ct. 2655 (2005). The majority opinion was written by Justice Stevens and joined without qualification by Justices Souter, Ginsburg and Breyer. Justice Kennedy, whose vote was necessary to the 5-4 majority, joined the Stevens opinion, but also wrote a concurrence suggesting significant limitations on the scope of the decision for subsequent cases. Justice O'Connor wrote the principal dissent, in which she was joined by the late Chief Justice Rehnquist and Justices Scalia and Thomas. She stressed practical defects in the majority opinion. Justice Thomas also wrote a separate dissent, stressing that the majority opinion was not necessitated by the Court's prior holdings and was not consistent with the intent of the Framers.

The Fifth Amendment to the United States Constitution says that "nor shall private property be taken for public use, without just compensation." In declaring that "public use" means no more than "public purpose," *Kelo* grants government at all levels almost unlimited deference in condemning non-blighted private residences and other property for subsequent retransfer to private parties for economic redevelopment. As Justice O'Connor emphasized, under the majority's holding, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. *Kelo*, 125 S.Ct. at 2676 (O'Connor, J., dissenting).

As most Americans understand, the case thus represents a dramatic departure from the traditional constraints on government's power of eminent domain. Justice Ste-

vens has acknowledged that his *Kelo* opinion has been “much criticized.” John Paul Stevens, “Judicial Predilections,” Address to the Clark County (Nevada) Bar Association, August 18, 2005, typescript at 7. The force of the public’s reaction to *Kelo* largely results from lack of prior awareness of the situation. For well over a decade, eminent domain had more aggressively been used by localities for economic development purposes, but this occurred in scattered individual instances with low visibility, thus making the pattern hard to recognize.

The growth of public awareness of condemnations for retransfer largely came about through a series of articles by *Wall Street Journal* reporter Dean Starkman. In 1998, he wrote:

Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business.

Dean Starkman, “Take and Give: Condemnation Is Used To Hand One Business Property of Another,” *Wall St. J.*, Dec. 2, 1998, at A1. By late 2004, it seemed that localities valued eminent domain for retransfer more than ever:

Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren’t tracked nationally, but even retailers themselves acknowledge that the explosive growth of the format in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas—including sites owned by other people.

Dean Starkman, “Cities Use Eminent Domain to Clear Lots for Big-Box Stores,” *Wall St. J.*, Dec. 8, 2004, at B1.

The most comprehensive study of eminent domain for retransfer to private interests was prepared by the Institute for Justice, the libertarian public interest organization that also represented the *Kelo* petitioners. Dana Berliner, *Public Power, Private Gain* (2003) (available at http://www.castlecoalition.org/report/pdf/ED_report.pdf). This analysis, which reviewed condemnation activity in 41 states during the years 1998-2002,

indicated that a total of 10,282 takings were threatened or filed in which the real property involved would be retransferred to a private entity. *Id.* at 2.

I will review briefly the importance of private property rights in historical context, then discusses both the Constitutional and practical infirmities of the *Kelo* decision. I conclude by respectfully suggesting elements that the Committee should incorporate in responsive legislation.

***Kelo* and Our Heritage of Private Property and Liberty**

While the focus of this hearing is on practical aspects of prevention of condemnation that is not truly for public use, it is entirely fitting to begin with first principles—our Anglo-American heritage of private property rights as a component of individual liberty and the intent of the Framers.

The Glorious Revolution of 1688 had affirmed that even the King of England was subject to the rule of law. As the leading thinkers of the English and Scottish Enlightenment understood, government was a compact among individuals for the preservation of their liberties. The best known of those authors to eighteenth century Americans was John Locke, whose *Second Treatise of Government* famously declaimed: “Lives, Liberties, and Estates, which I call by the general Name, *Property*.” William Pitt’s assertion that the “poorest man may in his cottage bid defiance to all the force of the Crown” was the root of John Adams’ declaration to a colonial jury that “an Englishman’s dwelling House is his Castle.”

When their proprietors attempted to lure settlers to the American colonies, they found that the irresistible lure was fee simple title—ownership free and clear. Many who lived under the remnants of feudalism, where tenants still “held of” the nobility, aspired to own absolute title in the land and would resettle in America to achieve that goal. See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 11 (2d ed 1998).

Weeks before the Declaration of Independence, the Preamble of the Virginia Constitution, drafted by George Mason, was unanimously adopted on June 12, 1776. It declared: “All men are created equally free and independent and have certain inherent and natural rights... among which are the enjoyment of life and liberty, with the means of

acquiring and possessing property, and pursuing and obtaining happiness and safety.” As even leading critics of the Lockean perspective have noted, “[t]he great focus of the Framers was the security of basic rights, property in particular.” Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 92 (1990).

While an artificial and incorrect distinction sometimes is drawn between “property rights” and “human rights,” the Supreme Court has noted: “Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Furthermore: “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.” *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Prior to *Kelo*, one could say that private property was limited by the police power, which gives government the authority to protect the health, safety, and welfare of the community from uses of property that are harmful, and by the power of eminent domain, which allowed government to arrogate to itself beneficial uses of private property, conditioned by the separate Constitutional requirements of “just compensation” and “public use.” By equating “public use” with “public benefit,” however, *Kelo* transmutes fee simple ownership into conditional ownership. When an owner fails to use his or her land in a manner that maximizes job creation, tax revenues, or whatever other goal sought by a government entity that is a potential condemner, that private ownership is subject to termination. In effect, the individual whose ownership of property was cherished by the Framers precisely because it facilitated political and economic independence from government now becomes a tenant at will. Under *Kelo*, Americans who assumed that their homes and shops were indeed their castles find that, once again, they “hold of” the government.

Perhaps anticipating the widespread public indignation that would follow its decision, the majority opinion in *Kelo* “emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed,

many States already impose ‘public use’ requirements that are stricter than the federal baseline.” *Kelo*, 125 S.Ct. at 2668. However, as Justice O’Connor responded in her dissent, the States “may or may not choose to impose appropriate limits on economic development takings. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.” *Id.* at 2677 (citation omitted).

Justice O’Connor’s wisdom in this matter becomes more apparent when we observe that while New London is a distressed city, Connecticut is a wealthy state. The path of least resistance for state legislators is to avoid making hard choices concerning taxes, social needs, and among programs competing for public funding. It is easier to encourage distressed cities to profit from condemning homes and small businesses, assembling their small lots into large parcels more attractive to commercial development, and transferring these at nominal cost as a subsidy for businesses that might bring jobs and taxes. In a real sense, then, condemnation for economic development is of direct financial benefit to the State. As the Supreme Court earlier declared, there is the need for more judicial oversight when “the State’s self-interest is at stake.” *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977).

While this subsidy might be a boon for government, it is not free. It comes at the expense of the individuals whose land is condemned. Their sense of community, personal ties, and sentimental attachments to their homes are destroyed, although, strictly speaking, they are not taken. While owners of condemned homes and businesses incur heavy pecuniary and other relocation costs, these also are not part of the taking (and mostly are not reimbursed by statutory relocation benefits). For these reasons, “[c]ompensation in the constitutional sense is . . . not full compensation.” *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988). Since “just compensation” is not full compensation, condemnees suffer uncompensated losses even where the taking is for crucial public needs and meets the traditional criteria for public use. Since at least some losses are impossible to avoid, Congress should not fund takings unless they comport with traditional public use criteria. These criteria include use by government employees, use by the general public, use by regulated transportation companies and utilities required

to serve the general public, and the alleviation of conditions, such as urban blight, that are harmful to the health, safety, and welfare of the public.

In the much-noted *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Michigan Supreme Court concluded that, under the state constitution, the transfer of condemned property is a “public use” when it involved “public necessity of the extreme sort” pertaining to pipelines, railroad rights of way, and the like; where the transferee remained accountable to the public; and where the condemnation itself was based on a matter of public concern, principally removal of blight. *Id.* at 781-783 (citations omitted). *Hathcock* achieved its notoriety by repudiating *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the case giving broad deference to the transfer of an ethnic neighborhood of 1,400 homes, schools, 16 churches, 144 local businesses to General Motors Corp. for a Cadillac assembly plant and generally regarded as the high-water mark of activist condemnation.

***Kelo* Builds Upon Extravagant and “Errant” Dicta**

In his *Kelo* majority opinion, Justice Stevens asserted that, for over a century, the Court has “embraced the broader and more natural interpretation of public use as ‘public purpose.’ . . . We have repeatedly and consistently rejected that narrow test” 125 S.Ct. at 2662-63. The cases Stevens included in his discussion sometimes did contain broad dicta. Nevertheless, a narrow rationale would have explained their holdings. For instance, in *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-162 (1896), the condemnation for purposes of constructing an irrigation ditch did serve the traditional public purpose of providing common infrastructure for the community, since, as Justice Thomas noted in his analysis of the cases in dissent, all landowners affected by the ditch had a right to use it. *Kelo*, 125 S.Ct. at 2683 (Thomas, J., dissenting).

The Court’s leading modern public use cases are *Berman v. Parker*, 348 U.S. 26 (1954), upholding the condemnation of a sound department structure so that the blighted area in which it was located could be comprehensively revitalized, and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), upholding the condemnation of underlying fee interests concentrated in a few eleemosynary trusts and retransferring the titles to the in-

dividual residential parcels to the homeowners who had long-term ground leases. These were justified as a means of ending feudalism in Hawaii.

In *Berman*, the Court’s opinion by Justice Douglas declared: “Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.” 348 U.S. at 33. *Berman* captures the notion that the Public Use Clause is superfluous. Likewise, in *Midkiff*, Justice O’Connor built upon *Berman*, declaring: “The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.” 467 U.S. at 240. Here, again, to say that “public use” has the same bounds as the sovereign’s powers to protect public health, safety, and welfare is to say that it has no independent significance at all.

In her *Kelo* dissent, Justice O’Connor noted the roots of *Berman* and *Midkiff* in blight and the need for land reform, respectively. She repudiated what she termed the “errant language” quoted above, and added: *This language was unnecessary to the specific holdings of those decisions. Berman and Midkiff simply did not put such language to the constitutional test. . . .*” 125 S.Ct. at 2675 (O’Connor, J., dissenting) (emphasis added).

Because each taking [in *Berman* and *Midkiff*] *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo’s and Wilhelmina Dery’s well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government’s power to condemn.

Id. at 2674-75 (O’Connor, J., dissenting).

In short, the dissent of Justice Thomas is a powerful analysis of why the conflation of “public purpose” and “public benefit” is not compelled by the holdings of the Court’s earlier cases. The dissent of Justice O’Connor, the author of *Midkiff*, indicates why it and *Berman*, the Court’s more contemporary public use cases, do not compel that result, either.

The concurring opinion of Justice Kennedy raises important questions about whether, as a matter of constitutional law, the *Kelo* decision should lead courts to defer to *all* types of takings for subsequent retransfer for private revitalization, or only those types less apt to be abused. “There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.” *Id.* at 2670 (Kennedy, J., concurring).

While this inquiry is laudable in principle, it is almost certain to provide little, if any, check on abusive condemnation in practice. The federal courts have been notoriously uninterested in scrutinizing state or local land use decisions for such abuses. The Supreme Court recently reaffirmed its unique “ripeness” test for regulatory takings claims against state or local governments—a test that makes it almost impossible to assert such claims in federal court. *San Remo Hotel, L.P. v. City of San Francisco*, 125 S.Ct. 2491 (2005). See also, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). The lower courts have found it easy to be dismissive of takings and similar property-based Constitutional claims, as well. The U.S. Court of Appeals for the Seventh Circuit, for instance, characterized one property owners claim as a “garden-variety zoning dispute dressed up in the trappings of constitutional law.” *Coniston Corp.*, 844 F.2d at 467. One could hardly imagine, by way of contrast, that the denial of a parade permit would be deemed a “garden variety political dispute.”

The Quest for Bad Motives and Avoidance of Waste in Economic Development Takings is Based on Illusion

The *Kelo* opinions of both Justices Stevens and Kennedy were predicated largely on the ability of state or local legal process to eliminate abusive or “pretextual” takings. The Stevens majority opinion emphasized “the comprehensive character of the [New London redevelopment] plan, the thorough deliberation that preceded its adoption, and the limited scope of our review,” *Kelo*, 125 S.Ct. at 2665, together with the Court’s conclusion that the “plan unquestionably serves a public purpose.” *Id.*

Likewise, Justice Kennedy did not find it necessary in *Kelo* to “conjecture” when heightened judicial review of condemnations for development would be necessary. “The

city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.* at 2670 (Kennedy, J., concurring).

There are at least three problems with these reassurances. The first is the supposition of judicial monitoring that is unlikely to be present. Justice Stevens brushed aside fears of abusive condemnations by stating that courts can confront them "if and when they arise," *Kelo*, 125 S.Ct. at 2667, and grandly quoting Justice Holmes admonition that "[t]he power to tax is not the power to destroy while this Court sits." *Id.* at 2667 n.18 (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)). Yet, as earlier noted, the federal courts in general and the Supreme Court in particular have seemed generally unwilling to sit to sift through the facts of property deprivation cases to see if the police power has been exercised properly.

A second problem is the Court's apparent notion that condemnation for retransfer for private development is a tidy process whereby expert staff utilize professional judgment to discern the need for economic development and revitalization, plans subsequently are formulated, but only after broad input from all segments of the community, and, finally, private businesses are engaged to help in the effort. In most communities, of course, that description would appear rather naive. Political, commercial, and financial elites are personally well acquainted with each other and connected through a myriad of social, civic, and professional relationships. One hand, as the saying goes, washes the other. This does not necessarily imply corruption or overt favoritism. Nevertheless, in the nature of things, the well-connected have a decided edge. Correlatively, the path of least resistance dictates that the raw material from which elites fashion personal and community advantage is the property of the less well off and less well connected. That is why groups such as the NAACP and the Southern Christian Leadership Conference were amici in the Supreme Court in support of Mrs. Kelo. As Justice Thomas recounted, urban renewal long has been associated with the displacement of the elderly, the poor, blacks, and other minorities. *Kelo*, 125 S.Ct. at 2687 (Thomas, J., dissenting).

Even apart from the problem of the powerful displacing the powerless, the *Kelo* majority does not grasp the dynamics that underlie the redevelopment process. Justice O'Connor, whose more acute understanding might in part be attributable to her former experience as a state legislator, put it as follows:

Whatever the details of Justice Kennedy’s as-yet-undisclosed test, it is difficult to envision anyone but the “stupid staff[er]” failing it. The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan’s developer is difficult to disaggregate from the promised public gains in taxes and jobs.

125 S.Ct. at 2675-76 (O’Connor, J., concurring) (citation omitted).

The implication of Justice O’Connor’s observation is that the quest for the “smoking gun”—the *quid pro quo* between the City of New London and Pfizer, in the *Kelo* case—not only is illusive, it is irrelevant. First and foremost, cities like New London, and states like Connecticut, which very actively participated in the New London project, are concerned not about contractual liability, but rather about their reputations as redevelopment partners. If major companies are pleased with the sites they enjoy as the result of condemnation for redevelopment, or, like Pfizer in the *Kelo* case, are pleased with the upscale hotels, executive housing, attractive shops, and other amenities on condemned and redeveloped land adjoining their own parcels, other corporations that might be significant redevelopment partners in the government entity’s future projects will learn of it. Correspondingly, if companies like Pfizer are unhappy, future redevelopment efforts would become more difficult. Everyone involved understands that explicit promises are unnecessary.

If a condemnation for retransfer results in a large increment in amenities, jobs, and tax revenues, should the condemnation nevertheless be invalidated because the redeveloper obtained the primary benefit, or because the local official was acting to benefit the redeveloper instead of his or her employer? Likewise, if the city obtains a poor deal, either in terms of the absolute amount of benefit that it receives, in relation to better deals that were available, or compared with the condemnee’s subjective (and therefore non-compensable) losses, should the city officials’ fidelity to the goal of primary public benefit obviate even an irrational disregard of the negative factors?

One of the examples cited in Justice Stevens’s majority opinion of judicial vigilance in uncovering pretextual condemnations, 125 S.Ct. at 2667 n.17, was *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001). There, the major player in local redevelopment efforts, a leading national “big box” chain,

threatened to leave the city unless the competing 99 Cents Only store was condemned and retransferred to it. While the city's ostensible reasons for the condemnation were inaccurate, there is no indication that its officials were bribed or in any other way acted for other than the city's welfare. The big box chain sought only its own profit, but that hardly distinguishes it from many redevelopers motivated economic incentives. If one looks at the city's economic redevelopment efforts as a whole, was its "pretextual" action necessarily wrong? The problem is that Justice Stevens is looking towards whether the city *or* the redeveloper is the primary beneficiary of the condemnation, whereas the fact is that *both* benefit, in ways often difficult to ascertain in the long run, at the expense of the individual whose home or business is condemned.

Likewise, there is no firm evidence that the immediate community, the State, or the Nation as a whole benefits from condemnation for economic development and that government funds are not wasted. Since there is no way to determine how much the condemnee *really* values his or her residence or business parcel, and since subsidies are convoluted, there is no way to be sure that condemnation and retransfer to private developers adds to, or subtracts from, society's welfare.

Also, subsidies provided by government—often resulting from the destruction of condemnees' enjoyment of their property—may do no more than offset the benefit that a relocating company would naturally enjoy in another location, or its former hometown, perhaps one that itself is suffering from economic distress. In an anomaly involving the Interstate Commerce Clause, the Supreme Court has said that, while a State cannot discriminate against out-of-state businesses, it can subsidize in-state firms or business that relocate from elsewhere. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). See also, Dan T. Coenen, "Business Subsidies and the Dormant Commerce Clause," 107 *Yale L.J.* 965 (1998). Whatever the constitutionality of this robbet-to-pay-Paul behavior, it makes little sense for Congress to subsidize one or both sides of the bidding wars with federal funds for economic development projects.

There is perhaps no better authority on this point than Justice Stevens himself. In a recent speech, he announced that "my opinion of what the law authorized [in *Kelo*] is entirely divorced from my judgment concerning the wisdom of the program that was attacked on constitutional grounds." "My own view," he added, "is that the allocation of

economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials.” Stevens, “Judicial Predilections,” typescript at 10. Congress is free to disregard Justice Stevens’ view of what the Constitution permits, but does not require, in making the legislative choice to reject funding for condemnation for economic development.

Suggestions for Legislation

In order for Congress to fashion an effective response to the unconstrained condemnations countenanced by *Kelo*, it may impose limitations upon its own acts of eminent domain and those of state and local programs receiving federal funds. Given the amorphous nature of “public use” adjudications and the considerable institutional and financial incentives mitigating against change, useful legislation must accomplish several tasks. It must, for purposes of federal agency actions and federally-funded state and local programs, specify (1) what “public use” is, (2) what “public use” is not, (3) a method by which landowners subject to impermissible condemnation might vindicate their own property rights, and (4) a mechanism allowing for more substantial compensation to those losing their homes or business property for purposes of remediation of blight while, at the same time, reducing the financial incentives for miscasting economic development projects as intended for removal of blight.

Limiting the Use of Federal Funds to Condemnation for “Traditional Public Uses” and Excluding Condemnation for Economic Development

The heart of a legislative response to the *Kelo* decision ought to be a ban on the exercise of the eminent domain power by the Federal Government, or by state and local governments using federal funds, for other than “traditional public uses.” In turn, “traditional public uses” should be defined to encompass only (1) facilities used predominantly by government employees, (2) facilities available for use by the general public, (3) facilities owned or operated by regulated transportation companies or utilities whose services are available to the general public, and (4) alleviation of blighted conditions harmful to the public health, safety, or welfare, where the harm is no more than incidentally of an economic nature. This definition (5) specifically should exclude economic development.

The Need for a “Realistic Availability of Owner Participation” Requirement for Blight Condemnation

An important ingredient of a legislative response to *Kelo* is that owners of land condemned for blight have a realistic opportunity to participate in the subsequent redevelopment of the area.

One glaring disparity evident to the justices in the *Kelo* case is the profit made by municipalities and redevelopers on condemned land and the fact that the condemnees are barred from the fruits of improvement of their own lands. Government entities pay low just compensation awards for small residential or business parcels, then assemble them with neighboring parcels acquired through condemnation or its threat, and use the resulting high-value parcels for income or development subsidies. At the *Kelo* oral argument, several of the justices seemed concerned about this. For instance, Justice Kennedy asked whether there were “any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner—the condemnee—can receive some sort of a premium for the development?” *Kelo* Transcript, Feb. 22, 2005, available at 2005 WL 529436 *15. Likewise, Justice Breyer observed: “So going back to Justice Kennedy’s point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn’t have to sell his house? Or is he inevitably worse off? *Id.* at *33-34.

This discrepancy between the city’s gain and the owner’s compensation is important for two reasons. The more obvious one is the unfairness to condemnees that the justices noted. Perhaps the more important reason, from the perspective of dealing with condemnation abuse, is that the discrepancy provides a strong incentive to mischaracterize what are essentially economic revitalization projects as projects for the alleviation of blight.

Given the theory that the governmental purpose for blight condemnation is achieved by the removal of the blighting condition, there should be no objection to giving the condemnee of the subsequently remediated land a stake in its future development. Such a step also would encourage voluntary participation in development projects by individuals and small business owning blighted property, who may not have the where-

withal to improve it independently. An example of such a provision is California Health and Safety Code § 33380, which provides: “An agency shall permit owner participation in the redevelopment of property in the project area in conformity with the redevelopment plan adopted by the legislative body for the area.”

Private Rights of Action

It is imperative that legislation limiting the use of Federal funding for projects involving eminent domain provides for a private right of action to enforce the statutory requirements. A narrowly drafted standing provision would limit the right to sue to property owners seeking to enjoin ongoing or impending condemnation actions with respect to their land, or for damages incurred as the result of a condemnation of their land contrary to statutory requirements.

Standing for such owners is appropriate. Since the object of the legislation would be their protection, they would be the statute’s third party beneficiaries. Standing for such owners also is necessary, since it would be difficult to imagine that those state or local governments that benefit from abuse would enforce the statute’s limitations with vigilance. It also strains credulity to think that the federal government would devote the necessary resources to investigation of such wrongdoing or prosecution of officials. This is especially so given the heavily fact-bound nature of the typical claim.

Plaintiffs alleging the violation of the statute by federal agencies should have the option of filing their complaints for both injunctive relief or money damages in the United States district courts or in the United States Court of Federal Claims. The Supreme Court has described its *Williamson County* ripeness rule as “prudential.” *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733 (1997). “Prudential” rules are rules of justiciability designed to prevent courts from hearing cases better resolved in another forum. When such rules are designed by the Supreme Court, they are not dictated by the Constitution, but, rather, reflect principles of judicial self-governance. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Congress has the power to abolish or modify prudential rules governing justiciability. See, e.g. *Bennett v. Spear*, 520 U.S. 154 162, 164-65 (1997) (stating prudential standing requirements may be “modified or abrogated by Congress.”).

A prime example regarding the ineffectiveness of reform of the Federal Government's stance on property rights if there is no private right of action is the fate of Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 Fed. Reg. 8859 (Mar. 15, 1988). The Order trumpeted recognition that "[r]esponsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights." *Id.* at § 1(c). However, the Order was explicitly "not intended to create any right or benefit, substantive or procedural, enforceable at law. . . ." *Id.* at § 6. Not coincidentally, the Order has proven ineffective.

In 2003, a report was prepared for Congress by the then-General Accounting Office on "Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use," U.S. General Accounting Office Report 03-1015 (Sept. 19, 2003). As a GAO report subheading gingerly put it: "Agencies Report That They Fully Consider the Takings Implications of Their Planned Actions but Provided Little Evidence to Support This Claim." GAO Report at 16.

Conclusion

The hallmark of a society under the rule of law is that individuals may rest secure in their basic rights, and that the possessions and liberties of all are not continually "up for grabs." The Supreme Court's decision in *Kelo v. City of New London* encourages the talented and well-off to enhance their own good, and perhaps the short-run good of their community as well, by putting in play the homes and businesses to which others hold fast. The Supreme Court has ruled as narrowly as possible that this approach to local economic development is constitutional.

If Congress is to discourage what in the long term is socially demoralizing and probably economically inefficient actions by government, it should respond to *Kelo* with legislation that forbids Federal funds from being used for condemnation for other than traditional public purposes. It must tightly define its terms and provide durable enforcement mechanisms.