

PRIVATE PROPERTY RIGHTS PROTECTION ACT OF 2017

JULY 23, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1689]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1689) to protect private property rights, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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Purpose and Summary

H.R. 1689, the Private Property Rights Protection Act, will help eliminate abusive economic development takings in those states

and political subdivisions that elect to receive federal economic development funds.

Background and Need for the Legislation

H.R. 1689 is bipartisan legislation introduced by Representatives Jim Sensenbrenner (R-WI) and Maxine Waters (D-CA) that will help preserve the constitutional protections for private property jeopardized by the Supreme Court's decision in *Kelo v. City of New London*.¹ The bill does this statutorily by conditioning state and local governments' receipt of federal economic development funds on their agreement to refrain from using eminent domain to transfer private property from one private owner to another for the purpose of economic development. If a state, or political subdivision of a state, uses its eminent domain power to take property for private economic development, the state is ineligible to receive federal economic development funds for two fiscal years following a judicial determination that the law has been violated. Additionally, the bill prohibits the federal government from using eminent domain for economic development purposes. The bill's provisions are enforceable through a private right of action or through an action brought by the Attorney General of the United States.

The Fifth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."² The Fifth Amendment imposes two distinct conditions on the exercise of the power of eminent domain: (1) that the taking must be for "public use," and (2) that the owner must be paid "just compensation." As Justice O'Connor has explained, although the Takings Clause presumes that governments are given the authority to take property without an owner's consent, "the just compensation requirement spreads the cost of condemnations and thus 'prevents the public from loading upon one individual more than his just share of the burdens of government.'"³ And, "the public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person."⁴

Unfortunately, the *Kelo* decision effectively "delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment"⁵ and thereby jeopardized the property rights of all Americans. The decision has been resoundingly criticized from all quarters. Indeed, in the wake of *Kelo*, a resolution expressing grave disapproval of the Court's decision was approved by the House of Representatives on June 30, 2005, by a vote of 365–33.⁶ Moreover, public opinion polling showed that Americans from across racial, ethnic, partisan,

¹ 545 U.S. 469 (2005).

² Additionally, as the Takings Clause is a prohibition, not an express grant of power, the use of eminent domain is further restricted by other limits on government power. For instance, the federal government may only exercise its power of eminent domain if it is necessary and proper for the execution of one of its enumerated powers. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

³ *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893)).

⁴ *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).

⁵ *Id.* at 494.

⁶ H. Res. 340, 109th Cong.

and gender lines condemned the decision.⁷ Disapproval of *Kelo* was expressed by 77% of men, 84% of women, 82% of whites, 72% of African-Americans, and 80% of Hispanics. The decision was also opposed by 79% of Democrats, 85% of Republicans, and 83% of Independents. Furthermore, advocacy groups ranging from the NAACP to the Libertarian Party and from the AARP to the American Farm Bureau Federation stood in opposition to the Court's decision.

On November 3, 2005, this widespread condemnation of the *Kelo* decision led 157 Democrats to join 218 of their Republican colleagues in the House to pass the Private Property Rights Protection Act, by a 376 to 38 vote margin.⁸ In subsequent Congresses, the legislation has passed the House by voice vote (in the 112th Congress) and by a vote of 353–65 (in the 113th Congress).

PROPERTY RIGHTS ARE FUNDAMENTAL RIGHTS

The protection of ownership of private property lies at the foundation of American government. “The conviction that private property was essential for self-government and political liberty was long a central tenet of Anglo-American constitutionalism.”⁹ According to John Locke, whose writings were widely read and quoted in the latter half of the eighteenth century and highly influential with the Framers, “[t]he great and *chief end* . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preserving of their Property*.”¹⁰ The Framers, who supported this tradition, “were motivated in large part by the desire to establish safeguards for property. They felt that property rights and liberty were indissolubly linked.”¹¹

James Madison said at the Constitutional Convention that “the primary objects of civil society are the security of property and public safety”¹² and, in the *Federalist Papers*, that “[g]overnment is instituted no less for the protection of property than of . . . individuals.”¹³ Madison believed that a government “which [even] indirectly violates [individuals’] property in their actual possessions, is not a pattern for the United States.”¹⁴ Indeed, according to John Adams, “[p]roperty must be secured or liberty cannot exist.”¹⁵ Ac-

⁷Two national polls conducted in the fall of 2005 showed that 81% and 95% of respondents were opposed to *Kelo*. American Farm Bureau Federation Survey, Oct. 29–Nov. 2, 2005, Zogby International (showing 95 percent of respondents disagreed with the Court’s ruling in *Kelo*); The Saint Index Poll, Oct.–Nov. 2005, Center for Economic and Civic Opinion at the University of Massachusetts/Lowell (showing 81 percent of respondents disagreed with the ruling).

⁸H.R. 4128, 109th Cong.

⁹James W. Ely, Jr., “‘Poor Relation’ Once More: The Supreme Court and the Vanishing Rights of Property Owners,” 2005 *CATO Sup. Ct. Rev.* 39, 40 (2005).

¹⁰John Locke, *Second Treatise* §124 (emphasis added). “It is very clear that the founders shared Locke’s and Blackstone’s affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.” Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 29 (1985); see also James W. Ely, Jr., “The Constitution and Economic Liberty,” 35 *Harv. J. L. & Pub. Pol’y* 27, 29–30 (2012) (“John Locke and the Whig emphasis on the rights of property owners profoundly influenced the founding generation.”).

¹¹Ely, *supra* note 9, at 40.

¹²1 *The Records of the Federal Convention of 1787* at 147 (Max Farrand ed., 1937).

¹³*The Federalist* No. 54 (James Madison); see also James Madison, “Speech in the Virginia Constitutional Convention,” reprinted in *James Madison: Writings* 824 (Jack N. Rakove ed., 1999) (“[T]he rights of persons, and the rights of property are the objects, for the protection of which Government was instituted. These rights cannot well be separated.”).

¹⁴James Madison, *Property* (1792), reprinted in *James Madison: Writings* 515 (Jack N. Rakove ed., 1999).

¹⁵6 John Adams, *The Works of John Adams* 280 (Charles Francis Adams, ed. 1850); see also Arthur Lee, “An Appeal to the Justice and Interests of the People of Great Britain,” in *The*

cordingly, although the word “property” does not appear in the Preamble of the Constitution,

The *Federalist Papers* make it very clear that each objective enumerated in the Preamble involved, in part, the protection of the citizen’s property rights. In fact, using the Madisonian conception that property includes all of the fundamental aspects of the integrity of the human person, life, liberty and property, the whole preamble is about protecting the citizens’ rights in property and property in rights.¹⁶

The early Supreme Court recognized Americans’ fundamental right to private property. In 1795, in an opinion authored by Justice William Paterson, who was a delegate to the Constitutional Convention, the Supreme Court declared, “possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . The preservation of property then is the primary object of the social compact.”¹⁷ Because, as Justice Story would later explain, “government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.”¹⁸

More recent Supreme Court opinions continue to acknowledge the fundamental nature of property rights, recognizing that “[i]ndividual freedom finds tangible expression in property rights.”¹⁹ And that the “right to enjoy property without unlawful deprivation . . . is, in truth a personal right. . . . 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.”²⁰

The sanctity and centrality of private property rights are part of our constitutional design. The Bill of Rights, too, contains several interrelated rights, in addition to the Takings Clause, a fair reading of which anchors a variety of personal liberties on the protection of property rights: the prohibition on infringing people’s right to keep and bear arms (Second Amendment); the prohibition on quartering soldiers on private property (Third Amendment); the prohibition on unreasonable searches and seizures of property (Fourth Amendment); the prohibition on depriving any person of life, liberty, or property without due process of law (Fifth Amendment); the right to trial by jury for controversies exceeding twenty dollars (Seventh Amendment); and the prohibition of excessive bails and fines (Eighth Amendment).²¹

Present Dispute with America 14 (4th ed. 1775) (“The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.”).

¹⁶ Hon. Loren A. Smith, “Life, Liberty, & Whose Property?: An Essay on Property Rights,” 30 *U. Rich. L. Rev.* 1055, 1056 (1996).

¹⁷ *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (1795).

¹⁸ *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

¹⁹ *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

²⁰ *Lynch v. Household Finance*, 405 U.S. 538, 552 (1972).

²¹ See Bernard H. Siegan, *Property and Freedom* 20–21 (1997).

PUBLIC USE AND KELO V. CITY OF NEW LONDON

Prior to *Kelo*, it was generally understood that the public use requirement “embodied the Framers’ understanding that property is a natural, fundamental right, prohibiting the government from ‘tak[ing] property from A. and giv[ing] it to B.’”²² As Justice Story observed, “[w]e know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.”²³ Similarly, the distinguished jurist Thomas M. Cooley, in his landmark 1868 treatise, asserted, “[t]he public use implies a possession, occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the right of government to seize and appropriate it could exist for any other use.”²⁴ Moreover, the Supreme Court, in 1872, declared that “[t]he right of eminent domain nowhere justifies taking property for a private use.”²⁵ Thus, although the public use requirement has traditionally allowed property to be taken for unambiguous public uses, such as for roads, schools, and court-houses, prior to *Kelo* it had been interpreted to prohibit the use of eminent domain for private-to-private transfers of property.

Under pre-*Kelo* Supreme Court precedent, there were generally three categories of takings that complied with the public use requirement. First, it was clear that a government could take land from its owner without his consent and transfer it to public ownership for use as a public road, a public hospital, or a military base.²⁶ Second, Supreme Court precedent recognized that a government could take private property from an owner without his consent and transfer it to private parties, referred to as common carriers, who would then make the property available for the general public’s use, such as with a railroad, a public utility, or a stadium.²⁷ Third, and more controversially, the Supreme Court had interpreted the public use requirement to permit a government to take private property even though the property was subsequently put to private use in two cases in which the previous use of the property was determined to be harmful to the general public.²⁸

The Supreme Court’s decision in *Kelo* greatly weakened the public use requirement by adding a fourth category to this list by upholding the use of eminent domain to take an individual’s private property and give it to another for purely private economic development purposes. As the Court described the reason for the City’s taking of private property in *Kelo*: “the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, there-

²² *Kelo*, 545 U.S. at 510–11 (Thomas, J. dissenting) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

²³ *Wilkinson*, 27 U.S. (2 Pet.) at 658.

²⁴ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 531 (1868).

²⁵ *Olcott v. The Supervisors*, 83 U.S. (15 Wall.) 678, 694 (1872).

²⁶ See, e.g., *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923).

²⁷ See, e.g., *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407 (1992); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916).

²⁸ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

by serving as a catalyst to the area's rejuvenation."²⁹ The Supreme Court held that the properties taken by the City were "[not] blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."³⁰ In fact, the Court refused to even look at the question of whether the area in question was in economic distress: "[the City's] determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."³¹ Thus, because the takings were part of "a 'carefully considered' development plan,"³² they were upheld as constitutional.

In reaching its determination that economic development constitutes a public use, the Court essentially read the words "public use" out of the Constitution. The Court determined that the words "public use" are synonymous with "public purpose" such that the Court was able to pronounce that "[t]he disposition of this case therefore turns on the question of whether the City's development plan serves a *public purpose*."³³

THE DISSENTING OPINIONS IN *KELO*

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, and Justice Thomas in a separate dissent, vehemently criticized the majority opinion. In the words of Justice O'Connor, the majority opinion pronounced that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public."³⁴ According to Justice O'Connor, "the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure."³⁵ However, "[t]he Constitution's text . . . suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking."³⁶

Justice Thomas decried that not only did the *Kelo* majority opinion ignore the original understanding of the public use requirement, but its holding that the courts should defer to the legislature's judgment as to what constitutes a public use was a far cry from the lack of deference given to legislatures when other constitutional rights are at issue:

We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process

²⁹ *Kelo*, 545 U.S. at 473.

³⁰ *Id.* at 475.

³¹ *Id.* at 483.

³² *Id.* at 478.

³³ *Id.* at 480 (emphasis added).

³⁴ *Id.* at 494 (O'Connor, J., dissenting).

³⁵ *Id.* at 501.

³⁶ *Id.* at 510 (Thomas, J., dissenting).

Clause. . . . The Court has elsewhere recognized “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,” when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to “second-guess the City’s considered judgments,” when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners’ homes. Something has gone seriously awry with this Court’s interpretation of the Constitution. *Though citizens are safe from the government in their homes, the homes themselves are not.*³⁷

As Justice O’Connor pointed out, “were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff.”³⁸ Moreover, as is discussed in the next section, the dissenting opinions predicted that the effects of the allowing takings for private economic development would fall most harshly on people of lower economic means, minorities, houses of worship, and farmers.

EMINENT DOMAIN ABUSE DISPROPORTIONATELY AFFECTS THE MOST VULNERABLE

The *Kelo* decision opened the door for virtually any property to be taken by eminent domain for economic development purposes. As Justices O’Connor and Thomas observed in their dissenting opinions, eminent domain abuse falls disproportionately on the poor, minorities, and other groups that are likely to be politically weak. The beneficiaries of the *Kelo* decision, Justice O’Connor wrote, are “likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.”³⁹

After *Kelo*, “[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.”⁴⁰ In fact, according to a study conducted by the Institute for Justice,

Eminent domain project areas include a significantly greater percentage of minority residents (58%) compared to their surrounding communities (45%). Median incomes in project areas are significantly less (\$18,935.71) than the surrounding communities (\$23,113.46), and a significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%) Taken together, more residents in areas targeted by eminent domain—as compared to those in surrounding communities—are ethnic or racial minorities, have completed significantly less education, live on signifi-

³⁷*Id.* at 518 (citations omitted).

³⁸*Id.* at 497 (O’Connor, J., dissenting).

³⁹*Id.* at 505.

⁴⁰*Id.* at 503.

cantly less income, and significantly more of them live at or below the federal poverty line.⁴¹

Other studies show that areas populated by the poor and minorities are far more likely to be targeted for condemnation than other neighborhoods.⁴² These studies confirm Justice Thomas's strong statement in dissent that:

Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages those citizens with disproportionate influence and power in the political process, including large corporations and development firms, to victimize the weak.⁴³

The studies also confirm the concerns raised by the National Association for the Advancement of Colored People, the American Association for Retired Persons, and other non-profit organizations in their amicus brief to the Supreme Court in the *Kelo* case:

Elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged. These groups are not just affected more often by the exercise of eminent domain power, but they are affected differently and more profoundly. Expansion of eminent domain to allow the government or its designated delegate to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more. This will place the burden of economic development on those least able to bear it, exacting economic, psychic, political and social costs. . . . The history of eminent domain is rife with abuse specifically targeting minority neighborhoods. Indeed, the displacement of African-Americans and urban renewal projects were so intertwined that "urban renewal" was often referred to as "Negro removal". . . . Well-cared-for properties owned by minority and elderly residents have repeatedly been taken so that private

⁴¹Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* at 6 (2007).

⁴²See, e.g., Dick Carpenter & John Ross, *Empire State Eminent Domain: Robin Hood in Reverse* (2010) (describing extensive use of eminent domain New York, especially against poor and minority neighborhoods); Dick Carpenter & John Ross, "Testing O'Connor and Thomas: Does The Use Of Eminent Domain Target Poor And Minority Communities?," 46 *Urban Studies* 2447 (2009).

⁴³*Kelo*, 545 U.S. at 521–22 (Thomas, J., dissenting).

enterprises could construct superstores, casinos, hotels, and office parks.⁴⁴

Eminent domain abuse also tends to affect religious groups and their houses of worship and farmers and ranchers disproportionately. Houses of worship and other religious institutions are, by their very nature, non-profit and almost universally tax-exempt. These fundamental characteristics of religious institutions render their property vulnerable to being taken under the rationale approved by the Supreme Court in favor of for-profit, tax-generating businesses. As the Becket Fund for Religious Liberty wrote in its amicus brief in the *Kelo* case, “[r]eligious institutions will always be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses. Such a result is particularly ironic, because religious institutions are generally exempted from taxes precisely because they are deemed to be ‘beneficial and stabilizing influences in community life.’”⁴⁵

Moreover, many other charitable organizations will face similar threats because of their tax-exempt status. Indeed, several charitable organizations have faced condemnation threats in recent years to satisfy municipal appetite for more tax revenue.⁴⁶

In addition, according to the American Farmland Trust, “[w]ith so much farmland on the urban edge and near cities still in steep decline, ex-urban towns could be tempted by [the *Kelo*] ruling to make farmland available for subdivisions.”⁴⁷ As the American Farm Bureau Federation has pointed out, “[a]s valuable as that land is to our members and to the rest of the country, however, it will often be the case that more intense development by other private individuals or entities for other private purposes would yield greater tax revenue to local government.”⁴⁸ Thus, the *Kelo* decision threatens American farmers and ranchers “with the loss of productive farm and ranch land solely to allow someone else to put it to a different private use.”⁴⁹ American farmers and ranchers need their private property rights protected “if they are to find economically feasible ways to use their land and remain in the agriculture business—the business of feeding the American populace.”⁵⁰

⁴⁴ Brief of Amici Curiae National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Association, Inc., and the Southern Christian Leadership Conference in Support of Petitioners, 2004 WL 2811057 at *3–*9.

⁴⁵ Brief of Amicus Curiae the Becket Fund for Religious Liberty, 2004 WL 2787141 at *3 (quoting *Walz v. Comm’r*, 397 U.S. 664, 673 (1970)).

⁴⁶ Brief of Amicus Curiae the Becket Fund for Religious Liberty, 2004 WL 2787141, at *11 n.22 (citing Sue Britt, “Moose Lodge Set for Court Fight; Group to Fight Home Depot Land Takeover,” *Belleville News-Democrat* (Missouri), April 1, 2002, at 1B (Moose Lodge faced condemnation in order to bring a Home Depot to the city); April McClellan-Copeland, Hudson, “American Legion Closer on Hall; City Wants Building to Demolish for Project,” *Plain Dealer* (Cleveland), March 8, 2003, at B3 (American Legion property faced condemnation to make way for small upscale shops, restaurants, and offices); Todd Wright, “Frenchtown Leaders Want Shelter to Move; Roadblock to Revitalization?,” *Tallahassee Democrat*, July 13, 2003, at A1 (describing threatened condemnation of homeless shelter to clear the way for business development); Joseph P. Smith, “Vote on Land Confiscation,” *Daily Journal* (Illinois), October 6, 2004, at 1A (detailing threatened condemnation of a Goodwill thrift store in order to build a shopping center)).

⁴⁷ American Farmland Trust Policy Update (July 6, 2005).

⁴⁸ Brief Amici Curiae of the American Farm Bureau Federation et al., 2004 WL 2787138, at

*2–*4.

⁴⁹ *Id.*

⁵⁰ *Id.*

POST-KELO STATE-LEVEL EMINENT DOMAIN REFORM IS INSUFFICIENT

The *Kelo* decision generated a massive public backlash that led most states to enact some sort of eminent domain reform. Some have argued that these state-level reforms have greatly diminished the problem of eminent domain abuse and, therefore, legislation at the federal level, such as the Private Property Rights Protection Act, is unnecessary. However, many such state-level efforts have been riddled with exceptions to their application that greatly limit their effectiveness. Furthermore, Congress has an obligation to directly protect federal taxpayer dollars to further economic development in states and localities that abuse eminent domain. In short, despite state-level reforms, “eminent domain abuse is still a problem, and federal money continues to support the use of eminent domain for private commercial development.”⁵¹ Accordingly, federal eminent domain legislation, like the Private Property Rights Protection Act, is still needed to curb abusive economic development takings.

CONGRESS’S POWER TO CONDITION FEDERAL FUNDS

Congress’s power to condition the use of federal funds extends to prohibiting states and localities from receiving any federal economic development funds for a specified period of time if such entities abuse their power of eminent domain, even if only state and local funds are used in that abuse of power. Such a broader prohibition is an appropriate use of Congress’s spending power, as the Supreme Court has made clear that “Congress may attach conditions on the receipt of federal funds . . . to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”⁵²

Congress may attach such conditions to the receipt of federal funds provided they are related “to the federal interest in particular national projects or programs” and they are “unambiguous.”⁵³ The Act does nothing more than use Congress’s “spending power to create incentives for States to act in accordance with”⁵⁴ the understanding of “public use” in the Constitution prior to the Supreme Court’s notorious decision in *Kelo v. City of New London*,⁵⁵ which allowed the government to take private property from one person simply to give it to another person or corporation. The fact that the Act’s condition on federal spending applies beyond economic development projects that are directly funded by federal money is simply an acknowledgement that “[m]oney is fungible.”⁵⁶

The bill denies states or localities that abuse eminent domain all federal economic development funds for a period of two years. There is a clear connection between the Federal funds that would be denied and the abuse Congress is intending to prevent: states

⁵¹H.R. 1944, the “Private Property Rights Protection Act”: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. (2013) (statement of Scott Bullock, Senior Attorney, Institute for Justice).

⁵²*South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding as constitutional legislation in which Congress provided that a state would lose 5% of its federal transportation funds unless states mandated a drinking age of 21) (internal quotations omitted).

⁵³*Id.* at 207–208.

⁵⁴*Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012).

⁵⁵545 U.S. 469 (2005).

⁵⁶*Sabri v. United States*, 541 U.S. 600, 606 (2004).

or localities that have abused their eminent domain power by using “economic development” as an improper rationale for a taking should not be trusted with federal taxpayer funds for other “economic development” projects that could themselves result in abusive takings of private property.

Furthermore, to ensure that any conditioning of the use of federal funds is unambiguous, the bill includes a “notification” section that requires the Attorney General to compile a list of the federal laws under which federal economic development funds are distributed and communicate such list to each state and make it available on the Internet. This will put states and localities on notice that if they choose to receive any federal funds under the listed federal laws, they must refrain from abusing their power of eminent domain or risk losing such funds for a period of two years. Moreover, if a locality abuses its eminent domain powers, only the locality, and not the whole state, would lose its economic development funds.

Hearings

The Committee’s Subcommittee on the Constitution and Civil Justice held 1 day of hearings on H.R. 1689 on March 30, 2017. Testimony was received from Jeffrey Redfern, Attorney, Institute for Justice; Tina Barnes, a client of the Institute for Justice in Charlestown, Indiana; and William Buzbee, Professor of Law at the Georgetown University Law Center, with additional material submitted by other interested individual and organizations.

Committee Consideration

On April 25, 2018, the Committee met in open session and ordered the bill (H.R. 1689) favorably reported without amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee’s consideration of H.R. 1689.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1689, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 8, 2018.

Hon. BOB GOODLATTE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate of H.R. 1689, the Private Property Rights Protection Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Robert Reese and Janani Shankaran, who can be reached at 226-2860.

Sincerely,

KEITH HALL.

Enclosure.

cc: Honorable Jerrold Nadler
Ranking Member

H.R. 1689—Private Property Rights Protection Act of 2017

As ordered reported by the House Committee on the Judiciary on
April 25, 2018

H.R. 1689 would deny federal economic development assistance to state or local governments that exercise the power of eminent domain for economic development purposes. (Eminent domain is the right to take private property for public use.) The bill also would prohibit federal agencies from engaging in such practices. Private property owners would be given the right to bring legal actions seeking enforcement of those provisions, and the bill would waive states' constitutional immunity to such suits.

The bill would require the Department of Justice (DOJ) to notify states and the public of how the legislation would affect individuals' property rights and to report to the Congress each year on private rights of action brought against state and local governments. Based on the costs of similar tasks, CBO estimates that additional reporting by the DOJ would cost less than \$500,000; such spending would be subject to the availability of appropriated funds.

The federal government provides economic development assistance to state and local governments through several programs, including the Community Development Block Grant Program, the Social Services Block Grant Program, Economic Development Administration Grants, Department of Agriculture grants and loans, and grants made by several regional commissions. CBO estimates that expenditures from those major programs totaled about \$8.5 billion in 2017 (although, depending on how the term is interpreted, some

of those expenditures may not meet the definition of economic development under the bill).

Many states have amended their constitutions or enacted laws to directly or indirectly prohibit the use of eminent domain for economic development purposes. While data on eminent domain is difficult to obtain at the national level, evidence suggests that its use solely for economic development purposes is minimal compared to other purposes, such as public infrastructure projects (which would be allowed under the bill without penalty). CBO expects that most state and local governments would not risk the loss of federal economic development assistance by exercising the use of eminent domain in situations described by the bill. As a result, CBO estimates that implementing the bill would have no significant net effect on those expenditures—which stem from both discretionary sources (such as the Community Development Block Grant Program) and mandatory sources (such as the Social Services Block Grant Program)—to state and local governments over the next five years.

Enacting H.R. 1689 also could affect direct spending by agencies that are not funded through annual appropriations; therefore, pay-as-you-go procedures apply. The bill would require federal agencies to report to the DOJ on how to bring existing regulations and procedures related to eminent domain into compliance with the bill. However, CBO estimates that the effects would be insignificant. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 1689 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 1689 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA), but it would impose significant new conditions on the receipt of federal economic development assistance by state and local governments. (Such conditions for receiving federal assistance are not considered mandates under UMRA.) Because the conditions would apply to a large pool of funds, the bill effectively would restrict the use of eminent domain by state and local governments, and would limit the ability of local governments to manage land use in their jurisdictions. Further, state and local governments could incur significant legal expenses to respond to private legal actions authorized by the bill. However, CBO cannot predict the magnitude, likelihood, or timing of such effects.

The CBO staff contacts for this estimate are Robert Reese and Janani Shankaran (for federal costs) and Andrew Laughlin (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1689 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee finds that H.R. 1689 contains no directed rule making within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1689 is designed to condition the use of federal funds in a way that limits eminent domain abuse by State and local governments.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1689 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title. Section 1 sets forth the short title of the bill as the Private Property Rights Protection Act.

Sec. 2. Prohibition on Eminent Domain Abuse by States. The Private Property Rights Protection Act protects property owners by restricting the ability of state and local governments to take private property for economic development purposes if they elect to receive federal economic development funds. Specifically, section 2(a) of the bill provides that:

No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property to be used for economic development within 7 years after that exercise, if that State received Federal economic development funds during any fiscal year in which the property is so used or intended to be used.

If a state or political subdivision of a state uses its eminent domain power to transfer private property to other private parties for economic development, that state or political subdivision is ineligible to receive federal economic development funds for two fiscal years following a judicial determination that law has been violated:

A violation of subsection (a) by a State or political subdivision shall render such State or political subdivision ineligible for any Federal economic development funds for a period of 2 fiscal years following a final judgment on the merits by a court of competent jurisdiction that such subsection has been violated

In order to encourage state and local governments to return private property that is taken for economic development to the former private landowner, section 2(c) terminates the ineligibility period if the offending state or local government returns all real property the taking of which the courts determine violated section 2(a).

Sec. 3. Prohibition of Eminent Domain Abuse by the Federal Government. Section 3 prohibits the federal government from exercising its eminent domain power for economic development purposes.

Sec. 4. Private Right of Action. Because previous congressional efforts to restrict the ability of federal, state, and local governments from using certain federal funds for economic development takings proved largely ineffective,⁵⁷ this section provides for a private right of action and an action by the Attorney General of the United States to enforce the bill's provisions. The private right of action provides that:

Any (1) owner of private property whose property is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, or (2) any tenant of property that is subject to eminent domain who suffers injury as a result of a violation of any provision of this Act with respect to that property, may bring an action to enforce any provision of this Act in the appropriate Federal or State court.

Sec. 5. Reporting of Violations to Attorney General. Similarly, the Attorney General enforcement provision in this section provides that if the federal government or a state or local government fails to cure a violation of the Act within 90 days of being notified of the violation, the "Attorney General will bring an action to enforce the Act unless the property owner or tenant who reported the violation has already brought an action to enforce the Act."

Sec. 6. Notification by Attorney General. Section 6 provides measures for notification to States and political subdivisions regarding their obligations under the Act, and to the public regarding their rights under the Act.

Sec. 7. Reports. Section 7 provides that the Attorney General shall make public reports regarding violations of the Act.

Sec. 8. Sense of Congress Regarding Rural America. Section 8 provides a Sense of Congress regarding the vulnerability or rural lands to eminent domain abuse.

Sec. 9. Sense of Congress. Section 9 provides a Sense of Congress regarding the policy of the United States to promote private property ownership and its protection.

Sec. 10. Religious and Nonprofit Organizations. Section 10 provides that no State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property of a religious or other nonprofit organization by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so. The same prohibition applies to the Federal government.

⁵⁷ See Section 726 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, and Independent Agencies Appropriations Act of 2006 (Pub. L. No. 109-115) (prohibiting the use of funds made available by that Act for projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use); Statement of Scott Bullock, *supra* note 53 ("Congress's previous efforts to restrict the use of certain federal funds for eminent domain . . . have unfortunately been ineffective.").

Sec. 11. Report by Federal Agencies on Regulations and Procedures Relating to Eminent Domain. Section 11 provides that not later than 180 days after the date of the enactment of this Act, the head of each Executive department and agency shall review all rules, regulations, and procedures and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with this Act.

Sec. 12. Sense of Congress. Section 12 provides a Sense of Congress regarding Hurricane Katrina, and its principles would apply to other natural disasters as well.

Sec. 13. Disproportionate Impact. Section 13 provides that if a court determines that a violation of this Act has occurred, and that the violation has a disproportionately high impact on the poor or minorities, the Attorney General shall use reasonable efforts to locate former owners and tenants and inform them of the violation and any remedies they may have.

Sec. 14. Definitions. Section 14 provides various definitions and exceptions for terms used in the Act. As the bill is intended to preserve the property rights protections jeopardized by the Supreme Court's decision in *Kelo*, its definition of "economic development" continues to allow the types of takings that have traditionally been considered public uses. Traditional public uses include those in which the condemned land is actually "used" by the public, such as for a public road, school, or military base. The bill also includes express exceptions for the transfer of property to common carriers and public utilities, and for related things like pipelines, and makes reasonable exceptions for the taking of land that is being used in a way that constitutes an immediate threat to public health and safety. Additionally, the bill makes exceptions for: the incidental use of a public property by a private entity, such as a retail establishment on the ground floor in a public property; the acquisition of abandoned property; and for clearing defective chains of title in which no one can be said to really own the property in the first place. However, while the bill does contain reasonable definitions and exceptions, it also includes a rule of construction that provides that its provisions shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of the bill and the Constitution.

Sec. 15. Limitation on Statutory Construction. Section 15 provides that nothing in this Act may be construed to supersede, limit, or otherwise affect any provision of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (which establishes minimum standards for federally funded programs and projects that require the acquisition of real property or displace persons from their homes, businesses, or farms).

Sec. 16. Broad Construction. Section 16 provides that this Act shall be construed in favor of a broad protection of private property rights, to the maximum extent permitted by the terms of this Act and the Constitution.

Sec. 17. Severability and Effective Date. Section 17 provides that the provisions of this Act are severable, and if any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated. It also provides the Act shall take effect upon the first day of the first fiscal year that begins after the date of the enact-

ment of this Act, but shall not apply to any project for which condemnation proceedings have been initiated prior to the date of enactment.

Dissenting Views

Dissenting Views for H.R. 1689. The “Private Property Rights Protection Act of 2017”

While H.R. 1689, the “Private Property Rights Protection Act of 2017,” has the laudable goal of preventing the abuse of the eminent domain power by states and localities to benefit a private party at the expense of another private party, it is nonetheless a flawed and potentially unconstitutional bill. The bill would prohibit states and localities that receive broadly-defined “federal economic development funds” from using the power of eminent domain for the purpose of “economic development,” which it defines as the taking and conveyance of private property from one private owner to another for certain public purposes. The bill would also authorize property owners and tenants injured by a violation of this prohibition to sue the state or local government within seven years after the conclusion of condemnation proceedings. States and localities that fail to comply with this prohibition would lose *all* federal economic development funds for two fiscal years after a final ruling in such a lawsuit that the prohibition had been violated.

The loss of economic development funds for two fiscal years would devastate state and local budgets. Many states and localities depend on federal funding for a significant portion of their budgets, much of which could be deemed “federal economic development funds.” Should the penalty actually be imposed on a jurisdiction, the loss in funding could easily render that jurisdiction insolvent, with catastrophic results. Moreover, by withholding such a broad array of funds, H.R. 1689’s penalty is overly punitive because it would punish an entire state or local community for the government’s action in one eminent domain matter. Even the mere threat that this penalty could be imposed would have a devastating effect on governments’ ability to raise funding by floating bonds.

Further yet, H.R. 1689 violates federalism principles and may be unconstitutional. In particular, the bill imposes conditions on federal funding that may have too attenuated a relationship to any federal interest in how the funds are spent. Also, the threatened penalty is so draconian that it may amount to unconstitutional coercion of the states by the federal government. Additionally, H.R. 1689 provides no adequate remedy for an aggrieved property owner or tenant and offers no mechanism to prevent a prohibited taking from occurring. Instead, the legislation sets up a system where, if the property owner or tenant prevails, the jurisdiction would be subject to crushing penalties, while the aggrieved property owner would get nothing. Finally, most states have amended their laws since 2005 to curtail the use of eminent domain for economic development, obviating the need for this legislation.

For these reasons, and those set out below, we respectfully dissent, and urge the House to reject this dangerously flawed legislation.

DESCRIPTION

H.R. 1689 would restrict the use of eminent domain by states or their political subdivisions. Specifically, it would prohibit states and their political subdivisions from exercising eminent domain for “economic development” if the jurisdiction receives federal economic development funds during any fiscal year in which the property is used or intended to be used for economic development purposes. The bill defines “economic development” as the “taking of private property without the owner’s consent and conveying or leasing that private property from one private owner to another private owner for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health.” Notably, the bill explicitly *excludes* certain private-to-private conveyances from this definition, including those used for the building of roads, aqueducts, pipelines, and public utilities, or for property taken to remove harmful land uses or abandoned property.

Persons whose property has been taken in violation of the Act, or tenants of that property, would have the right to sue the jurisdiction for temporary injunctive relief for a period of seven years following the completion of the taking. A violation of the Act would result in the state or political subdivision’s ineligibility for any federal economic development funds for two fiscal years following a final ruling on the merits. The bill defines “federal economic development funds” to mean “any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.” A jurisdiction could cure the violation by returning the real property that was unlawfully taken, replacing any property that was destroyed, and repairing any damage.

CONCERNS WITH H.R. 1689

I. THE PENALTY IMPOSED BY H.R. 1689 COULD FINANCIALLY CRIPPLE STATES AND LOCALITIES, AND WOULD PUNISH ENTIRE COMMUNITIES FOR THE GOVERNMENT’S ACTIONS

A. *The loss of economic development funds for two years would devastate state and local budgets*

The loss of economic development funds for two fiscal years would devastate state and local budgets. The legislation defines “federal economic development funds” very broadly to mean any “Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of the economies of States or political subdivisions of States.” Many states and localities depend on federal funding for a significant portion of their budgets, much of which could be deemed “federal economic development funds.” Should the penalty actually be imposed on a jurisdiction, the loss in funding could easily render that jurisdiction insolvent, with catastrophic results.

Notably, H.R. 1689 fails to identify which funds qualify as “federal economic development funds.” According to one estimate, federal discretionary and mandatory spending in the form of grants accounts for approximately 22 percent of spending by state and

local governments.¹ While healthcare is the single largest category of grants to state and local governments by federal outlays, transportation, education/training/employment, and community and regional development grants account for federal grant outlays in the approximate amount of \$160 billion.² Many of these grant programs would likely fall under H.R. 1689's expansive definition of "federal economic development funds." Depending on the state or locality, the withheld funds could represent a significant percentage of budgetary spending. Moreover, these grants also often provide critical development capital in economically depressed and chronically underserved communities, through such programs as Community Block Development grants and United States Department of Agriculture (USDA) Rural Development programs. Given the broad potential scope of "federal economic development funds," the loss of such funds could potentially cause states and localities to become insolvent.

Moreover, by withholding such a broad array of funds, H.R. 1689's penalty is overly punitive because it would punish an entire state or local community for the government's action in one eminent domain matter. Under the legislation, any use of eminent domain power for economic development purposes would trigger a penalty that withholds *all* federal economic development funds for that state or locality, not just funds associated with the prohibited taking. The loss of these funds could create dire economic consequences for individuals and communities who have no connection whatsoever to the government's exercise of eminent domain.

Private property ownership is an important right, but enforcing H.R. 1689's penalty would create an extreme and unjust scenario. Not only is the total loss of a state or localities federal economic development funds a disproportionate response to the harm done to the individuals, it punishes *innocent* individuals and communities for their *government's* actions.

B. The potential loss of all federal economic development funds would have a devastating effect even on jurisdictions that never exercised their eminent domain power

H.R. 1689's penalty provision could further harm innocent individuals and communities by impairing the ability of states and municipalities to raise money by issuing bonds. A reasonable bond underwriter would never be confident that a jurisdiction would not, at some future point during the life of the bond, engage in a prohibited taking, or convert a property taken by eminent domain to a prohibited use. Because the concomitant penalties would necessarily affect the ability of the jurisdiction to repay the bond, a prudent underwriter would have to take this possibility into account and charge a substantial risk premium to protect investors. Moreover, a political subdivision would also be at risk that the state or county on which it is dependent for funding and services

¹ Iris J. Lav & Michael Leachman, At Risk: Federal Grants to State and Local Governments, Center on Budget and Policy Priorities (Mar. 13, 2017).

² Robert Jay Dilger, Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues, Congressional Research Service Report. R40638 (May 7, 2018). The Congressional Budget Office estimates that the legislation could impact \$8.5 billion in federal funds in fiscal year 2017. H.R. 1689, the Private Property Rights Protection Act of 2017, Cost Estimate, Congressional Budget Office, at 1 (June 8, 2018). This illustrates one of the fundamental problems with the bill, namely, that its vague terminology and therefore applicability are nearly impossible to predict.

might incur the penalties, or that these units of government would face increased borrowing costs limiting their ability to aid a subdivision. As a result, even where the current administration foresees the use of eminent domain, lenders would still have to lend as if the penalties might be imposed by the action of a future administration. In this additional way, H.R. 1689's penalty provision could harm completely innocent individuals and communities.

II. H.R. 1689'S HEAVY-HANDED PENALTY IS POTENTIALLY UNCONSTITUTIONAL AS IT VIOLATES CONSTRAINTS ON CONGRESSIONAL SPENDING POWERS GROUNDED IN PRESERVING FEDERALISM

H.R. 1689 likely exceeds the constraints the Constitution places on Congress' exercise of its spending clause powers. As the Supreme Court explained in *National Federation of Independent Business v. Sebelius*, a decision which, among other things, struck down the Medicaid expansion of the Affordable Care Act:

We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "General Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.³

Here, there is no necessary connection between the federal economic development funds received and the eminent domain actions H.R. 1689 proponents intend to regulate. Any use of eminent domain power by the state or its localities can trigger the penalty imposed by this bill regardless of whether the project that is the beneficiary of the taking received federal economic development funds. The government or private entity undertaking the project need not have received any funds to trigger the bill's penalties. Instead, the jurisdiction that exercised the eminent domain power need only have received any federal economic development funds for any purpose no matter how unrelated to the project itself, even if the jurisdiction received only a *de minimis* amount of such funds. In short, the condition on the receipt of federal economic development funds is not related to the federal government interests in governing the use of such funds. The connection between the receipt of the funds and the prohibited use of eminent domain power is simply too tenuous, if it exists at all, to satisfy the Court's test in *Sebelius*.

Furthermore, as the Court noted in *Sebelius*, conditional federal spending can constitute unconstitutional coercion if it threatens states with too great of a loss. Here, H.R. 1689's threatened loss of *all* federal economic development funds may be so draconian as to be unconstitutionally coercive.

These constraints on federal spending power serve an important function in our constitutional scheme. Under our federal system, the states and the federal government are equal sovereigns. It is undisputed, however, that the federal government's considerable fi-

³ 132 S. Ct. 2566, 2603–04 (2012).

nancial resources could be used to undermine state sovereignty were it allowed to attach oppressive conditions to the receipt of federal funds to coerce states into adopting federal views in a potentially broad spectrum of public policies. Moreover, the Constitution does not permit Congress to attach even reasonable conditions to federal funds if they are unrelated to the use of those funds because unrelated conditions by definition do not serve the federal government's interest in overseeing how the funds are spent.

In fact, the federal interest in regulating a state's use of eminent domain powers appears to be minimal. At a hearing on this legislation before the Subcommittee on the Constitution and Civil Justice, Minority witness Professor William Buzbee of Georgetown University Law Center noted that the federal government has no special expertise in eminent domain abuse, a problem which creates no cross-border harms and which does not demand the federal government to set standards to prevent "regulatory races to the bottom."⁴ Moreover, he noted that in the wake of the Supreme Court's decision in *Kelo v. City of New London*,⁵ which upheld the constitutionality of a city's use of eminent domain to transfer property from one private owner to another for the purpose of economic development, more than 40 states have enacted provisions to prohibit or restrict eminent domain use for such a purpose. He also testified that regulation of land use in the eminent domain context is highly dependent on local conditions, stating: "Who knows state and local conditions and needs best? Again, not Congress. The diversity of circumstances and different political cultures and aspirations found in different states and localities would normally weigh strongly against uniform federal regulation."⁶

H.R. 1689's condition on the receipt of federal funds is both oppressive and unrelated to Congress' interest in determining how federal funds should be spent. The fact that the condition is attached to enact a "federal" policy on the appropriate, lawful exercise of a state's eminent domain power—a power closely associated with the concept of sovereignty—emphasizes its suspect constitutionality.

III. H.R. 1689 DOES NOT ADEQUATELY PROTECT PROPERTY OWNERS

While the penalties that H.R. 1689 imposes on states and localities are extreme, the protections this bill offers to individual property owners are minimal and ineffective. H.R. 1689 does not permit a property owner to stop an offending taking before it occurs. Rather, a property owner may commence suit under this legislation's private right of action provision only *after* the conclusion of any condemnation proceedings concerning the property at issue. Furthermore, the bill does not provide for any compensation for the plaintiff beyond what is already authorized under applicable law.

At the Committee's markup of H.R. 1689, Ranking Member Jerrold Nadler (D-NY) offered an amendment striking the bill's draconian penalty provision and replacing it with one that would

⁴*The Private Property Rights Protection Act: Hearing on H.R. 1689 before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 115th Cong. 11 (2017) (testimony of Prof. William Buzbee).

⁵545 U.S. 469 (2005).

⁶*The Private Property Rights Protection Act: Hearing on H.R. 1689 before the Subcomm. on the Constitution and Civil Justice, H. Comm. on the Judiciary*, 115th Cong. (2017) (written testimony of Prof. William Buzbee).

permit an aggrieved party to seek an injunction to block a taking *before* it occurs. This amendment would have allowed a party to prevent the harm, rather than force the party to wait until after the damage is done, and inflict a penalty designed to wreak financial ruin on the entire community. The Committee, however, rejected this amendment.

In addition to failing to give aggrieved property owners an adequate remedy, H.R. 1689 also does nothing to prevent “traditional” abuses of the eminent domain power. Abuse of eminent domain powers did not begin with and was never confined to economic development projects of the kind prohibited by this legislation. In fact, some of the greatest abuses cited by critics of the *Kelo* decision have come about in the context of public works, such as highways and other projects which are explicitly permitted by this legislation. Robert Caro, in his seminal work on urban political power, *The Power Broker*, observed:

[D]uring the seven years since the end of World War II, there had been evicted from their homes in New York City for public works . . . some 170,000 persons If the number of persons evicted for public works was eye-opening, so were certain of their characteristics. Their color for example. A remarkably high percentage of them were [African American] or Puerto Rican. Remarkably few of them were white. Although the 1950 census found that only 12 percent of the city’s population was nonwhite, at least 37 percent of the evictees . . . and probably far more were nonwhite.⁷

These public projects have often had a disproportionate impact on low-income and minority communities. Nevertheless, the bill’s definition of a prohibited taking for economic development purposes explicitly exempts these types of public works. Thus, H.R. 1689 fails to curb many of these past abuses.

Finally, H.R. 1689 also fails to prevent the use of eminent domain to seize private property and give it to a private developer for economic development purposes. The legislation would permit the exercise of eminent domain “conveying private property. . . . to an entity, such as a common carrier, that makes the property available to the general public as of right, such as a railroad or public facility.”⁸ Arguably, then, a state or locality could still convey private land from one private party to another private party for the purpose of constructing a sports stadium or shopping mall as both are facilities open to public use.

CONCLUSION

H.R. 1689’s heavy-handed approach to preventing eminent domain abuse punishes faultless communities for the government’s wrongdoing, while failing to provide adequate protections and remedies for individual property owners. In the 13 years since the *Kelo* decision, more than 40 states have enacted legislation to curtail the use of eminent domain for economic development purposes.⁹ Con-

⁷ ROBERT CARO, *THE POWER BROKER* 967–68 (Vintage Books 1974).

⁸ H.R. 1689, 115th Cong. § 14(1)(A)(ii) (2017).

⁹ 50 State Report Card: Tracking Eminent Domain Reform Legislation since *Kelo*, Castle Coalition (last accessed May, 8 2018) available at <http://castlecoalition.org/50-state-report-card>.

gress should not belatedly substitute its judgment for that of state legislatures by enacting this flawed and deeply harmful legislation. For these reasons we urge our colleagues to oppose H.R. 1689.

MR. NADLER.
MS. LOFGREN.
MR. JOHNSON, JR.
MR. RASKIN.
MS. JAYAPAL.

