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Routing

Robin Hood in Reverse

The Case against Economic Development Takings

by Ilya Somin

Executive Summary

The Fifth Amendment and most state constitutions prohibit government from condemning private property except for a "public use." Traditionally, that has forbidden most condemnations that transfer property from one private owner to another.

In recent years, however, many state courts have read "public use" more broadly to allow government to transfer property from one private owner to another simply because the latter is expected to make a greater contribution to the local economy. The most notorious of these decisions was the 1981 *Poletown* decision, in which the Michigan Supreme Court allowed the City of Detroit to uproot some 4,200 people in order to make way for a General Motors plant.

But last summer the Michigan Supreme Court overturned *Poletown*, just after the Connecticut Supreme Court had relied on that precedent to uphold economic development takings in the case of *Kelo v. City of New London*. Shortly thereafter, the U.S. Supreme Court agreed to hear the appeal of the property owners. If the Court decides in favor of the homeowners, the resulting decision will constrain economic development condemnations nationwide.

Federal and state courts should ban economic development takings. Such takings are usually the product of collusion between large and powerful interests and government officials against comparatively powerless local residents. They generally produce far more costs than benefits, as the *Poletown* case dramatically demonstrates. Finally, the economic development rationale renders nearly all property rights insecure because it can justify virtually any taking that benefits a private business interest.

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Introduction

Recent court decisions have rekindled the longstanding debate over whether government can condemn private property and transfer it to new private owners for the sole purpose of promoting "economic development." Both the Fifth Amendment to the federal Constitution and nearly all state constitutions contain a "public use clause."[1] By implication, such clauses prohibit government from taking private property, even when compensation is paid to the owner, except for a "*public* use." But for some time the U.S. Supreme Court and many state courts have allowed that restriction on the condemnation power to atrophy. In 1984, in the leading case of *Hawaii Housing Authority v. Midkiff*, the Supreme Court held that condemnations and private-to-private transfers are acceptable under the public use provision of the takings clause as long as they are "rationally related to a conceivable public purpose."[2] As a result of *Midkiff* and similar decisions in many state courts, local governments have been able to undertake so-called "economic development takings"—transfers from one owner to another, justified simply on the ground that the new owner is expected to make a greater contribution to the local economy. The economic development rationale has allowed the use of eminent domain in a much wider range of cases than the traditional view, which held that condemnation is permitted only for a "public use"—only if it leads to public works projects such as roads or bridges or, at the very least, paves the way for public utilities, such as power lines used by all.

Thus, a recent treatise written by two well-known scholars concludes that "nearly all courts have settled on a broader understanding [of public use] that requires only that the taking yield some public benefit or advantage."[3] That statement was not entirely accurate even at the time it was written, as some state supreme courts continue to follow a more restrictive approach to "public use."[4] Yet for a time it did reflect the dominant view.

More recently, however, the public use issue has been reopened. In particular, less than a year ago, in *County of Wayne v. Hathcock*,[5] the Michigan Supreme Court overruled *Poletown Neighborhood Council v. City of Detroit*,[6] the most notorious of the decisions justifying economic development takings. Shortly thereafter, the U.S. Supreme Court decided to review the Connecticut Supreme Court's decision in *Kelo v. City of New London*,[7] a case upholding the constitutionality of economic development takings under the federal Constitution's takings clause. Unlike *Hathcock*, decided under Michigan's state constitution, *Kelo* raises the prospect that economic development takings might be banned or restricted nationwide.

For more than 20 years, *Poletown* stood as both the most infamous symbol of eminent domain abuse and a precedent justifying nearly unlimited power to condemn private property.[8] As one scholar of the subject put it, "To many observers of differing political viewpoints, the *Poletown* case was a poster child for excessive condemnation."[9] *Poletown* held that condemnations transferring property from one private party to another satisfied the "public use" requirement even if the only claimed public benefit was that of "bolster[ing] the economy."[10] While it was not the first decision upholding so-called "economic development" takings,[11] *Poletown* was by far the most widely publicized and notorious. Its notoriety stemmed from the massive scale and seeming callousness of Detroit's use of eminent domain: destroying an entire neighborhood and condemning the homes of 4,200 people, as well as numerous businesses, churches, and schools, so the land could be transferred to General Motors for the construction of a new factory.[12] Aside from the moral and humanitarian concerns at issue, *Poletown* raised the fear that if "economic development" could justify such massive dislocation, it could be used to rationalize almost any condemnation that benefited a private business in a way that might "bolster the economy."[13]

Thus, the Michigan court's recent decision to overturn *Poletown* was an important

milestone in the history of eminent domain law. Moreover, *Hathcock* and *Kelo* are closely connected. Decided by the Connecticut Supreme Court just a few months before the *Hathcock* opinion was issued, *Kelo* relied heavily on *Poletown* in justifying its conclusion that economic development is a valid "public use." The majority opinion in *Kelo* described *Poletown* as a "landmark case . . . [that] illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit."[14]

In addition to those two highly publicized cases, several lower federal courts and the supreme courts of Illinois and South Carolina have recently invalidated or severely restricted the economic development rationale for takings.[15] Eight state supreme courts now categorically forbid economic development takings,[16] and several others, at the very least, seek to restrict them.[17] But the battle is far from over, even if the judicial tide is now starting to run against economic development takings.

This study argues that courts should ban economic development takings. A categorical ban is the best solution to the problems created by *Poletown* and other such decisions. Several of *Poletown*'s most serious flaws persist in takings decisions in other states—flaws found in *Kelo* itself. At the same time, it is essential to recognize that a ban of the kind the *Hathcock* court fashioned is not a panacea for all abuses of the power of eminent domain on behalf of private interests.

The first part of this study uses the *Poletown* decision as an exemplar of the flaws of economic development takings generally. Such condemnations allow politically powerful interest groups to "capture" the condemnation process for the purpose of enriching themselves at the expense of the poor and politically weak. While economic development takings are not the only condemnations subject to this kind of abuse, they are especially vulnerable to it because "economic development" can justify almost any condemnation that transfers property to a commercial enterprise.

Several other aspects of economic development takings also exacerbate the danger of abuse, including the failure to require the new owners of condemned property to actually provide the economic benefits that supposedly justify condemnation in the first place, and the refusal of courts to consider the social and economic costs of condemnation as well as the claimed benefits.

The *Poletown* majority was not completely oblivious to such dangers, and it sought to mitigate them by requiring "heightened scrutiny" in cases in which "the condemnation power is exercised in a way that benefits specific and identifiable private interests."[18] Unfortunately, the *Poletown* case itself and 23 years of experience since then show that the heightened scrutiny test is not an adequate bulwark against the dangers of economic development takings, and may in some cases actually exacerbate those risks.

The second part of this study shows that even a categorical ban on economic development takings is not a comprehensive solution to the underlying problem of eminent domain abuse. Although *Hathcock* held that "a generalized economic benefit" is not by itself enough to justify condemnation,[19] it does not forbid all condemnations that transfer private property to other private parties. The same is true of similar decisions in other states.

The *Hathcock* court outlined three categories of takings in which private-to-private transfers are still permissible: "public necessity of the extreme sort"; cases in which the condemned property remains subject to "public oversight" after transfer to a private entity; and situations in which the condemned property "is selected because of 'facts of independent public significance'" rather than because of the new owner's uses.[20] Unfortunately, both logic and experience in other states show that these exceptions, particularly the second and third, may be vulnerable to some of the same kinds of interest group exploitation as economic development takings. If not properly

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policed, they could even result in what would amount to a back-door revival of the economic development rationale under a new name.

Dangers of the Economic Development Rationale for Condemnation

A categorical ban on economic development takings is the best way to control abuse of the eminent domain power for the benefit of private interests. A variety of circumstances render these types of condemnations unusually vulnerable to interest group exploitation.

The Economic Development Rationale Can Justify Almost Any Taking That Benefits a Commercial Enterprise

One of the main driving forces behind *Hathcock* is the court's recognition that allowing "economic development" to justify condemnation of private property is almost a blank check for the abuse of government power on behalf of powerful private interests. As the court explained:

> [The] "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.[21]

Economic development can rationalize virtually any taking that benefits a private business because any such entity can claim that its success might "bolster the economy."

That claim is not new. Indeed, it was advanced by the dissenters in *Poletown*. Justice Fitzgerald warned that "the decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently 'public' to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses."[22] The economic benefit criterion, he continued, provides virtually a blank check for takings because "[a]ny business enterprise produces benefits to society at large."[23]

Courts in at least two of the other states that forbid economic development takings have reached the same conclusion. Like the Michigan Supreme Court in *Hathcock*, the supreme court of Illinois recently refused to allow a "contribu[tion] to economic growth in the region" to justify a taking because such a standard could justify virtually any condemnation that benefited private industry since "every lawful business" contributes to economic growth to some degree.[24] The supreme court of Kentucky, which banned the economic development rationale in 1979,[25] did so largely on grounds that, "[w]hen the door is once opened to it, there is no limit that can be drawn."[26] The Kentucky court noted that "[e]very legitimate business, to a greater or lesser extent, indirectly benefits the public by benefiting the people who constitute the state"; thus, the economic development rationale can be used to justify virtually any condemnation that transfers property to private businesses.[27]

Those decisions slightly overstate the case, but their basic logic is sound. Economic development can rationalize virtually any taking that benefits a private business because any such entity can claim that its success might "bolster the economy."[28] It is possible to try to limit the scope of the development rationale by requiring that the economic benefit gained exceeds some preset minimum size. This, indeed, is what the *Poletown* court tried to do when it held that the benefit must be "clear and significant."[29] Yet this amounts to simply saying that any taking benefiting a sufficiently large business enterprise can qualify. Moreover, this rationale actually creates perverse incentives to increase the amount of property condemned for any given project. Although the economic development rationale may not be limitless in the way that *Hathcock*'s more expansive rhetoric implies, neither can it be easily constrained.

Dangers of the Failure to Impose Binding Obligations on New Owners of Condemned Property

The danger of abuse created by the economic development rationale has been greatly exacerbated by courts' failure to require new owners of condemned property to actually provide the economic benefits that justified condemnation in the first place. The lack of such a binding obligation creates incentives both for businesses to look to acquire property "on the cheap" through eminent domain and for public officials to rely on exaggerated claims of economic benefit that neither officials nor businesses have any obligation to live up to. In some cases, this could even lead to the use of "bait and switch" tactics under which the new owners need not use the condemned property for the originally intended purpose at all. Such incentives greatly increase the likelihood that economic development takings will lead to abuse. As the Seventh Circuit recently held, "[t]he public use requirement would be rendered meaningless if it encompassed speculative future public benefits that could accrue only if [the new] landowner chooses to use his property in a beneficial, but not mandated, manner."[30]

Courts in a number of jurisdictions have held that property cannot be condemned without advance assurances that it will be employed only for specified public uses.[31] Unfortunately, *Poletown* and other decisions permitting economic development takings depart from this sensible principle.

Poletown*'s Failure to Impose Binding Legal Obligations on the New Owners of Condemned Property.* The *Poletown* court upheld the massive condemnations in Detroit primarily, if not solely, because of the "clear and significant" economic benefits that the GM factory was expected to provide for the city.[32] Indeed, the majority suggested that if the expected benefits were not so great, "we would hesitate to sanction approval of the project."[33] This fact renders all the more dubious the court's failure to require either the city or GM to ensure that the expected benefits would actually materialize.

Yet, as Justice Ryan emphasized in his dissenting opinion, the court failed to impose even minimal requirements of this kind.[34] *City of Detroit v. Vavro*,[35] a 1989 Michigan Court of Appeals decision interpreting *Poletown*, confirmed Ryan's view, holding that "a careful reading of the *Poletown* decision reveals that . . . a binding commitment [to provide the economic benefits used to justify condemnation] is unnecessary in order to allow the city to make use of eminent domain."[36] Indeed, the *Vavro* court went on to conclude that *Poletown* did not even require the new owner to proceed with the project that was initially used to justify the condemnation, much less proceed with it in a way that provided some predetermined level of economic benefit to the public.[37] Although the *Vavro* court expressed its distaste for those conclusions and even took the unusual step of urging that *Poletown* be overruled,[38] it nonetheless felt compelled to hold that *Poletown* imposes no obligation to actually provide the "clear and significant" economic benefits on which the power to condemn supposedly hinges.[39]

***Inflated claims of economic benefit in* Poletown.** The *Poletown* condemnations dramatically illustrate the danger of taking inflated estimates of economic benefit at face value. The City of Detroit and GM claimed that the construction of a new plant on the expropriated property would create some 6,150 jobs.[40] The estimate of "at least 6,000 jobs" was formally endorsed by both Detroit Mayor Coleman Young and GM Chairman Thomas Murphy.[41] Yet neither the city nor GM had any legal obligation to actually provide the 6,000 jobs or the other economic benefits they had promised.

The danger inherent in this arrangement was apparent even at the time. As Justice Ryan warned in dissent, "there are no guarantees from General Motors about employment levels at the new assembly plant . . . [O]nce [the condemned property] is sold to General Motors, there will be no public control whatsoever over the management, operation, or conduct of the plant to be built

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there."[42] Ryan pointed out that "General Motors will be accountable not to the public, but to its stockholders"; it would therefore make decisions as to the use of the property based solely on stockholder interests, not the city's economic interests, which the condemnation was intended to further.[43] "[O]ne thing is certain," Ryan emphasized, "[t]he level of employment at the new GM plant will be determined by private corporate managers primarily with reference, not to the rate of regional unemployment, but to profit."[44]

Justice Ryan's warning was prescient. The GM plant opened two years late; and, as of 1988—seven years after the *Poletown* condemnations—it employed "no more than 2,500 workers."[45] Even in 1998, at the height of the 1990s economic boom, the plant "still employed only 3,600" workers, less than 60 percent of the promised 6,150.[46]

Inability to Impose Binding Obligations as a Systematic Weakness of the Economic Development Rationale for Condemnation. *Poletown*'s failure to impose any binding obligations on the new owners of property condemned under an economic development rationale was not idiosyncratic. The same problem is evident in other states that permit economic development takings. The *Kelo* case currently before the U.S. Supreme Court is remarkably similar to *Poletown* in this respect. As the dissenting opinion in *Kelo* points out, "[t]here are no assurances of a public use in the development plan [under which the owners' property was condemned]; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized."[47]

Other states that allow economic development condemnations also fail to require either the government or the new owners to actually provide the alleged public benefits.[48] Thus, *Poletown*'s failure is a systematic shortcoming of the economic development rationale generally. It is not an idiosyncratic problem limited to Michigan or to the justices in the *Poletown* majority.

Why would such a systematic failure arise? It is difficult to know for certain, especially since neither the *Poletown* court nor courts in other states upholding the economic development rationale have ever explained their reasons for failing to impose binding obligations on either condemning authorities or the new owners of condemned property.

Nevertheless, it is possible to advance two tentative explanations. First, requiring a binding commitment to the creation of specific economic benefits for the community might severely constrain the discretion of the new owners, thereby possibly leading to inefficient business practices. For example, if GM had been required to ensure that at least 6,000 workers were employed at the Poletown plant, it might have been forced to forgo efficient labor-saving technology. Courts may well be reluctant to intrude so severely on the new owners' business judgment. While this is a serious problem with requiring binding commitments, it also provides a strong argument against permitting economic development takings in the first place. If there is no way to ensure that the promised economic benefits of condemnation are actually provided without creating major inefficiencies, this circumstance supports the *Hathcock* court's conclusion that economic development projects are best left to the private sector.[49]

A second possible explanation is that some judges may have an unjustified faith in the efficacy of the political process and thus may be willing to allow the executive and legislative branches of government to control oversight of development projects. For example, the *Poletown* majority emphasized that courts should defer to legislative judgments of "public purpose."[50] Whatever the general merits of such confidence in the political process, it is seriously misplaced in situations in which politically powerful interest groups can employ the powers of government at the expense of the relatively weak.[51]

Lack of Binding Obligations Increases the Danger of Abuse. In the absence of any binding obligations to deliver on the promised economic benefits, nothing prevents munici-

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palities and private interests from using inflated estimates of economic benefits to justify condemnations and then failing to monitor or provide any such benefits once courts approve the takings and the properties are transferred to their new owners.

Localities and businesses can circumvent the public use requirement simply by overestimating the likely economic benefits of a condemnation. Municipalities may overestimate intentionally, or they may simply take a private business's self-serving estimates at face value. Little prevents municipalities and private interests from abusing the system. Nothing in the *Poletown* heightened scrutiny test can ensure that miscalculations are avoided in future cases. Both business interests and political leaders dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation. Courts are in a poor position to second-guess seemingly plausible financial and employment estimates provided by officials. Yet even if governments and businesses do not engage in deliberate deception, there is a natural tendency to overestimate the public benefits and the likelihood of success of projects that advance one's own private interests.[52] Whether corporate and government leaders deliberately lie or honestly believe that "what is good for General Motors is good for America," the outcome is likely to be the same. This is a particularly serious problem when large-scale condemnations benefiting major corporations are at issue, since such firms can easily generate massive quantities of sometimes dubious "evidence" supporting their position.

Ignoring the Costs of Condemnation

What is especially striking about the *Poletown* decision is the majority's failure to even mention the costs imposed by condemnation on the people of Poletown or the city of Detroit as a whole. That omission not only facilitated a human tragedy but undermined the court's ability to ensure that the takings served a public use in any meaningful sense. Even if we assume that economic development is a legitimate public use justifying condemnation, that rationale cannot and should not justify condemnation in cases in which the resulting project imposes economic costs that greatly exceed its benefits.

***The Economic Costs of* Poletown.** The *Poletown* case dramatically illustrates how the promised economic benefits of condemnations often fail to materialize and are outweighed by the massive costs. Not only did the new GM plant create far fewer jobs than promised, but the limited economic benefits the plant did create were likely overwhelmed by the economic harm the project caused the city.

The "public cost of preparing a site agreeable to . . . General Motors [was] over $200 million,"[53] yet GM paid the city only $8 million to acquire the property.[54] In addition, we must add to the costs borne by the city's taxpayers the economic damage inflicted by the destruction of some 600 businesses and 1,400 residential properties.[55] Although we have no reliable statistics on the number of people employed by the businesses destroyed as a result of the *Poletown* condemnation,[56] it is quite possible that more workers lost than gained jobs as a result of the decision. If we assume, conservatively, that the 600 eliminated businesses employed an average of slightly more than four workers, the total lost work force turns out to be equal to or greater than the 2,500 jobs created at the GM plant by 1988.[57] And this calculation does not consider the jobs and other economic benefits lost as a result of the destruction of numerous nonprofit institutions such as churches, schools, and hospitals. Overall, even if we consider the *Poletown* condemnation's impact in narrowly economic terms, it is likely that it did the people of Detroit more harm than good.

The failure of the *Poletown* takings to produce any clear net economic benefit for the city has significance beyond the case itself. In Poletown, the magnitude of the economic crisis facing Detroit and the detailed public scrutiny given to the city's condemnation decision led the court to conclude that the economic benefit of the taking was particularly "clear and significant."[58] The court even

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went so far as to say, "[i]f the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project."[59] If the claimed "public benefit" of even so "clear" a case as *Poletown* ultimately turned out to be a mirage, it seems unlikely that courts will do any better in weighing claims of economic benefit in more typical cases in which the evidence is less extensive and less closely scrutinized.

Ignoring Costs in Other States. Those states that continue to permit economic development takings even after Poletown's demise also give little or no consideration to the harm they cause. In *Kelo*, the Connecticut Supreme Court admitted that the plaintiff property owners in the case would suffer serious harm if forced out of their homes and businesses.[60] In addition, some $80 million in taxpayer money had been allocated to the development project, without any realistic prospect of a return that rises above a tiny fraction of that amount.[61] Yet the court refused to consider the significance of those massive costs, claiming "the balancing of the benefits and social costs of a particular project is uniquely a legislative function."[62] Contrary to the Connecticut court, the political process often cannot be depended on to give due consideration to the "social costs" of economic development takings; such condemnations generally benefit the politically powerful, while the costs fall on the poor and politically disadvantaged. Yet the approach adopted in *Poletown* and *Kelo* is similar to that followed in other states that permit economic development condemnations.[63]

Nonmonetary Costs of Economic Development Takings. In addition to the economic costs to communities and homeowners, economic development takings also inflict major nonpecuniary costs on their victims by destroying communities and forcing residents to relocate to less desired locations. As Jane Jacobs explained in her classic 1961 study:

> [P]eople who get marked with the planners' hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed . . . . Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment and despair that must be seen to be believed.[64]

Although "fair market value" may compensate homeowners and businesses for part of the financial losses they incur, it does not compensate them for the destruction of community ties, disruption of plans, and psychological harm they suffer.[65] In recent years, scholars from a wide range of ideological perspectives have reinforced Jacobs's early conclusion that development condemnations inflict enormous social costs that go beyond their "economic" impact, narrowly defined.[66] The existence of such large uncompensated costs strengthens the case for stringent scrutiny of economic development takings.

Economic Development Takings and Interest Group "Capture" and Rent-Seeking

Obviously, economic development takings are not the only exercises of the eminent domain power that are vulnerable to capture by interest groups seeking to use the powers of government for their own benefit ("rent-seeking" as it is known in the literature). Indeed, interest group capture of government agencies and rent-seeking are serious dangers for a wide range of government activities.[67] However, there are three major reasons why economic development takings are especially vulnerable to this threat: the nearly limitless applicability of the economic development rationale; severe limits on electoral accountability caused by low transparency; and time horizon problems.

Nearly Limitless Scope. As we have seen, the economic development rationale for takings can potentially justify almost any condemnation that benefits a commercial enterprise. Obviously, such a protean rationale for condemnation exacerbates the danger of interest group capture by greatly increasing

the range of interest groups that can potentially use it. By the same token, it also increases the range of projects that those interest groups can hope to build on condemned land that is transferred to them. Both factors tend to increase the attractiveness of eminent domain condemnations as a means of making political payoffs to powerful interest groups.

Severely Constrained Electoral Accountability. Interest group manipulation of economic development takings could be curtailed if public officials responsible for condemnations faced credible threats of punishment at the polls after they approved condemnations that reward rent-seeking. Unfortunately, such punishment is highly unlikely for two important reasons. First, the calculation of the costs and benefits of most development projects is extremely complex, and it is difficult for ordinary voters to understand whether a particular project is cost-effective or not. Studies have repeatedly shown that most voters have very little knowledge of politics and public policy.[68] Most are often ignorant even of basic facts about the political system. Ignorance is likely to be an even more serious problem in a complex and nontransparent field such as the evaluation of projects promoted by economic development takings.

While the same danger may exist with some traditional takings, these usually at least produce readily observable benefits such as roads and bridges—public goods that can be seen and used by the average voter. By contrast, the alleged public benefit of economic development takings is a generalized contribution to the local economy that the average citizen often will not notice, much less measure. Second, even if voters were much better informed, democratic accountability for economic development takings may often be inadequate. Unlike with most conventional takings, the success or failure of a project made possible by economic development condemnations is usually apparent only years after the condemnation takes place. In the *Poletown* case, the GM factory did not even open until 1985, four years after the 1981 condemnations and two years behind schedule.[69] And not until the late 1980s did it become clear that the plant would produce far fewer than the expected 6,000 jobs.[70]

By that time, of course, public attention had moved on to other issues, and in any event many of the politicians who had approved the 1981 condemnations were no longer in office. Given such limited time horizons, a rational, self-interested Detroit political leader might well have been willing to support the *Poletown* condemnations even if he anticipated that the expected benefits would eventually fail to materialize. By the time that became evident to the public, he might well be out of office in any event. In the meantime, he could benefit from an immediate increase in political support from private interests benefiting from the taking.

Why "Heightened Scrutiny" Was Not Enough

Unlike economic development takings decisions in some other states,[71] the *Poletown* opinion was careful to avoid giving a blank check for all condemnations that might be said to promote development, emphasizing that "[o]ur determination that this project falls within the public purpose . . . does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial base."[72] Instead, the court held that "[w]here, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced."[73] Unfortunately, this "heightened scrutiny" test failed to provide adequate protection against eminent domain abuse, and in one crucial respect actually made the situation worse.

The purpose of the heightened scrutiny test is to ensure that there is a "clear and significant" public benefit resulting from a condemnation. Unfortunately, this created a perverse incentive to increase the amount of property

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condemned rather than reduce it. Since the public "benefit" involved is the "bolstering of the economy," the larger the commercial project served by a condemnation—and the more property owners expropriated as a result—the greater the chance that courts will find that the resulting economic growth is "clear and significant" enough to pass the test.[74]

In fact, Michigan cases applying the heightened scrutiny test displayed precisely this kind of bias in favor of grandiose projects benefiting large corporate enterprises dispossessing large numbers of property owners. To be sure, courts applying the heightened scrutiny test have sometimes invalidated condemnations of small amounts of property intended to benefit individuals and small- to medium-size businesses.[75] But in the main, Michigan courts applying *Poletown* felt themselves compelled to uphold condemnations of large amounts of property for the benefit of major commercial enterprises. Thus, in 1989 the Michigan Court of Appeals reluctantly held that *Poletown* required it to uphold the condemnation of 380 acres of private property in order to "transfer the property to [the] Chrysler Corporation for the construction of a new automobile assembly plant."[76] Ironically, the court of appeals believed that both the Chrysler condemnation and *Poletown* itself constituted "abuse[s] of the power of eminent domain."[77] Nonetheless, it was forced to follow *Poletown* and endorse the validity of the condemnation of large amounts of property for the benefit of Chrysler.[78] A 1995 court of appeals decision reaffirmed this holding.[79] And, of course, in *Poletown* itself, the construction of a large GM plant was held sufficient to justify the displacement of 4,200 people and 600 businesses.[80]

The *Poletown* heightened scrutiny test protects property owners least precisely when they need it most: in cases in which substantial numbers of people are displaced for the benefit of large, politically powerful interest groups. Indeed, interest groups seeking to ensure approval of condemnations under *Poletown* were well advised to plan large construction projects utilizing as much property as possible.

The failure of the heightened scrutiny test to curtail the danger to private property created by the *Poletown* decision is evidenced by the prevalence of private-to-private condemnations in Michigan. According to a recent Institute for Justice study, from 1998 to 2002 alone, at least 138 condemnation proceedings had been filed in Michigan for the purpose of transferring property to private parties; 173 more were threatened.[81] Michigan's record in this respect compares poorly with that of other states. In the five-year period from 1998 to 2002, only two other states had more reported condemnation filings for the purpose of transferring property to private interests.[82] The City of Detroit—the jurisdiction involved in both *Poletown* and *Hathcock*[83]—achieved the dubious distinction of filing more condemnations for private ownership than any other city in the nation in the same time period.[84] Detroit condemnations included takings for casinos and sports teams, and one in which a developer with ties to the mayor was able to obtain a condemnation that resulted in the destruction of an entire African-American neighborhood.[85]

The Institute for Justice figures may be overly conservative. Because they were compiled from news reports and court filings, they likely underestimate the prevalence of condemnations for the benefit of private parties.[86] Many cases are unpublished, and many other condemnations go unreported in the press.[87] Thus, we cannot know the true prevalence of private-to-private condemnations in Michigan, nor can we be completely certain that Michigan really is one of the worst states in this regard. We can be reasonably confident, however, that Michigan's heightened scrutiny requirement failed to reduce such condemnations to levels significantly below those observed elsewhere, including in states that lack heightened scrutiny.[88]

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Condemnation Is Usually Not Necessary to Solve Holdout Problems

The case for a categorical ban on economic development condemnations is further strengthened by the fact that they are usually

not necessary to achieve their ostensible objectives. Large-scale development projects can and do succeed without recourse to the coercive power of eminent domain.

The most common argument for economic development takings is that they are necessary to facilitate economic development in situations in which large-scale projects require assembling a large number of lots owned by numerous individuals. If the coercive mechanisms of eminent domain cannot be employed, the argument goes, a small number of "holdout" owners could either block an important development project or extract an extremely high price for acquiescence.[89]

But as is suggested by the existence of numerous large development projects that did not rely on eminent domain, private developers have a variety of tools for dealing with holdout problems without recourse to government coercion. In many cases, developers can negotiate with individual owners in secret or use specialized "straw man" agents to assemble the properties they need without alerting potential holdouts to the possibility of making a windfall profit by holding the project hostage.[90]

A second mechanism by which developers can prevent holdout problems without recourse to eminent domain is by means of "precommitment" strategies or "most favored nation" contract clauses. The developers can sign contracts with all the owners in an area where they hope to build, under which they commit themselves to paying the same price to all. By this means, the developer successfully "ties his hands" in a way that precludes him from paying inordinately high prices to the last few holdouts, because he would be legally required to pay the same high price to all the previous sellers.[91]

Finally, it is essential to realize that even if there is a small subset of desirable economic development projects that can be undertaken only with the assistance of eminent domain, there is no way of confining the use of economic development condemnations to those rare circumstances. Once the economic development rationale is allowed to justify takings, it can be and has been used by powerful interest groups to facilitate projects that either fail to provide economic benefits that justify their costs or could have been undertaken without resorting to coercion or both. The political power of the beneficiaries of condemnations is likely to be a far more potent determinant of the decision to condemn than any objective economic analysis of holdout problems.

Exceptions That Swallow the Rule? Assessing Possible Exceptions to a Ban on Private-to-Private Condemnations

Hathcock and other decisions striking down the economic development rationale fall well short of a complete ban on private-to-private condemnations. In fact, *Hathcock* laid out three scenarios in which such takings will still be upheld:

1. Where "public necessity of the extreme sort" requires collective action;
2. Where the property remains subject to public oversight after transfer to a private entity; and
3. Where the property is selected because of facts of independent public significance rather than the interests of the private entity to which the property is eventually transferred.[92]

Those three categories deserve close scrutiny because, unless tightly constrained, they could let in by the back door the same kinds of abuses that the *Hathcock* court sought to prevent by closing the front door. Moreover, at least two of the three exceptions are not unique to Michigan but have counterparts in other states that forbid economic development takings. The *Hathcock* court itself did not originate the three but consciously borrowed them from Justice Ryan's

The political power of the beneficiaries of condemnations is likely to be a far more potent determinant of the decision to condemn than any objective economic analysis of holdout problems.

famous *Poletown* dissent.[93] But unlike Ryan in 1981, judges in Michigan and elsewhere now face the task of ensuring that his three exceptions stop short of swallowing the rule.

"Public Necessity of the Extreme Sort"

The public necessity exception seems to be the least problematic of the three, as the *Hathcock* court was careful to confine it within narrow bounds. Quoting Justice Ryan's 1981 language, the court emphasized that this exception is limited to "'enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.'"[94] As an illustrative example, the court cited the classic case of a railroad that "must lay track so that it forms a more or less straight path from point A to point B" and is thereby vulnerable to "holdout" problems such that "[i]f a property owner between points A and B holds out[—]for example by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is halted unless . . . the railroad accedes to the property owner's demands."[95] Even the strongest advocates of judicial enforcement of limits on public use concede that the exercise of eminent domain is defensible in cases involving clear collective action problems of this type.[96]

Government agencies exercising the condemnation power are often "captured" by powerful private interest groups who use those powers for their own benefit rather than that of the general public.

The court was careful to indicate that this rationale cannot be expanded to justify the use of eminent domain for the purpose of promoting ordinary commercial development projects, such as the "business and technology park" at issue in *Hathcock*.[97] "To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe . . . that these constellations required the exercise of eminent domain or any other form of collective public action for their formation."[98]

Nevertheless, there is an important ambiguity in the court's holding here. Is the relevant question whether the project at issue falls into a *category* that owes its "very existence" to "collective action," or is it enough for the government to prove that the *individual project* is impossible without the use of eminent domain?[99] Most likely, the government's burden of proof would be considerably easier if only the latter had to be established, since it is always possible to argue that a given project could be implemented only through use of eminent domain, especially if the relevant evidence is relatively complex. Indeed, often the only way to know for sure if a project requires the use of eminent domain is to forbid its use and then see if the developers go forward anyway, utilizing noncoercive means to acquire the property.

However, the court appears to adopt the more restrictive categorical view. At least, this seems to be the best interpretation of its categorical dismissal of the possibility that "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce" may require "collective public action for their formation."[100] The underlying argument is sound: although it is possible to imagine that a given shopping center or office park might require the use of eminent domain, such institutions are not as dependent on the need to acquire unique sites as roads or railways; thus, assuming a competitive market in land, they are relatively unlikely to be undersupplied as a result of collective action and holdout problems.

Public Oversight and Control

Hathcock's second exception is much more problematic and potentially more dangerous than the first. Intuitively, the court's conclusion that private-to-private takings are permissible "where the property remains subject to public oversight" seems appealing.[101] At least in theory, such "oversight" could reduce the likelihood that the power of eminent domain is being used to facilitate rent-seeking behavior by private interest groups. Several other states that ban economic development takings follow a similar logic, concluding that public oversight or "control" might justify an otherwise impermissible taking.[102]

But *how much* "oversight" is required? For

example, would the *Poletown* condemnation have been permissible if GM had agreed to allow city officials to have a say in the management of the new factory, thereby enabling them to exercise a degree of influence over its economic impact on the city? What if the city owned the factory itself but gave GM a 99-year lease at nominal rent?

A broad interpretation of the public oversight exception would create two interrelated risks, one obvious and one less so. The obvious risk is that a mere fig leaf of public control could be used to justify a condemnation that effectively left the property under the near-total control of the new owners. Under such an approach, the court could have justified the *Poletown* takings by requiring Detroit to conduct periodic inspections of the GM factory, even if city officials were powerless to actually order GM to make any changes in its policies following the inspections.

A more subtle risk is the possibility that oversight powers, however extensive in theory, might prove inadequate in practice. The logic of the "public oversight" exception implicitly assumes that officials will use their oversight powers to ensure that the new owners actually produce the public benefits used to justify condemnation. But this assumption clashes with the underlying dynamic that leads to eminent domain abuse in the first place: the fact that government agencies exercising the condemnation power are often "captured" by powerful private interest groups who use those powers for their own benefit rather than that of the general public. If a local government is captured in this way, it is unlikely to impose meaningful accountability on the new owners of condemned property, even if its "oversight" authority is theoretically extensive. If, on the other hand, the political process has not been captured, it is not clear why the judiciary should require any oversight beyond what legislative and executive officials have determined to be necessary. Thus, the public oversight exception poses serious dangers even if the degree of oversight required by courts is relatively high.

This important point calls into question the adequacy of even very stringent oversight requirements. For example, Washington state courts have adopted a "literal" definition of "private use" that forbids condemnation unless the government retains ownership of the condemned property or creates a right of access for the general public.[103] On the surface, such a requirement seems extremely stringent. Yet consider the possibility that under this view the City of Detroit might have been able to take ownership of the Poletown property while simultaneously allowing GM to use the land in any way it saw fit. Although Detroit's "public oversight" would have been very impressive in theory, in practice the situation would be little different from what actually occurred.

Unfortunately, the *Hathcock* court says very little about the amount and type of "public control" required for a condemnation to fall within the exception. Significantly, the court did hold that the condemnation in that case failed to meet the test because "[n]o formal mechanisms exist to ensure that the businesses that would occupy what are now the defendants' properties will continue to contribute to the health of the economy."[104] That statement implies that the necessary oversight cannot be just a fig leaf but must actually ensure that the public benefit that justified the condemnation—here, a contribution "to the health of the economy"—is actually achieved. If taken seriously, that requirement might invalidate not only takings with minimal oversight provisions but even those more extensive ones that seem unlikely to be used in a way that actually ensures the achievement of the justifying public purpose.

On the other hand, it is difficult to interpret the court's statement with any great confidence. If taken literally, it contradicts the court's own holding—stated just a few pages later—that "a generalized economic benefit" is not, by itself, a valid public use under the state constitution.[105] The court's formulation of the public control exception suggests that "economic benefit" could be a public use so long as there are adequate "formal mecha-

The public oversight exception poses serious dangers even if the degree of oversight required by courts is relatively high.

Many states have expanded the concept of blight to encompass almost any area where economic development could potentially be increased.

nisms" put in place to ensure that the "benefit" is actually created.[106] It is possible that the court merely meant to say that the absence of such oversight mechanisms is sufficient to show that a condemnation does *not* pass muster. On that reading, the converse conclusion—that a condemnation that does include such safeguards must be upheld—does not necessarily follow. A definitive interpretation of the court's meaning must await future cases. One can only hope that the court will not interpret its decision in such a way as to effectively gut the central benefit of overruling *Poletown*: the abolition of economic development takings. And the same holds true for courts in other states that might choose to follow Michigan's lead.

"Facts of Independent Public Significance"

Hathcock's third exception is perhaps the most problematic of the three, even though, like the others, it makes considerable intuitive sense. The exception has special significance, however, because it has parallels in every other state. The basic idea behind the "independent fact" exception, as the court explains, is this: "the act of condemnation *itself*, rather than the use to which the land would eventually be put, was a public use."[107] For that reason, the danger of abuse on behalf of interest groups is minimized because it really doesn't matter what the new owners of the property do with it, so long as the old, harmful uses of the condemned land are done away with.

The court's paradigmatic example of this type of scenario is the removal of "urban blight for the sake of public health and safety."[108] As long as the blight is removed, it can be argued, courts shouldn't care about what happens to the property afterward. Even courts that have invalidated economic development takings endorse this reasoning. For example, the supreme court of Illinois, in a major recent decision rejecting the economic development rationale, was careful to note that "[c]learly, the taking of slums and blighted areas is permitted for purposes of clearance and redevelopment, regardless of the subsequent use of the property."[109] All 50 states and the District of Columbia have statutes that permit condemnation of "blighted" property for redevelopment purposes.[110]

Unfortunately, this line of argument has two serious flaws that reveal the major dangers of *Hathcock*'s "independent facts" exception: overexpansion of the definition of "blight"; and interest group exploitation of the condemnation process, even in areas that really are "blighted."

Overexpansion of the Definition of Blight. The first danger is that the concept of "blight" is vulnerable to creative expansion. Early blight cases in the 1940s and 1950s upheld condemnations in areas that closely fit the layperson's intuitive notion of "blight": dilapidated, dangerous, disease-ridden neighborhoods. For example, in the famous *Berman v. Parker* decision, which upheld blight condemnations under the federal takings clause, the condemned neighborhood was characterized by "[m]iserable and disreputable housing conditions."[111] According to studies cited by the court, "64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating."[112]

In the years since those early cases, many states have expanded the concept of blight to encompass almost any area where economic development could potentially be increased. In the recent *West 41st Street Realty* case, a New York appellate court held that the Times Square area of downtown Manhattan was sufficiently "blighted" to justify the use of eminent domain to condemn land needed to build a new headquarters for the *New York Times*![113] In *City of Las Vegas Downtown Redevelopment Agency v. Pappas*,[114] another recent "blight" decision, the Nevada Supreme Court held that downtown Las Vegas is blighted, thereby permitting condemnation of property for the purpose of building a parking lot servicing a consortium of Las Vegas casinos.[115] The Nevada Supreme Court held that down-

town Las Vegas suffers from "[e]conomic blight [that] involves downward trends in the business community, relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes."[116]

Obviously, virtually any neighborhood, no matter how prosperous, occasionally suffers "downward trends in the business community, . . . business failures, and loss of sales or visitor volumes."[117] If Times Square and downtown Las Vegas are "blighted," it is difficult to think of any place that isn't. As the definition of "blight" expands, so too does the rationale for economic development takings. Almost any large commercial enterprise can argue that condemning land for its benefit might help improve "trends in the business community."[118] The road from the *Berman*-era cases to decisions like *West 41st St.* and *Pappas* exhibits a classic slippery-slope dynamic. That dynamic is difficult to guard against because it is virtually impossible to draw a nonarbitrary distinction between "blighted" and "normal" areas and because powerful political pressures are exerted by development interests that benefit from condemnation.[119]

The same slippage that occurred in New York and Nevada is likely to recur in Michigan and other jurisdictions that follow the *Hathcock* approach unless courts make strong efforts to guard against it early on.[120] Numerous state courts have either adopted very broad definitions of "blight" or deferred to legislative and administrative definitions that reach a similar result.[121] Moreover, in the vast majority of states, courts review blight designations by redevelopment agencies only under deferential standards such as "arbitrary and capricious" behavior, "abuse of discretion," or "clear error."[122] This judicial deference greatly increases the danger of abuse.

Abusive Condemnations in Truly "Blighted" Neighborhoods. The second danger posed by the blight exception is perhaps even more serious. Even in cases in which the condemned property really is blighted under a narrow definition of the term, condemnation of property often serves the interests of developers at the expense of people living or running businesses in the area. Indeed, condemnations in truly blighted neighborhoods have probably caused far more injustice and misery than either *Poletown*-style economic development condemnations in nonblighted areas or condemnations driven by dubious expansions of the definition of "blight."

Large-scale condemnations to alleviate blight began with the "urban renewal" programs of the 1940s and 1950s. Such takings uprooted hundreds of thousands of people, destroyed numerous communities, and inflicted enormous social and economic costs, with few offsetting benefits.[123] A recent study concluded that the use of eminent domain in "urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods and helped entrench racial segregation in the inner city."[124] By 1963, over 600,000 people had lost their homes as a result of urban renewal takings.[125] The vast majority ended up living in worse conditions than they had experienced before their homes were condemned,[126] and many suffered serious nonpecuniary losses as well.[127] More recent blight condemnations have inflicted similar harms on communities and poor property owners.[128]

The sheer scale of forced relocations driven by "urban renewal" condemnations dwarfs the harms inflicted by economic development condemnations in nonblighted areas. Although *Poletown*'s displacement of some 4,200 people was regarded as extreme, it is worth noting that the blight condemnation upheld in *Berman* condemned the homes of more than 5,000 people,[129] and this fact evoked little outrage or surprise among contemporary observers.[130] Sociologist Herbert Gans estimates that, altogether, some one million households were displaced by federally sponsored urban renewal condemnations between 1950 and 1980.[131] Assuming, as economist Martin Anderson did, that the average household size was equal to the 1962 national average of 3.65 people,[132] that means that federally sponsored urban renewal condemnations

Large-scale condemnations to alleviate blight began with the "urban renewal" programs of the 1940s and 1950s. Such takings inflicted enormous social and economic costs.

forcibly relocated some 3.6 million people. And this figure does not include blight condemnations undertaken by state and local governments on their own initiative.[133]

This history points to a serious flaw in the logic endorsed by *Hathcock*: that in blight cases the disposition of condemned property is irrelevant because "the act of condemnation . . . *itself* . . . was a public use."[134] As Herbert Gans points out, the key flaw in urban renewal condemnations is precisely the fact that "redevelopment proceeded from beginning to end on the assumption that the needs of the site residents were of far less importance than the clearing and rebuilding of the site itself."[135] As a result, the residents of blighted neighborhoods suffered massive harm, while their former homes were converted to commercial or residential uses that primarily benefited developers and middle-class city residents.[136] In the *Berman* case, for example, only about 300 of the 5,900 new homes built on the site were affordable to the neighborhood's former residents.[137]

Gans and other reformers recommend that redevelopment programs be redesigned so as to create "benefit" for "the community as a whole and for the people who live in the slum area; not for the redeveloper or his eventual tenants."[138] However, such recommendations are flawed because they assume that benefiting local residents and "the community as a whole" is the real purpose of blight takings to begin with. In reality, such condemnations often deliberately target poor and minority property owners for the purpose of benefiting politically powerful development interests and middle-class homeowners who are expected to move in after the redevelopment process is completed. So many poor African Americans were dispossessed by urban renewal condemnations in the 1950s and 1960s that "[i]n cities across the country urban renewal came to be known as 'Negro removal.'"[139] Urban elites deliberately focused urban renewal condemnations on the poor and African Americans.[140] Between 1949 and 1963, 63 percent of all families displaced by urban renewal condemnations were nonwhite.[141]

Sociologist Herbert Gans estimates that, altogether, some one million households were displaced by federally sponsored urban renewal condemnations between 1950 and 1980.

Results like those should hardly surprise, given the forces unleashed once economic development condemnations are permitted. It is only to be expected that the condemnation process would target those least able to resist it politically, which in many cities is likely to be residents of poor and majority black neighborhoods.

This is not to suggest that the use of condemnation can never be justified as a means of alleviating blight. For example, it may be the case that the elimination of blight involves a collective action problem since no one property owner in a blighted neighborhood will have a strong incentive to make major improvements on his own property unless others in the area do the same. If he is the only one to make improvements, he is unlikely to recoup their full value because the value of his property will still be dragged down by virtue of its location in a generally dilapidated area. On the other hand, if all or most of the other owners make improvements on their holdings, the first owner can reap the benefits of increased land values in the area even if he does nothing to improve his own tract. Thus, some sort of centralized coercion may be defensible in such cases, although it would not necessarily have to take the form of condemnation.

Yet even if condemnation may be justified theoretically in some cases of blight, the interest group dynamics involved suggest that real-world blight condemnations are more likely to be driven by the needs and interests of politically powerful developers and middle-class residents than those of the politically weak citizens of blighted neighborhoods. Thus, even if condemnation may be justifiable in theory, it should still be viewed with great suspicion in practice.

In sum, even in areas where there is "real" blight—perhaps especially there—the condemnation process is likely to be abused for the benefit of private interests at the expense of the poor and politically weak. The *Hathcock* court—like its counterparts in almost every other state—was arguably wrong to allow an apparent blanket exemption for condemna-

tions based on "facts of independent public significance."[142] Future cases will determine exactly how much harm this exception will be allowed to cause.

Conclusion

The recent judicial trend toward increasing skepticism of economic development takings is a positive development. *County of Wayne v. Hathcock* is in itself an important milestone in takings law. Even aside from its doctrinal and precedential value, the decision to overturn *Poletown* has tremendous psychological and symbolic significance. Defenders of nearly unlimited condemnation power will no longer be able to cite *Poletown* as a "landmark case" supporting their position.[143] It is also significant that post-*Hathcock* Michigan is only one of several states that have recently banned economic development takings.[144]

At the same time, *Hathcock* and other similar decisions are not a panacea for eminent domain abuse; their longterm impact will in large part depend on future judicial interpretation. Only time will tell whether the exceptions end up restoring *Poletown* by swallowing the rule. The new direction in public use law is a major step forward, but it is not the end of the road.

Notes

This Policy Analysis is derived in part from a forthcoming article in the MICHIGAN STATE LAW REVIEW Symposium on *County of Wayne v. Hathcock*. See Ilya Somin, Overcoming Poletown: County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICHIGAN STATE LAW REVIEW 1005.

1. *E.g.*, U.S. CONST., AMEND. V.: " . . . nor shall private property be taken for public use without just compensation."

2. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

3. THOMAS MERRILL & DAVID A. DANA, PROPERTY: TAKINGS 196 (2002).

4. *See, e.g*, Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); Merrill v. City of Manchester, 499 A.2d 216, 217-18 (N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); In re Petition of Seattle, 638 P.2d 549, 556–57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory"); Karesh v. City of Charleston, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development); City of Little Rock v. Raines, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); Hogue v. Port of Seattle, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential property so that agency could "devote it to what it considers a higher and better economic use," *id.* at 187); Opinion of the Justices, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use).

5. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

6. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

7. Kelo v. City of New London, 843 A.2d 500, 511 (Conn.) *pet. cert. granted* 125 S. Ct. 27 (2004).

8. Poletown, 304 N.W.2d at 464.

9. James W. Ely Jr., *Can the "Despotic Power" be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, PROBATE & PROP., Nov.–Dec. 2003 at 31, 35.

10. Poletown, 304 N.W.2d at 458.

11. *See, e.g.*, Prince George's County v. Collington Crossroads, 339 A.2d 278, 287 (Md. 1975) (1975 Maryland high court decision holding that "industrial development" qualifies as a legitimate public use).

12. *See* Ilya Somin, *Michigan Should Alter Property Grab Rules*, DET. NEWS, Jan 8, 2004, at 11 (brief description of the facts and background of *Poletown*).

13. Poletown, 304 N.W.2d at 458.

14. Kelo v. City of New London, 843 A.2d 500, 531 n.39 (Conn.) *pet. cert. granted* 125 S. Ct. 27 (2004).

15. See Aaron v. Target Corp., 269 F. Supp. 2d

1162, 1175 (E.D. Mo. 2003) (owner likely to prevail on claim that condemnation of shopping center for transfer to Target so that Target would keep its economic benefits in the city lacked public use); 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129-31 (C.D. Cal. 2001), app. dismissed as moot, 2003 WL 932421 (9th Cir. Mar. 7, 2003) (finding that condemnation to replace one store with another, more lucrative one, was not a public use); Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a "substantial . . . projected economic benefit" cannot justify a "condemnation"); Southwestern Ill. Dev. Auth. v. National City Env., 768 N.E.2d 1, 9-11 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (holding that a "contribu[tion] to economic growth in the region" is not a public use justifying condemnation).

16. The eight states are Arkansas, Florida, Illinois, Kentucky, Michigan, Maine, South Carolina, and Washington. See cases cited in notes 5 and 15 above.

17. *See, e.g.*, Merrill v. City of Manchester, 499 A.2d 216, 217–18 (N.H. 1985) (condemnation for industrial park not a public use where no harmful condition was being eliminated); Opinion of the Justices, 250 N.E.2d 547, 558 (Mass. 1969) (holding that economic benefits of a proposed stadium were not enough of a public use to justify condemnation).

18. Poletown, 304 N.W.2d at 459.

19. County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004).

20. *Id.* at 783.

21. *Id.* at 786 (emphasis in original).

22. Poletown, 304 N.W.2d at 464 (Fitzgerald, J., dissenting).

23. *Id.*

24. Southwestern Ill. Dev. Auth. v. National City Env., 768 N.E.2d 1, 9 (Ill.), *cert. denied*, 537 U.S. 880 (2002).

25. Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979).

26. *Id.* (quoting 26 Am.Jur.2d Eminent Domain § 34, at 684–85 (1966)).

27. *Id.*

28. Poletown, 304 N.W.2d at 458.

29. *Id.*

30. Daniels v. Area Plan Comm'n, 306 F.3d 445, 466 (7th Cir. 2002).

31. *See, e.g.*, Cincinnati v. Vester, 281 U.S. 439, 447–48 (1930) (holding that "private property could not be taken for some independent and undisclosed public use"); County of San Francisco v. Ross, 279 P.2d 529, 532 (Cal. 1955) (en banc) (invalidating agreement that lacked controls over the use of the condemned property because "[s]uch controls are designed to assure that use of the property condemned will be in the public interest"); State ex. rel. Sharp v. 0.62033 Acres of Land, 110 A.2d 1, 6 (Del. Super. Ct. 1954), *aff'd* 112 A.2d 857 (Del. 1955) (holding that "[t]he doctrine of reasonable time prohibits the condemnor from *speculating* as to *possible* needs at some *remote* future time") (emphasis in the original); Alsip Park Dist. v. D & M P'shp, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993) (holding that "[I]f the facts" in a condemnation proceeding "established that . . . [the condemnor] had no ascertainable public need or plan, current or future for the land, defendants [property owner] should prevail"); Mayor of the City of Vicksburg v. Thomas, 645 So. 2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to "private parties subject to conditions to insure that the proposed public use will continue to be served"); Krauter v. Lower Big Blue Nat. Res. Dist., 259 N.W.2d 472, 475–76 (Neb. 1977) (holding that "a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action . . . . The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not sufficient"); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. 1998) (holding that when a "public agency acquires . . . property for the purposes of conveying it to a private developer," there must be advance "assurances that the public interest will be protected").

32. Poletown, 304 N.W.2d at 459.

33. *Id.*

34. Poletown, 304 N.W. 2d at 480 (Ryan, J., dissenting) (noting that "there will be no public control" over the GM plant scheduled to be built on the Poletown site).

35. City of Detroit v. Vavro, 442 N.W.2d 730 (Mich. Ct. App. 1989).

36. *Id.* at 731–32.

37. *See id.* at 731 (upholding a taking transferring property to the Chrysler Corporation for the construction of a new auto assembly plant despite

the fact that "Chrysler . . . has not entered into a binding commitment with the City of Detroit to construct the [plant] following the city's use of the power of eminent domain").

38. *Id*.

39. Poletown, 304 N.W.2d at 459.

40. *Id*. at 467 (Ryan, J., dissenting).

41. *See id*. at 467–68 (citing statement of Mayor Young and reprinting letter from Thomas A. Murphy, Chairman of the Board, General Motors, to Coleman A. Young, (October 8, 1980)).

42. *Id*. at 480.

43. *Id*.

44. *Id.*

45. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, DOLLARS & SENSE, July 2001.

46. *Id*.

47. Kelo, 843 A.2d at 602 (Zarella, J., dissenting).

48. *See, e.g.*, Gen. Bldg. Contractors v. Bd. of Shawnee Cty. Comm'rs, 66 P.3d 873, 881-83 (Kan. 2003) (upholding economic development condemnation for purpose of building industrial facility for later transfer to private owners with whom no development agreements had as yet been reached); City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 373-74 (N.D. 1996) (following *Poletown* approach and concluding that economic development takings will be upheld so long as the "primary object" of the taking is "economic welfare"); City of Minneapolis v. Wurtele, 291 N.W.2d 386, 390 (Minn. 1980) (holding, in a case endorsing the constitutionality of economic development takings, that "a public body's decision that a [condemnation] project is in the public interest is presumed correct unless there is a showing of fraud or undue influence"); Cf. Vitucci v. New York City Sch. Constr. Auth., 289 A.D. 2d 479, 480 (N.Y. App. Div. 2001) (holding that an economic development taking passes muster despite the fact that the property was originally condemned to build a school, because "as long as the initial taking was in good faith, there appears to be little limitation on the condemnor's right to put the property to an alternate use upon the discontinuation of the original planned public purpose"). The Maryland Court of Appeals decision endorsing economic development condemnations was partly based on the fact that the government "will maintain significant control over the industrial park" that the new owner used the condemned property to build. Prince George's County v. Collington Crossroads, 339 A.2d 278, 283 (Md. 1975). However, the control in question involved merely the right to regulate the facility to ensure "health, safety, and welfare, control . . . hazards and nuisances, and guidelines for assuring a high quality physical environment; and a guarantee that part of the project would be used as 'open space.'" *Id*. It did not create a binding obligation to produce any actual economic benefits for the community of the kind that were used to justify condemnation in the first place.

49. *See* Hathcock, 684 N.W.2d at 783–84.

50. Poletown, 304 N.W.2d at 458–59.

51. For more extensive analysis of weaknesses in the political process that might justify stronger judicial review, see Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004) (showing how political ignorance undermines common "countermajoritarian difficulty" arguments against judicial review); Ilya Somin, *Posner's Democratic Pragmatism*, 16 CRITICAL REV. 1 (2004) (showing how political ignorance and interest group exploitation of the political process strengthen the case for aggressive judicial review).

52. *See* STEVEN PINKER, HOW THE MIND WORKS 421–23 (1999) (explaining how deception is more effective if those who seek to deceive actually believe their own lies, as a result of which self-interested self-deception may be a common genetic tendency of humans).

53. Poletown, 304 N.W.2d at 470 (Ryan, J., dissenting).

54. *Id*.

55. Michael, *supra* note 45 at 25. The estimate of the number of businesses eliminated in the Poletown takings is in fact unclear. While Marie Michael cites a figure of 600, other sources cite much lower numbers, in the range of 140 to 160. See Somin, "Overcoming Poletown," (forthcoming) for a more detailed discussion of these conflicting figures. If the lower estimates are correct, it would be much less likely that the number of jobs lost from the businesses shut down was equal to that created by the new factory. However, it is important to remember that the lost jobs were wiped out immediately, whereas the new ones did not begin to appear for four years after the 1981 condemnations, and that the job losses suffered from wiping out the businesses do not include jobs eliminated by the destruction of Poletown's churches, schools, and hospitals, nor those lost as a result of the expulsion of over 4,000 residents.

56. At the time, opponents of the condemnations claimed that 9,000 jobs would be lost as a result of them. *See* John Bukowczyk, *The Decline and Fall of a Detroit Neighborhood:* Poletown vs. GM and the City of Detroit, 41 WASHINGTON & LEE LAW REVIEW 49, 68 (1984). This estimate, like GM's own promise that 6,000 jobs would be created, must be viewed with skepticism.

57. According to data compiled by the city, some one-third of the affected businesses closed down immediately, while two-thirds of the remainder (approximately 40–45 percent of the original total) relocated to other parts of Detroit. BRYAN D. JONES, ET AL., THE SUSTAINING HAND: COMMUNITY (1986). Even if we assume—implausibly—that those relocated businesses that stayed in Detroit continued to employ as many workers as before, the area would have suffered a net job loss if the approximately 350 businesses that either shut down or moved outside of the city employed an average of just seven workers each. And, obviously that does not even consider the job losses and other economic costs inflicted by the destruction of schools, churches, and other nonprofit institutions.

58. Poletown, 304 N.W.2d at 459.

59. *Id*.

60. *See* Kelo v. City of New London, 843 A.2d 500, 511 (Conn.) *pet. cert. granted* 125 S. Ct. 27 (2004) (noting that two of the plaintiffs' families have "lived in their homes for decades and others had put enormous amounts of time, effort, and money into their property").

61. *Id.* at 596-600 (Zarella, J., dissenting).

62. *Id*. at 541 n. 58.

63. See cases cited in note 48, all of which set highly deferential standards for evaluating economic development takings that take little or no account of social costs.

64. JANE JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5 (1961).

65. *See generally* MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004) (describing extensive social and psychological costs of forced relocation); HERBERT J. GANS, THE URBAN VILLAGERS 362–86 (rev. ed. 1982) (same); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN INC: HOW AMERICA REBUILDS CITIES 20–35 (1989) (same); *Cf.* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–85 (1986) (showing how the use of eminent domain systematically imposes "uncompensated subjective losses" because most property owners value their holdings at more than their market value).

66. *See, e.g.*, Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1689–91 (1988) (making the case for limitations on the eminent domain power because of the connection between "personal property" and individuals' sense of personhood and community); David R. E. Aladjem, *Public Use and Treatment as an Equal: An Essay on* Poletown Neighborhood Council v. City of Detroit *and* Hawaii Housing Authority v. Midkiff, 15 ECOLOGY L.Q. 671, 673–74 (1988) (same); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 62 n.60 (1992) (criticizing *Poletown* as a "notorious" decision that "sustained a takeover of a neighborhood by General Motors that ignored huge elements of losses to the private owners who were dispossessed" and arguing for strict judicial constraints on similar condemnations).

67. For a recent summary and analysis of the literature on rent-seeking and capture, see DENNIS C. MUELLER, PUBLIC CHOICE III 337–48 (2003).

68. *See* Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–1304 (2004) (summarizing evidence of extensive voter ignorance); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413, 413-19 (1998) (same).

69. JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 214 (1989).

70. *Id*. at 214–5; Michael, *supra* note 45.

71. *See, e.g.*, cases cited in notes 5 and 15.

72. Poletown, 304 N.W.2d at 459.

73. *Id*.

74. *Id*. at 458–59.

75. *See, e.g.*, Tolksdorff v. Griffith, 626 N.W.2d 163, 167–69 (Mich. 2001) (invalidating legislation that allows condemnation of limited amounts of property in order to build roads for the benefit of landlocked property owners); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638, 643–46 (Mich. 1993) (invalidating taking of two apartment complexes for the benefit of a cable television company); City of Novi v. Robert Adell Children's Funded Trust, 659 N.W.2d 615, 622–29 (Mich. Ct. App. 2003), *App. granted* 687 N.W. 2d 297 (Mich. 2004) (invalidating condemnation for the purpose of building a small spur

line for the benefit of a private corporation); City of Center Line v. Chmelko, 416 N.W.2d 401, 402, 404–407 (1987) (invalidating condemnation of "two parcels of property" in order to facilitate expansion of a "local car dealership").

76. Vavro, 442 N.W.2d at 730.

77. *Id*. at 731.

78. *Id*. at 731–32.

79. *See* Detroit Edison Co. v. City of Detroit, 527 N.W.2d 9, 11 (Mich. Ct. App. 1995) (reaffirming *Vavro*'s conclusion that approval of the Chrysler condemnations is required by *Poletown*).

80. Michael, *supra* note 45.

81. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 100 (2003), http://www.ij.org/publications/castle/. I should mention here that I wrote an amicus brief on behalf of the Institute for Justice and the Mackinac Center for Public Policy in the *Hathcock* case. However, I had no role in the preparation of the empirical study discussed here.

82. *Id*. at 2.

83. The technical plaintiff in *Hathcock* was the County of Wayne rather than the City of Detroit; however, the purpose of the taking was to benefit Detroit by promoting development near the Detroit Metropolitan Airport. County of Wayne v. Hathcock, 2003 WL 1950233 at *1–2 Mich. Ct. App. Apr. 24, 2003), *rev'd*, 684 N.W.2d 765 (Mich. 2004).

84. Berliner, *supra* note 81 at 2.

85. *Id*. at 102–06.

86. *Id*. at 100.

87. *Id.* at 2.

88. Only one other state, Delaware, adopted the *Poletown* heightened scrutiny test. *See* Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227, 231 (Del. 1987) (holding that "when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced").

89. Merrill, *supra* note 65 at 72–81 (describing the "holdout" rationale for use of eminent domain).

90. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 43–44 (2d ed. 1977) (describing these methods).

91. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 35-43, 120-31 (1960) (classic explanation of the ways in which tying one's own hands can be an advantage in negotiations); *see also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective,* 3 TEX. REV. L. & POL. 49, 88–90 (1998) (explaining how precommitment strategies used to prevent holdouts in corporate transactions can be applied to economic development projects that might otherwise need to resort to eminent domain).

92. Hathcock, 684 N.W.2d at 783 (quoting Poletown, 304 N.W.2d at 478–80 (Ryan, J., dissenting).

93. *See id*. at 780-83 (relying extensively on Poletown, 304 N.W.2d at 478–80 (Ryan, J., dissenting).

94. *Id.* at 781 (quoting Poletown, 304 N.W.2d at 478 (Ryan, J., dissenting)).

95. *Id.* at 781–82.

96. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162-69 (1985).

97. Hathcock, 684 N.W.2d at 783.

98. *Id.* at 783–84.

99. *Id*.

100. *Id*. at 783–84.

101. Hathcock, 684 N.W.2d at 783.

102. *See, e.g.*, Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (noting that a sufficiently high degree of "public control" can validate an otherwise illegal taking); Mfg. Housing Communities v. State, 13 P.3d 183, 189–90 (Wash. 2000) (en banc) (holding that Washington law requires a "literal" definition of forbidden "private use" under which the government must exercise a high degree of control over the condemned property in order to legitimate a taking, or allow the general public access to it after transfer to the new owners).

103. Mfg. Housing Communities, 13 P.3d 189–90.

104. Hathcock, 684 N.W.2d at 784.

105. *Id*. at 786–87.

106. *Id*. at 784.

107. *Id*. at 783.

108. *Id.* (citing Poletown, 304 N.W.2d at 478–79 (Ryan, J., dissenting)).

109. Southwestern Ill. Dev. Auth. v. National City Env., 768 N.E.2d 1, 9 (Ill.), *cert. denied*, 537 U.S. 880 (2002)

110. Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 391 (2000).

111. Berman v. Parker 348 U.S. 26, 32 (1954). "Slum clearance" was upheld as a public use to justify condemnation under the Michigan state constitution in 1951. In Re Slum Clearance, 50 N.W.2d 340 (Mich. 1951).

112. *Id*. at 32.

113. West 41st St. Realty v. N.Y. State Urban Dev. Corp., 298 A.D. 2d 1, 3–8 (N.Y. A.D. 1 Dept. 2002), *cert. denied*, 123 S.Ct. 1271 (2003).

114. City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004).

115. *Id*. at 12–15.

116. *Id*. at 13.

117. *Id*.

118. *Id*.

119. *See generally* Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

120. On the history of blight condemnations and their gradual expansion over time, see Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003).

121. *See* Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389 (2000) (discussing numerous criteria for blight applied by statutory definitions and court decisions).

122. *Id.* at 409–13. Several jurisdictions do not allow review of blight designations at all. *Id*. at 413–14.

123. *See, e.g.,* JANE JACOBS, DEATH AND LIFE OF GREAT AMERICAN CITIES 5, 270-90, 311–14 (1961) (describing enormous social and economic costs of urban development takings); MARTIN ANDERSON, THE FEDERAL BULLDOZER (1964) (same); HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 362–84 (2d ed. 1982) (documenting loss of community and economic harms caused by condemnations); SCOTT GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3–5 (1965) (describing various harms caused by urban renewal condemnations); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 47 VA. L. REV. 745 (1971) (describing extensive uncompensated losses suffered by victims of urban renewal condemnations).

124. Pritchett, *supra* note 120 at 47.

125. Anderson, *supra* note 123 at 8, 54.

126. *Id*. at 57–70.

127. *See generally* MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004) (describing extensive social and psychological costs of forced relocation); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN INC: HOW AMERICA REBUILDS CITIES 20–35 (1989) (same).

128. A 1994 summary of the evidence on redevelopment takings concludes:

> In essence, the powers and internal pressures [of the blight condemnation process] create a mandate to gentrify selected areas, resulting in a de facto concentration of poverty elsewhere, preferably outside the decision makers' jurisdiction. Numerous past experiences indicate that the process has been driven by racial animosity as well as by bias against the poor. The net result is that a neighborhood of poor people is replaced by office towers, luxury hotels, or retail centers. The former low-income residents, displaced by the bulldozer or an equally effective increase in rents, must relocate into another area they can—perhaps—afford. The entire process can be viewed as a strategy of poverty concentration and geographical containment to protect the property values—and entertainment choices—of downtown elites.

Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM, 680, 740–41 (1994).

129. Berman, 348 U.S. at 30.

130. *See, e.g.*, Pritchett, *supra* note 120 at 44 (noting

that "none of the briefs in *Berman* even mentioned the fact that the project would uproot thousands of poor blacks"); *cf. Id.* at 37–41 (noting widespread contemporary support for early urban renewal takings despite recognition that thousands of poor residents would be displaced).

131. Gans, *supra* note 123 at 385–86.

132. Anderson, *supra* note 123 at 54.

133. For example, New York City "uprooted" some 250,000 people between 1946 and 1953 alone. Pritchett, *supra* note 120 at 37.

134. Hathcock, 684 N.W.2d at 783.

135. Gans, *supra* note 123 at 368.

136. *Id.* at 369–71, 378–81.

137. HOWARD GILLETTE JR., BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C., 163–64 (1995).

138. Gans, *supra* note 123 at 370.

139. Pritchett, *supra* note 120 at 47.

140. *Id.*

141. Frieden & Sagalyn, *supra* note 127 at 28.

142. Hathcock, 684 N.W.2d at 783.

143. Kelo v. City of New London, 843 A.2d 500, 528 n.39 (Conn.), *pet. cert. granted*, 125 S. Ct. 27 (2004).

144. See cases cited in notes 5 and 15.

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