GEORGE MASON UNIVERSITY SCHOOL of LAW

OVERCOMING *POLETOWN: COUNTY OF WAYNE V. HATHCOCK*, ECONOMIC DEVELOPMENT TAKINGS, AND THE FUTURE OF PUBLIC USE

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05-04

LAW AND ECONOMICS WORKING PAPER SERIES

OVERCOMING *POLETOWN*: *COUNTY OF WAYNE V. HATHCOCK,* ECONOMIC DEVELOPMENT TAKINGS, AND THE FUTURE OF PUBLIC USE

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2004 MICH. ST. L. REV. 1005

TABLE OF CONTENTS

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INTRODUCTION

For over twenty years, *Poletown Neighborhood Council v. City of Detroit* stood as both the most visible symbol of eminent domain abuse and as a precedent justifying nearly unlimited power to condemn private property.[1] "To many observers of differing political viewpoints, the *Poletown* case was a poster child for excessive condemnation."[2] *Poletown* famously held that condemnations transferring property to a private party were for a valid "public use" even if the only claimed public benefit was that of "bolster[ing] the economy."[3]

While it was not the first decision upholding so-called "economic development" takings,[4] *Poletown* was by far the most widely publicized and notorious. The 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 that the land could be transferred to General Motors for the construction of a new factory.[5] Aside

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1. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 464 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

2. James W. Ely, Jr., *Can the "Despotic Power" be Tamed? Reconsidering the Public Use Limitation on Eminent Domain,* 17 PROB. & PROP. 35 (2003).

3. *Poletown*, 304 N.W.2d at 458.

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

5. *See* Ilya Somin, *Michigan Should Alter Property Grab Rules*, DETROIT NEWS, Jan. 8, 2004, at A11 (containing a brief description of the facts and background of *Poletown*). The

from the moral and humanitarian concerns raised by these events, they also led to a 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."[6]

The Michigan Supreme Court's recent decision in *County of Wayne v. Hathcock*[7] overruling *Poletown* is therefore a major development in eminent domain law, not only for Michigan, but nationwide. It takes on added importance in view of the fact that the United States Supreme Court is currently considering the viability of economic development takings under the Public Use Clause of the Fifth Amendment to the federal constitution.[8] *Kelo v. City of New London*–decided by the Connecticut Supreme Court just a few months before the *Hathcock* opinion was issued–relied heavily on *Poletown* in justifying its conclusion that economic development is a valid public use.[9] 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."[10] At the very least, the result in *Hathcock* ensures that *Poletown* can no longer be cited as a legitimating precedent in the way it was by the Connecticut Supreme Court.

This article shows why the *Hathcock* court was right to overrule *Poletown* and hold that economic development is not a public use justifying condemnation of private property. But it also contends that *Hathcock* is not a panacea for all abuses of the power of eminent domain on behalf of private interests. While at this late date, it may be unnecessary to further attack the much-reviled result of *Poletown*, it is still important to understand why a categorical ban on economic development takings is the best solution to the problems *Poletown* and other similar decisions created. If this aspect of *Hathcock* is right, it has important implications for economic development takings doctrine in other states and also for the Supreme Court's consideration

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figure of 4,200 is higher than that given in Justice Fitzgerald's dissent in *Poletown. Poletown,* 304 N.W.2d at 464 n.15 (Fitzgerald, J., dissenting) (quoting figure of 3,438). Justice Fitzgerald's figure is taken from an estimate compiled before the condemnations were actually carried out. Afterwards, the city determined that the total number of people actually relocated was "more than 4,200." See Laura Mansnerus, note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 419 n.50 (1983).

6. *Poletown*, 304 N.W.2d at 458.

7. 684 N.W.2d 765 (Mich. 2004).

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

9. *Kelo,* 843 A.2d at 500.

10. *Id.* at 528 n.39.

of the issue in *Kelo*. Moreover, several of *Poletown's* most serious flaws persist in takings decisions in other states, notably including *Kelo* itself.

Part I uses the *Poletown* decision as a mirror on the flaws of economic development takings more 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 type of condemnation 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 the *Poletown* decision also exacerbated the danger of abuse, including the failure to require the new owners of condemned property to actually provide the economic benefits that supposedly justified condemnation in the first place, and the refusal of the court to consider the social and economic costs of condemnation as well as the claimed benefits.

The *Poletown* majority was not completely oblivious to these dangers, and it sought to mitigate them by requiring "heightened scrutiny" in cases where "the condemnation power is exercised in a way that benefits specific and identifiable private interests . . . ."[11] Unfortunately, both the *Poletown* case itself and twenty-three 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. For these reasons, the *Hathcock* court was right to insist on a categorical ban on economic development takings rather than a continuation of the *Poletown* approach.[12]

Though *Hathcock* held that "a generalized economic benefit" is not by itself enough to justify condemnation,[13] it does not forbid all condemnations that transfer property to private parties. Instead, the court outlined three categories of takings where private-to-private transfers are still permissible: "'public necessity of the extreme sort,'" cases where the condemned property remains "subject to public oversight after transfer to a private entity," and situations "where the [condemned] property is selected because of 'facts of independent public significance,'" rather than the uses to which it will be put to in the future by the new owners.[14] 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 policed, they could even result

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11. *Poletown*, 304 N.W.2d at 459.
12. County of Wayne v. Hathcock, 684 N.W.2d 765, 786-87 (Mich. 2004).
13. *Hathcock*, 684 N.W.2d at 786.
14. *Id*. at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

in what would amount to a back-door revival of the economic development rationale under a new name.

I. *POLETOWN'S* PERILS: THE CASE FOR BANNING ECONOMIC DEVELOPMENT TAKINGS

The most important result of *Hathcock* was the court's decision to forbid the use of economic development as a justification for takings under the Public Use Clause of the Michigan Constitution.[15]

This Part defends the court's resolution of that key issue, and argues that 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. 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.[16]

This claim is not a new one. Indeed, it was advanced by the dissenters in *Poletown.* Justice Fitzgerald's dissent warned that

> [t]he 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.[17]

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15. *Id.* at 786-87. For the Public Use Clause of the Michigan Constitution of 1963, see MICH. CONST. art. X, § 2.

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

17. Poletown Neighborhood Council v. City of Detroit, 304 N.W. 2d 455, 464 (Mich. 2004) (Fitzgerald, J., dissenting).

Fitzgerald argued that that the economic benefit criterion provides virtually a blank check for takings because "[a]ny business enterprise produces benefits to society at large."[18]

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 has recently refused to allow a "contribu[tion] to positive economic growth in the region" to justify takings because such a standard could validate virtually any condemnation that benefited a private business due to the fact that "every lawful business" contributes to economic growth to some degree.[19] The Supreme Court of Kentucky, which banned the economic development rationale in 1979,[20] did so largely on the ground that "'[w]hen the door is once opened to it, there is no limit that can be drawn.'"[21] 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," and that therefore the economic development rationale can be used to justify virtually any condemnation that transfers property to private businesses.[22]

Were these decisions right to claim that the economic development rationale is essentially limitless? The answer is not an unequivocal one. In and of itself, economic development probably can justify almost any taking that benefits a private business because virtually any business enterprise can claim that its success might "bolster the economy."[23] It is, however, possible to try to limit the scope of the development rationale by requiring that the economic benefit exceed some preset minimum size. This is indeed what the *Poletown* court tried to do by holding that the benefit must be "clear and significant."[24] However, this approach still ensures that virtually any taking benefiting a sufficiently large business enterprise can qualify. Moreover, as argued below,[25] such a requirement actually creates perverse incentives to increase the amount of property condemned for any given project.

While the economic development rationale may not be literally limitless in the way that *Hathcock's* more expansive rhetoric implies, it certainly has an enormously broad scope that cannot easily be confined.

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18. *Id.*

19. S.W. Ill. Dev. Auth. v. Nat'l City Envtl L.L.C., 768 N.E.2d 1, 9 (Ill. 2002).

20. Owensboro v. McCormick, 581 S.W.2d 3, 7 (Ky. 1979).

21. *Owensboro*, 581 S.W.2d at 7 (quoting 26 AM. JUR. 2D *Eminent Domain* § 34, at 684-85 (1966)).

22. *Id.*

23. *Poletown*, 304 N.W.2d at 458.

24. *Id.*

25. *See* discussion *infra* Part I.D.

B. Dangers of *Poletown*'s Failure to Impose Binding Obligations on New Owners of Condemned Property

The danger of eminent domain abuse was greatly exacerbated by the *Poletown* court's 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 an incentive for both corporations looking to acquire property through eminent domain and public officials acting to help them to rely on exaggerated claims of economic benefit that they have no obligation to live up to. These circumstances greatly increased the likelihood that economic development takings would 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."[26]

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.[27] Unfortunately, *Poletown* and other decisions permitting economic development takings depart from this sensible principle.

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

27. *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"); City 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 added)); Alsip Park Dist. v. D & M P'ship, 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 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 Natural 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. Law Div. 1998) (holding that when a "public agency acquires . . . property for purposes of conveying it to a private developer," there must be advance "assurances that the public interest will be protected").

1. Poletown*'s Failure to Impose Binding 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.[28] Indeed, the majority suggested that if the expected benefits were not so great, "we would hesitate to sanction approval of the project."[29] 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.[30] *City of Detroit v. Vavro,* 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."[31] Indeed, the court of appeals went on to hold that *Poletown* did not even require the new owner to proceed with the project that was initially used to justify a condemnation at all, much less proceed with it in a way that provided some predetermined level of economic benefit to the public.[32] Although the *Vavro* court expressed its distaste for these conclusions and even took the unusual step of urging that *Poletown* be overruled,[33] 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.[34]

2. *Inflated Claims of Economic Benefit in* Poletown

The history of the *Poletown* condemnation itself illustrates the danger of taking inflated estimates of economic benefit at face value. The city of Detroit and General Motors claimed that the construction of a new plant on the

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28. *Poletown*, 304 N.W.2d at 459.

29. *Id.*

30. *Id.* 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).

31. City of Detroit v. Vavro, 442 N.W.2d 730, 731-32 (Mich. Ct. App. 1989).

32. *See Vavro*, 442 N.W.2d at 731-32 (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").

33. *Id.*

34. *Poletown,* 304 N.W.2d at 459.

expropriated property would create some 6,150 jobs.[35] The estimate of "at least 6,000 jobs" was formally endorsed by both Detroit Mayor Coleman Young and Thomas Murphy, Chairman of the Board of General Motors.[36] 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 his 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, or operation, or conduct of the plant to be built there."[37] Ryan pointed out that "General Motors will be accountable not to the public, but to its stockholders," and would therefore make decisions as to the use of the property based solely on stockholder interests rather than the economic interests of the city that the condemnation was intended to further.[38] "[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."[39]

Justice Ryan's warning was prescient. The GM plant opened two years late,[40] and, as of 1988–seven years after the *Poletown* condemnations–it employed "no more than 2,500 workers."[41] Even in 1998, at the height of the 1990s economic boom, the plant "still employed only 3,600" workers, less than 60% of the promised 6,150.[42]

3. *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

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

36. *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, Mayor, City of Detroit (Oct. 8, 1980)).

37. *Id.* at 480.

38. *Id.*

39. *Id.*

40. BRYAN D. JONES ET AL., THE SUSTAINING HAND: COMMUNITY LEADERSHIP AND CORPORATE POWER 218 (1986). Despite the title, most of this book is devoted to a detailed study of the *Poletown* controversy.

41. Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City?*, DOLLARS & SENSE, July/Aug. 2001, at 25.

42. *Id.*

economic development takings. The Connecticut *Kelo* case currently before the United States 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 Petitioners' 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.[43]

The 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.[44] 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.

However, it is possible to advance two tentative explanations. First, requiring a binding commitment to the creation of specific economic benefits

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43. Kelo v. City of New London, 843 A.2d 500, 602 (Zarella, J., dissenting).

44. *See*, *e.g.*, Gen. Bldg. Contractors v. Bd. of Shawnee County 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*'s 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., 735 N.Y.S.2d 560, 562 (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, Inc., 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 of 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." *Prince George's County*, 339 A.2d at 283. 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.

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 forego 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.[45]

A second possible explanation is that some judges may simply have an unjustied faith in the efficacy of the political process, and thus are 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."[46] Whatever the general merits of such confidence in the political process, it is seriously misplaced in situations where politically powerful interest groups can use the powers of government at the expense of the relatively weak.[47]

4. *Lack of Binding Obligations Increases the Danger of Eminent Domain Abuse*

In the absence of any binding obligations to deliver on the promised economic benefits, nothing prevents municipalities and private interests from using inflated estimates of economic benefit to justify condemnation and then failing to provide any such benefits once courts approve the taking and the property is transferred to its new owners.

Localities and corporations can circumvent it simply by overestimating the likely economic benefits of a condemnation. Municipalities may

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45. *See Hathcock*, 684 N.W.2d at 783-84.

46. *Poletown*, 304 N.W.2d at 458-59.

47. 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) [hereinafter Somin, *Ignorance*] (showing how political ignorance undermines common "countermajoritarian difficulty" arguments against judicial review); Ilya Somin, *Posner's Democratic Pragmatism*, 16 CRITICAL REV. 1 (2004) [hereinafter Somin, *Pragmatism]* (showing how political ignorance and interest group exploitation of the political process strengthen the case for aggressive judicial review).

overestimate intentionally, or they may simply take a private business' self-serving estimates at face value. Little prevents municipalities and private interests from abusing the system. Both corporate 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. Even if governments and corporations do not engage in deliberate deception, there is a natural tendency to overestimate the public benefits and likelihood of success of projects that advance one's own private interests.[48] 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 in cases where large-scale condemnations benefiting major corporations are at issue. The latter can easily generate massive quantities of sometimes dubious "evidence" supporting their position.

C. Ignoring the Costs of Condemnation

One of the most striking aspects of the *Poletown* decision is the majority opinion's failure to even mention the costs imposed by condemnation on either the people of Poletown or the city of Detroit as a whole. This omission not only facilitated a humanitarian tragedy but also undermined the court's ability to ensure that the takings served a public use in any meaningful sense.

1. *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,[49] but the limited economic benefits that the plant did create were likely overwhelmed by the economic harm the condemnations inflicted on the city.

The "public cost of preparing a site agreeable to. . . General Motors [was] over $200 million."[50] GM paid the city only $8 million to acquire the

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48. *See* STEVEN PINKER, HOW THE MIND WORKS 421-23 (1999) (explaining the most effective liars are often those who are convincing precisely because they come to believe their own falsehoods).

49. *See supra* notes 40-41 and accompanying text.

50. *Poletown*, 304 N.W.2d at 469 (Ryan, J., dissenting) (emphasis omitted).

property.[51] In addition to the cost to the city's taxpayers, we must also consider the economic damage inflicted by the destruction of some 600 businesses and 1,400 residential properties.[52] Although we have no reliable estimates of the number of people employed by the businesses destroyed as a result of the *Poletown* condemnations, it is quite possible that more workers lost jobs than gained them as a result of the decision. At the time, opponents of the takings claimed that 9,000 jobs would be lost as a result of the destruction of Poletown.[53] Like GM's claim for the other side, this partisan estimate must be viewed with skepticism. But if we assume that the 600 eliminated businesses employed a modest average of slightly more than four workers, their total lost workforce still turns out to be equal to or greater than the 2,500 jobs created at the GM plant by 1988. According to data complied 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.[54] Even if we assume - implausibly[55] - that those relocated businesses that stayed in the city continued to employ as many workers as before, Detroit would have suffered a net job loss if the approximately 350 businesses that were either shut down or moved outside of the city employed an average of just seven workers each. 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,

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51. *Id.*

52. Michael, *supra* note 41, 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, e.g.* JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 52 (1989) (citing estimate of 144); Joshua P. Rubin, note, *Take the Money and Stay: Industrial Location Incentives And Relational Contracting*, 70 N.Y.U. L. REV. 1277, 131 n.216 (1995) (citing estimate of 160). Possibly, these lower figures represent attempts to count the number of business properties rather than actual businesses (more than one business might operate out of any given tract). 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 4000 residents.

53. John J. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood:* Poletown vs. G.M. and the City of Detroit, 41 WASH. & LEE L. REV. 49, 68 (1984).

54. Figures calculated from JONES ET AL., *supra* note 40, at 100. The remaining 20-25 percent of the original businesses are presumably located outside of the city.

55. The assumption is implausible because the new locations were probably less optimal than the old. If they were not, the businesses would probably have moved there previously. Moreover, some reduction in the scale of operations - and employment - can be expected from the uncompensated loss of good will incurred as a result of forcible relocation.

schools, and hospitals. Overall, even if we consider its impact in narrowly "economic" terms, it is likely that the *Poletown* condemnation did the people of Detroit more harm than good.

As William Fischel correctly emphasizes in his contribution to this symposium,[56] the economic burden on the city was reduced by the fact that much of the $200 million cost of acquiring and preparing the property for GM was borne by the federal and state governments. All told, federal loans and grants accounted for about $150 million and state government funds for over $30 million of the total of $203 million.[57] Fischel is absolutely right to argue that such misplaced federal and state largesse increases the incentives of local governments to engage in abusive condemnations.[58] However, he is perhaps too quick to assume that cities would not undertake them in the absence of outside subsidies.

Some 50 percent of the federal and state funds made available to Detroit came in the form of loans rather than grants, and their repayment placed a heavy fiscal burden on the city.[59] Moreover, the cost of acquiring the property turned out to be some $46 million higher than the original estimate of $203 million, further increasing the city's burden.[60] It is also important to note that the city and its residents never received any outside compensation for the economic damage caused by the loss of Poletown's businesses, schools, and churches. Finally, if the federal and state governments were prepared to provide Detroit with massive funding for the Poletown project, they might also have been willing to provide it for other development projects that did not inflict such high economic costs on the community and perhaps did not require the use of eminent domain on such an enormous scale.[61]

The failure of the *Poletown* takings to produce any clear net economic benefit for the city has significance beyond that 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

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56. William A. Fischel, *The Political Economy of Public Use in* Poletown: *How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929.

57. JONES ET AL., *supra* note 40, at 96.

58. Fischel, *supra* note 56, at 942-45. I have myself criticized federal grants to state governments on related, though distinct grounds. *See* Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002).

59. JONES ET AL., *supra* note 40, at 96-97, 219; Bukowczyk, *supra* note 53, at 61.

60. JONES ET AL., *supra* note 40 at 219.

61. Professor Fischel contends that the federal government was only willing to fund building projects. Fischel, *supra* note 56, at 945-46. Even if this is correct, it is possible that Detroit could have used federal funds to build a variety of other types of facilities that might have contributed to local economic development.

that the economic benefit of the taking was particularly "clear and significant . . . ."[62] The court even went so far as to say that "[i]f the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project."[63] 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 where the evidence is less extensive and less closely scrutinized.

2. *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.[64] 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 commercial properties.[65] In addition, some $80 million in taxpayer money had been allocated to the development project of which the condemnations were a part, without any realistic prospect of a return that rises above a tiny fraction of this amount.[66] Yet the court refused to even consider the significance of these massive costs, claiming "the balancing of the benefits and social costs of a particular project is uniquely a legislative function."[67] 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. Unfortunately, however, the approach adopted in *Poletown* and *Kelo* has also been followed by other states that permit economic development condemnations.[68]

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62. *Poletown*, 304 N.W.2d at 459.

63. *Id.*

64. See cases cited *supra* note 43, all of which set highly deferential standards for evaluating economic development takings that take little or no account of social costs.

65. *Kelo*, 843 A.2d at 511 (noting that two of the plaintiffs' families have "lived in their homes for decades" and others had put enormous amounts of "time, money and effort," into their property).

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

67. *Id.* at 541 n.58.

68. *See* cases cited in note 44, all of which set highly deferential standards for evaluating economic development takings that take little or no account of social costs.

3. *Nonpecuniary Costs of 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 heard and seen to be believed.[69]

While "fair market value" may compensate homeowners for a part of the financial loss they suffer, it does not repay them for the destruction of community ties, disruption of plans, and psychological harms they suffer.[70] In recent years, scholars from a wide range of ideological perspectives have reinforced Jacobs' early conclusion that development condemnations inflict enormous social costs that go beyond their "economic" impact, narrowly defined.[71] Although the *Poletown* compensation was more generous than that offered to most other victims of urban condemnations,[72] it still fell well short

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

70. *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: GROUP AND CLASS IN THE LIFE OF ITALIAN AMERICANS 362-86 (rev. ed. 1982); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN INC.: HOW AMERICA REBUILDS CITIES 20-35 (1989); *Cf.* Thomas W. Merrill, *The Economics of Public Use,* 72 CORNELL L. REV. 61, 84-85 (1986) (showing how the use of eminent domain systematically imposes "uncompensated subjective loss" because most property owners value their holdings at more than their market value).

71. *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); Richard A. Epstein, *Property, Speech and the Politics of Distrust,* 59 U. CHI. L. REV. 41, 62 n.60 62-63 (1992) (criticizing *Poletown* as a "notorious" decision that "sustain[ed] 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).

72. See JONES ET AL., *supra* note 40, at 97-102, 155 (describing the compensation offered in detail, and noting that it was a "good deal" compared to that provided in previous Detroit urban renewal takings).

of the actual losses suffered by area homeowners and businesses.[73] For example, "homeowners often failed to receive replacement costs for their condemned homes," businesses were not compensated for lost "good will," and neither group obtained anything for the loss of community ties.[74] The existence of these large uncompensated costs strengthens the case for stringent judicial scrutiny of economic development takings.

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

In his detailed study of the *Poletown* condemnations, historian John Bukowczyk concluded that General Motors "exerted a disproportionate, indeed, a determinant influence upon the public policy process."[75] As he puts it, "the game was rigged" in GM's favor.[76] In the terminology of economists and political scientists, GM had"captured" the political process. 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 these powers of government for their own benefit ("rent-seeking" as it is known in the literature). Indeed, interest group capture and rent-seeking are serious dangers for a wide range of government activities.[77] 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.

1. *Nearly Limitless Scope*

As we have seen, the economic development rationale for takings can potentially justify almost any condemnation that benefits a commercial enterprise.[78] 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

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73. Bukowczyk, *supra* note 53, at 72-73.
74. *Id.* at 72.
75. *Id.* at 70.
76. *Id.*
77. For a recent summary and analysis of the literature on rent-seeking and capture, see DENNIS C. MUELLER, PUBLIC CHOICE III 337-48 (2003).
78. *See supra* Part I.A.

of eminent domain condemnations as a means of making payoffs to powerful interest groups.

2. *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 if they approve 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 most rank and file 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.[79] Most are 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. One study of the *Poletown* takings points out that "most [Detroit] citizens knew little about the specifics of the Central Industrial Development project[80] and some had not even heard about it."[81]

While this may also be true of some traditional takings, the latter at least usually produce readily observable tangible benefits, such as roads and bridges 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 cannot readily measure or even verify the existence of.

Second, democratic accountability for economic development takings may often be inadequate even if voters were much better informed than most currently are. Unlike most conventional takings, the success or failure of a project made possible by economic development condemnations is usually apparent only years after the condemnation took 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.[82] Not until the late 1980s did

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79. *See* Somin, *Ignorance*, *supra* note 47, 1290-1304 (summarizing evidence of extensive voter ignorance); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413, 413-19 (1998).

80. The formal name of the plan to build a plant for General Motors.

81. JONES ET AL., *supra* note 40, at 126.

82. WYLIE, supra note 52, at 214.

it become clear that the plant would produce far less than the expected 6,150 jobs.[83]

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 she accurately foresaw that the expected benefits would eventually fail to materialize. By the time the latter fact became evident to the public, she would probably be out of office in any event. In the meantime, she could benefit from an immediate increase in political support from GM, the United Auto Workers, and other interests that supported the condemnation.[84]

A study of the *Poletown* takings conducted by three political scientists concludes that the majority of Detroit voters probably supported the condemnations, despite their ignorance of most aspects of the project.[85] They trusted popular Detroit Mayor Coleman Young and understood the need to create "jobs."[86] While no firm conclusions can be drawn in the absence of detailed survey data, one wonders whether this support would have held up had the majority known of the high costs inflicted on the city by the condemnation process and of the fact that GM was under no binding obligation to actually provide the promised 6,000 jobs.[87]

E. Why "Heightened Scrutiny" was not Enough

Unlike economic development takings decisions in some other states,[88] the *Poletown* court was careful to avoid giving a blank check for all condemnations that might 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 or commercial base."[89] Instead, the court held that "[w]here, as here, the condemnation power is exercised in a way that

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83. *Id.* at 214-15; Michael, *supra* note 41.

84. For a discussion of the alignment of different Detroit interest groups on the *Poletown* taking, see WYLIE, *supra* note 52, at 36-50. *See also* JONES ET AL., *supra* note 40 (detailed analysis of the politics of *Poletown* condemnations).

85. JONES ET AL., *supra* note 40, at 126-27.

86. *Id.* at 126.

87. *See* discussion in I.B.C, *infra.*.

88. *See* cases cited *supra* note 27.

89. *Poletown,* 304 N.W.2d at 459.

benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced."[90] This well-intentioned rule "heightened scrutiny" test failed to provide adequate protection against eminent domain abuse, and in one crucial respect may have actually made the situation worse.

The purpose of the heightened scrutiny test was 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 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.[91]

Michigan cases applying the heightened scrutiny test displayed precisely this kind of bias in favor of grandiose projects benefitting large corporate enterprises at the expense of dispossessing large numbers of property-owners. Courts applying the heightened scrutiny test sometimes invalidated condemnations of small amounts of property intended to benefit individuals and small to medium-size businesses.[92] On the other hand, Michigan courts applying *Poletown* felt themselves compelled to uphold condemnations of large amounts of property for the benefit of major commercial enterprises. For example, in 1989 the Michigan Court of Appeals reluctantly held that *Poletown* required it to uphold the condemnations 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 . . . ."[93] Ironically, the court believed that both the Chrysler condemnation and *Poletown* itself constituted "abuse[s] of the power of eminent domain . . . ."[94] Nonetheless, the court of appeals was forced to follow *Poletown* and endorse the validity of the

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90. *Id.* at 459-60.

91. *Id.* at 458-59.

92. *See*, *e.g.*, Tolksdorf v. Griffith, 626 N.W.2d 163, 167-69 (Mich. 2001) (invalidating legislation allowing 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, 643-44 (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, 627-29 (Mich. Ct. App. 2002), *appeal docketed* 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, 407 (Mich. Ct. App. 1987) (invalidating condemnation of "two parcels of property" in order to facilitate expansion of a "local car dealership").

93. *Vavro,* 442 N.W.2d at 730.

94. *Id.* at 731.

condemnation of large amounts of property for the benefit of Chrysler.[95] A 1995 court of appeals decision reaffirmed this holding.[96] And, of course, in *Poletown* itself, the construction of a large GM plant was held sufficient to justify the displacement of 4,200 people.[97]

The *Poletown* heightened scrutiny test protects property owners least precisely when they need it most: in cases where substantial numbers of people are displaced for the benefit of large, politically powerful interest groups. Indeed, an interest group seeking to ensure that a condemnation would be upheld under *Poletown* was well-advised to plan a large construction project 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 condemnations that transfer property to private parties in Michigan. According to a recent Institute for Justice study, from 1998 to 2002 alone, at least 138 condemnation proceedings were filed in Michigan for the purpose of transferring property to private parties; 173 more were threatened.[98] 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.[99] The city of Detroit–the jurisdiction involved in both *Poletown* and *Hathcock*[100]–achieved the dubious distinction of filing more condemnations for private ownership than any other city in the same time period.[101] Detroit condemnations included takings for casinos and sports teams, and one where a developer with ties to the Mayor was able to obtain a

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95. *Id*. at 731-32.

96. 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*).

97. Michael, *supra* note 41, at 25.

98. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 100 (2003), *available at* http://www.ij.org/publications/castle/. It perhaps should be mentioned 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 analyzed here.

99. *Id*. at 2.

100. 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. *See* 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).

101. BERLINER, *supra* note 98, at 23.

condemnation that resulted in the destruction of an entire African-American neighborhood.[102]

The Institute for Justice figures must be used with caution. They likely underestimate the prevalence of condemnations for the benefit of private parties because they were compiled from news reports and court filings.[103] Many cases are unpublished, and many other condemnations go unreported in the press.[104] Thus, we cannot know the true prevalence of private-to-private condemnations in Michigan, nor can we be certain that Michigan really is one of the very worst states in this regard. We can, however, be reasonably confident that Michigan's heightened scrutiny requirement failed to reduce such condemnations to levels significantly below those observed elsewhere, including in states that do not impose heightened scrutiny on private-to-private takings.[105]

F. Condemnation is Rarely 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 where Major projects require the assembly of a large number of lots each with its own separate owner. 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 their acquiescence.[106]

However, as the existence of numerous large development projects that did not rely on eminent domain suggests, 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

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102. *Id.* at 102-06.

103. *Id.* at 100.

104. *Id.* at 2.

105. 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. 1986) (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'" (quoting *Poletown*, 304 N.W.2d at 459)).

106. *See* Merrill, *supra* note 70, at 80-83 (describing the "holdout" rationale for use of eminent domain).

secret or use specialized agents to assemble the properties they need without alerting potential holdouts to the possibility of making a windfall profit by holding the project hostage.[107]

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. It can sign contracts with all the owners in the area where it hopes to build, under which they commit themselves to paying the same price to all. By this means, the developer successfully "ties its hands" in a way that precludes it from paying inordinately high prices to the last few holdouts, because it would be legally required to pay the same high price to all the previous sellers.[108]

Finally, it is essential to realize that even if there is a small subset of desirable economic development projects that can only be undertaken with the assistance of eminent domain, there is no way of confining the use of economic development condemnations to these circumstances. Once the economic development rationale is allowed to justify takings, it can and will be 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.

II. EXCEPTIONS THAT SWALLOW THE RULE? ASSESSING *HATHCOCK'S* THREE EXCEPTIONS TO THE RULE AGAINST PRIVATE-TO-PRIVATE CONDEMNATIONS

The *Hathcock* decision falls well short of a complete ban on private-to-private condemnations. Instead, the court laid out three scenarios in which such takings will still be upheld:

1. [W]here "public necessity of the extreme sort" requires collective action;

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

108. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 35, 121-31 (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).

> 2. [W]here the property remains subject to public oversight after transfer to a private entity; and
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> 3. [W]here 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.[109]

These 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 one. The three exceptions are not original inventions of the *Hathcock* majority; indeed, the *Hathcock* court consciously borrowed them from Justice Ryan's famous *Poletown* dissent.[110] Unlike Ryan in 1981, courts in Michigan and possibly elsewhere now face the task of ensuring that his three exceptions stop short of swallowing the rule.

A. "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."[111] 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."[112] 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.[113] The court was careful to indicate that this rationale cannot be expanded to justify the use of eminent domain for the purpose of promoting

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109. County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004) (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478-80 (Mich. 1981) (Ryan, J., dissenting)).

110. *Hathcock*, 684 N.W.2d at 780-83.

111. *Id.* at 781.

112. *Id.* at 781-82.

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

ordinary commercial development projects, such as the "business and technology park" at issue in *Hathcock*.[114] "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."[115]

There is one possible important ambiguity in the court's holding. 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?[116] Obviously, the government's burden of proof would be considerably easier if only the latter need 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 to go forward may be to forbid condemnation and then see if the developers go forward regardless.

However, the court appears to adopt the more restrictive categorical view. At least this seems to be the best interpretation of its 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."[117] The underlying argument is a sound one: 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, and therefore–assuming a competitive market in land–they are relatively unlikely to be undersupplied as a result of collective action and holdout problems.

The scope of the "extreme necessity" exception is likely to be at least partially clarified in *City of Novi v. Robert Adell Children's Funded Trust*, [118] a case currently before the Michigan Supreme Court. In *Adell*, the Michigan Court of Appeals–relying on Justice Ryan's *Poletown* dissent as a persuasive authority held that a condemnation used to acquire property for an "industrial spur" road connecting a main thoroughfare with a tract owned by the Wisne Corporation was not a valid public use.[119] Despite the fact that the spur would

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114. *Hathcock*, 684 N.W.2d at 783.

115. *Id.* at 783-84.

116. *Id.*

117. *Id.* at 783-84.

118. City of Novi v. Robert Adell Children's Funded Trust, 659 N.W.2d 615 (Mich. Ct. App. 2003), *appeal docketed* 687 N.W.2d 297 (Mich. 2004).

119. *Id.* at 617, 627.

be publicly owned and that "without eminent domain, it would not exist at all," the court of appeals held that it was "not an essential improvement that requires a particular configuration,"[120] and therefore not a legitimate exercise of the eminent domain power under Ryan and *Hathcock's* first category.

If the lower court decision is upheld by the Supreme Court, it would make clear that the "extreme public necessity" exception applies only to narrowly defined categories of takings, not to individual instances where a taking might enable construction of a specific project that would not otherwise exist. As a general rule, short spur lines intended to link the main road system to a single individual property do not raise collective action or holdout problems. Nor do they create public goods problems on the side of the beneficiaries that might lead to their undersupply because of free-riding on their provision.[121]

In this regard, it is significant that the property condemned in *Adell* in order to build the spur line was not owned by a large number of different owners, but by a single consortium of three interlinked trusts, referred to as the "Adell trusts."[122] Thus, there was little danger of a holdout problem because there was effectively only one owner that the Wisne Corporation needed to buy out to build its proposed spur line. Given the low transaction costs of negotiation between these two neighbors, if Wisne truly valued the spur line more than the Adell Trusts valued their own preexisting uses of the property, it should have been able to achieve its goal through standard Coasean bargaining.[123] This is a classic example of a case where "collective public action" is unnecessary.[124]

The Michigan Supreme Court refused to allow the use of condemnation to build roads that connect to a single owner's property even under the old *Poletown* heightened scrutiny test.[125] Hopefully, it will not retreat from this stance under its new test, which after all is intended to be more, rather than less, restrictive.

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120. *Id.* at 627.

121. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (explaining the logic of the free-rider problems that arise when the provision of a good that is nonrivalrous and nonexcludable depends on the contributions of a large group).

122. *Robert Adell Children's Funded Trust*, 659 N.W.2d at 617.

123. *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

124. *Hathcock*, 684 N.W.2d at 784.

125. *See* Tolksdorf 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).

B. Public Oversight

Hathcock's second exception is much more problematic and potentially 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.[126] 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. The difficult doctrinal question is: *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? In fact, Detroit political leaders briefly considered the possibility that the new plant might be publicly owned and then leased to GM.[127] Had this approach been followed, would the resulting taking be valid under *Hathcock*? It is difficult to say for certain.

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

A more subtle risk is the possibility that even oversight powers that seem extensive on paper might be inadequate. 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 that were used to justify condemnation. However, 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.[128] 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 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

126. *Hathcock*, 684 N.W.2d at 783.
127. Bukowczyk, *supra* note 53, at 61.
128. *See supra* Part I.B.

public oversight exception poses serious dangers even if the degree of oversight required by courts is relatively high.[129]

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 proposed developmetn project failed to meet the test because "[n]o formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy."[130] This 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, this 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 case's main holding–stated just a few pages later–that "a generalized economic benefit" is not, by itself, a valid public use under the state constitution.[131] 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 mechanisms" put in place to ensure that the "benefit" is actually created.[132] 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. The converse conclusion–that a condemnation which does include such safeguards must be upheld–does not necessarily follow. A definitive interpretation of the court's meaning must await future cases. Hopefully, 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.

As with the "necessity" exception,[133] the public oversight exception may be partly clarified by the *Adell* case.[134] In *Adell,* the lower court refused to uphold a condemnation for the construction of a spur road under the public

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129. This dilemma is partly recognized by historian John Bukowczyk, an early academic critic of *Poletown* who argued that increased governmental control could curb similar abuses in the future but also acknowledge that "[r]egulation alone is not *the* answer, because we have amply seen how regulatory bodies often have become the creatures of the regulated." Bukowczyk, *supra* note 53, at 74.

130. *Hathcock*, 684 N.W.2d at 784.

131. *Id*. at 786-87.

132. *Id*. at 784.

133. *See supra* Part II.A.

134. *Robert Adell Children's Funded Trust*, 659 N.W.2d at 627.

control exception despite the fact that the proposed spur "will be publicly owned."[135] The court of appeals held that "[t]he fact that the spur is a public street does not, automatically and standing alone, mean that it is for a public purpose/public use."[136] The condemnation still had to be invalidated because its "purpose" was "primarily, to benefit the Wisne/PICO property"–the tract which the spur line was to link to.[137]

Obviously, if even full-blown public ownership of the condemned property is not enough to ensure that a condemnation passes the test, then the test must be considered a fairly stringent one. The lower court in *Adell* implicitly recognizes that even a high degree of formal public control might fail to ensure that a condemnation actually benefits the general public rather than a private interest group. In *Adell,* the fact that the spur would be under public ownership does not in any way undermine the conclusion that the Wisne Corporation is likely to reap almost all the benefits of the condemnation. Since the spur connects only to Wisne's property, only Wisne and its customers and business associates (whose gains can be internalized by Wisne through the prices it charges for its goods) would actually benefit from the taking.[138] If the City of Novi's condemnation powers had been "captured" by Wisne in this case, as seems likely, the fact that the city would retain a high degree of control over the condemned property should not determine the outcome of the court's public use analysis.

C. "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. As the court explains, the basic logic of what we can call the "independent fact" exception is that "the act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, [is] a public use."[139] For this 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."[140] As long as the

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135. *Id.* at 627 n.68.

136. *Id.* at 627.

137. *Id.*

138. This analysis assumes that the trial court's analysis of the evidence in *Adell* is factually accurate. *See id.* at 617-18 (summarizing its findings).

139. *Hathcock*, 684 N.W.2d at 783.

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

blight is removed, it can be argued, courts should not care about what happens to the property afterwards. Unfortunately, this line of argument has two serious flaws that reveal major dangers of *Hathcock's* "independent facts" exception: overexpansion of the definition of "blight" and interest group exploitation of condemnations even in areas that really are "blighted."

1. *Overexpansion of the Definition of Blight*

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 Public Use Clause, the condemned neighborhood was characterized by "[m]iserable and disreputable housing conditions . . . ."[141] According to studies cited by the Supreme 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."[142]

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*![143]

In *City of Las Vegas Downtown Redevelopment Agency v. Pappas,* 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.[144] The Nevada Supreme Court held that downtown Las Vegas suffers from "[e]conomic blight [that] involves downward trends in the business community, relocation of existing businesses outside of the community,

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

142. *Berman*, 348 U.S. at 30.

143. *In re* W. 41st St. Realty, L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002), *cert. denied*, 537 U.S. 1191 (2003).

144. City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 12-15 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004).

business failures, and loss of sales or visitor volumes."[145] 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."[146] If Times Square and downtown Las Vegas are "blighted," it is difficult to think of any place that isn't.

A sufficiently expansive definition of blight that can be used to justify condemnation is essentially equivalent to authorizing economic development takings. Almost any large commercial enterprise can argue that condemning land for its benefit might help improve "trends in the business community."[147] The road from the *Berman*-era cases to decisions like *West 41st St.* and *Pappas* is a classic slippery slope dynamic, one that is difficult to guard against because of the virtual impossibility of drawing a nonarbitrary distinction between "blighted" and "normal" areas.[148]

The same slippage that occurred in other states 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.[149] Numerous state courts have either adopted very broad definitions of "blight" or deferred to legislative and administrative definitions that reach a similar result.[150] Moreover, in the vast majority of states, adherence to these definitions by redevelopment agencies responsible for making blight designations is reviewable only under deferential standards such as "arbitrary and capricious" behavior, "abuse of discretion," or "clear error."[151]

2. *Abusive Condemnations in Truly "Blighted" Neighborhoods*

The second danger posed by the independent fact tests is perhaps even more serious. Even in cases where the condemned property really is blighted, under a strict definition of the term, condemnation of property in the area often serves the interests of developers at the expense of the people living in the

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145. *Pappas*, 76 P.3d at 13.

146. *Id.*

147. *Id.*

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

149. 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).

150. *See*, *e.g.*, 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).

151. *Id.* at 409-13. Several jurisdictions do not allow review of blight designations at all. *See id.* at 413-14.

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 use condemnation for blight alleviation purposes began with the "urban renewal" programs of the 1940s and 1950s. Condemnations stimulated by these programs uprooted thousands of people, destroyed numerous communities, and inflicted enormous economic costs, with few offsetting benefits.[152] 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."[153] By 1963, over 600,000 people had lost their homes as a result of urban renewal takings.[154] The vast majority ended up living in worse conditions than they had experienced before their homes were condemned,[155] and many suffered serious nonpecuniary losses as well.[156] More recent blight condemnations inflict similar harm on communities and poor property owners.[157]

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152. *See*, *e.g.*, JACOBS, *supra* note 69, at 311-14 (describing enormous social and economic costs of urban development takings); MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962 (1964); GANS, *supra* note 70, at 362-84 (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*, 57 VA. L. REV. 745 (1971) (describing extensive uncompensated losses suffered by victims of urban renewal condemnations).

153. Pritchett, *supra* note 149, at 47.

154. ANDERSON, *supra* note 152, at 8, 54.

155. *Id*. at 57-70.

156. *See generally* FULLILOVE, *supra* note 70 (describing extensive social and psychological costs of forced relocation); FRIEDEN & SAGALYN, *supra* note 70, at 20-35.

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

> 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*

The sheer scale of forced relocations driven by "urban renewal" condemnations dwarfs the harms inflicted by economic development condemnations in nonblighted areas. While *Poletown's* displacement of some 4,200 people was widely viewed as an extreme case[158] it is worth noting that the blight takings upheld in *Berman* condemned the homes of over 5,000 people,[159] and this fact evoked little outrage or surprise among contemporary observers.[160] Altogether, sociologist Herbert Gans estimates that some one million households were displaced by federally sponsored urban renewal condemnations between 1950 and 1980.[161] Assuming, as economist Martin Anderson does, that the average household size was equal to the 1962 national average of 3.65,[162] this means that federally sponsored urban renewal condemnations 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.[163]

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."[164] As Herbert Gans points out, the key flaw in urban renewal condemnations was 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."[165] 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.[166] 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.[167]

Control, 27 U. MICH. J.L. REFORM, 689, 740-41 (1994) (footnotes omitted).

158. *See* nn.1-5 and accompanying text.

159. *Berman*, 348 U.S. at 30.

160. *See*, *e.g.*, Pritchett, *supra* note 149, at 44 (noting that "none of the briefs in the *Berman* case 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).

161. GANS, *supra* note 70, at 385-86.

162. ANDERSON, *supra* note 152, at 54.

163. For example, New York City "uprooted" some 250,000 people between 1946 and 1953 alone. *See* Pritchett, *supra* note 149, at 37.

164. *Hathcock*, 684 N.W.2d at 783.

165. GANS, *supra* note 70, at 368.

166. *Id.* at 369-71, 378-81.

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

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."[168] However, such recommendations are flawed because they assume that benefitting local residents and "the community as a whole" is the real purpose of blight takings to begin with. In reality, blight condemnations often deliberately target poor and minority property owners for the purpose of benefitting 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.'"[169] Urban elites deliberately focused urban renewal condemnations on the poor and African-Americans.[170] Between 1949 and 1963, sixty-three percent of all families displaced by urban renewal condemnations were nonwhite.[171]

Such results are not surprising under our basic model. 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.

Ironically - and tragically - some African-American Detroiters were unwilling to support the residents of Poletown in their struggle to save their homes because many black residents had themselves been displaced by previous "urban renewal" condemnations. They believed that the majority-white Poletowners should not get better treatment than they themselves had received.[172] In light of the history of urban renewal takings, the Poletown condemnations were unusual less because of their scale than because many of the victims were neither African-American nor poor.

The sorry history of urban renewal condemnations does not prove that the use of eminent domain 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. 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 the other owners make

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168. GANS, *supra* note 70, at 370.
169. Pritchett, *supra* note 149, at 47.
170. *Id.*
171. FRIEDEN & SAGALYN, *supra* note 70, at 28.
172. JONES ET AL., *supra* note 40, at 155.

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 theoretically be justified 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. So, 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 was wrong to allow an apparent blanket exemption for condemnations based on "'facts of independent public significance.'"[173] Future cases will determine exactly how much harm this exception will be allowed to cause.

CONCLUSION

County of Wayne v. Hathcock is an important milestone in takings law. Even aside from its doctrinal and precedential value, the decision to overrule *Poletown* has great 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.[174]

At the same time, *Hathcock* is not a panacea for eminent domain abuse; its longterm impact will in large part depend on future judicial interpretation. Only time will tell whether *Hathcock's* exceptions end up restoring *Poletown* by swallowing the rule. *Hathcock* is a major step forward, but it is not the end of the road.

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173. *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

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