A GLEEFUL OBITUARY FOR *POLETOWN NEIGHBORHOOD COUNCIL V. DETROIT*

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The Michigan Supreme Court's decision in *Wayne County v. Hathcock*,[1] overruling the infamous decision in *Poletown Neighborhood Council v. Detroit*,[2] represents a major victory for property owners not only in that state, but, indirectly, throughout the United States. The earlier decision greatly broadened the scope of the eminent domain power, enabling government to seize land for the benefit of private corporations such as General Motors, instead of for "public use," as the text of the state constitution required. In the years following *Poletown*, many state and federal courts embraced a similar theory of the "public use" clause, holding that any use the legislature declared to be a public benefit qualified as a public use.[3] The result has been a rash of condemnations benefiting private parties.

The *Hathcock* court's decision to overrule *Poletown* vindicates an important legal principle to protect people from what the founding fathers called "the mischiefs of faction."[4] It sends a clear message to other courts that the abuse of eminent domain must be stopped, and that the government's power to seize property must be limited by effective constitutional restraints. As the United States Supreme Court

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1. 684 N.W.2d 765 (Mich. 2004).

2. 304 N.W.2d 455 (Mich. 1981).

3. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243 (1984); General Bldg. Contractors v. Bd. of Shawnee County Comm'rs, 66 P.3d 873 (Kan. 2003); Hous. and Redevelopment Auth. of Richfield v. Walser Auto Sales, 630 N.W.2d 662, 668 (Minn. Ct. App. 2001); City of Toledo v. Kim's Auto & Truck Serv., 2003 WL 22390102 (Ohio Ct. App. 2003).

4. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 1999).

considers the subject of eminent domain this term, an examination of this most famous of eminent domain cases is especially timely.[5] This article discusses the background and importance of *Hathcock*, and some of the important matters that must be addressed to further rein in the extreme government power of eminent domain. Part I describes the history of *Poletown* and its demise. Part II discusses *Hathcock* and its effect. Part III suggests the next steps that must be taken to restore the public use limitation as an effective brake on the condemnation power.

I. THE STORY OF *POLETOWN V. DETROIT*

A. The Litigation of Poletown

In the early 1980s, high oil prices, inflation, and government regulation brought on a severe recession, which hit Michigan's automobile manufacturers especially hard. As Americans turned to cheaper and more efficient Japanese imports, the state's unemployment rate rose from 7 percent in March of 1979, to 9.9 percent a year later; 12.2 percent in March, 1981, and peaked at 16.3 percent in November, 1982.[6] The Detroit property tax base fell by $100 million.[7] Government attempts to resolve such problems included major subsidies to domestic businesses both at the state and federal levels.[8] In particular, Michigan sought to relieve the ailing General Motors Corporation. In 1980, GM informed the city of Detroit that it would be willing to construct a new factory in a region of the city known as Poletown (due to the large number of Polish immigrants living there). The company had already threatened to close a factory which would have cost the community 6,000 jobs, and, as Justice James L. Ryan would later note, the city felt severe pressure from GM's "immense political and economic power."[9]

The Poletown neighborhood was "a rare commodity in an urban environment: a stable, integrated area that in many ways harkened

5. Kelo v. City of New London, 843 A.2d 500, 528 (Conn. 2004), *cert. granted* No. 04-108 (Sept. 28, 2004).

6. U.S. Department of Labor, Bureau of Labor Statistics, Local Area Unemployment Statistics, *at* http://www.bls.gov/lau/home.htm (last visited Dec. 27th, 2004).

7. JEAN WYLIE, POLETOWN: COMMUNITY BETRAYED 30 (1989).

8. The federal government spent $25 billion on business-aid programs and extended over $33 billion in loans to businesses in 1984. *See* Congressional Budget Office, *Federal Financial Support of Business* 22, 27 (July, 1995), *available at* http://www.cbo.gov/showdoc.cfm?index=15&from=1&sequence=0 (last visited Aug. 18, 2004). *See also* WYLIE, *supra* note 7 at 35–37.

9. *Poletown*, 304 N.W.2d at 467 (Ryan, J., dissenting).

back to the close-knit ethnic communities that characterized Detroit's past."[10] The GM project meant condemning over 1,000 properties and the homes of 3,438 people.[11] And although it was deteriorating in the 1980s, many residents cherished their neighborhood, where milkmen still made their rounds,[12] local policemen regularly lunched at Carl Fisher's Famous Bar-B-Q Restaurant,[13] and where, one resident recalled, "[p]eople watched out for one another . . . . In the suburbs, it's keep up with the Joneses.' Over here, nobody cared. You were neighbors."[14] As Jean Wylie explains in her history of the Poletown case, "even as late as 1980, the community was known for its sound housing stock, its low rents, its good access to shops and services, and its tolerance for divergent ethnic groups and religious denominations. . . . [A] study done by the University of Michigan in 1980 suggested that 'this area may be one of the most continuously racially integrated areas in Michigan.'"[15]

The destruction of Poletown was remarkably swift. GM presented its plan to the city in July of 1980. On September 30, the city's Economic Development Corporation approved the plan. On October 8, GM chairman Thomas Murphy wrote to Detroit Mayor Coleman Young and to the chairman of the Detroit Economic Development Corporation, strongly urging them to adopt the plan: "I firmly believe the prospect of retaining some 6,000 jobs, and the attendant revitalization of these communities is a tremendous challenge," he wrote. "But it also is an opportunity and a responsibility which none of us can ignore."[16] This letter and GM's other maneuvers, wrote dissenting Justice Ryan, "suggest the withering economic clout of the country's largest auto firm."[17] Detroit was more than eager to do GM's bidding. An Environmental Impact Statement was approved on

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10. 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). *See* WYLIE, *supra* note 7, at 20 (describing racial cohesion in Poletown).

11. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 YALE L. & POL'Y REV. 1, 48–49 (2003); Stephen J. Jones, Note*: Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 295 (2000).

12. WYLIE, *supra* note 7, at 6.

13. *Id.* at 12.

14. *Id.* at 22.

15. *Id.* at 7.

16. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 468–69 (Mich. 1981) (Ryan, J., dissenting).

17. *Id.* at 469.

October 15, and on the 29th the Detroit Community and Economic Development Department recommended approval of the project. On October 31, the city council followed that recommendation, and Mayor Coleman Young signed his final approval on November 3.

Action in the courts moved just as quickly. Homeowners immediately filed for an injunction, and trial began November 17. On December 9, the court dismissed the complaint. Bypassing the Court of Appeals, the residents sought review by the state Supreme Court, which was granted on January 29, 1981. Oral arguments were heard March 3, and the final decision, upholding the condemnation, was issued only ten days later.[18]

B. The Historical Background of Michigan's "Public Use" Limitation

Although *Poletown* has been characterized as a major break with Michigan's constitutional history,[19] the case was, in many ways, a continuation of a trend lasting at least a half-century.[20]

Early cases held that the public use limitation prohibited government from taking property for a private use.[21] But the line between public and private uses became increasingly blurred with the industrial age. Two historical events are responsible for this blurring: the invention of the railroad and the privatization of the corporation.[22]

Railroads grew at a fantastic rate in the 19th century. Although only about 3,000 miles of track existed in America in 1840, by 1850,

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18. This timeline is derived from Justice Ryan's dissent. *See id.* at 468–71. Contrast this timeline with Wayne County v. Hathcock, 684 N.W.2d 765, 770–71 (Mich. 2004). In that case, the plan to construct a business park was conceived in 1998, the condemnation occurred in 2001, and the trial completed in December of 2001. The landowners' motion for reconsideration was denied in January of 2002, and the Circuit Court decided the appeal April 24, 2003. The Supreme Court granted the appeal in November of 2003, and finally rendered its decision July 30, 2004.

19. *See, e.g.*, *Hathcock*, 684 N.W.2d at 784 ("[T]he majority opinion in *Poletown* is most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence.").

20. *See also* Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 368 (1983) ("Justice Ryan was correct in one sense: the *Poletown* taking was unprecedented. Yet, the railroad, slum-clearance, and *Poletown* takings share one common characteristic: their justification. In each taking, the state employed eminent domain to assist an essentially private enterprise achieve a societally desired result.").

21. *See, e.g.*, Chicago B&Q R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897); Wilkinson v. Leland, 2 Pet. (27 U.S.) 627, 658 (1829); Arrowsmith v. Burlingim, 1 F. Cas. 1187, 1189 (C.C.D. Ill. 1848) (No. 563); Nesbitt v. Trumbo, 39 Ill. 110, 114 (1866); Swan v. Williams, 2 Mich. 427, 434–36, (Mich. 1852).

22. Much of the following is drawn from Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW. U. L. REV. 569 (2003).

there were 9,000 miles, and by 1860, there were 30,000 miles, the largest railroad network in the world.[23] To the legal minds of the time, railroads were much like highways, and highways were usually constructed by private companies with a government charter.[24] Such charters were issued on the premise that providing roads was a government prerogative, which could be delegated to a group of private citizens via a monopolistic charter granted by government. A group receiving such a charter was called a corporation.[25]

But at the same time, the nature of corporations was changing drastically. In the eighteenth century, the term was practically interchangeable with "monopoly,"[26] meaning an exclusive trading privilege enjoyed by government bequest; "corporations" in this sense were essentially government agencies—indeed, in the nineteenth century, city governments were routinely referred to as corporations.[27] During the Nineteenth century, however, the corporation evolved into its present form—an entirely private enterprise chartered not by special legislative act but by a routine ministerial certification process, and granted to any applicant.[28] Today's corporation bears little resemblance to its pre-19th century ancestor. But at the time that railroads were being laid out, the difference was much less clear. Since eminent domain had long been used to build toll roads in previous ages and in England, early American courts held that the government could give the eminent domain power to railroad companies notwithstanding the fact that they were privately run for profit. The first court to face this problem was the New York Chancery Court. In *Beekman v. Saratoga & Schenectady Railroad*,[29] and *Bloodgood v. Mohawk & Hudson Railroad*,[30] Chancellor

23. *See* PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 444–45 (1997).

24. *Id.* at 306, 443–45.

25. *See also* ROBERT HESSEN, IN DEFENSE OF THE CORPORATION 5–11 (1979).

26. *See* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 226 (1955); HESSEN, *supra* note 25, at 25–33. The Michigan Supreme Court commented on the evolution of the corporation in Swan v. Williams, 2 Mich. 427, (1852).

27. This is one reason cities can be sued for violations of the Sherman Anti-Trust Act. *See* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690–94 (1978). Some American cities are still referred to as corporations; the attorney for the City of Chicago, for instance, is referred to as the "corporation counsel." *See* Chicago Department of Law Website, *at* http://www.cityofchicago.org/Law (last visited Dec. 27th, 2004).

28. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 318 (1992); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 50 (1997); HESSEN, *supra* note 25, at 29–33.

29. 3 Paige Ch. 45 (N.Y. Ch. 1831).

30. 18 Wend. 9 (1837).

Walworth upheld the use of eminent domain by private companies. A dissenting judge argued that "eminent domain. . . [does] not authorize the government to take the property of one citizen for the mere purpose of transferring it to another, even for a full compensation, where the public was not interested in such transfer,"[31] but the court upheld the taking because "[t]he Legislature . . . came to the conclusion that the public required the use of a railroad . . . deemed it inexpedient to construct it at the public expense, and adopted the policy of having a Co. construct it at its own expense and risk, having the money expended refunded by way of tolls or fare . . . . Because the Legislature permitted the Co. to remunerate itself for the expense of constructing the road, from those who should travel upon it, its private character is not established."[32]

By the middle of the nineteenth century, the use of eminent domain by private railroad companies presented a serious problem for American courts and legislatures. Reformers had begun protesting the subsidies and other benefits the railroads derived from government, and the Populist movement pitted farmers and small landowners against the railroad/government complex which was likened to a giant octopus, grasping everything in sight.[33] When delegates at the 1879 California Constitutional Convention proposed to extend the condemnation power to allow farmers to take neighboring land for irrigating their fields, some protested that this violated the public use clause. "It is true," one delegate replied, that eminent domain was "originally used only for governments, but it has been perverted to corporations, and we propose here to extend it further, and to allow it to be used for private individuals."[34]

Many judges tried to justify the extension of the eminent domain power to railroads by explaining that the railroad really was a "public use." One chief rationalization was that the railroad was regulated by the government in such a way as to render it essentially "public." Rates were subject to regulation, and the railroad was required to accept all passengers.[35] Although such theories were at best

31. *Id.* at 14.

32. *Id.* at 21.

33. *See* JOHNSON, *supra* note 23, at 454–57; RICHARD HOFSTADTER, THE AGE OF REFORM 45–59 (1955). LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 388–96 (1973); CARL BRENT SWISHER, MOTIVATION AND POLITICAL TECHNIQUE AT THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-79 at 45–66 (1930).

34. E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1025 (1880).

35. Passengers who paid the fare, that is. The weakness of this rationalization is that these limits are no more than the government imposes on private corporations to begin

questionable, they crystallized into general acceptance by 1873, when Justice Stephen Field, a consistent enemy of government regulation of private enterprise, wrote:

> [E]xclusive grants for ferries, bridges, and turnpikes . . . [are] of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain . . . . It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty . . . upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others.[36]

Thus the regulation of the railroad rendered it a sort of government enterprise and allowed it to use eminent domain.

Thomas Cooley's famous treatise on constitutional limitations[37] reveals the sort of confusion prevailing on this issue at the time: while Cooley insisted that "the public use implies a possession, occupation and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property if the right of the government to seize and appropriate it could exist for any other use,"[38] he also conceded that "[t]here is still room, however, for much difference of opinion as to what is a public use."[39] Railroads were a primary example:

> Every government makes provision for the public ways; and for this purpose it may seize and appropriate lands. And as the wants of traffic and travel require facilities beyond those afforded by the

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with, and while a private person could take his own horse-cart onto a toll road, he could not put his own train car on the tracks of a private company. Nevertheless, the public access rationale prevailed and even broadened in later years to the absurd degree that eminent domain cases involving the installation of power lines invoked "a purely hypothetical right of the farmers along the transmission line to insist that the power be stepped down and made available to them. The difficulties they would encounter if they actually sought to exercise this 'right' hardly need to be stressed." Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 623 (1940).

36. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 88 (1872) (Field, J., dissenting).

37. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868). Cooley served as a Justice of the Michigan Supreme Court from 1864 to 1885 and as a professor of law at the University of Michigan from 1859 to 1884, where his star pupil was George Sutherland, later a Justice on the United States Supreme Court. *See* THOMAS G. BARNES, INTRODUCTION TO CONSTITUTIONAL LIMITATIONS (1987); HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND 41–43 (1994). Cooley's *Constitutional Limitations* was one of the most influential legal treatises of the nineteenth century, but it fell into disrepute in the wake of the New Deal. Still, the *Hathcock* Court referred to him as "our patron saint of constitutional interpretation." 684 N.W.2d at 779.

38. COOLEY, *supra* note 37, at 531.

39. *Id.* at 531–32.

> common highway, over which every one may pass with his own vehicles, the government may establish the higher grade of highways, upon which some of its own vehicles alone shall run, while others shall be open for use by all on the payment of toll. The common highway is kept in repair by assessments of labor and money; the tolls paid turnpikes, or the fares on railways, are the equivalents to these assessments, and the latter are equally public highways with others, when open for use to the public impartially.[40]

The distinction between public and private use continued to erode into the early years of the twentieth century.[41] The rise of Progressivism brought an increasing hostility to individualism and previous conceptions of the limit on government power.[42] This period was especially marked by the rise of belief in extreme majoritarianism.[43] Oliver Wendell Holmes admitted to a friend "You respect the rights of man . . . . I don't except those things which a given crowd will fight for—which vary from religion to the price of a glass of beer,"[44] and declared that "the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ."[45] Other figures of the Progressive age were even more hostile to the notions of private rights. "The modern school [of political thought] has, indeed, formulated a new idea of liberty, widely different from that taught in the early years of the Republic," admitted Charles Edward Merriam in 1903.[46] "The idea that liberty is a natural right is abandoned and the inseparable connection between political liberty and political capacity is strongly emphasized."[47]

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40. *Id.* at 533.

41. *See, e.g.*, JOHN DEWEY, THE FUTURE OF LIBERALISM (1935), *reprinted in* NEW DEAL THOUGHT 28 (H. Zinn ed. 1966); J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 542–61 (2004) (describing Progressive breakdown of the public/private distinction).

42. *See generally* MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 1870-1920 (2003) (describing anti-individualism at the heart of Progressivism).

43. *See* JOHN MARINI, THE POLITICS OF BUDGET CONTROL 191–92 (1992) ("Liberal democratic governments had originally attempted to distinguish the economic order from the political system. . . . The growth of the administrative state has blurred the distinction between the public and private sphere, between the state and society.").

44. LOUIS MENAND, THE METAPHYSICAL CLUB 63 (2002).

45. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

46. CHARLES EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 311 (1903).

47. *Id.* at 313.

The Progressive Era and the New Deal which it spawned[48] brought a further erosion of the public use limitation. During this period, government authority was expanded to permit the state to provide much more than previous generations had deemed proper. Thus the concept of "blight" was first applied to neighborhoods at this period,[49] and condemnations were permitted not just to eradicate blight, but also to provide for public amusements.[50] In the 1950s, when the states and the federal government embarked on a project of eradicating slums, the courts held that the public use clause was satisfied by taking slum property, because slums were a threat to public health and safety.[51] But the slum properties were then resold to private parties. It was therefore a small step to allow government to take property and transfer it directly to a private party whose use of the property was more acceptable to the authorities.[52] As the California Court of Appeal explained in 1954:

> Originally the definition of "public use" was very narrowly restricted . . . . [M]ore modern courts have enlarged the traditional definition of public use to include "public purpose." The idea now is that the taking of the property itself, as distinguished from the subsequent use of that property, may be required in the public interest . . . . [And since] the acquiring of the property is for a public use, its sale and the transfer of the property from one individual to another, so far as it may occur, are merely incidental to that use, and not the main object of the statute . . . . [This] is for a public purpose . . . [53]

In short, the 1950s cases which held that the concept of public use allowed government to redistribute property to private parties for

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48. MCGERR, *supra* note 42, at 315–17, argues that the New Deal was not part of the Progressive movement, but much of the intellectual framework for the New Deal was set by the Progressives, and notable Progressives like Dewey and Rexford Tugwell acted as advisors to President Roosevelt. Dewey himself saw the two movements as identical. *See* DEWEY, *supra* note 41.

49. *See* Sandefur, *supra* note 22, at 659–61.

50. *See, e.g.*, Egan v. San Francisco, 133 P. 294, 296 (Cal. 1913) ("[g]enerally speaking, anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes.").

51. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954); Van Hoff v. Redevelopment Agency of San Francisco, 348 U.S. 897 (1954); Redevelopment Agency of San Francisco v. Hayes, 266 P.2d 105 (Cal. 1954), *cert. denied*; Bruestle v. Rich, 159 Ohio St. 13 (1953).

52. *See* Laura Mansnerus, Note: *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 423 (1983) ("When twentieth century courts permitted condemnation of urban land for reuse by private interests, the first step was slum clearance for the improvement of housing. The second was slum clearance with the ancillary purpose of commercial or industrial development. The third was clearance of sound property for arguably more desirable private development.").

53. *Hayes*, 266 P.2d at 114, 123.

private profit—on the grounds that such profit had beneficial social consequences—were based on the gradual erosion of the division between public and private. That erosion started with the advent of railroads and the privatizing of the corporation during the nineteenth century, but was strongly accelerated during the Progressive and New Deal eras. By the time *Poletown* was decided, the public use limitation had already largely ceased to function as a serious restriction on the condemnation power.[54] That, combined with the apotheosis of "rational basis scrutiny" of laws involving property or economic rights,[55] led at least as much to the *Poletown* decision as did the political pressures and economic crisis facing Detroit in 1980.

C. What Poletown Decided—And What It Meant

The per curiam opinion in *Poletown* held that the economic benefits resulting from the redistribution of property to GM satisfied the public use limitation. Quoting Justice Cooley's statement that "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good,"[56] the Court declared that "the benefit to be received by the municipality" in redistributing Poletown to GM was "clear and significant."[57] In fact, the benefit to GM would be less than the benefit to the public: "alleviating unemployment and revitalizing the economic base of the community" were "essential public purposes" but "the benefit to [GM] is merely incidental."[58]

Recognizing the danger posed by such a rationale the Court insisted that strict scrutiny should apply to such takings,[59] but in the end concluded that "the terms 'use' and 'purpose' . . . have been used interchangeably in Michigan statutes and decisions in an effort to

54. *See also* Detroit v. Mich. Bell Tel. Co., 132 N.W.2d 660, 663 (Mich. 1965) (urban renewal is a proper governmental function, even when the land is transferred to private owner).

55. *See* Roger Pilon, *How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees*, 7 NEXUS 61, 67–68 (2002).

56. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (quoting *People ex rel. Detroit & Howell R. Co. v. Salem Twp. Bd.*, 20 Mich. 452, 480–81 (1870)).

57. *Id.*

58. *Id.* As for the Poletown project itself, GM ended up offering only about 3,400 jobs at the completed factory instead of the 6,000 it had promised. *See* WYLIE, *supra* note 7, at 215. There was no significant decrease in Detroit's unemployment rate. *Id.* In 1987, the plant's first and second shifts were laid off, *id.* at 214, and the city ended up borrowing more money to make up for condemnation judgments. *Id.* at 216.

59. *Poletown*, 304 N.W.2d at 459–60.

describe the protean concept of public benefit"[60] and quoted *Berman v. Parker* to the effect that "when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.'" It is impossible to reconcile such a statement with strict scrutiny. If a legislative declaration of public benefit is "well-nigh conclusive,"[61] and if any public benefit satisfies the public use clause, the Court's role is reduced to a mere formality, in spite of its assertions of strict scrutiny.[62] A century earlier, Justice Field had warned that the Constitution "intended that the rights of the citizen should be secure against deprivation . . . by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."[63] But that was precisely the consequence of the *Poletown* case.

Gutting the public use clause leads to what economists call the "public choice" problem.[64] When government can redistribute benefits and burdens to private parties, it is in the interest of those parties to lobby the government to do so on their behalf.[65] As one writer explains it, "groups who can organize for less than one dollar in order to obtain one dollar of benefits from legislation will be the effective demanders of laws."[66] When a company like GM can expect tens of millions of dollars in benefits from the government, it will spend a great deal in its attempt to persuade the government to act on its behalf.

There are at least four major drawbacks to this public choice effect.

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60. *Id.* at 457.

61. *Id.* at 459 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

62. This was made clear in the Supreme Court's decision in Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984): "[w]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power." The Michigan Supreme Court did strike down some condemnations under the *Poletown* strict scrutiny standard. *See, e.g.*, Tolksdorf v. Griffith, 626 N.W.2d 163, 169 (Mich. 2001). Cases like *Tolksdorf*, however, relied on unclear criteria to declare that "[w]e are unconvinced that the public is the predominant interest served . . . ." *Id.* at 168. The problem, however, is that this sort of scrutiny, if honestly applied, would have invalidated the taking in *Poletown* as well.

63. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866).

64. *See generally* DENNIS C. MUELLER, PUBLIC CHOICE 1 (1st ed. 1979).

65. *See generally* JAMES M. BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT (1965).

66. Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 341–42 (1988).

First, it is simply unfair that a person's property can be taken and given to another simply on the basis of political influence. As Cass Sunstein has put it, one of the primary concerns of the Constitution's framers was to prevent the government from engaging in "naked preferences."[67] The use of eminent domain to redistribute "resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want"[68] puts political popularity ahead of justice. Thomas Hobbes argued that in the state of nature "there [can] be no propriety, no dominion, no mine and thine distinct; but only that to be every man's that he can get: and for so long, as he can keep it."[69] The goal of the Constitution was to curb these problems.[70] As a founding father, James Madison strove to maintain the distinction between might and right. When James Monroe asked him about the popular notion that the good of the majority is the highest law, Madison replied that

> [t]here is no maxim . . . more liable to be misapplied . . . than the current one, that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "ultimate happiness," in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense, it would be the interest of the majority in every community to despoil and enslave the minority of individuals . . . . In fact, it is only re-establishing, under another name and a more specious form, force as the measure of right.[71]

The public use clause was designed to ensure that these moral qualifications were retained, and that the government respected the private property even of non-influential groups.

A second, related problem with reducing the public use

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67. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

68. *Id.*

69. THOMAS HOBBES, LEVIATHAN 101 (Michael Oakeshott ed., Collier Books 1962) (1651).

70. Indeed, James Madison, who would go on to write the federal public use clause, argued that "[i]n a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger." THE FEDERALIST NO. 51, *supra* note 4, at 324. The United States Supreme Court recently acknowledged that the Fifth Amendment was designed specifically in contrast to Hobbesian notions. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

71. Letter from James Madison to James Monroe (Oct. 5, 1786), *in* THE COMPLETE MADISON 45 (Saul K. Padover ed., 1953).

requirement is that it places the heaviest burdens on precisely the most vulnerable parties. Since the poor and members of racial minorities are generally less able to influence the authorities than are wealthy corporations, the poor are often the victims of condemnations which benefit wealthy and well-connected groups. Many Americans were shocked when former GM CEO Charles Wilson was reported to have said that "[w]hat's good for General Motors is good for America."[72] But *Poletown*'s reasoning is really no deeper.

Third, lobbying activity is economically wasteful, because it leads businesses to over-invest in lobbying, rather than spending time and money on productive pursuits such as research, construction, or innovation.[73] Such spending ultimately raises costs for consumers and taxpayers, with no corresponding increase in productivity or consumer satisfaction. What Justice Ryan called "the withering economic clout of the country's largest auto firm"[74] was exerted, not to improve automotive technology, discover cheaper or more effective manufacturing procedures, or serve customers better, but instead to lobby the government to pass a law.

Finally, such lobbying tends to have a ratchet effect: since the benefits a lobbyist receives are concentrated and usually quite large, those lobbying in favor of redistribution have a very large incentive to exert themselves. But since the costs of redistribution tend to be dispersed and much smaller per person, those lobbying against the same redistributive measure have less incentive. If government can take a dollar from each of 100 people, to distribute to a chosen party, it is only economical for them to spend up to 99 cents to oppose such a measure. As Donald J. Kochan puts it, "[i]t is not cost-efficient . . . for a taxpayer to fight a particular piece of special-interest legislation."[75] But on the receiving end, it is worthwhile for a party to spend $99 to encourage government to give them the bounty. Thus the trend is toward greater and greater redistributions even though this trend may not actually reflect the desires of a majority of the voting

72. In fact, the quote was apocryphal. *See* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 75 n.63 (1992).

73. *See* Gordon Tullock, *Rent-Seeking as a Negative-Sum Game, in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 30–34 (James M. Buchanan et al. eds., 1980).

74. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 469 (Mich. 1981) (Ryan, J., dissenting).

75. Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 81 (1998).

populace.[76] Justice Ryan hinted at just this problem in his *Poletown* dissent when he described

> the overwhelming psychological pressure which was brought to bear upon property owners in the affected area . . . . [A] crescendo of supportive applause sustained the city and General Motors and their purpose . . . . The promise of new tax revenues, retention of a mighty GM manufacturing facility in the heart of Detroit, new opportunities for satellite businesses, retention of 6,000 or more jobs . . . all fostered a community-wide chorus of support for the project.[77]

These four major problems combine to result in what can only be described as an epidemic of private condemnations in America. A recent study by Dana Berliner of the Institute for Justice found some 10,000 cases of threatened or successful condemnations for private profit from 1999–2003.[78] At least 3,700 properties across the nation—and 138 in Michigan—were actually condemned for the benefit of private parties during that time.[79] In fact, this figure is probably overly conservative, because many property owners lack the resources or will to challenge a condemnation, especially when faced with the severe psychological pressure Justice Ryan mentioned.

Another effect of *Poletown* must not be underestimated: the case's symbolic value. *Poletown* became the most well-known instance of economic redevelopment eminent domain, so that many attorneys who know little else about eminent domain recognized the case's name. Law students usually read about it in their first year of law school.[80] The *Poletown* case has been cited directly by the courts of nine other states,[81] and the Seventh Circuit.[82] More importantly, the

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76. *See* John O. McGinnis and Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 378–82 (1999) (explaining how "special interests . . . almost always cause an *increase* in government spending by persuading the government to subsidize their activities").

77. *Poletown*, 304 N.W.2d at 470–71 (Ryan, J., dissenting).

78. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2 (2003).

79. *Id.* at 2, 100.

80. See such standard introductory property texts as JESSE DUKEMINIER AND JAMES E. KRIER, PROPERTY 1116–20 (4th ed. 1998) and JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 788–89 (7th ed. 1996).

81. *See* Wilmington Parking Auth. v. 227 W. 8th St., 1986 WL 10505, at *5 (Del. Super. Ct. Aug. 11, 1986); City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 372–73 (N.D. 1996); City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 12 (Nev. 2003); Township of West Orange v. 769 Assocs., L.L.C., 800 A.2d 86, 94 (N.J. 2002); City of Toledo v. Kim's Auto & Truck Serv., Inc., 2003 WL 22390102, at *4 (Ohio Ct. App. Oct. 17, 2003); City of Duluth v. State, 390 N.W.2d 757, 763 (Minn. 1986); Maready v. City of Winston-Salem, 467 S.E.2d 615, 626 (N.C. 1996); Kelo v. City

equation of "public use" with "public purpose" that underlay that decision was adopted by the United State Supreme Court in *Hawaii Housing Authority v. Midkiff*.[83]

Remarkably, the Connecticut Supreme Court recently rejected reliance on *Poletown*, not because it allows too much condemnation, but because it allows too little: "[W]e decline to follow the Michigan court's holding that when 'the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court . . . [applies] heightened scrutiny,'" the court said. "[T]he application of a 'heightened scrutiny' standard . . . is inconsistent with our well established approach of deference to legislative determinations of public use."[84]

As an extreme case, *Poletown* gained the sort of symbolic authority—and infamy—reserved for those few cases recognized by a single name (*Marbury*,[85] *Plessy*,[86] *Korematsu*[87]). Its demise will exert great pressure on those courts that have relied on the case or on its rationale to address the concerns expressed in *Hathcock*.

II. THE DECLINE AND FALL OF THE *POLETOWN* CASE

Poletown's dissenters were not alone in expressing their dismay over the decision. Influential legal scholars criticized the case from the outset.[88] The first Michigan case to limit the *Poletown* decision

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of New London, 843 A.2d 500, 528 (Conn. 2004), *cert. granted* No. 04-108 (Sept. 28, 2004). A Maine Court rejected *Poletown*, in Craig v. Kennebec Reg'l Dev. Auth., 2001 WL 1715952, at *3 (Me. Super. Ct. Apr. 2, 2001). *But see* Common Cause v. State, 455 A.2d 1, 24–25 (Me. 1983) (embracing a rationale similar to *Poletown*).

82. Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445, 464–65 (7th Cir. 2002).

83. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

84. *Kelo*, 843 A.2d at 528–29 n.39.

85. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

86. Plessy v. Ferguson, 163 U.S. 537 (1896).

87. Korematsu v. United States, 323 U.S. 214 (1944).

88. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 179–80 (1985) (criticizing *Poletown* for too-liberal definition of public use); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 489–90 (1983) (citing *Poletown* among other examples of decline of property rights); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1353–54 (1982) ("The arguments deployed by Detroit in support of the publicness of this venture could be deployed in support of virtually *any* venture one can imagine."); Note, *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 225, 232 (1984) ("In the wake of *Midkiff*. . . one important question that lingers is whether courts retain the power to overturn takings that, although legislatively approved, seem 'constitutionally disquieting.' The facts of *Poletown* . . . present one example of a situation in which extensive deference to the legislature would have been inappropriate.") (citation omitted); Susan Crabtree, Note, *Public Use in Eminent Domain: Are There Limits After* Oakland

was *City of Center Line v. Chmelko*,[89] in which the Court of Appeals blocked the city from condemning some apartments and shops to transfer the property to a Toyota dealer.[90] The government argued that *Poletown* gave authoritative weight to its determination that a Toyota dealership advanced the public welfare. The *Chmelko* court, however, "read the factual context of *Poletown* as extremely significant to the holding in that case."[91] *Chmelko* recited the *Poletown* formulation that condemnations benefiting private parties should be subject to strict scrutiny, and concluded that "the record readily indicates that the land, if condemned, would be made available to a private party, Rinke Toyota."[92]

The problem is that the factors the *Chmelko* court relied upon do not actually distinguish *Chmelko* from *Poletown*. While the number of jobs or dollars accruing from the Poletown project was obviously greater than that accruing from the *Chmelko* transfer, this is merely a matter of proportion. Center Line, Michigan, was (and is) a small town of less than 10,000 inhabitants.[93] It is entirely possible that a Toyota dealership would have provided a significant boost to the town's economy.[94] The *Chmelko* court also pointed out that the condemned properties were structurally sound and well-maintained.[95] But there is no evidence that the homes in Poletown were any less sound. Besides, this, the only theoretical distinction between the cases is the hectic, crisis climate that produced the earlier decision[96]—precisely what ought to make the reader more skeptical of *Poletown*.

Raiders *and* Poletown*?*, 20 CAL. W. L. REV. 82, 108 (1983) ("The constitutional limitation of public use has been defined so broadly that it is no longer a restraint . . . . The real danger . . . lies in the threat to individual liberties."); Peter E. Millspaugh, *Eminent Domain: Is It Getting Out of Hand?*, 11 REAL EST. L. J. 99, 115 (1982) ("The prospect of a public process under few if any constraints, aimed at any and all forms of private property, driven by large special interests both public and private, is unsettling at best."); Emily J. Lewis, Comment, *Corporate Prerogative, "Public Use" And A People's Plight:* Poletown Neighborhood Council v. City of Detroit, 4 DET. C. OF L. REV. 907, 929 (1982) ("[A]fter examining the facts of *Poletown*, one might conclude that the 'elastic' public use requirement, after being stretched for a little over two centuries, has finally snapped.").

89. 416 N.W.2d 401, 405–06 (Mich. Ct. App. 1987).

90. *Id.* at 402.

91. *Id.* at 406.

92. *Id.*

93. *See* Michigan Population by County and Town, 1980-2000 Grand Traverse-Menominee Counties, DETROIT FREE PRESS, http://www.freep.com/news/census/allstatepop2.htm (last visited Aug. 12, 2004).

94. *See, e.g.*, City of Duluth v. State, 390 N.W.2d 757, 763–64 (Minn. 1986) (permitting condemnation of property for construction of a paper mill to revitalize West Duluth).

95. *Chmelko*, 416 N.W.2d at 406.

96. *See id.* at 405–06.

Michigan's lower courts began openly criticizing *Poletown* in 1989, when the Court of Appeals upheld the condemnation of some 380 acres of land for transfer to the Chrysler corporation.[97] Such condemnations, the court said, were "unconscionable," but the court was obliged to follow precedent.[98] The Court urged the Supreme Court to take the case and overrule *Poletown*, but the invitation was ignored.[99] In the years following, courts frequently were called upon to decide whether a public project benefited the public primarily, and private parties only incidentally, or vice versa.[100] The criteria for such a determination were vague or nonexistent, however, and it is difficult to avoid the conclusion that, in the absence of clear criteria, these decisions were based on the judges' own policy preferences. Again, in 2002, the Michigan Court of Appeals called Justice Ryan's *Poletown* dissent "persuasive."[101]

Meanwhile, other state courts began questioning the principles upon which *Poletown* rested. The Illinois Supreme Court ruled in 2002 that the government could not condemn property and transfer it to the owner of a racetrack to allow the racetrack to expand its parking lot.[102] The government argued that the flourishing of the racetrack would improve the area's general prosperity. But, the Court concluded,

> While we do not deny that this expansion in [a private company's] revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. Using the power of the government for purely private purposes to allow [a private company] to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.[103]

The Arizona Court of Appeals issued a decision the next year prohibiting the City of Mesa from taking a small auto repair shop to

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

98. *Id.* at 731.

99. *Id.* That same year, Presiding Judge Beasley also urged the Supreme Court to reconsider *Poletown*. City of Detroit v. Lucas, 446 N.W.2d 596, 599 (Mich. Ct. App. 1989).

100. *See, e.g.*, City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638, 643 (Mich. 1993); Tolksdorf v. Griffith, 626 N.W.2d 163, 168 (Mich. 2001).

101. City of Novi v. Robert Adell Children's Funded Trust, 659 N.W.2d 615, 622–23 (Mich. Ct. App. 2002).

102. *See* S.W. Ill. Dev. Auth. v. Nat'l City Envtl, L.L.C., 768 N.E.2d 1, 3 (Ill. 2002).

103. *Id.* at 10–11.

give a nearby hardware store a better location.[104] Federal district courts in California struck down two condemnations in decisions that expressed serious concerns about private takings.[105] The media began publicizing some of the more extreme abuses of eminent domain: the comic strip Doonesbury parodied Donald Trump's attempt to condemn a widow's home to build a limousine parking lot[106] and CBS's *60 Minutes* featured the city of Lakewood, Ohio's attempt to declare a quaint neighborhood "blighted" as a step toward condemnation intended to attract private developers.[107]

County of Wayne v. Hathcock began like many other eminent domain cases. In 2001, Detroit authorities started a project to create an industrial park near the Detroit airport. They filed condemnation actions against 19 landowners seeking approximately 1,300 acres of land. The trial court upheld the condemnations, rejecting the landowners' argument that the public use clause barred the takings.[108] The Michigan Court of Appeals affirmed,[109] but of the three appellate judges one wrote a concurring opinion that another joined explaining that although they were constrained by precedent to permit the taking, they believed *Poletown* was wrongly decided and that it was time for the court to overrule the case.[110] Some months later the state's highest court took the case, specifying that it wished the briefs to focus on whether *Poletown* ought to be overruled.[111]

Amici arguing for the overruling of *Poletown* came from a diverse group. The Institute for Justice, a libertarian organization which frequently represents property owners in condemnations, filed a brief along with the conservative Mackinac Center for Public Policy.[112] Perennial Green Party candidate and anti-corporation activist Ralph

104. Bailey v. Myers, 76 P.3d 898 (Ariz. Ct. App. 2003).

105. *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203, (C.D. Cal. 2002); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F.Supp.2d 1123 (C.D. Cal. 2001).

106. *See* Jones, *supra* note 11, at 287 n.14.

107. *See 60 Minutes* (CBS television broadcast, Sept. 28, 2003) (transcript available at 2003 WL 7841149), *cited in* County of Wayne v. Hathcock, 684 N.W.2d 765, 797 nn.43–44 (Mich. 2004) (Weaver, J., dissenting).

108. *Hathcock,* 684 N.W.2d at 771.

109. County of Wayne v. Hathcock, 2003 WL 1950233, at *1 (Mich. App. Apr. 24, 2003), *rev'd,* 684 N.W.2d, 765 (Mich. 2004).

110. *Id.* at *7 (Murray, J., concurring); *Id.* at 8 (Fitzgerald, J., concurring).

111. County of Wayne v. Hathcock, 671 N.W.2d 40 (Mich. 2003) (order granting leave to appeal).

112. Brief of Non-party Institute for Justice and Mackinac Center for Public Policy as Amicus Curiae, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070-124078), *available at* 2004 WL 687838, *also available at* http://www.ij.org/PDF_folder/property_rights/MI_Hathcock_Amicus_Brief.pdf.

Nader also filed a brief arguing for the overruling of *Poletown*.[113] The pro-property rights Pacific Legal Foundation submitted a brief co-signed by the ACLU Fund of Michigan, strongly urging the same result.[114] This diversity revealed the consequences flowing from the public choice problem that *Poletown* created: property rights are fundamental civil rights that are even more important for the poor than for the wealthy, since the wealthy can usually afford to persuade the government to act in their interests.

The Michigan Supreme Court's unanimous decision in *Hathcock* explained the fundamental flaw in the older case:

> Every business, every productive unit in society, does . . . contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "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 . . . .[115]

The court then announced that eminent domain may be used for the benefit of private parties in three circumstances. These three categories reflect the influence that railroad and corporation law had on the development of public use theory. First, condemnation for the benefit of a private party is allowed in cases involving "public necessity of the extreme sort" in that a project would be "otherwise impracticable." This category includes the building of "highways, railroads, canals, and other instrumentalities of commerce . . . ." Second, transfers are permitted "when the public retain[s] a measure of control over the property" through government regulation ensuring that the public can take advantage of the taken property. Third, when "the underlying purpose for resorting to condemnation, rather than the subsequent use of condemned land" is a public use, property may be

113. Brief of Amicus Curiae, County of Wayne v. Hathcock, 684 N.W.2d, 765 (Mich. 2004) (Nos. 124070-124078), *available at* 2004 WL 687836.

114. Brief of Amicus Curiae of Pacific Legal Foundation and ACLU Fund of Michigan in support of Defendants-Appellants, County Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070-78), *available at* 2004 WL 687839.

115. *Hathcock*, 684 N.W.2d at 786–87 (citations omitted).

taken and given to a private group.[116]

The third category is the most problematic. It preserves government's ability to eradicate slums on the theory that such eradication is itself a public use. Yet this is the rationale underlying all economic redevelopment condemnations. If *Hathcock* means that government may, consistent with the public use clause, eradicate "blight" as well as "slums"—a distinction which is far from clear—with the seized property transferred to a private party, then the decision is actually quite narrow.[117] Government redevelopment agencies will simply characterize condemnations as the "eradication of blight," instead of the "promotion of economic health." Courts might then take the intellectual path set out by the California Court of Appeal's decision in *Redevelopment Agency of San Francisco v. Del-Camp Investments*.[118] In that case, the property owner argued that the public use requirement prohibited a redevelopment agency from taking his property for the construction of a hotel. The court rejected this argument because "[t]he public use for which defendant's property was to be taken was community redevelopment, not the construction of a hotel."[119] In the end, the condemnation is the same, merely with a different name.

These possible traps aside, the overruling of *Poletown* is a significant victory for property owners, and may have a profound effect on the law, as well as the civic education of judges, lawyers, and political leaders. By unanimously reversing this major symbol of private takings, and by clearly explaining the threat to private property that *Poletown* created, the Michigan Supreme Court has practically forced other courts considering the issue to take this threat seriously.

Another major lesson to be drawn from *Hathcock* is that there is no substitute for judicial focus on what Epstein has called the "large job"

116. *Id.* at 781–83.

117. "Blight" is defined by statute in many states, but these statutes can be quite vague. *See* Pritchett, *supra* note 11, at 3 ("A vague, amorphous term, blight was a rhetorical device that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city . . . [and] broaden[] the application of the Public Use Clause . . . ."); Colin Gordon, *Blighting The Way: Urban Renewal, Economic Development, And The Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 307 (2004) ("Blight is less an objective condition than it is a legal pretext for various forms of commercial tax abatement . . . [and] subsidiz[ing] the building of suburban shopping malls."). If "blighted" property can be condemned and transferred to private properties, then the vaguer the definition of "blight," the greater the threat posed by the eminent domain power.

118. 38 Cal. App. 3d 836 (1974).

119. *Id.* at 841.

of determining the limits of government action.[120] Many scholars addressing the abuse of eminent domain have sought what one might call means-based remedies rather than ends-based remedies. Under the "rational relationship" test employed in property rights cases, a law must be rationally related to a legitimate government interest. But even the Supreme Court has acknowledged that "[its] cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest.'"[121] Judicial determinations of what are or are not legitimate state interests are uncomfortable because doing so would "require[ ] a conception of the functions of government,"[122] which has been highly disfavored since the rise of the New Deal.[123] The notion of judicial restraint in cases involving property rights has therefore led courts to avoid declaring that a particular condemnation project violates the public use clause because doing so would be to declare certain pursuits off limits to government. As the *Midkiff* Court put it,

> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But . . . "it is an extremely narrow one" . . . . [D]eference to the legislature's "public use" determination is required . . . [because] "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."[124]

Courts and scholars seeking to avoid the uncomfortable problem of declaring certain government purposes to be illegitimate have therefore sought to remedy eminent domain abuse by focusing on the "rational relationship" factor instead.[125] For example, Thomas Merrill, acknowledging that "the transition from the minimalist state to the activist state" has made courts "increasingly uncomfortable in defining the correct or 'natural' ends of government,"[126] has argued

120. Richard A. Epstein, *The Ebbs and Flows in Takings Law: Some Reflections on the* Lake Tahoe *Case*, 1 CATO SUP. CT. REV. 5, 16 (2002).

121. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

122. *See* DUKEMINIER AND KRIER *supra* note 80, at 1114.

123. *See generally* Roger Pilon, *How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees*, 7 NEXUS 61 (2002) (detailing rise of deference as a consequence of the New Deal).

124. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984) (citations omitted).

125. *See* Sandefur, *supra* note 22, at 669–70.

126. Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 64 (1986).

that courts should address "public use in terms of choice of means."[127] Others have argued for the use of "strict scrutiny" in cases involving condemnation for private benefit.[128]

But *Poletown* applied a strict scrutiny standard to condemnations benefiting private parties, assuming that this would suffice to prevent the abuse of eminent domain. That attempt and others like it fail because legislatures have resources and time which private property owners do not have; therefore, placing more procedural roadblocks in the way of condemnation, rather than simply declaring certain condemnations off-limits, is unlikely to stop abuses.[129] Rather, protecting property owners can only be accomplished by squarely acknowledging the fact that some things are simply beyond the legitimate authority of government. By seeking to reform the means chosen for condemnations rather than the ends pursued, the *Poletown* court offered false promises legal protection. *Hathcock* remedies this problem by declaring that mere wealth redistribution is not an acceptable rationale for the exercise of eminent domain.[130]

III. THE NEXT STEPS IN ENDING EMINENT DOMAIN ABUSE—AND THE OBSTACLES

Poletown's significance as a symbol of economic redevelopment condemnations makes its demise especially important. Attorneys will be able to point to a persuasive example of a court recognizing its error in liberalizing the condemnation power. It is possible that *Hathcock* will persuade the United States Supreme Court to reconsider its precedents regarding the Fifth Amendment's public use clause, in which the prevailing legal theory is quite similar to the *Poletown* rationale.

In *Midkiff*, the Supreme Court upheld a Hawaii law which enabled lessors to request the state to condemn the property they were leasing. After a condemnation, the state would resell the property to the tenant with the state financing up to ninety percent of the purchase price.[131] The owners of the property sued, arguing that such condemnations were for a private use, rather than a public one. Like the *Poletown*

127. *Id.* at 109.

128. *See, e.g.*, Jones, *supra* note 11.

129. *Id.* at 305 ("[V]ague arguments for 'stricter' judicial scrutiny do not provide the critical framework by which to review legislative determinations. Unless a coherent analytical theory by which to review transfers to private third parties is articulated, courts will continue to grasp at cryptic legal concepts while ruling in an unguided manner.").

130. County of Wayne v. Hathcock, 684 N.W.2d 765, 786–87 (Mich. 2004).

131. *Midkiff*, 467 U.S. at 233–34.

Court, the United States Supreme Court declared that public use and public purpose are virtually synonymous terms; public use imposed nothing more than the rational relationship test that is already required of all government legislation under the due process clause.[132] *Midkiff* did not even require strict scrutiny of private takings, as the *Poletown* Court purported to do. Rather, "if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."[133]

Midkiff commits the same errors as *Poletown* and for the same reasons. First, it reduces the public use clause to a pointless redundancy, which violates a fundamental rule of construction.[134] Second, it gives the legislature almost carte blanche to redistribute property to whatever interest group is most politically influential—encouraging wasteful lobbying behavior. Third, *Midkiff* has contributed to an epidemic of eminent domain that benefits particular interest groups at the expense of the least politically powerful, even though the Supreme Court itself has long acknowledged that judicial review is most legitimate when it protects vulnerable groups against the politically powerful.[135] As in *Poletown*, the abandonment of the public use limitation in *Berman* and *Midkiff* have created an atmosphere of "naked preferences" in clear contradiction to the purpose of the Constitution.[136] It is to be hoped that the demise of *Poletown* will lead the Supreme Court to reconsider its view of the public use clause.

But there are two serious obstacles to further reform on this issue, one affecting liberals and one affecting conservatives.[137]

Liberals have long embraced the proposition that regulation of property rights or economic liberty ought to be subjected to the highly deferential rational basis test. This has caused some contradictions among left-leaning attorneys. Prof. Erwin Chemerinsky, for instance, strongly defends the application of rational basis scrutiny to economic

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132. *Id.* at 241.

133. *Id.* at 244.

134. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803); United States v. Lopez, 514 U.S. 549, 588–89 (1995) (Thomas, J. concurring).

135. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

136. *See* Derek Werner, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 346–58 (2001).

137. In what follows, I do not mean to suggest that the terms "liberal" or "conservative" are precise or even especially helpful. I use them in their popular connotations. *See* Timothy Sandefur, *Rights Are A Seamless Web*, 26 Rutgers L. Rec. 5, n.10, *at* http://www.lawrecord.com/articles/vol26/26rlr5/seamless.htm.

and property regulations,[138] yet, as Laurence Tribe notes, failing to protect economic rights "overlooks the importance of property and contract in protecting the dispossessed no less than the established; it forgets the political impotence of the isolated job-seeker who has been fenced out of an occupation . . . ."[139] Justice Ginsburg rightly condemns 19th century decisions which upheld economic regulations prohibiting women from engaging in various professions[140]—yet she joined in an opinion by Justice Souter[141] which criticized *Adkins v. Children's Hospital*,[142] a case which struck down just such a regulation on the grounds that "adult women . . . are legally as capable of contracting for themselves as men."[143] Eminent domain implicates liberal concerns because the victims of redevelopment are typically poor minorities.[144] But protecting poor minorities from this fate requires liberal advocates to reconsider their traditional deference to government redistributions of property. When government has the authority to redistribute wealth, that power will fall into the hands of powerful interest groups, which usually means wealthy and influential parties. The solution to this problem can only be to limit the state's authority.[145] The left needs a serious theory of protecting property rights before it can approach this problem effectively.

Professor Kenneth Karst expresses a sentiment common on the left when he writes that "property and economic liberty . . . [are] freedoms that matter[ ] most to people at the top of the heap."[146] But consider for a moment a typical example of eminent domain abuse, *Mississippi Major Economic Impact Authority v. Andrew Archie*.[147] In 2000, the Mississippi legislature decided to condemn 23 acres of land

138. *See* Erwin Chemerinsky, *Under The Bridges of Paris: Economic Liberties Should Not Be Just for The Rich*, 6 CHAP. L. REV. 31, 31–32 (2003).

139. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1374 (2d ed. 1988) (citations omitted).

140. Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 269–70 (1997).

141. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting).

142. 261 U.S. 525 (1923). 261 U.S. 525 (1923).

143. *Adkins*, 261 U.S. at 554. *See also* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 242–43, 249–50 (2003) (criticizing liberals for failing to respect economic liberty).

144. *See* Sandefur, *supra* note 22, at 597–99.

145. *See* BUCHANAN AND TULLOCK, *supra* note 65, at 291–92.

146. KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 179 (1989).

147. No. CO-2001-0082, slip op. 601 (Miss. Special Ct. of Eminent Domain filed July 26, 2001). *See also* Sandefur, *supra* note 22, at 598.

in a minority neighborhood, to transfer it to the Nissan Corporation to construct an automobile plant. Although officials acknowledged that Nissan did not need the land, the state proceeded with the condemnation simply to show Nissan how eager it was to do the company's bidding.[148] The Mississippi Court of Eminent Domain held that the creation of jobs satisfied the public use clause—an ironic holding in a state that once declared that eminent domain did not exist at all under its constitution.[149] The landowners were vindicated when the state dropped its condemnation attempt, and the attorneys who filed the case were awarded the NAACP's "Drum Major for Justice" Award for their work.[150] It is hard to see how the victims of condemnation in this case could agree with Prof. Karst's characterization of property rights. The reality is, property rights—indeed, all rights, and all Constitutional limits—are designed to protect the weak against the strong. In a democracy, there is the added danger that government instrumentalities can be captured by interest groups which seek to use the government itself to violate the rights of others.[151] Thus "[i]n framing a government which is to be administered by men over men . . . you must first enable the

148. Mississippi Development Authority Executive Director James Burns, Jr. admitted in the *New York Times* that "[i]t's not that Nissan is going to leave if we don't get that land. What's important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through." David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20. This is startlingly similar to the language used by Larry Brown, one of the planners responsible for the condemnation of Poletown: "We'd do it again . . . no question about it. The city didn't have a choice. We'd have to do it again. If we had not been able to accommodate General Motors in the city, then we would have had no credibility with any other companies in terms of being able to deliver buildable land or financing. We were just really lucky that General Motors gave us a year's choice." WYLIE, *supra* note 7, at 218.

149. Griffin v. Mixon, 38 Miss. 424, 448 (1860), *overruled by* Martin v. Dix, 52 Miss. 53, 59 (1876).

150. *See* Scott Bullock, *IJ Receives Top Civil Rights Award From Dr. King's SCLC*, 11 Liberty & L. 4, *available at* http://www.ij.org/Publications/liberty/2002/11_4_02_k.asp.

151. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* MADISON: WRITINGS 421 (J. Rakove ed., 1999) ("Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *cheifly* [*sic*] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."); THE FEDERALIST No. 78 (Hamilton), *supra* note 4 at 469 ("independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjectures sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion dangerous innovations in the government and serious oppressions of the minor party in the community.").

government to control the governed; and in the next place oblige it to control itself."[152] But those on the left who wish to rein in the abuse of eminent domain must take property rights seriously, and give up their dream of devising a government which will engage in wealth redistribution only when they approve of such redistribution.[153] Ralph Nader deserves great credit for defending the property owners in Poletown, but as Jean Wylie points out, "[n]o other Left groups were willing to involve themselves, either because of [Detroit Mayor Coleman Young's] former reputation as a radical or because they saw battles for property as 'petty bourgeois.'"[154] This sort of thinking seriously handicaps the Left's ability to defend its traditional constituency.

Conservatives, however, may face an even greater problem. Many conservatives endorse government policies which favor corporations, policies popularly called "corporate welfare."[155] In the 1980s, for example, the Reagan Administration "bailed out" the sickly Chrysler Corporation by guaranteeing $500 million in loans.[156] Republicans as well as Democrats continue to favor business subsidies which exceed $125 billion per year.[157] Conservative real estate developers tend to support the use of eminent domain for economic redevelopment. As Zygmunt Plater and William Norine put it,

> Modern eminent domain is a political paradox that mirrors the twisting historical currents of substantive due process. On its face, governmental exercise of the condemnation power often awaken the reactionary rhetoric of the most stalwart conservative defenders of private property principles. But, in practice, it is often the power groups that call

152. THE FEDERALIST No. 51 (Madison), *supra* note 5, at 322.

153. For example, Ralph Nader and Alan Hirsch, in *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 229–30 (2004), seek to develop a rule that would prevent *Poletown*-style redistributions but at the same time preserve the government's authority to redistribute wealth to its favored groups. What they conclude, however, is that government should be allowed to take property from wealthy parties and give it to less wealthy parties. Nader and Hirsch's approach is marked by their strained attempt not only to preserve the characteristic leftist distinction between property rights and other types of rights, but even to subdivide property rights into "those that are purely economic and those that more closely resemble the kind of rights and liberties we have come to regard as sacred." *Id.* at 215.

154. WYLIE, *supra* note 7, at 75.

155. *See* Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101, 102–05 (1995).

156. Robert B. Reich, *Bailout: A Comparative Study in Law and Industrial Structure*, 2 YALE J. ON REG. 163, 180–187 (1985).

157. *See* Donald L. Barlett and James B. Steele, *Special Report: Corporate Welfare, a System Exposed*, TIME, Nov. 9, 1998 at 36 ("There are no reasonably accurate estimates on the amount of money states shovel out.").

> themselves "conservative" that are allied with the state in eminent domain actions . . . . [T]he traditionally powerful forces of America's economic system . . . have now often joined forces with their erstwhile governmental regulators. When freeways, airports, and pork-barrel public work projects are built with the eminent domain power, the "conservative establishment" and government often constitute an indistinguishable bloc . . . . In the Poletown case, for example, the largest American corporation accurately presumed that it could enlist the powers of government in its behalf to override the private property claims of lower-income landowners. With few notable exceptions . . . eminent domain has achieved a comfortable familiarity and usefulness for its nominal ideological opponents on the Right.[158]

Conservative public policy organizations, therefore, have been disturbingly quiet on the question of public use. The only legal organization that has aggressively challenged the use of eminent domain for economic redevelopment is the Institute for Justice, even though conservative public interest legal foundations have existed for over thirty years.[159]

These are serious obstacles, but they present opportunities, as well. Both the left and the right have as much obligation to educate their own supporters and constituencies as they have to educate courts and the general public. The fact that left and right interests overlap in a case like *Hathcock* presents public interest legal groups with a chance to demonstrate that the Constitution is written to protect all Americans, and that while it may sometimes appear temporarily advantageous to exploit government's dread powers for personal gain, doing so sets a precedent for future such abuses, inevitably harms society, both by decreasing aggregate wealth and in the more abstract sense that it harms fundamental constitutional values.

Right-wing defenders of property rights must be made to see that the very reason for those rights is, as Madison said, the equal

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158. Zygmunt J.B. Plater and William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary And Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 679–80 (1989); WYLIE, *supra* note 6, at 137 (Noting that some conservative groups did "blast GM for its conduct" during the Poletown case. Specifically, Richard Wilcke, president of the Council for a Competitive Economy, told the media that "[t]he right to own homes or a business should not be subordinated to the political or economic gain of others . . . . As this case clearly and dramatically demonstrates, if property rights are not respected, there can be no rights at all.").

159. An attorney at one conservative organization in an East Coast state told me that he experienced serious opposition to challenging a major eminent domain project because the organization was supported by business interests looking forward to exploiting the eminent domain power.

protection of unequal property[160]—to ensure that the poor and the wealthy are both protected from government abuse. The right must stand up against the union of government and corporate power. The left, on the other hand, must be made to understand that the solution to that union is to restrict government power, not to expand it; that concerns for the safety and happiness of the least wealthy and powerful can be addressed in no better way than by ensuring a serious respect for Constitutional limits on government and for protections of private property. As Justice Stewart put it,

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.[161]

Ending eminent domain abuse is vitally important: Americans in most states are at risk of losing their homes to whatever faction is able to gain political influence. Cases liberalizing the use of eminent domain have rendered important constitutional language nugatory, leading to a rash of private condemnations, a threat to the most vulnerable members of the community, and unfair subsidies to the most economically powerful members of the community. By overruling the famous *Poletown* case, *County of Wayne v. Hathcock* took a major step in the right direction. But the legal community now faces a major challenge: those on the left must seriously reconsider the post-New Deal prejudice against property rights if they wish to protect the disenfranchised; those on the right must confront corporate power if they are to restore the constitution's protections for private property.

160. James Madison, *Property*, NATIONAL GAZETTE, March 22, 1792, *reprinted in* RAKOVE, *supra* note 152, at 515.

161. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted).