

Are You Still Master of Your Domain? Abuses of Economic Development Takings, and Michigan's Return to "Public Use" in County of Wayne v. Heathcock

Peter M. Agnetti

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COMMENTS

ARE YOU STILL MASTER OF YOUR DOMAIN? ABUSES OF ECONOMIC DEVELOPMENT TAKINGS, AND MICHIGAN'S RETURN TO "PUBLIC USE" IN *COUNTY OF WAYNE V. HATHCOCK*

PETER M. AGNETTI†

INTRODUCTION

One of the most awesome powers of government is the ability to condemn and take privately owned property through eminent domain.¹ The Fifth Amendment to the United States Constitution restricts the power of eminent domain, prohibiting the taking of private property unless it is for public use.² This restraint on government takings is substantively applied to the

† J.D. Candidate, June 2006, St. John's University School of Law; B.S., 2000, State University of New York at Geneseo.

¹ See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 1 (2003), *available at* http://www.castlecoalition.org/report/pdf/ED_report.pdf ("Eminent domain has the potential to destroy lives and livelihoods by uprooting people from their homes and businesspeople from their shops."); Tony Mauro, *Land Case Is a Hot Property*, LEGAL TIMES, Sept. 20, 2004, at 12 (discussing the importance of determining limits on "one of the most awesome powers a government has at its disposal," eminent domain).

² See U.S. CONST. amend. V (placing two constraints on the power of eminent domain: (1) "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law"; and (2) "[n]or shall private property be taken for public use, without just compensation"). This second constraint contains the Public Use Clause, which mandates that any taking of private property must be justified with a valid benefit being accrued to the public. *See id.* The analysis of this Comment will concentrate on the taking of private property for a purported "public use" and the various legislative and judicial meanings given to this term.

several states through the Fourteenth Amendment.³ Many state constitutions similarly limit eminent domain to those takings justified by public use.⁴ Notwithstanding constitutional limitations, the power of eminent domain has been widely used by state and federal legislatures for various public purposes, including urban renewal and economic development.⁵ Traditionally, eminent domain has been employed to condemn and take private property for improvements such as railroads, utilities, and other infrastructures, and was justified on the theory that the general public would be the beneficiaries of the takings through literal public use.⁶ However, with states and municipalities eager to generate higher tax revenues through economic redevelopment, private real property owners nationwide are increasingly finding their non-blighted, middle-class properties appropriated and transferred over to commercial and residential developers for profit-making ventures.⁷

Facilitating the process, the United States Supreme Court has given free reign to state governments to devise legislative

³ See U.S. CONST. amend. XIV; *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 n.7 (1984) (stating that the Fifth Amendment's Public Use requirement "is made binding on the States only by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause"); see also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711, 716 (1999).

⁴ See, e.g., *infra* note 26 (discussing Michigan's constitutional restraints on eminent domain).

⁵ See, e.g., *Berman v. Parker*, 348 U.S. 26, 33-36 (1954) (declaring the constitutionality of eminent domain for the purpose of urban renewal, which was meant to regenerate Washington D.C.'s inner-city areas by eliminating slums and removing blight); see also Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 1-2 (2003) (noting how *Berman* highlighted the "struggle to balance the rights of individual property owners against societal interests in the development, or protection, of scarce resources").

⁶ See James W. Ely, Jr., *Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, PROB. & PROP., Nov./Dec. 2003, at 30, 31 (stating that eminent domain was historically used "to provide public facilities, such as roads, parks, and military installations"); Pritchett, *supra* note 5, at 9 ("[S]uch takings were approved on the theory that the fruits of the takings would be available to the general public."); M. Robert Goldstein & Michael Rikon, *'Public Use' Redefined*, N.Y. L.J., Aug. 25, 2004, at 3 (explaining that the taking of property by eminent domain "originally contemplated the taking for the literal use of the public"); see also *infra* note 34 (discussing the traditional definition of public use).

⁷ See Mauro, *supra* note 1 (noting that home owners nationwide are finding their "unblighted properties seized and turned over to commercial and residential developers" due to municipalities' eagerness to generate higher tax revenues through redevelopment).

takings. The pioneering cases of *Berman v. Parker*,⁸ *Hawaii Housing Authority v. Midkiff*,⁹ and a Michigan Supreme Court case, *Poletown Neighborhood Council v. City of Detroit*,¹⁰ shifted the understanding of the term “public use” and practically relegated the Public Use Clause to a distant memory.¹¹ As a result, over the past few decades many state courts and legislatures have come to interpret the state and federal public use clauses in a manner that allows state and municipal governments to condemn and take private property for virtually any reason provided there is a somewhat rationally stated economic benefit in store for the government fisc.¹² Solidifying the demise of federal constitutional protection through the Public Use Clause, the United States Supreme Court, in *Kelo v. City of New London*,¹³ held that the taking of private property by a state to promote economic development “unquestionably serves a public purpose,” and hence satisfies the public use requirement of the Fifth Amendment.¹⁴ As a result of *Kelo*, the states, through their own constitutional or statutory restraints, are now the sole protectors of private property owners from the threat of eminent domain exercised upon the rationale of economic development.¹⁵

⁸ 348 U.S. 26 (1954).

⁹ 467 U.S. 229 (1984).

¹⁰ 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

¹¹ See *infra* Part II (discussing the legal analysis provided by the United States Supreme Court for determining if a particular use of eminent domain satisfies the Public Use Clause).

¹² See *Midkiff*, 467 U.S. at 241 (holding that the federal Public Use Clause will not prohibit a taking as long as “the exercise of the eminent domain power is rationally related to a conceivable public purpose”); see also BERLINER, *supra* note 1, at 1 (revealing that the present trend is for local and state governments to use eminent domain “for casino[s], condominiums or . . . private office building[s] . . . as part of corporate welfare incentive packages and deals for more politically favored businesses”); Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 208 (2004) (arguing that judicial interpretation of the public use requirement has “render[ed] it meaningless” by allowing private property to be taken “for any reason whatsoever, including crass political purposes or speculative, transient economic purposes”). Criticism of such condemnations with virtually no limit has come from both ends of the political spectrum. See *id.* at 223 (“Conservatives object to government coercion and disrespect for private property in service of speculative claims about the public good. Liberals object to the exercise of government authority on behalf of the powerful and at the expense of the powerless.”).

¹³ 545 U.S. ___, 125 S. Ct. 2655 (2005).

¹⁴ *Id.* at 2664–65.

¹⁵ See *id.* at 2668 (“We emphasize that nothing in our opinion precludes any

Despite the *Kelo* precedent and the trend among state legislatures to expand the traditional meaning of the Public Use Clause, several recent state and federal court decisions have successfully reined in expansive executions of eminent domain power.¹⁶ Recently, in *County of Wayne v. Hathcock*,¹⁷ the Michigan Supreme Court has seemingly given hope to private owners of real property by providing a "public use" standard for government takings that are done primarily to benefit other private entities.¹⁸ The court held that Michigan municipalities do not have the power under the state's Public Use Clause to condemn private property for the purpose of transfer to another private party in order to spur economic development, except under exceptional circumstances.¹⁹

State from placing further restrictions on its exercise of the takings power."). *But see id.* at 2677 (O'Connor, J., dissenting) (positing that the suggestion by the Court that property owners must rely on the states to determine limits on economic development takings "is an abdication of [the Supreme Court's] responsibility"). "States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them." *Id.*

¹⁶ See, e.g., *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229–30 (C.D. Cal. 2002) (barring the City of Cypress, California from condemning church property so it could be sold to Costco by granting an injunction, in part, because of the likelihood of success on the merits of the plaintiff's takings claims on public use grounds); *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. 2003) (prohibiting the use of eminent domain by the City of Mesa to take property from a brake shop owner for the primary benefit of Ace Hardware, and holding that "[Arizona's] constitutional requirement of 'public use' is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use"). Not all state courts, however, have been equally as critical of their legislature's definition of "public use." See *Kelo v. City of New London*, 843 A.2d 500, 520 (Conn. 2004) (holding that economic development projects "that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions"), *aff'd*, 545 U.S. ___, 125 S. Ct. 2655 (2005); *W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 298 A.D.2d 1, 5–7, 744 N.Y.S.2d 121, 124 (1st Dep't 2002) (upholding the use of eminent domain to condemn a city block consisting of several profitable office buildings in New York City's Times Square in order to provide property to the New York Times to build a new headquarters). Likewise, federal courts now must defer to the central holding of *Kelo* that takings for the purpose of economic development are justified under the federal Constitution. See *Calhoun Realty, Inc. v. City of Cincinnati*, No. 1:03-CV-00198, 2005 WL 2000664, at *2 (S.D. Ohio Aug. 19, 2005) (holding that "[t]he precedent in *Kelo* applies since [d]efendants' goals for taking the property are to promote economic development").

¹⁷ 684 N.W.2d 765 (Mich. 2004).

¹⁸ See *infra* Part I (discussing the analysis in *Hathcock*).

¹⁹ See *Hathcock*, 684 N.W.2d at 781–83, 787. The special circumstances given by

In *Hathcock*, the Wayne County legislature (the "County") sought to condemn the defendants' property in order to develop and establish a 1300-acre business and technology park ("Pinnacle Project") adjacent to the recently expanded Metropolitan Airport.²⁰ The purpose of the park was to boost the local economy by generating new employment opportunities and a higher tax-base for the local government.²¹ The County was able to procure most of the property needed to develop the new park, but still needed to acquire an additional 300 acres to complete its land assembly objective.²² The County then adopted legislation²³ authorizing the acquisition of the remaining 300 acres desired for the Pinnacle Project.²⁴ Appraisal-based offers were delivered to the remaining property owners, and although some offers were accepted, the defendants chose not to sell.²⁵ Unable to secure voluntary sales from the defendants, the

the court under which eminent domain can legitimately be exercised for the benefit of a private entity will be discussed in Part I. As noted above, as a result of the *Kelo* decision, property owners can now look only to their state's constitution for protection from economic development takings. The *Kelo* ruling has no binding influence on a state's interpretation of its own constitutional protections. See *supra* note 15 and accompanying text.

²⁰ See *Hathcock*, 684 N.W.2d at 770. Wayne County received a grant of \$21 million from the Federal Aviation Agency to partially fund a program to purchase properties neighboring the new terminal and runway of the Metropolitan Airport. See *id.* This was done in an effort to abate any inconvenience to local homeowners as a result of enhanced noise from the increased air traffic at the airport. See *id.* The County was able to purchase 500 of the 1300 acres needed through the noise abatement program, and only when it needed further assembly of land to build the park did it turn to eminent domain. See *id.* at 771. Hence, it seems that the County was proposing to protect private homeowners from bothersome airport noise by condemning their property.

²¹ See *id.* at 770-71. The County claimed that the technology park would "enhance the image" of the community and "attract national and international businesses." *Id.*; cf. *Kelo*, 843 A.2d at 542-43 (finding a valid public use based on similar benefits to the community). The County also supplied expert testimony that claimed the proposed project would create 30,000 jobs and generate an additional \$350 million in annual tax revenue. See *Hathcock*, 684 N.W.2d at 771.

²² The County acquired 500 acres through the noise abatement program and an additional 500 acres through solicitation of voluntary sales. See *Hathcock*, 684 N.W.2d at 771.

²³ The law was named the Resolution of Necessity and Declaration of Taking. See *id.*

²⁴ See *id.*

²⁵ See *id.* There were a total of nineteen outstanding parcels owned by the defendants. See *id.* The defendants' parcels were dispersed throughout the desired 300-acre area in a checkerboard pattern. See *id.* at 770.

County initiated condemnation actions.²⁶ The trial court, in an unpublished opinion, held that the Pinnacle Project served a valid public purpose under the controlling constitutional jurisprudence, and the Michigan Court of Appeals affirmed.²⁷

Applying the standard set forth by the dissent in *Poletown*,²⁸ the Michigan Supreme Court reversed the decision of the lower

²⁶ See *id.* at 771. The condemnation actions were initiated by the County under the Uniform Condemnation Procedures Act. See *id.*; MICH. COMP. LAWS §§ 213.51–213.76 (2004). Each of the defendant property owners filed a motion to review the actual necessity of the proposed condemnations. See *Hathcock*, 684 N.W.2d at 771. The defendants had three arguments: first, that there was no statutory authority for eminent domain in their cases; second, that the condemnations were not necessary as required by the statute; and third, that the condemnations were unconstitutional because the Pinnacle Project lacked a valid public use. See *id.* This Comment will concentrate on the third argument, as that focuses on the definition of public use in a constitutional sense. It should be noted that the *Hathcock* court based its decision and definition of public use on its interpretation of the Michigan State Constitution. See *id.* at 779; see also MICH. CONST. art. X, § 2 (“Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law.”). Michigan’s Constitution, therefore, provides an adequate and independent state ground for the *Hathcock* decision, precluding review by the United States Supreme Court. See Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1888–89 (2003) (explaining how the adequate and independent state ground doctrine protects state court decisions that rest on state law from federal review). States are free to grant more protections than those afforded by the Federal Constitution, but are prohibited from granting less. See Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339, 345–46 (2004). However, because Michigan’s Public Use Clause is nearly identical to that of the United States Constitution and similar to those of the constitutions of virtually every other state, an analysis of the *Hathcock* court’s reasoning will prove fruitful for future state and federal undertakings to define “public use.” See 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, 569–70 (2003).

²⁷ See *Hathcock*, 684 N.W.2d at 771–72. The trial court rendered its decision under the analysis of the then-controlling law of *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 457 (Mich. 1981), overruled by *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The *Poletown* court held that the City of Detroit was permitted to condemn private residential properties in order to convey those properties to General Motors, a private corporation, for the construction of an assembly plant. See *id.*; see also *infra* Part I. The Michigan Court of Appeals affirmed on the same grounds but argued that *Poletown* was “poorly reasoned, wrongly decided, and ripe for reversal by [the Michigan Supreme Court].” See *Hathcock*, 684 N.W.2d at 771–72.

²⁸ In his dissent in *Poletown*, Justice Ryan laid out three possible characteristics of a governmental taking for the benefit of a private corporation that would satisfy the constitutional definition of public use. See *Poletown*, 304 N.W.2d at 477–78 (Ryan, J., dissenting).

court.²⁹ In his dissent in *Poletown*, Justice Ryan explained that there are three elements that “justify[] the use of eminent domain for private corporations: 1) *public* necessity of the extreme sort, 2) continuing accountability to the *public*, and 3) selection of land according to facts of independent *public* significance.”³⁰ Adopting these elements, the *Hathcock* court first reasoned that the Pinnacle Project was “certainly not an enterprise ‘whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.’”³¹ Next, the court stated that because the Pinnacle Project was not subject to sufficient public oversight, there was no guarantee that the venture would contribute the anticipated long term benefits to the local economy.³² Finally, the court asserted that although enhancement of economic conditions is an appropriate public purpose, the underlying purpose of the Pinnacle Project did not serve the public good *independent* of the benefits conferred by the private corporations through post-condemnation development.³³

By overruling *Poletown*, the *Hathcock* court partially restored, at least in Michigan, the definition of “public use” to the rational meaning intended by those who drafted and ratified the public use clauses in the federal and various state constitutions.³⁴

²⁹ See *Hathcock*, 684 N.W.2d at 788.

³⁰ *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting).

³¹ See *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)); see also *infra* Part I.A (analyzing the first exception to the general requirement of literal public use when using the power of eminent domain—instrumentalities of commerce).

³² See *Hathcock*, 684 N.W.2d at 784. Rather than ensuring public oversight, the court found that the County planned to take the defendants’ property and transfer it to private corporations that planned “to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise.” See *id.*; see also *infra* Part I.B (analyzing the second exception—public oversight).

³³ See *Hathcock*, 684 N.W.2d at 784; see also *infra* Part I.C (analyzing the third exception—public good).

³⁴ For an originalist interpretation of the term “public use,” Justice Thomas provided a valuable tutorial in his *Kelo* dissent: “The most natural reading of the [Public Use] Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.” *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655, 2679 (2005) (Thomas, J., dissenting). Justice Thomas then explained that the noun “use” was understood by the Founding Fathers as “[t]he act of employing any thing to any purpose.” *Id.* (quoting S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2194 (4th ed. 1773)) (alteration in original). “When the government takes property and gives it to a

It is submitted, however, that the requirements test laid out by the Michigan Supreme Court in *Hathcock* still leaves too much discretion with the legislature to take private property unconstitutionally for others' private gain by relying on an economic development rationale. Furthermore, the *Hathcock* decision will likely send reverberations throughout the country, despite the Supreme Court's holding in *Kelo*, because of *Poletown's* vast and strong influence on other states in expanding their own powers of eminent domain.³⁵

This Comment asserts that takings that do not fall within one of the limited exceptions and which primarily benefit a private entity at the expense of owners of non-blighted private property not only fail to pass constitutional muster, but also work in an economically inefficient manner so as to threaten perpetually all ownership of real property in the United States. Far from being a discourse on the evils of corporate exploitation, this Comment will examine and criticize the public use requirement of the *Hathcock* court, which revitalized, albeit incompletely, the "dead-letter" of the Public Use Clause in Michigan. Part I will analyze the *Hathcock* checks on government takings and distinguish them from the unfettered discretion given to municipalities by other states and, unquestionably, by United States Supreme Court jurisprudence. Part I also offers ideas on how states can ensure the receipt of the public benefits promised by the private beneficiaries of eminent domain, and will show how the use of eminent domain to eliminate alleged "blight" can manipulatively be used interchangeably with the economic development rationale overruled by *Hathcock* and upheld by *Kelo*. Part I further will propose suggestions for further state restrictions that should be

private individual, and the public has no right to use the property, it strains language to say that the public is 'employing' the property, regardless of the incidental benefits that might accrue to the public from the private use." *Id.* Finally, Justice Thomas asserted that "[t]he term 'public use,' then, means that either the government or its citizens as a whole must actually 'employ' the taken property." *Id.* "The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A. and giv[ing] it to B.'" *Id.* at 2680 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)) (alteration in original).

³⁵ See Dean Starkman, *Michigan Upholds Property Rights In Broad Ruling*, WALL ST. J., Aug. 2, 2004, at A6 (noting how the *Hathcock* decision will have broad impact because other state courts have long relied on *Poletown* to justify condemnations made pursuant to an economic development rationale).

imposed on government condemnations, particularly in the wake of *Kelo*'s grant of discretion. Part II briefly advocates the need for meaningful state judicial review of what opportunistic legislatures deem to be a "public use." The Comment concludes with a look at recent public reaction and political responses to economic development takings.

I. *HATHCOCK*'S THREE EXCEPTIONS FOR THE USE OF EMINENT DOMAIN THAT PRIMARILY BENEFITS PRIVATE PARTIES

Although undoubtedly disappointing to state and municipal legislatures looking to give a shot in the arm to the local economy, *Hathcock*'s overruling of *Poletown* certainly appears to be encouraging news to owners of real property in Michigan.³⁶ *Hathcock* has refuted the idea that a "generalized economic benefit" to a private corporation is sufficient to satisfy Michigan's Public Use Clause.³⁷ The court explained how *Poletown* erroneously and continually endangered private property ownership:

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.³⁸

The continuous threat of arbitrarily losing one's property because someone else can use it more profitably intuitively promotes economic inefficiency by discouraging the purchase of private property.³⁹ After all, with no protection from a well-

³⁶ Property owners in other states should also be encouraged due to *Poletown*'s vast influence on other states' expansion of public use to include generalized economic benefits to a beneficiary private corporation. See *supra* note 35 (discussing *Poletown*'s national influence). Any optimism, however, must be tapered by the lack of federal constitutional protection. See *Kelo*, 545 U.S. at ___, 125 S. Ct. at 2665.

³⁷ See *Hathcock*, 684 N.W.2d at 786 ("Before *Poletown*, we had never held that a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy.").

³⁸ *Id.*

³⁹ See Dana Berliner, *You Can't Go Home Again*, LEGAL TIMES, Oct. 11, 2004, at 42 (noting how private property can never be deemed secure if it can be condemned under any rationale that relies on its transferee's ability to use the property in a

financed developer, it's much less appealing to buy in the first place if the purchase is conditioned on the buyer using the property in a manner that is most financially rewarding to the state. However, *Hathcock* did not completely bar the use of eminent domain for the benefit of another private party. As will be discussed below, there are three exceptions under *Hathcock* that allow for government takings to subsidize a private corporation.

A. The Instrumentalities of Commerce/Public Necessity Exception

In some situations, a public or private project affecting the instrumentalities of commerce cannot be accomplished without the taking of a particular parcel of land. In such cases, eminent domain is needed to provide a resolution.⁴⁰ Such projects may include a private railroad or public highway that, due to geographical constraints, needs to run directly through a privately owned piece of real estate.⁴¹ In *Hathcock*, the proponents of the Pinnacle Project could not show that the technology park was unable to be constructed but for the

more lucrative manner).

⁴⁰ See *Hathcock*, 684 N.W.2d at 781 (referring to this prerequisite context as a "public necessity of the extreme sort"). In his dissent in *Poletown*, Justice Ryan stated that within the court's historical jurisprudence, "the exercise of eminent domain for private corporations has been limited to those 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." *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting) (emphasis in original).

⁴¹ See *Hathcock*, 684 N.W.2d at 781 (describing Justice Ryan's list that includes "highways, railroads, canals, and other instrumentalities of commerce" as illustrations of public necessities (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting))); see also Ely, *supra* note 6, at 33 (stating that during the industrial revolution, state and federal courts repeatedly upheld legislation that allowed private railroads "to appropriate private property"). Such takings for the benefit of private entities were rationalized on the theory that railroads, which were analogous to public highways, furthered the "public purpose of improving [interstate] transportation." See *id.* This analogy between private railroads and public highways commenced a line of thinking that "began to conflate public use with the more expansive concept of public interest or public benefit." See *id.*; see also Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV 61, 64 (1986) (discussing how many courts have shifted their focus from "property rules," which grant injunctive relief because of the questionable *means* used to take private property, to "liability rules," which grant compensation while solely concentrating on the stated *ends* of the taking).

exclusive use of the defendants' private property.⁴² As courts have interpreted it, the public necessity exception is a legitimate, widely accepted use of eminent domain.⁴³ The ability to condemn private property for a genuine public use affecting the instrumentalities of commerce, as traditionally understood, is not in dispute and not within the scope of this Comment.⁴⁴ The final two exceptions provided by the court, however, leave considerable room for abuse under the very economic development rationale overruled by the *Hathcock* court.

B. The Public Oversight/Accountability Exception

The *Hathcock* court explained that eminent domain may be used primarily to benefit a private corporation "when the private entity remains accountable to the public in its use of that property."⁴⁵ The municipality must put in place "formal mechanisms . . . to ensure that the businesses that . . . [receive the benefit of the condemned] properties . . . continue to contribute to the health of the local economy."⁴⁶ The court noted

⁴² See *Hathcock*, 684 N.W.2d at 783–84 (explaining that shopping centers, office parks, hotels, and the like do not need eminent domain for their construction, notwithstanding their lack of characterization as instrumentalities of commerce).

⁴³ See, e.g., *City of Novi v. Robert Adell Children's Funded Trust*, 701 N.W.2d 144, 147 (Mich. 2005) (holding that, even under the narrow standards of the *Hathcock* decision, the City's taking of private property to build a road, which was to be open to the public but primarily used by a private entity that helped finance the project, satisfies the public use requirement).

⁴⁴ See, e.g., *Kelo v. City of New London*, 545 U.S. at ___, 125 S. Ct. 2655, 2681 (2005) (Thomas, J., dissenting) (conceding the necessity of eminent domain and explaining that historically states used takings "to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (stating that it is beyond question that Congress has the power to adopt public policies "authoriz[ing] the taking of private property for public use"). Indeed, forbidding government intervention in situations affecting the instrumentalities of commerce would likely erect serious economic and practical roadblocks in the form of bilateral monopolies. See *Hathcock*, 684 N.W.2d at 781–82 (explaining the problem of bilateral monopoly, where a land owner in the path of a proposed railroad track could refuse to sell his land for less than fifty times its appraised value, thereby creating a deadlock); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55 (6th ed. 2003) (arguing that due to the high transaction costs resulting from bilateral monopolies faced with right-of-way companies, such as railroads, eminent domain is necessary "to shift resources to a more valuable use, because the market is by definition unable to perform this function in those settings").

⁴⁵ *Hathcock*, 684 N.W.2d at 782.

⁴⁶ *Id.* at 784. Unlike the Michigan Constitution, the U.S. Constitution requires no such "reasonable certainty" that the expected public benefits will actually

that the Pinnacle Project, like the General Motors manufacturing plant in *Poletown*, was not subject to any public oversight to ensure that the benefits emanating from the property continued to accrue to the community.⁴⁷ The court gave some examples of what does and does not constitute public oversight, but left readers and real property owners guessing as to how liberally this exception will be applied by the judiciary.⁴⁸

There are several ways that the public oversight requirement can be accomplished. For instance, one method might be requiring a beneficiary corporation to promise a requisite number of jobs and tax dollars. However, no matter how optimistic such promises may be, they are merely speculative.⁴⁹ The *Hathcock* court paid "lip service" to this problem, stating that "[t]o justify the exercise of eminent domain solely on the basis of the fact that the use of that property . . . *might* contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."⁵⁰ The court, however, failed to give municipalities that are truly interested in serving

accrue." *Kelo*, 545 U.S. ___, 125 S. Ct. at 2667. The Court in *Kelo* reasoned that "[a] constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans." *Id.* at 2668. Apparently, the *Kelo* Court was more concerned with expediting the taking process than ensuring the purported economic benefits of the plan to the public.

⁴⁷ *Hathcock*, 684 N.W.2d at 784.

⁴⁸ See *id.* at 782. As an example of what does not constitute public oversight, the court mentioned a case where the private entity, a power utility, would "own, lease, use, and control" the land and the water power emanating from the land. See *id.* (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 479 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)). As an example of valid public oversight, the court mentioned a case where the state retained control of a petroleum pipeline. See *id.* In that case: (1) the private beneficiary corporation guaranteed that it would transport petroleum in intrastate commerce; (2) the corporation's plans were subject to directions from the state; and (3) the state was able to enforce those obligations. *Id.* It should be noted that the latter example may fall under the instrumentalities of commerce exception. See *supra* Part I.A.

⁴⁹ See Nader & Hirsch, *supra* note 12, at 220. In *Poletown*, the majority conceded that the public benefits promised "cannot be speculative or marginal but must be clear and significant." *Poletown*, 304 N.W.2d at 460. Still, the *Poletown* court accepted General Motors's highly speculative claims. See Nader & Hirsch, *supra* note 12, at 219 (pointing out this contradiction in *Poletown*).

⁵⁰ *Hathcock*, 686 N.W.2d at 786 (emphasis added); see Nader & Hirsch, *supra* note 12, at 219.

the public good through economic stimulation a solution to this dilemma.⁵¹ A municipality that transfers private property to a private entity at a favorable price in return for speculative promises should retain more control than the abstract ability to enforce any promised obligations. After all, individuals' personal residences are potentially at stake.⁵² When weighing the interests of private persons and their residences (or their private commercial real estate) against speculative gains for the community at large, a more exacting standard should be used.

1. Alternatives for Enforcing Speculative Promises Through Public Oversight

To guard against the risk that speculative claims may fail to come to fruition, a number of objective safety measures may be put in place by the state judiciary or legislature. For example, where eminent domain is used to transfer private property to a private entity vowing to provide economic stimulus, the probability of that stimulus should be demonstrated to the satisfaction of objective experts.⁵³ The next logical question becomes: Even if the purported benefits are vouched for by an expert witness and guaranteed by the private entity, what happens if the entity fails to perform? The *Hathcock* court made no mention of any bona fide ramifications for entities that fail to meet their promised obligations.⁵⁴ Furthermore, even if the state

⁵¹ As discussed in note 48, the examples given by the court for the public oversight exception appear to involve projects that would fall under the first exception, which allows eminent domain to be used to benefit private parties when dealing with instrumentalities of commerce. Assuming the court meant that this second exception is only available for public utilities and the like, the economic development rationale put forth by the County would not be valid even if sufficient public oversight were available. Because the *Hathcock* court was unclear as to whether the second exception could apply to entities other than public utilities, this Comment assumes that this exception may apply to other entities as well and will explore the alternative means available for ensuring public oversight of transfers to these entities.

⁵² See *Poletown*, 304 N.W.2d at 470 (Ryan, J., dissenting) (discussing how a person's personal residence can be his or her "single most valuable and cherished asset" and how a stable community can be an "unchanging symbol of the security and quality of [life]"); see also Nader & Hirsh, *supra* note 12, at 216 (noting that "property can be a foundation for 'self-determination and self-expression,' and 'personal property' can be inseparable from liberty").

⁵³ See Nader & Hirsch, *supra* note 12, at 230.

⁵⁴ See *Hathcock*, 684 N.W.2d at 784. The *Hathcock* court noted that at the trial court level, expert testimony anticipated that the Pinnacle Project would create 30,000 jobs and add \$350 million in tax revenue for the County. See *id.* at 771.

retains the right to enforce the obligations through contractual remedies, it cannot be expected, as a practical matter, to be able to force a private retailer or technology park to hire more workers or sell more of its product so as to increase its taxable income.

One solution to this predicament is to use a legal device to deprive the beneficiary corporation of the benefit received by the taking if the promises do not pan out. The contractual commitment can be given some teeth by including a "claw back" provision, under which the beneficiary corporation, in the event it fails to deliver on its promises, is required to pay the municipality the equivalent of any benefits received in return for such promises.⁵⁵ Another solution is to grant the beneficiary corporation a defeasible estate or to impose some type of restrictive covenant in the deed. For example, the municipality could transfer the land subject to the condition that the land be used only for the specific purposes needed to fulfill the promised benefits.⁵⁶ Retention of the fee could be further conditioned on actually meeting the promised employment opportunities and tax revenue. In the alternative, an affirmative restrictive covenant could be used as an incentive for the corporation to provide the promised economic benefits.⁵⁷ Under such a restrictive covenant, the corporation would be compelled to use the land only in a manner consistent with its promised goals. Other possible options include restrictive covenants like those found under limited profit housing laws.⁵⁸ Under such a conveyance, the

⁵⁵ See Nader & Hirsch, *supra* note 12, at 221 n.101, 230 (describing the characteristics of a "claw back" provision in the eminent domain context). Concededly, none of these public oversight solutions will likely console the private property owner whose home has been taken for private development.

⁵⁶ There are two types of defeasible estates: the determinable fee and the fee subject to condition subsequent. See, e.g., *Mahrenholz v. County Bd. of Sch. Trustees of Lawrence County*, 417 N.E.2d 138, 141 (Ill. App. Ct. 1981). Under the former, the grantor retains a possibility of reverter, which confers on the grantor an immediate reversion of the fee simple if the condition is broken. See *id.* Under the latter, the grantor retains a right of reentry, which confers on the grantor only the right to retake the property, not an automatic reversion. See *id.*

⁵⁷ Most jurisdictions in the United States subscribe to the rule that such affirmative burdens "run with the land." See, e.g., *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 254, 15 N.E.2d 793, 795 (1938). This would prevent the corporation from avoiding the obligations in the covenant by transferring the land to a related subsidiary or the like.

⁵⁸ See, e.g., N.Y. PRIV. HOUS. FIN. LAW §§ 10-37 (McKinney 2002); see also John R. Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local*

beneficiary corporation would be prohibited from selling the property it received at a price above that produced by a prearranged formula.⁵⁹ This would deter the corporation from closing up shop, reneging on its promises, and selling at a substantial profit the property, which was transferred to it at a favorable price. The state could also merely grant a leasehold interest to the corporation with an option to purchase contingent upon it meeting the promised benefits.⁶⁰ Whatever the method used, some legal device must be used to hold accountable the private beneficiary of the eminent domain.

2. A Uniform Federal Standard on Public Oversight

Even the preceding proposed safeguards may be ineffective without a uniform federal standard governing public oversight provisions.⁶¹ Absent such a standard, these safeguards may actually have a counterproductive effect. In theory, companies can be forced to keep their promises of jobs and tax revenues by agreeing to pay a penalty of some kind or even to forfeit the property if stated goals are not met. Although this contractual arrangement may appear to be a panacea, in reality there is nothing binding the potential developer or corporation to a specific geographic area. In *Poletown*, for instance, General Motors was clearly in the proverbial driver's seat vis-à-vis the City of Detroit, which was already in the middle of a severe

Government to Create Affordable Housing, 17 FORDHAM URB. L.J. 383, 409–10 (1989) (discussing the movement by New York State to encourage private enterprises to develop housing for low- and middle-income persons). In 1955, in response to the need for low-income housing, New York enacted the Limited-Profit Housing Companies Law, popularly known as the Mitchell-Lama Program. *See id.* at 409–10 & n.131. The law authorized the state government to make 90%, 50-year loans to limited-profit companies incorporated under the new Mitchell-Lama law, which created a cooperative housing project. *See id.* at 409 n.131. Additionally, in order to improve the quality of life in urban areas, the legislature made available tax exemptions and long-term financing at favorable interest rates to low-income cooperative tenants. *See id.* at 410 n.134.

⁵⁹ *See* Nolon, *supra* note 58, at 410 n.134. The purpose of this formula is to prevent the beneficiary developers or tenants from flipping their properties at a large profit. *See id.* The resale price, subject to the approval of the commissioner of housing, was to be “equal to the price paid by the selling tenant plus the cost of any capital improvements plus a portion of the actual aggregate amortization paid on all existing and prior mortgages plus reasonable administrative costs.” *See id.*

⁶⁰ *See id.* at 413 n.150.

⁶¹ *See* Nader & Hirsch, *supra* note 12, at 230.

economic downturn.⁶² Had Detroit insisted on a guarantee of a specific number of jobs and tax dollars per year, General Motors would likely have skipped town to a friendlier state; one where General Motors could cheaply purchase land or one that would transfer land via eminent domain with no strings attached. Thus, not only could a demand for guarantees or an agreement to “claw back” provisions potentially push developers out of a particular jurisdiction, they could also create a “race to the bottom” between states with friendly land transfer laws trying to lure in private corporations.⁶³ For these reasons, a uniform federal standard governing public oversight is necessary ensure effective accountability measures.

C. *The Public Good/Slum Clearance Exception*

The final exception addresses the situation where the property itself is in such a condition that condemnation is in the best interest of the public. The *Hathcock* court explained that property may be condemned where “the selection of the land to be

⁶² In *Poletown*, General Motors was threatening to close two plants in Detroit, a city that was already in the midst of a major recession. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). Such a threat could not have resulted in an arm's-length transaction because the city was desperate for economic stimulus and wanted to prevent local businesses from leaving town. This reality coupled with the fact that General Motors was opposed by low-income families suggests that the deck was stacked against the interests of the homeowners. See Nader & Hirsch, *supra* note 12, at 226–27 (“[P]itting General Motors against the elderly, unwealthy citizens of Poletown is like a football game between Penn State and a junior college.”).

⁶³ See Nader & Hirsch, *supra* note 12, at 231 (hypothesizing that the imposition of a federal legislative standard would prevent state governments from the undesirable “race to the bottom”). In *Kelo*, rather than providing a federal standard governing the taking of private property for economic development, the United States Supreme Court simply deferred to state legislatures. See *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655, 2668 (2005) (“Just as we decline to second-guess the City’s considered judgments about the efficacy of its development plan, we also decline to second-guess the City’s determinations as to what lands it needs to acquire . . . to effectuate the project.”). Because *Kelo* presented virtually the same fact pattern as *Hathcock*, the Supreme Court did not tackle the problem addressed in Part I.C, i.e., the problem of dealing with the use of the “blight” designation by legislatures in place of the economic development rationale. Concerning the “race to the bottom” problem, it is less likely that a retail store or technology park developer, who comes to the municipality for the *locally originating* sales, will have as much leverage as companies like General Motors who use a manufacturing plant to produce cars for sale *nationwide*. Such local businesses will, therefore, be less prone to participate in a “race to the bottom.”

condemned is itself based on public concern.”⁶⁴ That is, the property chosen for condemnation is “selected on the basis of ‘facts of independent public significance,’ meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution’s public use requirement.”⁶⁵ In *Hathcock*, all of the alleged benefits of the Pinnacle Project, including the new jobs and tax revenue, were to arise *after* the land was seized by the County and transferred to the private corporations developing the property.⁶⁶ Therefore, the Pinnacle Project condemnations did not fit into this seemingly narrow exception. Examples of condemnations that do satisfy this exception are those made in furtherance of slum clearance or removal of “blighted”⁶⁷ property.⁶⁸ In the process of clearing so-called blighted property, the public allegedly accrues the benefits of increased health and safety, even if the property is later transferred to private real estate developers.⁶⁹ However, since the Supreme Court’s ruling in *Berman v. Parker*, many states have been moving towards

⁶⁴ *County of Wayne v. Hathcock*, 684 N.W.2d 765, 782–83 (Mich. 2004).

⁶⁵ *Id.* at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

⁶⁶ *See id.* at 784. In her *Kelo* dissent, Justice O’Connor discussed the underlying principle of direct public benefit that was present in both *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *See Kelo*, 545 U.S. ___, 125 S. Ct. at 2674 (O’Connor, J., dissenting) (“In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth.”). Justice O’Connor convincingly pointed out that “[b]ecause each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use.” *Id.* This analysis is analogous to *Hathcock*’s requirement, under the third exception, that the reason for condemning the property itself must independently satisfy the public use requirement. *See Hathcock*, 684 N.W.2d at 783. As noted by Justice O’Connor, “if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words ‘for public use’ do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.” *Kelo*, 545 U.S. ___, 125 S. Ct. at 2675 (O’Connor, J., dissenting).

⁶⁷ *See infra* Part I.C.2 (discussing traditional and contemporary meanings of the term “blight”).

⁶⁸ *See Hathcock*, 684 N.W.2d at 784.

⁶⁹ *See id.*; *see also Berman*, 348 U.S. at 32 (explaining that public problems subject to the traditional application of police power, such as “[p]ublic safety, public health, morality, peace and quiet, [and] law and order,” are legitimate areas for the exercise of eminent domain). In a rather blunt analogy, the *Berman* Court remarked that “[t]he misery of [slum] housing may despoil a community as an open sewer may ruin a river.” *Id.* at 33.

very opportunistic interpretations of the word "blight" and the term "public use."⁷⁰

1. *Berman's* Transformation of "Public Use" to "Public Purpose"

Prior to *Berman*, with a few exceptions, private property could only be taken through eminent domain for traditional public uses, not for "purely private, profit-driven companies."⁷¹ The *Berman* Court, however, interpreted the term "public use" to have a meaning of "public purpose," with such purpose to be determined by the legislature.⁷² The public purpose justifying the takings in *Berman* was the removal of blight in the form of slum housing.⁷³ The *Berman* opinion is filled with broad rhetoric about the pressing need to revitalize the country's areas.⁷⁴ Such a utopian view of the government's ability to solve the social ills of urban dwellings was likely a product of the times,⁷⁵ but the rationale has carried forward to modern day takings and the term "blight" has been unjustifiably expanded to meet the goals of economically strapped states and municipalities.⁷⁶

⁷⁰ At least with respect to the United States Constitution, *Kelo* eliminates the need for state legislatures to manipulate the term "blight" because economic development has been deemed a public use. See *Kelo*, 545 U.S. ___, 125 S. Ct. at 2665. Therefore, only legislatures in states, such as Michigan, with protectively interpreted constitutions need to contrive the meaning of blight to exercise opportunistic eminent domain.

⁷¹ See Scott Bullock, *Narrow 'Public Use'*, NAT'L L.J., Aug. 16, 2004, at 23.

⁷² See *Berman*, 348 U.S. at 34; see also *Kelo*, 545 U.S. at ___, 125 S. Ct. at 2663 (discussing and approving of *Berman's* deference to the state legislature in its determination of the efficacy of a taking that confiscated both blighted and non-blighted property as part of a community redevelopment program); Bullock, *supra* note 71.

⁷³ See *Berman*, 348 U.S. at 32-33.

⁷⁴ See *id.* at 32 (stating that "[m]iserable and disreputable housing . . . suffocate[s] the spirit by reducing the people who live there to the status of cattle"). The *Berman* Court also stated that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.* at 33.

⁷⁵ See Bullock, *supra* note 71 (noting that the *Berman* Court was influenced by "the post-New Deal, post-World War II optimism in the ability of the government to centrally plan urban areas" and to solve most social problems facing the public).

⁷⁶ Incidentally, most of the urban renewal projects did not work out the way the post-New Deal optimists had planned. See *id.* ("[S]lum clearance efforts of the 1950s and 1960s turned out to be public-policy disasters, leading to the wholesale demolition and destruction of many communities from which cities have yet to recover."). Furthermore, commentators have equated the adverse effect on minority populations of urban renewal projects with, in the uncivilized words of the past, "Negro removal." See *id.* For a discussion on how urban renewal programs have played a significant role in impeding racial integration by disproportionately

2. Blight Is in the Eye of the Beholder

Even if one subscribes to the theory that the public benefit requirement will suffice in situations of bona fide slum clearance,⁷⁷ this exception still leaves the door open to legislative abuse. On its face, this requirement may appear to protect those living in what most would consider non-blighted residential homes. But therein lies the key shortcoming of the *Hathcock* ruling: just as beauty is in the eye of the beholder, the third exception solely depends on what the legislature deems to be blighted property.⁷⁸ Just because an area is deemed to be a blight on the community does not necessarily mean it is so. Traditionally, the term "blighted" meant that the property was so

relocating minority populations, see Pritchett, *supra* note 5, at 6 ("*Berman* was decided just six months after *Brown v. Board of Education* [347 U.S. 483 (1954)], but while *Brown* receives more attention, *Berman* was equally influential in shaping American race relations."). It is ironic that the Supreme Court's rationale in *Brown* represented a mistrust of local government to safeguard minority interests, while *Berman*'s rationale shows an almost complete confidence in those same local governments to act in a non-discriminatory manner towards those same minorities' property rights. See *Berman*, 348 U.S. at 32 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . ."); see also Pritchett, *supra* note 5, at 46-47.

⁷⁷ See *Berman*, 348 U.S. at 28 n.* (stating that the term "[s]ubstandard housing conditions" includes "lack of sanitary facilities, ventilation, or light, or [the presence] of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors." (quoting D.C. CODE §§ 5-701-5-719 (1951))). In *Berman*, the buildings in the "Washington, D.C., neighborhood were beyond repair." Berliner, *supra* note 39. Most of the homes lacked plumbing and the "residents suffered from high rates of crime, syphilis, and infant mortality." *Id.* Berliner suggests that "[t]he neighborhood probably could have been condemned as a nuisance or hazardous to the public health." *Id.*

⁷⁸ See Editorial, *Let There Be Blight*, WALL ST. J., Apr. 22, 2004, at A18 (explaining that legislatures are quick to characterize choice property as blighted).

Because businesses will always pay governments more than homeowners (and large businesses will yield more than small), it's no coincidence that governments tend to invoke eminent domain powers on behalf of the rich and politically well-connected at the expense of the mom-and-pop shop or the family that simply wants to keep the home it's lived in for generations.

Id. The threat of opportunistic blight designations by local legislatures is especially dangerous given the reluctance of courts to employ meaningful judicial review in cases of eminent domain. See *infra* Part II (discussing the need for more significant judicial review); see also *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting) ("The beneficiaries [of eminent domain] are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."). Justice O'Connor also pointed out that with the ruling of the majority in *Kelo*, "the government now has license to transfer property from those with fewer resources to those with more." *Id.*

run down and dilapidated that its mere presence would constitute a public nuisance.⁷⁹ In the past few decades, however, "it has become common for city [and community] leaders to define 'blighted' as: 'Not developed as nicely as we'd prefer' [or] '[n]ot developed by the people we'd prefer.'"⁸⁰ Hence, a tax-hungry Michigan city can condemn private property pursuant to the economic development rationale, which was seemingly overruled by *Hathcock*, as long as it is done under the guise of clearing blight.⁸¹

New York is one of the worst states in the country for abusing eminent domain under the pretext of eliminating blight.⁸² For example, in *West 41st Street Realty LLC v. New York State Urban Development Corp.*,⁸³ the Empire State Development Corporation (the "ESDC")⁸⁴ planned to condemn an entire city block in Times Square to make way for a new fifty-two-story office tower that would serve as the new headquarters for the New York Times, as well as provide 700,000 square feet of

⁷⁹ See Jonathan Rauch, *Taking Property: Bush's Landgrab—and the New York Times*, NAT'L J., July 26, 2002, available at <http://www.reason.com/rauch/072902.shtml>; see also Berliner, *supra* note 39 (describing the conditions of the condemned property in *Berman*).

⁸⁰ Rauch, *supra* note 79; see also Berliner, *supra* note 39 (suggesting that some state legislatures have come to include in their definition of "blight" a building that merely lacks parking or central air conditioning).

⁸¹ The *Hathcock* court stated that "*Poletown's* 'economic benefit' rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity." *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004). It seems as though the court's "public good exception," when used to characterize middle-class, non-slum homes as blighted, gives municipal legislatures the same unfettered discretion as does the "economic benefit" rationale. Troublingly, this means that the ability to take private property depends on the definition of blight employed by the government representatives proposing use of eminent domain. See *supra* note 63 (discussing how the United States Supreme Court in *Kelo* did not address the dilemma of opportunistic blight designations). As stated above, the modern trend of designating homes that present no public hazard or nuisance as blighted is a legislative alternative to facing litigation on the meaning of the public use clause in the relevant state constitution. See *supra* notes 77–78 and accompanying text.

⁸² See BERLINER, *supra* note 1, at 144 (explaining how, between 1998 and 2002, New York has used at least fourteen private use projects to condemn the property of at least fifty-seven businesses).

⁸³ 298 A.D.2d 1, 744 N.Y.S.2d 121 (1st Dep't 2002).

⁸⁴ The ESDC is a subsidiary of the New York State Urban Development Corporation, which was created to engage in a variety of activities to facilitate the acquisition, construction, reconstruction, rehabilitation, or improvement of industrial, manufacturing, and commercial facilities. See N.Y. UNCONSOL. LAWS § 6252 (McKinney 2000).

office space to other well-heeled tenants.⁸⁵ In order to proceed with the proposed condemnation, the ESDC was required by law to find that the property constituted blight in the Times Square vicinity.⁸⁶ Although the office buildings on the proposed condemnation site were not trendy or home to chic urban periodicals, they were still considered profitable parcels of commercial real estate to their owners.⁸⁷ Nevertheless, the ESDC ultimately found that the properties were statutorily blighted and entered into discussions with the New York Times to negotiate a rather favorable selling price.⁸⁸

The New York Supreme Court, Appellate Division, First Department, noting that its scope of review was narrow,⁸⁹ upheld the use of eminent domain because the property in question, which was home to many commercially productive businesses, was a "pernicious blight."⁹⁰ Essentially, the court refused to stay the condemnations because the property was *deemed* to be blighted by the legislature, which plainly acted pursuant to an economic development rationale as opposed to ridding the city of

⁸⁵ See *W. 41st St. Realty*, 298 A.D.2d at 5, 744 N.Y.S.2d at 124 (describing the details of the New York Times headquarters project); see also BERLINER, *supra* note 1, at 146–47.

⁸⁶ When considering land use improvement projects, the ESDC is required to find that the proposed project site is substandard or unsanitary and impairs sound growth and development of the municipality. See N.Y. UNCONSOL. LAWS § 6260.

⁸⁷ See BERLINER, *supra* note 1, at 147 (noting that some of the tenants in the buildings proposed to be condemned by the ESDC included Arnold Hatters, B&J Fabrics, and more than thirty other prosperous businesses); David W. Dunlap, *Blight to Some Is Home to Others: Concern Over Displacement by a New Times Building*, N.Y. TIMES, Oct. 25, 2001, at D1 (illustrating the profitable businesses that would be displaced to accommodate the New York Times building). In any event, the property certainly did not constitute a public nuisance, as would seemingly be required by the *Berman* rationale. See *supra* notes 66–68 and accompanying text. Absent New York's statutory requirements of blight, however, the United States Constitution merely requires a "carefully considered" economic development plan. See *Kelo v. City of New London*, 545 U.S. ___, 125 S. Ct. 2655, 2661 (2005).

⁸⁸ The price secured by the New York Times for the property was "\$84.94 million, or \$62 per square foot, compared with \$130 per square foot paid in a private transaction for a nearby parcel." BERLINER, *supra* note 1, at 147.

⁸⁹ See *W. 41st St. Realty*, 298 A.D.2d at 6, 744 N.Y.S.2d at 125 ("The scope of our review is necessarily narrow since this exercise of the eminent domain power is a legislative function.").

⁹⁰ See *id.* at 7, 744 N.Y.S.2d at 126 ("Virtually all of the anticipated outcomes of this project clearly serve a public purpose by eliminating a pernicious blight which has impaired the economic development of a midtown Manhattan neighborhood.").

a public nuisance.⁹¹ Prime commercial real estate in Times Square being used for legitimate and profitable business purposes can hardly be deemed blighted, even if the legislature feels a different use of the land would economically invigorate the city. Unfortunately, the *Hathcock* court did not have the opportunity to address this dilemma directly because the Wayne County legislature did not even attempt to classify the property as blighted, choosing instead to condemn the property solely on the basis of an economic development rationale.⁹²

II. THE NEED FOR GREATER JUDICIAL REVIEW

Although *Hathcock* has pleased many commentators for its prohibition on the use of eminent domain for a stated economic development rationale,⁹³ legislatures can apparently circumvent such a ruling by simply characterizing private property as blighted.⁹⁴ A primary way for legislatures to be held accountable

⁹¹ Ironically, the New York Times has taken a strong editorial position against such legislative economic development projects that take non-blighted private property from individuals for the benefit of private corporations. See, e.g., Nicholas D. Kristof, Op-Ed., *Bush and the Texas Land Grab*, N.Y. TIMES, July 16, 2002, at A17 (harshly criticizing President George W. Bush for a business deal in which he negotiated with a Texas municipality to acquire land through eminent domain for the Texas Rangers, a Major League Baseball organization of which Bush was a part-owner); see also Rauch, *supra* note 79 (sarcastically noting that what made this land acquisition so scandalous was the fact that Bush and his associates were in fact playing within the rules).

⁹² See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 775–76 (Mich. 2004). In dictum, however, the court did qualify eminent domain used for the removal of blight as necessarily being “for the sake of public health and safety.” See *id.* at 783. The ESDC of New York, exemplifying the problem of using “blight” and “economic development” interchangeably, never purported to condemn the property in Times Square for purposes of public health and safety. See *W. 41st St. Realty*, 298 A.D.2d at 6–7, 744 N.Y.S.2d at 125–26. The *Kelo* Court also neglected to address this problem because the facts before the Court were nearly identical to that of *Hathcock*. See *Kelo*, 545 U.S. at ___, 125 S. Ct. at 2658–60.

⁹³ See, e.g., Editorial, *Supreme Court Restores Sanctity of Property Rights*, DETROIT NEWS, Aug. 4, 2004, at 10 (praising the Michigan Supreme Court for “turn[ing] back the clock and restor[ing] a vital civil liberty” by overruling *Poletown*).

⁹⁴ See Goldstein & Rikon, *supra* note 6 (suggesting that *Hathcock* will make very little difference in how properties are taken because many abuses of eminent domain are based on findings of blight, not on the economic development rationale). Such findings of blight will presumably fit into the *Hathcock* court’s public good exception, even though the takings may very well be based on their economic benefit to the city and its local economy. See *id.*; see also *infra* Part I.C.2 (explaining and giving examples of the use of the blight rationale in place of an economic development justification). Of course, in the wake of *Kelo*, a state legislature will only face this problem in a state that statutorily or judicially prevents the exercise of

to an objective meaning of public use—which includes a definition of blight that incorporates legitimate removal “for the sake of public health and safety,”⁹⁵—is for state courts to cease the abdication of their duty to provide meaningful judicial review of eminent domain used (or rather abused) for the benefit of private entities.⁹⁶ Unfortunately, many courts, including the lower courts in the *Hathcock* case, and even the United States Supreme Court in *Kelo*, simply avoid the questions of public use by putting forth the proposition that their hands are tied by the legislature.⁹⁷

Much of the apprehensiveness on the part of the state courts to invalidate economic development takings has come from reliance on United States Supreme Court jurisprudence. The last case prior to *Kelo* in which the Supreme Court directly addressed the federal Public Use Clause was *Hawaii Housing Authority v. Midkiff*.⁹⁸ There, the Court upheld the use of eminent domain to redistribute ownership of real property in Hawaii from an oligarchy of landowners to the general public.⁹⁹ However, the Court cited *Berman* as guidance for the principle that the role of the judiciary “in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power . . . is ‘an

eminent domain under an economic development rationale.

⁹⁵ See *Hathcock*, 684 N.W.2d at 783.

⁹⁶ See Goldstein & Rikon, *supra* note 6 (stating that “[i]f the abuses of the use of the power of eminent domain are to be effectively contained . . . the courts have to be given a broader role in the process”). According to Justice O’Connor, the United States Supreme Court did “abdicate” its responsibility in *Kelo*. See *Kelo*, 545 U.S. at ___, 125 S. Ct. at 2677 (O’Connor, J., dissenting).

⁹⁷ See *Hathcock*, 684 N.W.2d at 785; *cf.* Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 475 (Mich. 1981) (Ryan, J., dissenting) (“Notwithstanding explicit legislative findings, this Court has always made an independent determination of what constitutes a public use for which the power of eminent domain may be utilized.”), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). The *Hathcock* court agreed with Justice Ryan’s view, but neglected to expand the thought any further. See *Hathcock*, 684 N.W.2d at 785.

⁹⁸ 467 U.S. 229 (1984).

⁹⁹ See *id.* at 233. Under Hawaii’s condemnation scheme, tenants who lived on single-family residential lots within development tracts of at least five acres were entitled to ask the Hawaii Housing Authority to condemn the property on which they lived. *Id.* at 233. The facts of *Midkiff* do not address the concerns of this Comment, which deal with a legislature taking non-blighted private property from real property owners of modest means. In *Midkiff*, the takings adversely affected seventy-two private landowners who cumulatively owned 47% of the land in Hawaii. See *id.* at 232.

extremely narrow' one."¹⁰⁰ Likewise, the *Kelo* Court reasoned that the Court's jurisprudence on eminent domain has evolved to a point where now state legislatures are the primary source for construing the definition of public use.¹⁰¹ This argument, of course, assumes that the legislature's definition of public use or blight is such that the state action would be considered legitimate by the citizens who elected the present government representatives. Given the significant barriers to attacking the findings of fact which lead to condemnation,¹⁰² the public should have greater protection than merely the political process, which is exercised intermittently at the polls. Especially with legislatures armed with *Kelo*, state courts must exercise greater power of review to prevent the abuse of eminent domain being used for economic development, either blatantly or under the guise of blight clearance.

¹⁰⁰ *Id.* at 240 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954) (holding that judicial review was "extremely narrow" in determining whether a legislature's definition of public use passed constitutional muster)); see also Richard B. Tranter, *Defer to Legislatures*, NAT'L L.J., Aug. 16, 2004, at 23 (arguing that courts, by taking away the broad discretion of legislatures in condemning private property, will thwart efforts for urban redevelopment and grant private citizens "the right to veto legitimate state action [instead of merely acquiring] the right to just compensation").

¹⁰¹ See *Kelo*, 545 U.S. at ___, 125 S. Ct. at 2664 ("[O]ur public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

¹⁰² See Goldstein & Rikon, *supra* note 6; see also N.Y. EM. DOM. PROC. LAW § 202 (McKinney 2003). Owners of private property in New York are given public notice in a newspaper listing that a public hearing will take place on the taking of their property. *Id.* Owners receive no phone call, mail, or fax telling them about the hearing. At the hearing, which is conducted by the very government entity that is trying to take the property, owners cannot ask questions or call witnesses, and may only speak for a "reasonable" time. *Id.* § 203. Next, owners are not notified of the government's determination that their property can be taken at some time in the future. Owners whose property is being taken have a right to appeal the determination, but no one notifies them of this right to appeal, and they only have thirty days after the publication of the determination to somehow figure out that this right exists and to file papers in court. *Id.* § 207. If an owner does not appeal, he or she loses all rights to challenge the constitutionality of the taking and can never challenge the government's purpose. *Id.*; see also *Minnich v. Gargano*, No. 00 Civ. 7481, 2001 WL 46989 (S.D.N.Y. Jan. 18, 2001) (upholding New York's rapid and perplexing condemnation proceedings); Marni Soupcoff, *New York Eminent Domain Laws Kafkaesque*, INTELL. AMMUNITION, Mar. 1, 2001, available at <http://www.heartland.org/Article.cfm?artId=96> (pointing out the lack of notice and general unfairness of New York's eminent domain proceedings).

CONCLUSION

The *Hathcock* court properly pointed out that there is virtually no limit to eminent domain under the economic development rationale. Moreover, as put by Justice O'Connor in her *Kelo* dissent, "Today nearly all real property is susceptible to condemnation on the Court's theory."¹⁰³ A government can always envision a more lucrative use for most privately owned property.¹⁰⁴ With the *Kelo* decision ringing the death knell of the federal Public Use Clause, now only the states have the power to protect private property from abusive takings. However, leaving the door open for legislatures to arbitrarily deem property as "blighted" provides little assurance to real estate owners that their land will not be condemned for some economic purpose under the guise of blight clearance.

Those affected can use the political process to remove the representatives who propose to abuse the power of eminent domain under an economic development rationale. In fact, as a result of the *Kelo* ruling and the rise in abuse by municipal legislatures, public backlash to excessive takings is on the rise and the formation of grassroots efforts to pass statutory protection has begun.¹⁰⁵ The *Kelo* effect should not be underestimated.¹⁰⁶ Politicians are poised to act, demonstrated by

¹⁰³ *Kelo*, 545 U.S. at ___, 125 S. Ct. at 2677 (O'Connor, J., dissenting).

¹⁰⁴ See Berliner, *supra* note 39 ("Businesses inevitably generate more jobs than private homes, and big companies pay higher taxes than small companies.").

¹⁰⁵ See *Connecticut Tea Party*, WALL ST. J., July 19, 2005, at A14 (describing how the *Kelo* ruling has spurred a "grassroots movement" across the country to press local governments to statutorily or constitutionally curtail their unlimited eminent domain powers). Even the Governor of Connecticut, Jodi Rell, has changed her tune. Immediately after *Kelo*, she benignly spoke of a need "to strike a right balance between property rights and economic development." *Id.* (quoting Governor Jodi Rell). Now, after significant public backlash to *Kelo*, she characterizes eminent domain as "the [twenty-first] century equivalent of the Boston Tea Party." *Id.* (quoting Governor Jodi Rell); see also Adam Karlin, *Property Seizure Backlash*, CHRISTIAN SCIENCE MONITOR, July 6, 2005, at 1 (summarizing the widespread backlash against *Kelo* by citizens, politicians, and private organizations).

¹⁰⁶ See Inst. for Justice, *Grassroots Groundswell Grows Against Eminent Domain Abuse* (July 12, 2005), http://www.ij.org/private_property/connecticut/7_12_05pr.html (showing that state legislators in Connecticut have been pressured into calling for a moratorium on the use of eminent domain by all Connecticut cities until the law can be revised to grant more protection to property owners); see also John Tierney, *Making Roberts Talk*, N.Y. Times, Sept. 13, 2005, at A31 (explaining how after Justice Souter's endorsement of economic development takings in *Kelo*, a group in Weare, New Hampshire proposed raising local tax revenue by condemning and taking Souter's home so a developer could build a private resort called the "Lost

the introduction in Congress of two pieces of legislation designed to undo the effect of *Kelo*,¹⁰⁷ and with state legislators moving for constitutional amendments prohibiting eminent domain for private development.¹⁰⁸ *Kelo* has opened the eyes of many politicians, conservative and liberal, to the potential misuses of eminent domain.¹⁰⁹

The United States Supreme Court can remedially overrule *Kelo* and interpret the federal Public Use Clause literally, thereby allowing an exception for truly blighted property and setting a standard to determine if property is really blighted and not just deemed to be so by an opportunistic legislature.¹¹⁰ Until it does, however, *Kelo* moves the fight to the states. The ruling in *Hathcock* sets an example for other states to follow in rejecting the economic development rationale. But, like plugging one hole only to gouge out another, because it neglected to address the definition of "blight," *Hathcock* leaves ownership of real property in Michigan essentially in the same position as before: perpetually threatened by the expansion plans of a profitable

Liberty Hotel").

¹⁰⁷ Senator John Cornyn (R-TX) has introduced the "Protection of Homes, Small Businesses, and Private Property Act of 2005," to "prohibit the transfer of private property without the owners' consent if the transfer is for economic development rather than public use." Ronald D. Utt, *Kelo Backlash Could Lead to Restoration of Property Rights Lost to Smart Growth and Eminent Domain Abuses*, THE HERITAGE FOUNDATION WEB MEMO, June 29, 2005, <http://www.heritage.org/Research/SmartGrowth/wm781.cfm>; see also Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005). Likewise, House Judiciary Chairman James Sensenbrenner (R-WI) plans to introduce the "Private Property Rights Protection Act," which is intended "to restore the property rights of all Americans the Supreme Court took away on June 23." Utt, *supra*; see also Private Property Rights Protection Act of 2005, H.R. 3135, 109th Cong. (2005).

¹⁰⁸ See Inst. for Justice, *supra* note 106 (stating that legislators are assembling support for constitutional amendments in Texas, Florida, Oklahoma, New Jersey, and Michigan).

¹⁰⁹ Even Representative Maxine Waters (D-CA), hardly a proponent of conservative ideology, has expressed her displeasure with the *Kelo* ruling, stating that "[g]overnment should be in the business of protecting private property." Rich Lowry, "Mad Max" Stands with the Right, NAT'L REV. ONLINE, Aug. 5, 2005, <http://www.nationalreview.com/lowry/lowry200508050737.asp> (quoting Rep. Maxine Waters). Representative Waters is rightly concerned that, as with the urban renewal projects of the mid-twentieth century, economic development takings can easily be used to remove poor, minority property owners who "don't have the wherewithal to fight back." *Id.*; see also *supra* note 76 (discussing the historical effects of urban renewal on minority populations).

¹¹⁰ As discussed in note 63, however, the Court need not address the problems outlined in Part I.C concerning opportunistic blight designations, and did not address such problems in *Kelo*.

enterprise that can provide greater tax proceeds to a legislature promising ever more spending to its constituents. In a country that values property rights as much as life and liberty, it is essential that eminent domain be justified by a more legitimate rationale than mere economic development.

