

## CONCURRENT SESSION

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# Condemnation for Private Use: The Recent Revival of the Public Use Requirement and its Implications for Private Redevelopment

10:00–11:10 a.m.  
Friday, April 22, 2005  
Sturm College of Law

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**Moderator: David Thomas**  
Professor of Law, Reuben Clark Law School  
Brigham Young University  
Provo, Utah

**Panelists: David Callies, FAICP**  
Benjamin A. Kudo Professor of Law  
William S. Richardson School of Law  
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Honolulu, Hawaii

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## EMINENT DOMAIN

“Condemnation for Private Use: The Recent Revival of the Public Use Requirement and Its Implications for Private Development”

## U.S. Constitution, Fifth Amendment (part of the Bill of Rights):

- “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice in jeopardy of life or limb;

- nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.**”

## Berman v. Parker, 348 U.S. 26 (1954).

- Under the provisions of an authorized redevelopment plan for Washington, D.C., an area was designated as blighted. The area thus eligible to be redeveloped by, first, being “taken” from the private owners by a redevelopment agency (for “just compensation), and then, second being resold to a private entity that was the redevelopment agencies partner. Owners of nonblighted enclaves within the redevelopment district objected to the forced sale of their property to another private party.

- The Court rejected plaintiffs’ complaint and also approved of the use of the eminent domain power for aesthetic purposes: “It 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.” 348 U.S. at 33.

## Hawaii Hous. Authority v. Midkiff, 467 U.S. 229 (1984)

- A state statute authorizing the state to require large landowners to sell their lands to tenants at prices set by the state was held to be acceptable under the Fifth Amendment’s eminent domain clause. The public use was land reform.

**Poletown Neighborhood  
Council v. Detroit, 304  
N.W.2d 455 (Mich. 1981)**

- A viable residential neighborhood was condemned so the property could be turned over to a private owner for an automobile body plant. The public use was alleviating unemployment and revitalizing the economic base of the community.

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

- Overruled *Poletown*.

**Kelo v. City of New London,  
843 A.2d 500 (Conn. 2004)**

- Several residences were condemned and the property turned over to commercial and residential development associated with an adjacent research facility. The public use was the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization. Argued before the U.S. Supreme Court on Feb. 22, 2005.

# Phoenix Rising: The Rebirth of Public Use

By

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Presented at the Annual Meeting  
Of the  
Rocky Mountain Land Use Institute  
Denver, Colorado  
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## I. INTRODUCTION

The Fifth Amendment to the U.S. Constitution prevents government from taking private property unless for a public use. U.S. Const. amend. V. The federal standard for determining such a use is broadly stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984): courts should defer to legislative determinations of public use unless such determination “is shown to involve an impossibility” or unless the [public] use be palpably without reasonable foundation.” *Id.* at 240-41. The Court in *Midkiff* purported to build upon its earlier decision in *Berman v. Parker*, 348 U.S. 26 (1954), in which a landowner of viable commercial property challenged its taking by a redevelopment agency whose statutory authority for such taking was to eliminate blight. *Id.* at 28. After concluding that blight elimination was a proper police power objective and that the use of eminent domain was an appropriate means to accomplish that objective, the Court summarily dealt with the property owner’s argument that since his property was demonstrably unblighted, its taking was not for a public use: “Property may of course be

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taken for redevelopment which, standing by itself, in innocuous and unoffending . . . it is not for the courts to oversee the choice of boundary line .” *Id.* at 35.

For decades following *Berman* and *Midkiff*, state courts followed the federal lead in virtually emasculating the public use requirement either in theory, *see Haw. Hous. Auth. v. Lyman*, 704 P.2d 888, 895 (Haw. 1985), or in practice, *see Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (1981) (allowing the condemnation of a viable residential neighborhood for an automobile body plant). However, commencing in early 2000, a trickle of decisions struck down compulsory purchases of private land where the land itself was unblighted and the stated public purpose was for generalized economic development . *See, e.g., Daniels v. The Area Plan Comm’n*, 306 F.3d 445 (7th Cir. 2002); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); *Avalonbay Cmty., Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001); *S. Ill. Dev. Auth. v. Nat’l City Envtl., LLC*, 768 N.E.2d 1 (Ill. 2002).

## II. THE MISUSE OF PUBLIC PURPOSE

The increase scrutiny of public use and public purpose resulted from state and local government misuse of public use to justify compulsory purposes purely on economic revitalization or other grounds beyond traditional exercises of eminent domain (for streets and roads, public facilities and public parks land schools) or the elimination of urban blight. The following are some particularly egregious examples culled from Dana Berliner, *Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain* 16 (2004) [hereinafter Berliner, *Public Power*], which surveyed condemnation for private use during the period Jan. 1, 1998 to Dec. 31, 2002 in all 50 states.

## **A. Arizona**

City officials are trying to figure out what to do with 30 acres of land that sit vacant thanks to a failed redevelopment project that began in 1992. Known to the City as “Redevelopment Site 17,” the tract once contained 63 homes, which the City condemned and purchased at a cost of \$6 million. A group of Canadian developers planned to build Mesa Verde, an entertainment village featuring a time-share resort, water park and ice-skating rink. Once the homes were taken by the City, however, financing for the project fell through. *Id.* at 16 (citing Paul Green, *Eminent Domain: Mesa Flexes a Tyrannical Muscle*, East Valley Tribune, Sept. 2, 2001; Robert Robb, *Count on City Driven Project to Fail*, The Arizona Republic, Sept. 21, 2001).

## **B. California**

### **1. Garden Grove**

Over the past five years, Garden Grove has gone on an eminent domain rampage as it tries to turn Harbor Boulevard into a hotel corridor. In 1998, the City condemned several properties so that a private developer could build a Hampton Inn. The project primarily displaced lower income residents and visitors. It destroyed three low-cost hotels, a mobile-home park occupied by fixed-income senior citizens, and the Sage Park Apartments, which consisted of 96 units that rented mainly to maids and busboys employed by the razed hotels. Berliner, *Public Power* 29 (citing Nick Schou, *More Freebies to the Rich*, OC Weekly, June 29, 2001, at News 12).

### **2. Garden Grove**

In July 2001, the Garden Grove City Council approved two new hotel projects along Harbor Boulevard, with at least \$4.2 million in public financial assistance, for McWhinney/Stonebridge Corp., a Colorado-based development group that previously

received tens of millions of dollars in assistance for building other hotels in Garden Grove. For one of these new hotel developments, the City has threatened to condemn 11 homes and 14 businesses unless the targeted owners agree to sell at the City's prices. The City has already bought three other homes standing in the way of the hotel, and now is using heavy-handed tactics to force the other owners out. Assistant City Manager Matt Fertal takes an especially dim view of the right of property owners along Harbor to use the free market to determine what price developers should pay to take their land from them. According to Fertal, "[Owners] think that just because they're on Harbor and hotels are coming, that it increases the value of their property, but it doesn't. Commercial [developers] only care about the cost of the dirt on the land. We're offering to pay for the structure at the appraised value and the land." In other words, the rightful owners don't deserve to profit from their investment; instead, any profit will go to the City's favored corporate developers. And for the people who actually want to keep their homes or businesses, at least one city leader couldn't care less. Berliner, *Public Power* 30 (citing Katherine Nguyen, *Selling—If the Price is Right: Cities—As Garden Grove Seeks Property on Harbor for New Hotels, Some Owners Feel Exploited by Offers Based on Land Value*, The Orange County Register, July 25, 2002).

## **C. Florida**

### **1. Jacksonville**

In April 2002, the Jacksonville Economic Development Commission awarded a \$210,000 grant over five years to the Marks Gray law firm, as an incentive for the firm to build a new headquarters building in the Riverside-Brooklyn area of Jacksonville. The redevelopment agreement provided that the City will use its eminent domain authority to acquire property located on the planned site for the law firm's headquarters. Berliner,

*Public Power 55* (citing Earl Daniels, *JEDC OKs \$2.4 Million in Financial Incentives*, The Florida Times-Union, Apr. 12, 2002, at D1). The site was occupied by three single-family homes and one lot, which were condemned by the City. Berliner, *Public Power 55* (citing Earl Daniels, *Trapped in Path of Development*, The Florida Times-Union, April 29, 2002, at FB12). One representative of the law firm commented, “I’m surprised the City lets people even live there,” and suggested the whole area should be condemned. At least some of the residents of this historically black residential area disagree. Berliner, *Public Power 55* (quoting Tiffany Lankes, *Redefining Brooklyn*, The Florida Times-Union, August 19, 2002, at FB14).

## **2. Riviera Beach**

In December 2001, the Riviera Beach City Council voted unanimously to approve a \$1.25-billion redevelopment plan with the authority to use eminent domain to condemn about 1,700 homes and apartments and displace 5,100 people. Berliner, *Public Power 55* (citing Scott McCabe, *Residents Vow to Fight Riviera Plan*, The Palm Beach Post, Dec. 17, 2001, at 1B). About 300 businesses would also be forced to relocate. The City plans to take the properties and sell the land to commercial yachting, shipping and tourism interests. The plan would also move Route 1 and replace a city park with an enlarged harbor. If the development does occur, it will stand as one of the largest exercises of eminent domain in U.S. history. Berliner, *Public Power 55* (citing Thomas R. Collins, *Many Businesses Feeling Put Out By Riviera Plans*, The Palm Beach Post, Jan. 6, 2003, at 1A).

## **D. Illinois**

Walgreens wanted to open a new store in Des Plaines, but without the hassle of finding land and purchasing it from willing sellers. So Walgreens enlisted the help of the

Des Plaines Board of Aldermen, which used its eminent domain powers to bully two businesses and one homeowner off their properties. Elmer's Goodyear, a local service station, had operated in Des Plaines for 55 years. After the City threatened to condemn Elmer's if it refused to sell out, the service station's owner reached an agreement conveying title to the land to the City. Berliner, *Public Power* 66 (citing Amy McLaughlin, *Des Plaines Moves Ahead on Several Land Purchases*, Chicago Daily Herald, Nov. 30, 2001, at News 4). In January 2002, the City authorized eminent domain to take the two other targeted properties, the Des Plaines Glass Co. and the home of Irene Angell. Berliner, *Public Power* 66 (citing Amy McLaughlin, *Des Plaines Holds Off on Church's Expansion*, Chicago Daily Herald, Jan. 24, 2002, at Neighbor 1). Ms. Angell, who was born in this same house over 80 years ago, ironically had met her late husband in a Walgreens store. Ms. Angell eventually settled with the City.

### **E. Indiana**

AM General wanted to expand its auto manufacturing facility in Mishawaka. In January 2000, the automaker announced plans for a \$200 million plant expansion that would produce a new sport utility vehicle based on the all-terrain military vehicle known as the Hummer, which the company already built in its existing Mishawaka factory. One problem for AM General, however, was that the land on which it proposed to expand was already occupied by a neighborhood of 51 homes. Berliner, *Public Power* 73-74 (citing Deanna McCool, *Homeowners Unhappy*, South Bend Tribune, Jan. 13, 2000, at A1). So, the redevelopment commission of St. Joseph County stepped in to act on the automaker's behalf.

The County announced that by March 2000 it would decide whether to declare the surrounding neighborhood as "blighted," which would allow it to condemn the homes

and transfer ownership of the land to AM General. Many of the targeted homeowners were angered by the County's announcement. For one, the neighborhood consisted of well maintained, decidedly middle-class homes that were nothing like the ramshackle eyesores conjured up by the term "blight." Also, the County had made no attempts at negotiation with individual owners, who were generally in favor of the redevelopment. Berliner, *Public Power* 73-74 (citing Rick Thackeray, *Proposed Hummer Plant Raises Eminent Domain Questions*, *The Indiana Lawyer*, Mar. 29, 2000, at 6).

As the County's decision date approached, AM General reached agreements with the owners of the seven properties that directly abutted its already existing facility, allowing the automaker to begin the project. Around the same time, the County announced that it would delay until July 2000 its decision on whether to designate the area as blighted, which was a necessary step toward condemnation. This would give AM General more time to negotiate directly with the other owners. Berliner, *Public Power* 73-74 (citing Deanna McCool, *2 Owners Find AM General Deal Fair*, *South Bend Tribune*, Mar. 29, 2000, at D1). Over the next four months, the company began in earnest to negotiate for the rest of the properties, and by the July deadline, agreements had been reached with all of the remaining owners. This obviated the need for the blight designation or eminent domain proceedings altogether. Berliner, *Public Power* 73-74 (citing Jason Callicoa, *In General, Hummer Plant Negotiations End Well*, *South Bend Tribune*, Aug. 6, 2000, at C1).

Certainly AM General's willingness to deal directly with the owners and take their concerns seriously helped, but the owners still knew that if they did not sell, the County would move forward with the condemnations.

## F. Kentucky

The Howlett family found out the hard way what happens when the little guy successfully defeats a state's attempts to take his land for a billion-dollar project that serves to benefit another private party. The Hyundai Motor Company wanted to build its first U.S. manufacturing facility, and Kentucky officials mounted an all-out effort to lure the automaker to a 1,500-acre site in rural Hardin County. The only problem for the State was that the Howlett family did not want to give up its 111-acre farm. The family vigorously fought all efforts to condemn their land, wishing only to be left alone on their family farm. State officials then tried to bully the Howletts by portraying them in the press (without a hint of irony) as greedy opportunists trying to "extort" money from the state by demanding at least \$10 million for their farm. Eventually, the Howletts agreed to an option that would allow the state to buy it for \$6 million. But by then Hyundai had announced that it would build its plant in Montgomery, Alabama.

To the Howletts, the issue was never money, but rather about property rights and a desire to preserve the family's traditional way of life. Hyundai even stated that it could have built the plant without taking the Howlett farm. After losing his bid to lure Hyundai, though, Governor Paul Patton refused to accept the fact that Kentucky lost because of the state's own ineffectual leadership and inferior proposal to the automaker. Instead, Patton continued to accuse the Howletts, saying the family had tried to "destroy" the Hyundai deal by "kill[ing] the goose before it had time to lay the golden egg." Berliner, *Public Power* 82 (quoting Jim Warren, *Blame for Hyundai Loss Rejected; Attorney Calls Patton's Version Wrong, Unfair to Hardin Family*, Lexington Herald-Leader, Apr. 3, 2002, at A1). This attitude is typical of bureaucrats who have no interest in people's

attachment to their homes and businesses but see owners just as obstacles to private and public money-making schemes.

## **G. Maryland**

In December 2002, the Baltimore City Council passed legislation that gives the City the power to condemn about 3,000 properties for an east side redevelopment project anchored by a biotechnology research park and up to 2,000 new and renovated homes. East Baltimore Development Inc. is overseeing the project, which is expected to displace around 800 households in the neighborhood and purportedly will be completed over the next 10 years.<sup>299</sup> Apparently the City and developer subscribe to the notion that they have to destroy the village in order to save it. Berliner, *Public Power* 94 (citing Laura Vozzella, *City Council Approves Measure for East-Side Urban Renewal Plan*, *The Baltimore Sun*, Dec. 7, 2002, at 2B).

## **H. Missouri**

### **1. Maplewood**

The Town of Maplewood wanted to lure developers as a means of increasing tax revenues and the City budget. In May 2001, the Maplewood City Council announced that it would offer up chunks of the City to any developer promising to deliver tax revenue. Berliner, *Public Power* 120 (citing Safir Ahmed, *Selling Out: To Save Maplewood, Some Residents Have to Go*, *Riverfront Times* (St. Louis, MO), Nov. 28, 2001). Maplewood officials approved a plan submitted by Pace Properties to build a Costco and Home Depot. THF Realty also submitted a proposal for a Sam's Club and Wal-Mart at the same location, but Maplewood liked the Costco project better. Berliner, *Public Power* 120 (citing Kathie Sutin, *Homeowners Want Bigger Buyout*, *St. Louis Post-Dispatch*, Sept. 3, 2001, at West Post 1). Eventually, Maplewood officials switched to THF Realty's plan,

for which THF wanted to demolish more than 120 homes and apartments. In May, 2002, the Maplewood City Council declared the area blighted, even though it was made up of tidy homes with well-kept lawns. Berliner, *Public Power* 120 (citing Greg Freeman, *Residents Fight City Plan to Raze Homes, Make Way for Wal-Mart*, St. Louis Post-Dispatch, June 30, 2002, at C3).

Many of the residents loved their neighborhood and did not want to move. Berliner, *Public Power* 120 (citing Safir Ahmed, *Selling Out: To Save Maplewood, Some Residents Have to Go*, Riverfront Times (St. Louis, MO), Nov. 28, 2001). The energetic but politically weak property owners who stood to lose their homes mounted a petition drive to put a referendum on the November 2002 ballot regarding the condemnation and tax incentive issues. Berliner, *Public Power* 120 (citing Greg Freeman, *Residents Fight City Plan to Raze Homes, Make Way for Wal-Mart*, St. Louis Post-Dispatch, June 30, 2002, at C3). The owners succeeded in forcing the referendum, but the project was approved by a large majority. Berliner, *Public Power* 120 (citing Phil Sutin, *Bayless School District Voters Reject \$5 Million Bond Issue*, St. Louis Post-Dispatch, Nov. 7, 2002, at South Post 1). As Mayor Mark Langston explained, “We decided not to raise property taxes, but unfortunately we had to get rid of 150 homes.” Berliner, *Public Power* 120 (quoting Kathie Sutin, *Loss of Neighbors Tempers Joy Over Referendum in Maplewood*, St. Louis Post-Dispatch, Nov. 11, 2002, at West Post 5). Since the November 2002 referendum victory, THF Realty has signed contracts with some of the owners and was preparing to initiate condemnation actions against the property owners who would not sign. However, Alan Bornstein of THF hinted after the election that the developer may be hedging on going forward with the project, saying that while he

expects the shopping center to be completed by September 2004, “[t]here are so many things that happen every day that could have an impact on the development.” Berliner, *Public Power* 120 (quoting Kathie Sutin, *Developer Hedges on Maplewood Buyouts; Events Could Block Project, He Tells Residents*, St. Louis Post-Dispatch, Nov. 21, 2002, at West Post 1).

## **2. Sunset Hills**

The Sunset Manor subdivision in the Town of Sunset Hills has 254 homes, which are mostly tidy little brick-and-frame dwellings. Berliner, *Public Power* 123 (citing Bethany Halford, *Disappointed or Relieved, Sunset Manor Residents Resume Lives*, St. Louis Post-Dispatch, June 20, 2002, at South Post 1). Town leaders decided the neighborhood would look better if those houses were bulldozed and replaced by commercial development. The Sansone Group, a private developer, presented the Town with a plan to build a \$115-million, 57-acre shopping center on the Sunset Manor site. The first phase would include 22 acres of retail stores, while the second would include 16 acres of offices and 19 acres of residential units (112 apartments, 44 “villas” and 56 condominiums). Mayor James Hobbs and other Town leaders heartily endorsed the planned development, and pledged to give the developer tax-increment-financing subsidies totaling \$46 million, as well as the use of eminent domain to force unwilling sellers out of their homes. Berliner, *Public Power* 120 (citing Theresa Tighe, *Despite Some Reluctance, the Buyout Goes On in Sunset Hills*, St. Louis Post-Dispatch, Apr. 22, 2002, at South Post 1). Some owners wanted to move, but many had lived in the neighborhood for years and were unhappy about being forced out. As a result, the once tight-knit neighborhood became bitterly divided.

The Sansone Group went on to purchase more than half of the homes in Sunset Manor. But in June 2002, the local Board of Aldermen abruptly changed its mind about bulldozing neighborhoods in favor of retail development. The Board voted unanimously to reject the Sunset Manor proposal, though it reached its decision not because of any aversion to the idea of seizing and destroying homes, but because the developer could not line up enough interested retailers. Berliner, *Public Power* 120 (citing Bethany Halford, *Disappointed or Relieved, Sunset Manor Residents Resume Lives*, St. Louis Post-Dispatch, June 20, 2002, at South Post 1).

### **I. New York**

One of the more unusual eminent domain situations we have seen involves the efforts of the Lower East Side Tenement Museum at 97 Orchard Street in Manhattan to acquire the nearly identical building next door, 99 Orchard Street. The Tenement Museum, a private, nonprofit museum that first opened in 1988, attempts to recreate for visitors the experience of the millions of poor immigrants who passed through the area after arriving on Ellis Island in the early 20th century. The museum claims that it must have more space to accommodate an elevator for the handicapped and to double the number of visitors to the museum. The problem for the museum is that the owners of No. 99 do not want to sell their building. Berliner, *Public Power* 148 (citing Clyde Haberman, *NYC: Your Tired, Your Poor, Your Building?*, The New York Times, Feb. 13, 2002, at B1). So the museum has asked the Empire State Development Corporation (ESDC) to work on its behalf and condemn No. 99 for the expanded museum facilities. Berliner, *Public Power* 148 (citing Verena Dobnik, *Tenement Museum Wants to Expand, Oust Residents of Former Tenement Next Door*, AP Wire, Apr. 21, 2002).

The building next door is indeed a former tenement building, but it has been newly renovated as a modern, 15-unit apartment building and has a thriving restaurant on the ground floor. Lou Holtzman and his wife, part-owners of the building, live in one of the apartments. Holtzman grew up in the building and helped his mother run a small business there. His family has owned it since 1910. He believes that using eminent domain to convert actual housing that is not blighted into a fake re-enactment of urban blight from a century ago is not a valid “public use,” and has vowed to fight the museum and ESDC. Berliner, *Public Power* 148 (citing Clyde Haberman, *NYC: Your Tired, Your Poor, Your Building?*, *The New York Times*, Feb. 13, 2002, at B1).

After a hearing on the Tenement Museum’s application to have 99 Orchard Street condemned, the ESDC allowed the application to lapse in May 2002 without any comment. However, the agency did not give Holtzman any assurance that the building will not be condemned at some point in the future. The Tenement Museum still wants the building, Berliner, *Public Power* 148 (citing Denny Lee, *Neighborhood Report: Lower East Side; A Tenement Owner Gets a Reprieve as a Museum Peers Over His Shoulder*, *The New York Times*, Aug. 11, 2002), so property rights advocates nationwide will be closely following the developments in this case.

## **J. Ohio**

### **1. Akron**

Ganley Toyota-Mercedes Benz wanted to expand. However, three homes, the Kathmandu Restaurant, the Quinn Furnace Co., an apartment building and other property stood in its way. The dealership recently threatened to relocate to the suburbs outside Akron unless the City helped it acquire the properties for an expanded lot. Ganley only opened in 1995 and was aware at the time of the properties adjacent to it, but it quickly

became ready to oust its neighbors. Berliner, *Public Power* 160 (citing *Should City Aid Land Deals for Private Business?*, Akron Beacon Journal, Nov. 28, 2001, at A15; *What Should Be City's Role in Brokering Private Land Deals?*, Akron Beacon Journal, Dec. 5, 2001, at A11). On December 11, 2001, the Akron City Council voted to create an urban renewal area encompassing all of the properties, as a first step toward condemning them in favor of the dealership. While the homeowners eventually sold their properties, the City began eminent domain proceedings against the furnace company. The other properties are still under threat. Berliner, *Public Power* 160 (citing Julie Wallace, *Neighbors Will Divide \$464,000*, Akron Beacon Journal, Oct. 1, 2002, at B1).

After witnessing the lengths to which Akron City officials have bent to please Ganley, other dealerships are now joining in on the act. Dave Walter Volkswagen warned that it might leave town unless the City helped it acquire property for an expansion. So the City bought the gas station next door and then entered into a purchase agreement with the dealership for the land. The only stipulation to the deal is that Dave Walter must stay within the Akron city limits. Berliner, *Public Power* 160 (citing Julie Wallace, *Akron Will Help Car Dealer Expansion*, Akron Beacon Journal, Jan. 8, 2002, at D1).

## **2. Shaker Heights**

Sean Tucker and his wife have a company, Shaker Development Corp., that owns an apartment building on a 2-acre parcel of land in Shaker Heights. The building provides 27 families with affordable housing. The City wants to take the Tuckers' property and sell it to developers for 157 luxury townhouses and loft condominiums as part of a \$33-million redevelopment of Shaker Towne Center and the surrounding area. The owners of the neighboring properties all sold to the City. After the Tuckers rejected the City's offer to buy their land, the Shaker Heights City Council voted in October 2002 to condemn the

property. Berliner, *Public Power* 168 (citing Rosa Maria Santana, *Property Owners Are Holdouts on Shaker Heights Project*, *The Plain Dealer* (Cleveland, OH), Oct. 27, 2002, at A13). Update: In January 2003, City officials voted to purchase Tucker's building.

Berliner, *Public Power* 168 (citing Rosa Maria Santana, *Purchase Paves Way for Shaker Towne Centre Plan*, *The Plain Dealer* (Cleveland, OH), Jan. 4, 2003, at B4).

### **3. Toledo**

In 1999, the City of Toledo condemned 83 homes to make room for expansion of a DaimlerChrysler Jeep manufacturing plant. Even though the homes were well maintained, Toledo declared the area to be a slum. After threatening to leave town otherwise, Chrysler asked for and received \$232 million in state and municipal aid for its new plant. Using \$28.8 million loaned to the City by HUD, Toledo paid for relocation of the property owners and used eminent domain to acquire the homes of those who resisted its offers. Toledo had hoped to repay the loan through increased tax revenue from the expected 4,900-person Chrysler workforce. However, the new plant that Jeep built was fully automated, assembling cars by laser-guided robots without much human participation. In total, the new plant employs only 2,100 workers. Berliner, *Public Power* 168 (citing Gideon Kanner, *The New Robber Barons*, *The National Law Journal*, May 21, 2001, at A19).

### **K. Pennsylvania**

In September 1999, the Borough of Ambridge condemned nine properties to help a private developer assemble the half-acre of land it needed to construct a new CVS Pharmacy. The Gustine Company wanted the land so that it could build a CVS "mega drugstore" more centrally located than the current CVS store 10 blocks away. The targeted properties consisted of four homes and five businesses, none of which were

vacant or dilapidated, and none of whose owners wanted to move. Berliner, *Public Power* 175 (citing John Hanna, *CVS Proposal Angers Residents*, Pittsburgh Post-Gazette, Mar. 31, 1999, at W1). After trying unsuccessfully to purchase the parcels, the developer asked the Borough to act on its behalf in taking the property through eminent domain. The Borough Council complied, after voting to declare the area blighted because of “lack of measurable reinvestment, business growth, and the continuing demise of the downtown business base.” Berliner, *Public Power* 175 (quoting Letter from Timothy S. Brown, Borough Manager of Ambridge, Pa., to William Barlamas (Sept. 21, 1999) (on file with author)). In June 2000, the buildings were demolished and the property given to the developer on a 20-year lease under which Gustine will pay the City a mere \$100 annually. Berliner, *Public Power* 175 (citing *Business Briefs from Across Pennsylvania*, AP Wire, June 26, 2000).

### **L. Rhode Island**

Under a plan first proposed by the Cranston Redevelopment Agency (CRA) in 2001, a tidy, middle-class Cranston neighborhood consisting of 65 households in 31 buildings along Garfield Avenue was slated for demolition to make way for a huge, privately owned shopping plaza and office park development. The CRA would appraise the homes, but if the residents decided not to sell at the prices determined by the CRA, their homes would be condemned. The project’s cost to the City would be an estimated \$7.25 million for the acquisition of the buildings and other improvements. Also, the CRA recommended borrowing money to pay for the project, to be offset by the supposedly increased tax revenue from the project.

The CRA’s eminent domain-based redevelopment scheme left many of the targeted residents fearful and angry. Many residents want to stay in their homes. Floyd

Kohler, an 80-year old man who has lived in his Garfield Avenue home almost 50 years, could not believe that his city would destroy perfectly adequate, non-blighted houses at a time when there is a statewide shortage of affordable housing. Under the CRA plan, Kohler and his neighbors would simply be left out in the cold. Some residents might be willing to move, but they bristled at the notion that the City was acting as the real estate agent for the developer and that they would not be able to negotiate the amount of compensation.

Even though the mayor and City Council continue to back the proposed Garfield Avenue redevelopment, the City's own financial woes and lack of replacement housing have forced the City Council to move the project to the back burner for now. According to Councilwoman Paula McFarland, the City's budget deficits, which have pushed the City's bond rating to junk status, make the project unfeasible. She and other Council members withdrew their support from the plan in April 2002, but hope to rekindle it when the City is in better financial shape. Berliner, *Public Power* 184-85 (citing *Agency Hopes to Raze Neighborhood For Redevelopment*, The Providence Journal, Sept. 14, 2001, at C1; Mark Arsenault, *Neighbors Bristle At Proposal To Raze Homes*, The Providence Journal, Sept. 18, 2001, at C1; Mark Arsenault, *Garfield Ave. Land Taking Should Be Shelved, Says McFarland*, The Providence Journal, Apr. 22, 2002, at B1).

### **M. Texas**

Leigh Bass owned an historic 97-year-old building near downtown Dallas that her late husband bought for her. She lived in a loft on the top floor of the building, and leased out the rest to several other residents and businesses. Dallas City officials determined that the building stood in the way of the proposed performing arts center in the City's Arts District, so they condemned the property and forced Ms. Bass and the other residents out.

It appears that the proposed center will be privately owned or run, but the facts are a bit murky. Berliner, *Public Power* 194 (citing Dallas Center for the Performing Arts Foundation website, [www.dallasperformingarts.org](http://www.dallasperformingarts.org)). In fact, Dallas has no plans on the horizon to build the arts center any time soon, and the City's own property management director admits that it may never get built. The City has not even proposed a financing structure for the arts center, or decided whether to use public or private funds to build it. However, the City wants to own the building now, even though it has no immediate plans either to demolish or restore it. Berliner, *Public Power* 194 (citing Selwyn Crawford, *Dallas Begins to Empty Building that It Now Owns; Tenants Forced to Leave 97-Year-Old Structure; Plans Unclear for Property Some Say Is Worth Preserving*, *The Dallas Morning News*, July 9, 2002, at 13A). It continues to sit vacant.

#### **N. Washington**

The Town of Lakewood and a Kentucky-based developer were working to get a \$150-million, privately owned amusement park built on 80 acres of land currently occupied by hundreds of families. City manager Scott Rohlfs indicated that the Town could buy the land and then lease it back to the park operators. Lakewood claimed that the amusement park was a "public purpose" that would lure development and spark urban renewal in depressed Lakewood neighborhoods. Berliner, *Public Power* 208 (citing Skip Card, *City May Condemn Land for Theme Park; Lakewood Needs Property for Amusement Center*, *The News Tribune* (Tacoma, Wa.), Feb. 3, 2000, at B1). It would also be the only large theme park in the Northwest U.S., with many exciting thrill rides. However, the longtime residents of 59 trailers in the Sunrise Village mobile home park were not thrilled. Neither were the approximately 150 other families who rent low-cost apartments or duplexes on the site, which is close to Army and Air Force bases. They all

currently live on the 80-acre site and would be forced to move if the park is built. Most believe they would be forced to pay significantly higher rents elsewhere. Berliner, *Public Power* 208 (citing Skip Card, *Planned Lakewood, Wash., Theme Park's Neighbors Fear Being Forced Out*, The News Tribune (Tacoma, Wa.), Dec. 18, 2000). The whole project fell though when the Washington legislature denied a sales tax exemption the developer requested. Berliner, *Public Power* 208 (citing Joseph Turner, *Why Did Pierce Lose its Clout in Olympia?*, The News Tribune (Tacoma, Wa.), Apr. 28, 2002, at Front Page).

### **III. JURISDICTIONS THAT HAVE DETERMINED THE ADEQUACY OF PUBLIC PURPOSE**

In addition, a number of recent federal and state courts have addressed the adequacy of government public purpose determinations for the exercise of eminent domain:

#### **A. Fifth Circuit**

In *City of Shreveport v. Shreve Town Corp.*, 314 F.3d 229 (5th Cir. 2002), the court held that the City of Shreveport's condemnation of Shreve Town Corporation's lot for the purpose of building a parking lot for a new convention center showed a public purpose, as "the public purpose requirement was satisfied because the expropriation resulted in an economic benefit to the community." *Id.* at 234 (citing *City of Shreveport v. Chanse Gas Corp.*, 794 So. 2d 962, 973 (La. Ct. App. 2001)).

In *J.C. Penny Corp. v. Carousel Center Co.*, 306 F. Supp. 2d 274 (N.D.N.Y. 2004), the court held that Syracuse Industrial Development Agency's condemnation of plaintiff's lease in a shopping center in order for the shopping center's owner to redevelop the shopping center was not merely for private use, because "advancing the general prosperity and economic welfare of both the residents of the City and the general

population of the State, promoting tourism and attracting visitors from outside the economic development region, promoting employment in the City, and increasing the tax base as well as tax revenues” was for a public use. *Id.* at 280.

### **B. Seventh Circuit**

In *Daniels v. The Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002), the court held that the defendant Area Plan Commission of Allen County’s vacation of plaintiff landowner’s restrictive covenant (which limited the uses in the area to single family dwellings), so that a developer could build commercial establishments in the area and incidentally remove vacant houses, did not show a “public use,” because (1) mere economic redevelopment was deemed insufficient by the Indiana legislature and (2) the developer was not bound to build anything that would benefit the public, therefore rendering the purpose of the vacation private. *Id.* at 465.

### **C. Ninth Circuit**

In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), the court held that the City of Lancaster and the Lancaster Redevelopment Agency’s (“Lancaster’s”) condemnation of a store in order to accommodate an adjacent store’s, Costco’s, expansion did not evidence a public purpose, since “the only reason [Lancaster] enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco[,]” *id.* at 1129, and the prevention “future blight” thereby is not a valid public purpose, as it is unsupported by any authority or factual findings, *id.* at 1130.

### **D. California**

In *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265 (Cal. Ct. App. 2000), the lack of evidence that a redevelopment project area was blighted required

invalidation of redevelopment plans. *Id.* at 268. Redevelopment area was an affluent suburb with high median income, mid-high home values, and low crime. *Id.* at 268. However, City’s general plan explained that retail commercial uses generated “significantly more municipal revenues as compared to costs.” *Id.* The court held that there was insufficient evidence of blight, potential blight was not sufficient, the entire record failed to connect any alleged blight to the proposed remediation, mere generalities in the City’s finding were not taken at face value. *Id.* at 276. “The CRL is not simply a vehicle for cash-strapped municipalities to finance community improvements. *Id.* at 279.

In *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 98 Cal. Rptr. 2d 334 (Cal. Ct. App. 2000), the court overturned trial court’s determination that the administrative record supported Town’s finding that the Project Area was blighted. *Id.* at 339. “The touchstone of redevelopment is the elimination of blight on developed lands, not the instigation of economic development on forested lands.” *Id.* at 355. Just because an area could be more profitable if redesigned does not mean it sufficiently prevents economically viable use. *Id.* at 362.

### **E. Illinois**

In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E.2d 1 (Ill. 2002), on a rehearing from previous order in favor of the Southwestern Illinois Development Authority (“SWIDA”), court held that SWIDA did not have the authority to take property from National City Environmental, L.L.C. (“NCE”) and convey it to Gateway International Motorsports (“Gateway”). *Id.* at 11. Gateway had a successful car racetrack, needed more parking space, and asked SWIDA to condemn neighboring land. *Id.* at 4. Neighboring landowner NCE had been at that location since 1975 and employed 80 to 100 people. *Id.* at 4.

SWIDA argued the public purpose served via the condemnation was threefold, (condemnation would foster economic development, promote public safety, and prevent or eliminate blight) and that any distinction between public purpose and public use has evaporated. *Id.* at 8. The court held the terms were not indistinguishable. *Id.* at 8. The court was not persuaded that the condemnation would serve a sufficient public use even though the new parking lot would make lines for parking shorter and pedestrian access to the track safer. *Id.* at 10. Economic growth from an increase in Gateway’s business was not a public use. *Id.* The court weighed the benefit to the public derived from the taking against Gateway’s benefit, and held that the “condemnation clearly was intended to assist Gateway in accomplishing their goal in a swift, economical, and profitable manner.” *Id.*

#### **F. Kansas**

In *General Building Contractors, L.L.C., v. Board of Shawnee County Commissioners of Shawnee County*, 66 P.3d 873 (Kan. 2003), the County filed eminent domain petition to attract economic development by establishing an industrial park. *Id.* at 875. General Building Contractors (“GBC’s”) business sold services or products outside the traditional market area of county, but county wanted employers who would bring in new dollars, jobs, and demand for services. *Id.* at 876. GBC’s property was slated for a new building and county knew a major employer would require control of adjoining property. *Id.* The court held that public purpose, public use, and public welfare, are all terms that must be broad and inclusive. *Id.* at 883. The fact that the possibility for a private party to make a profit exists does not divest the act of its public use and purpose. *Id.*

## **G. Minnesota**

In *Minneapolis Community Development Agency (MCDA) v. OPUS Northwest, LLC*, 582 N.W.2d 596 (Minn. 1998), Opus Northwest, LLC (“Opus”) owned the parcels to be condemned and bid on the Minneapolis Community Development’s project. *Id.* at 598. City wanted to put a mid-priced retail store, parking complex, extended skyway access, and office building in the area so it contracted with Ryan Corp for the development and eventual ownership of project. *Id.* Retail store would be owned and operated by Dayton Hudson, which would place a Target in the building. *Id.* Opus’s bid was rejected in spite of it offering to build a \$120 million office building without government subsidies because Opus could not secure a mid-priced retailer. *Id.* The Court’s review of condemnation is very narrow and heightened scrutiny for a condemnation that benefits private interests was “out of touch with the national trend.” *Id.* at 599 (citation omitted). Condemnation to create jobs and improve tax base have sufficient public purpose. *Id.* (citation omitted).

## **H. New Jersey**

In *Casino Reinvestment Development Authority v. Banin*, 727 A.2d 102 (N.J. Super. 1998), property owners argued the primary purpose of the condemnation was to achieve a private benefit. *Id.* at 103. Donald Trump proposed a \$28.6 million hotel redevelopment project and requested that the Casino Reinvestment Development Authority (“CRDA”) use eminent domain powers to acquire parcels Trump had not been able to acquire independently. *Id.* at 106. These parcels had homes and businesses on them. *Id.* Court held CRDA acquired the property to allow Trump to use it for any purpose so long as it fits within the definition of “hotel development project and

appurtenant facilities.” *Id.* at 106. This was analogous to giving Trump a blank check with respect to future development on the property for casino hotel purposes. *Id.* at 111.

### I. New York

In *In re West 41 Street Realty LLC v. New York State Urban Development Corporation*, 298 A.D.2d 1 (N.Y.S. 2002), six property owners challenged the condemnation of land across Eighth Ave. from the Port Authority Bus Terminal because the benefit inured to the New York Times (plan was to build a high rise for a new Times headquarters, provide an additional 700,00 sq ft of office space for other tenants, build condos, new subway entrance, 350-seat auditorium, gallery and retail space). *Id.* at 3. The court held that public use only requires “an evident utility on the part of the public” and the public benefit is broadly defined. *Id.* at 6 (quoting *Bloodgood v Mohawk & Hudson R.R.*, 18 Wend. 9, 14 (N.Y. 1837)). So long as the project is rationally related to a conceivable purpose, it is constitutional. *West 41*, 298 A.D.2d at 6 (citations omitted).

In *Vitucci v. New York School Construction Authority*, 289 A.D.2d 479 (N.Y.S. 2001), landowner’s truck repair and selling business was condemned for the construction of a new school. *Id.* The school was not built and the defendants determined that the area would benefit from the creation of an urban renewal project. *Id.* It chose to expand a neighboring food production business. *Id.* Court explained that public use and public purpose are broadly defined as encompassing virtually any project that may further the public benefit, utility, or advantage. *Id.* at 480 (citing 51 NY Jur 2d Eminent Domain § 22 (2003)). “If a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain.” *Id.* at 481 (citing *Sunrise Props. v Jamestown Urban Renewal Agency*, 206 A.D.2d 913 (1994)).

## **J. Ohio**

In *City of Toledo v. Kim's Auto & Truck Service, Inc.*, No. L-02-1318, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003) (unpublished decision), the City wished to attract a new Jeep plant so City Council directed Planning Commission to develop an urban renewal plan to alleviate slum and blight conditions and allow for economic development. *Id.* at \*1. Appellant's automobile service station was in the urban renewal area. *Id.* Appellant argued the City manipulated the blight by purchasing lots and allowing lots to deteriorate and be stripped by vandals, and that the land was taken to benefit a private corporation, not the public, and the Jeep plant resulted in a new loss of 800 jobs and its tax abatement resulted in loss of tax revenue. *Id.* at \*2. Judicial review of a municipality's determination to taken land is limited; if it's rationally related to a conceivable public purpose the taking is allowed. *Id.* at \*4 (citing *Midkiff*, 467 U.S. at 241). In Ohio "public use" should be read as synonymous with "public welfare." *Toledo*, 2003 WL 22390102 at \*4. Appellant contended that the public benefit here was incidental due to the loss of taxes and jobs. *Id.* "However, appellee apparently determined that, despite these losses, keeping the Jeep manufacturing jobs in Toledo and eliminating blight in the neighborhood was conducive to the public welfare." *Id.* "Necessary" includes what is reasonably convenient or useful to the public. *Id.* at \*5.

## **K. Virginia**

In *City of Virginia Beach v. Christopoulos Family, L.C.*, No. CL99-2811, 2000 WL 33595021 (Va. Cir. Ct. Aug. 10, 2000) (unpublished decision), the city sought to condemn Family's property to build a parking garage. *Id.* at \*1. City had contracted with a developer to build a four-star hotel and accompanying park and the garage was needed because of that development. *Id.* Family argued that this use of eminent domain

power too greatly benefited private development. *Id.* at \*2. The court held that the contract divested the City of control over “the terms and manner of enjoyment . . . independent of the rights of the private owner appropriated to the use” and the developer’s use of the property exceeded incidental benefit because the developer could dictate how the City was to exercise its power over a public parking garage. *Id.* at \*10.

#### **L. Others**

*See also Bailey v. Myers*, 76 P.3d 898 (Ariz. App. 2003) (condemnation of brake shop for hardware store for purposes of economic development lacked public use); *Georgia DOT v. Jasper County.*, 586 S.E.2d 853 (S.C. 2003) (condemnation for private marine terminal that would provide significant local economic benefit not for public use).

#### **IV. KELO & HATHCOCK**

While state courts (or federal courts applying state law) have thus found such condemnations void for lack of adequate public use in Arizona, California, Georgia, Illinois, Indiana, Michigan, Missouri, New Jersey and Virginia, other courts in Kansas, Louisiana, Ohio, Minnesota and New York have upheld such condemnations for general economic revitalization purposes on similar facts. Surely public use clause of the Fifth Amendment requires more than such random protection against government compulsory purchase.

Most spectacularly, the Michigan Supreme Court recently overruled the *Poletown*, case, *see* 304 N.W.2d 455, in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), holding that a generalized economic benefit to the public was not a public use “simply because one entity’s profit maximization contributed to the health of the general economy.” *Id.* at 786. Indeed, the court took great pains to strike at the heart of the *Poletown* opinion holding that “*Poletown*’s conception of a public use – that of

alleviating unemployment and revitalizing the economic base of the community - has no support in the Court's eminent domain jurisprudence." *Id.* at 787. Therefore, the condemnation of nonblighted land for an airport technology park for economic development purposes was unconstitutional. *Id.* at 788.

*Hathcock* is in stark contrast to the Connecticut Supreme Court's recent decision in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004). There, the court concluded that commercial and residential development associated with an adjacent global research facility in order to create jobs and increase taxes and other revenues in a "distressed" city like New London was sufficient public use to justify the condemnation of several residences on the project site: "We conclude that economic development projects created and implemented [pursuant to statutory authority] 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 constitution." *Id.* at 520. The *Kelo* case has drawn national attention because the U.S. Supreme Court has accepted a petition for certiorari and will hear and decide it in the current term. 125 S. Ct. 27 (2004).

The *Hathcock* and *Kelo* opinions represent polar extremes on sufficiency of public use to support condemnation for the purpose of generalized economic benefit to the public at large. However, there is broad agreement in both cases that the question of public use sufficiency under the Fifth Amendment (as broadly stated in *Midkiff*) or a state constitutional clone thereof, is a judicial one, and not a legislative one. The critical issue is: with what standard should the Court replace its overly-deferential and clearly misused rational basis test?

It is likely that both condemnations would pass constitutional muster under the relaxed rational basis public use standard which the Court set out in *Midkiff*. Neither is “impossible” or “palpably without reasonable foundation” and both arguably are “rationally related to a conceivable purpose.” Not necessarily so under *Berman*, however, where the redevelopment authority engaged in the condemnation mainly (not incidentally) of blighted land for urban renewal and redevelopment, not mere economic revitalization. *Berman*, 348 U.S. at 31. In both state cases, the project area is largely if not totally free of blight. See *Hathcock*, 684 N.W.2d at 769; *Kelo*, 843 A.2d at 508-11. The condemned parcels thus do not represent islands of viable property amidst a sea of blight. Rather, the cases represent examples of the increasing use of eminent domain in order to take property from one private landowner and give it to another for generalized economic (and future) benefit to the condemning authority, and clear profit maximization for the “other” landowner. As the previously cited cases demonstrate, this makes a mockery of the public use clause, leaving virtually any landowner without so much as a remnant of a public use shield and leaving only compensation as a remedy for the owners of the parcels condemned.

Surely the Fifth Amendment requires more than the lip service to its public use clause to which many local governments have reduced it in the name of generalized economic benefit. For a start, the Court should find that government violates even its relaxed rational basis test in *Midkiff* when it condemns unblighted property in an unblighted area for generalized economic benefit, particularly when government fails to maintain control over the use of the condemned property and simply and immediately transfers it to another private owner, not to right an alleged wrong to that owner or

ownership class (as in *Midkiff* for land reform) but rather so that the private transferee can make a profit, employ more people and pay more taxes. Second, as suggested in an earlier article published here, the Court might usefully consider adopting an intermediate standard of review, as it has in the so-called unconstitutional conditions cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See James W. Ely, Jr., *Can the Despotic Power be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, A.B.A. Prob.& Prop. (Nov./Dec. 2003). Perhaps the Court might adopt a “reasonable necessity” test, “seeking to determine whether a condemnation is ‘related in nature and extent’ to the public purpose justifying it”. Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934, 966 (2003). Just as the Court required project-specific findings of nexus and proportionality to support dedications of land as conditions for land development permits in *Dolan*, the Court should now require government to make a specific, individualized determination to ensure that “a controlling purpose of the condemnation is the removal of blight or slums that endanger the public health, morals, safety or welfare.” *Hathcock*, 684 N.W.2d at 796 (Weaver, J., concurring in part and dissenting in part). In sum, as suggested by 9th Circuit Judge O’Scannlain:

Because the *Nollan-Lucas-Dolan* trio increased the level of scrutiny given to police power regulations, identifying some of them as takings, it stands to reason that the same increased scrutiny should be given to outright condemnation. If a taking does not have the required fit – perhaps something like *Nollan*’s “essential nexus” – between its proclaimed public use and its actual effect, then it should be invalid under the Public Use Clause.

*Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1168 (9th Cir. 1997)

(O’Scannlain, J., concurring in part and dissenting in part).

## Reforming Eminent Domain

John Fee\*

Government's power to take property against an owner's will is both a powerful tool for public policy and a threat to liberty. It may be used for good or for ill. Today, we increasingly hear of cases in which it appears that state and local governments have possibly abused that power, or at least have used it too casually. Many eminent domain projects now go forward on the basis of public benefits that are uncertain and indirect, while causing direct and certain hardship to those individuals who lose their property.<sup>1</sup> Often, these projects involve private businesses, such as WalMart, who ask government to exercise eminent domain to acquire land that they need. Governments agree to do so, using the eminent domain power to displace existing homeowners, because they hope to stimulate the tax base and produce more jobs for the community.

Are these redevelopment projects worth the costs that they impose? Does the Constitution contemplate this form of redistribution through eminent domain? These questions strike at the heart of the current debate over the public use doctrine.

The public use doctrine holds, in its classic form, that government may condemn private property only for public use. Although the Supreme Court has consistently recognized this doctrine, it has applied it to mean that there must be a public benefit supporting a condemnation.<sup>2</sup> Moreover, the doctrine gives deference to the government's

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<sup>1</sup> Dana Berliner and the Institute for Justice have compiled an impressive report of eminent domain actions, organized by state, showing this pattern. See *Public Power, Private Gain* (2003), available at <http://www.castlecoalition.org/report/report.shtml> (last visited March 20, 2005).

<sup>2</sup> See *Housing Hawaii Authority v. Midkiff*, 467 U.S. 229, 239-41 (1984).

finding of public benefit, so that it amounts to nothing more than a rational basis test.<sup>3</sup> In essence, as long as government compensates displaced landowners, the U.S. Constitution prohibits only patently arbitrary, irrational or malicious uses of the eminent domain power.

This broad concept of public use has not satisfied many property rights advocates who are concerned about governments' overuse of eminent domain. Many continue vigorously to raise the public use doctrine as a defense in eminent domain cases, arguing for a stricter standard. They have successfully convinced some state courts to apply a more restrictive standard than federal law imposes.<sup>4</sup> Moreover, they are attempting to persuade the United States Supreme Court, in the pending case of *Kelo v. New London*,<sup>5</sup> that revitalizing a local economy by drawing new businesses is not a legitimate public use under the Fifth Amendment.

The movement to limit government's power of eminent domain by narrowing the concept of public use reflects a need for legal reform. As one hears of states and cities commonly displacing people from their homes to make way for private businesses, one is naturally troubled. I question, however, whether a narrow public use doctrine is the appropriate way to address this problem, or, indeed, whether it would do much good. I suggest that the current injustices in eminent domain are not the product of an

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<sup>3</sup> *Id.* at 241 (“[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”).

<sup>4</sup> *See, e.g.,* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (finding a condemnation action for the purpose of economic redevelopment unconstitutional under state public use doctrine); Southwestern Illinois Development Authority v. National City, 768 N.E.2d 1 (2002) (same). For a summary of state public use cases, *see* Amicus Brief of Professor David L. Callies *et al.*, *Kelo v. New London*, U.S. Docket No. 04-108 (filed Dec. 3, 2004) at 5-15.

<sup>5</sup> U.S. Supreme Court Docket No. 04-108 (cert. granted Sept. 28, 2004).

unreasonably broad concept of public use. Rather, the root of the problem lies with the current system's failure to require adequate compensation.

Before turning to compensation problem, however, let's consider some weaknesses in the argument for a narrow public use doctrine. I will briefly examine the issue from three perspectives: text, precedent, and policy.

#### I. Constitutional Text

The Fifth Amendment to the Constitution provides: “[N]or shall private property be taken for public use, without just compensation.” Commentators commonly say that this Clause contains two rules: a rule that government must provide “just compensation,” and a rule that government may take property only for “public use.” Ultimately, I believe that this is correct (as an inference), but careful observers should see that this is not the most straightforward reading of the Takings Clause. The Takings Clause literally provides only that *in the case of takings for public use* government must pay compensation. It does not actually say that government must have a public use for every taking, nor does it say anything about takings for private use. This means that those who rely on constitutional text to support a narrow public use doctrine must depend upon constitutional inference.

To be sure, the wording of the Takings Clause does fairly imply that the power of eminent domain exists for public use purposes. (It would make little sense for the Constitution to require compensation for public use takings, while allowing government to take property *without compensation* for non-public use purposes). But the fact that we must infer that there is a public use in every legitimate taking to avoid the loophole of

allowing some takings without compensation seems, if anything, to support a broad and encompassing interpretation of the phrase “public use,” rather than a narrow one.

Advocates of a narrower public use doctrine say that the words “public use” must mean something enforceable and prohibitory (something more restrictive than a rational basis test, they say), but they often overlook that the phrase is not framed as a prohibition and appears only in passing. Given its context, it seems more natural to interpret the phrase “public use” to refer to any derivation of public benefit (including indirect benefit) from the use of eminent domain. If the framers had actually intended to create strict distinction between takings for direct public use and takings for indirect public use, it is odd that they neglected to make such a distinction in the text. It is even more surprising that they forgot to prohibit the second type of taking.

## II. History and Precedent

There is no direct historical evidence that the authors of the Fifth Amendment meant by the phrase “public use” to impose a substantive limitation on eminent domain. Moreover, while one can find historical support for a public use doctrine in practices of the early States, much of this practice supports a broad public interest standard.<sup>6</sup>

As early as 1798, the Supreme Court said in dictum that a legislature does not have the power to enact “a law that takes property from A. and gives it to B.”<sup>7</sup> Property rights advocates sometimes quote this statement as the basis for a narrow public use doctrine. It is not clear, however, that the Supreme Court meant anything more than that it would be unjust for legislatures to make uncompensated redistributions of wealth,

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<sup>6</sup> For thorough historical accounts, see Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 *Hastings L. J.* 1245 (2002); Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 *Envtl. L.* 1 (1980).

<sup>7</sup> *Calder v. Bull*, 3 U.S. 386, 388 (1798); see also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 435 (1837) (repeating the dictum).

which was a major concern to the constitutional framers. The cases using this statement are not about eminent domain. Moreover, early eminent domain practice suggests that this axiom did not apply to compensated takings, at least not where the government had a legitimate public reason for using eminent domain.

In the early 1800s, even before courts explicitly recognized a public use doctrine, states used eminent domain to acquire private property for private entrepreneurs based on the finding that their anticipated use would produce public benefits. Governments commonly condemned property for private turnpikes, private railroads, private bridges and private canals.<sup>8</sup> In the same era, and even earlier, legislatures commonly authorized private owners to build dams flooding the land of other owners, effectively taking their neighbors' property.<sup>9</sup> States also enacted statutes allowing owners of landlocked parcels to use eminent domain to acquire access.<sup>10</sup> Later, in the early 20<sup>th</sup> Century, the Supreme Court allowed government to condemn property for such things as private drainage ditches<sup>11</sup> and to acquire property to compensate those displaced or cut-off by federal reservoirs.<sup>12</sup> All of these exercises of eminent domain effectively transferred property "from A to B" based on indirect public benefits, and yet they were considered to be legitimate public uses.

Indeed, although the Supreme Court has heard many eminent domain cases involving private beneficiaries, it has only once found a public use lacking.<sup>13</sup> Even

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<sup>8</sup> See Meidinger, *supra* note 6, at 26-28.

<sup>9</sup> See *id.* at 14-15 (describing the mill acts of the colonial era); *id.* at 23-24 (describing their expansion in the 1800's).

<sup>10</sup> *Id.* at 25-26.

<sup>11</sup> See *O'Neill v. Leamer*, 239 U.S. 244 (1915); *Clark v. Nash*, 198 U.S. 361 (1905); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

<sup>12</sup> See *Brown v. United States*, 263 U.S. 78 (1923); *United States ex re. TVA v. Welch*, 327 U.S. 546 (1946).

<sup>13</sup> *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896).

during the *Lochner* era, when the Court enforced a very narrow concept of the police power, it applied the public use doctrine deferentially.<sup>14</sup> While state courts were historically divided on the meaning of public use (as they are today), many also applied a broad public interest standard.<sup>15</sup>

This indicates that those who advocate a narrow public use doctrine today must rely on something more than history. Although history may support the existence of a public use doctrine, it also supports the view that indirect public benefits flowing from private entrepreneurship are a legitimate form of public use. There was never a historical consensus that eminent domain requires government to retain title or to use the land it acquires directly, or that government may not rely on private entrepreneurs to produce public benefits.

### III. Public Policy

Supporters of a narrow public use doctrine have a somewhat stronger argument on public policy grounds. It does appear that state and local governments overuse eminent domain, sometimes doing more harm than good. Problems are especially apt to arise when governments fail to internalize all of the costs (both financial and emotional) that eminent domain causes to displaced owners, and where the affected owners are politically powerless. Because of these factors, a government's decision whether to use eminent domain is often skewed, and it may choose to use eminent domain where alternatives would better serve the public interest.

The famous Poletown incident, where Detroit condemned a neighborhood of thousands of residents for the purpose of providing General Motors a site for a new

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<sup>14</sup> See notes 11 and 12, *supra*.

<sup>15</sup> See Meidinger, *supra* note 6, at 16-41.

Cadillac plant, provides a poignant example.<sup>16</sup> In the end, the plant did not produce nearly as many jobs as promised, and there were alternative ways that project managers could have designed the plant to occupy less acreage.<sup>17</sup> While the plant surely produced some benefits for Detroit, it is doubtful that those benefits were sufficient to justify the extraordinary personal costs imposed.

There are, however, some problems with using the public use doctrine as a primary defense against government's overuse of eminent domain. First, the government's overuse of eminent domain is not limited to cases in which the land is intended for transfer to private beneficiaries. Indeed, the problem of eminent domain overuse has little to do with who ultimately acquires the land or whether the public benefits are direct or indirect. Government may abuse eminent domain just as easily for traditional purposes, such as for roads. Individual homeowners are hurt just as much when the government casually condemns their land to widen a road, to build a freeway interchange, or to build a waste facility, when other options are available to serve the government's interests, and when government pays inadequate compensation.

Many people are skeptical of the merits of urban redevelopment projects, and some of this skepticism has fueled the movement for a narrower public use doctrine. But there are also many people who are appropriately skeptical of large transportation projects. Ill-conceived transportation projects can impose unjustified costs on taxpayers, cause environmental damage, encourage sprawl, accelerate urban decay, and, yes, cause significant hardship to condemnees. Like economic redevelopment projects,

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<sup>16</sup> The Michigan Supreme Court upheld Detroit's action as a valid public use in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981).

<sup>17</sup> For a powerful account of the Poletown case and its aftermath (albeit from an activist's perspective), see Jeanie Wylie, *POLETOWN: COMMUNITY BETRAYED* (University of Illinois Press 1989).

transportation projects create winners and losers, are often instigated by interest groups, are hotly contested in the political arena, and sometimes turn out to do more harm than good. When governments do not internalize all of the costs that these projects impose on society, and when the injured individuals are politically weak, it is likely that governments will move too quickly, and will use the eminent domain power casually for the benefit of those with political influence. Thus, even a narrow public use doctrine is an inadequate response to the vast problem of eminent domain overuse.

Second, a narrow public use doctrine could potentially deter many projects that are important to the public interest. While the technique of reallocating property can be abused, it is often quite reasonable for government to take property from one group of owners to transfer to another owner, relying upon private entrepreneurship to produce important public benefits. This is the story of American canals and railroads. The same hold-out problems that require government to have the power of eminent domain for publicly-owned operations also stand in the way of many privately-owned operations that serve important public needs. These include not only common carriers and utilities, but also large retailers, large manufacturers, housing providers, and universities. Without government's ability to use eminent domain, some of these services, which require large amounts of land, will not exist in places where the public desperately needs them. Indeed, in many deteriorating cities, the public needs these kinds of services far more than they need new roads or sewers.

To be sure, if a community needs a service badly enough, government may provide it directly, and sometimes it will do so. Even a narrow public use doctrine would allow this. But why should we interpret the Fifth Amendment to favor government

ownership of traditionally private activities, when we know that private entrepreneurship is often far more efficient in serving the public welfare? If proponents of a narrow public use doctrine had prevailed in the early 1800s, we might have had a system of government-owned railroads. If they have their way today, we can expect to see more government-owned housing, government-owned retail centers, and perhaps even government-owned manufacturing operations. Governments will continue to use eminent domain for urban redevelopment and blight removal in places where the need is great enough, but it will take place in a less efficient form, whereby government agencies retain title after the fact.

A narrow public use doctrine would therefore impose an unjustified preference for government ownership over private ownership as a means of serving the public welfare. It is ironic that that many of the supporters of a narrow public use doctrine are groups ostensibly opposed to big government. Whether they mean it or not, their arguments reflect an unreasonable distrust of private entrepreneurship and its ability to produce public benefits,<sup>18</sup> while apparently trusting that government alternatives would do a better job.

A narrow public use doctrine would also favor suburban sprawl over urban redevelopment. Whatever the merits of outward land development versus urban redevelopment, there is no reason why the Constitution should impose a preference for the former, saying in effect that government may use eminent domain to subsidize development at the perimeter (by building and widening roads and commuter rail

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<sup>18</sup> For example, the Petitioner's brief in *Kelo v. New London*, filed by the Institute for Justice, is replete with skeptical references to the "trickle-down" benefits of private enterprise, borrowing the term from those who harshly criticized supply-side economics in the Reagan era. While one might expect to hear such skepticism of private enterprise from figures such as Ralph Nader (who also advocates a narrow public use doctrine), I have been surprised to see so much of it coming from the political right.

networks), but not to facilitate redevelopment of urban areas. If there should be any preference, I would choose a constitutional rule that favors the latter.

#### IV. The Problem is Unjust Compensation

A narrow public use doctrine is an inadequate solution to the problem of eminent domain abuse because it does not address its underlying causes. Overuse of eminent domain has little to do with whether a private entity will acquire title after the land is condemned. We should acknowledge that private entities do usually produce valuable public benefits with their land, sometimes doing more for the public good than certain government agencies. The real problem in eminent domain today has to do with whether the public interest is sufficient to justify eminent domain in individual cases, given all of the costs involved. This has less to do with the public use requirement, and more to do with the requirement of just compensation.

The constitutional requirement of just compensation serves two fundamental purposes. First, it promotes equality by spreading the burdens of government action more evenly among society. As the Supreme Court said in *Armstrong v. United States*, the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>19</sup> Second, the requirement of just compensation deters government from using eminent domain too frequently. Without such deterrence, governments would often use eminent domain for insufficient reasons. To be sure, courts could attempt to review all eminent domain projects to ensure that their benefits outweigh their costs, but courts often lack the expertise to do this, and there are other problems with courts meddling in the details of government planning. A far more reliable indicator that a particular

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<sup>19</sup> 364 U.S. 40, 49 (1960).

eminent domain action is worth its price to the public is that the government is willing to compensate every aggrieved landowner in full. If the government is not willing to do this, the project probably shouldn't happen.

Both of these purposes of the Takings Clause function well only when government pays condemned owners sufficient compensation to make them whole. A regime that allows government systemically to undercompensate owners will fail adequately to deter eminent domain abuse, and will cause the burdens of eminent domain to fall selectively upon certain individuals. It is remarkable, therefore, that current law does not require full compensation.

The Supreme Court has interpreted the Fifth Amendment to mean that government must pay assessed market value for whatever land it condemns, and usually nothing more.<sup>20</sup> It is notable that the Fifth Amendment does not use the words "market value"; it uses the words "just compensation"; and we know that in many cases market value does not put owners in nearly as good a position as they were in before the taking of their property. In addition to the loss of market value, eminent domain causes individuals to suffer relocation costs, inconvenience, loss of goodwill (in the case of businesses), personal detachment from their homes, and personal detachment from their communities. These are not trivial values.

The disparity between market value and full compensation is particularly great when government condemns residential housing. It is common for many people, particularly those who have lived in their home for many years, to value their own homes at significantly more than assessed market value. This explains why their homes are not

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<sup>20</sup> United States v. 564.4 Acres of Land, 441 U.S. 506, 510-12 (1979). Some eminent domain statutes provide additional elements of compensation, such as relocation expenses, but even these usually come far short of fully compensating affected owners.

for sale. Elderly people are especially prone to this and are commonly averse to change. It is not coincidental, therefore, that so many troubling cases of eminent domain involve the displacement of elderly people who have lived in their homes for many years, in neighborhoods where market values are low.

Is it reasonable for people to value living in their homes at more than market value? Of course it is. Even though a large component of this extra value is subjective, it is a kind of subjective value many homeowners can appreciate. There is nothing unusual or irrational about loving the home one has settled in, or the community of neighbors that one has come to associate with, and therefore strongly preferring to stay put rather than move.

Why, then, does eminent domain law fail to require government to compensate for such losses when it displaces landowners? The Supreme Court has said that “practical difficulties” with measuring an owner’s actual loss require using market value as a proxy.<sup>21</sup> This is an unsatisfying answer. While it is surely difficult to place a dollar value on the emotional loss that a displaced homeowner suffers, this does not justify assuming that the value is always zero. Indeed, the current state of eminent domain law bears a striking resemblance to the obsolete law of wrongful death, whereby a victim’s family used to receive only damages for the decedent’s lost wages, and not for any emotional injury associated with losing a family member. Tort law has now fixed this extraordinary injustice, by recognizing emotional damages. It is time for eminent domain law to make a similar reform.

Accordingly, I propose a new rule: the Fifth Amendment should require governments to compensate condemned owners for all of their losses associated with

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<sup>21</sup> *Id.* at 511.

eminent domain, making at least a reasonable approximation of those losses that are difficult to quantify or verify. To be clear, I do not propose that property owners should be able to set the value that government must pay, or that those who assess compensation should always trust an owner's account of how he or she is affected. Such a practice would allow holdouts to take advantage of the public's need for their property, and would undermine the purpose of eminent domain. I do propose, however, that the Fifth Amendment should require governments to make a reasonable effort to assess every element of damages caused by eminent domain, attempting to leave owners as well off as they were before condemnation. This means that governments should pay for relocation costs, incidental damages and even emotional losses associated with eminent domain.

A government might fulfill its constitutional obligation under this standard in a variety of ways. It might rely upon judges or juries to hear evidence and assess damages on a case by case basis, as in tort cases. Or it might enact a statutory formula that approximates certain damage elements. For example, a state might enact a formula providing for emotional damages for displaced homeowners as a percentage of market value according to how long the owner has occupied the home. To the extent that governments rely on statutory formulas to estimate certain damage elements, courts should scrutinize the formulas to make sure that they are reasonable. Damage elements that are not covered by reasonable statutory formulas should be compensable in court.

No matter how states choose to comply, a more accurate standard of just compensation would lessen the impact of eminent domain on owners. Even more importantly, it would deter government from exercising eminent domain in cases where the benefits are insubstantial and the costs are great. The razing of Poletown probably

would have never happened had the Constitution required Detroit to compensate every aggrieved owner for their full losses. If it had happened, at least the City would have made the decision using a more reliable cost-benefit framework, and the owners would have received more for their loss.

In conclusion, the major problem in eminent domain law today is not that the public use doctrine is too lax. It is that courts do not require full compensation, which leads governments to use eminent domain too often, imposing severe losses on particular groups of owners. This applies equally to traditional eminent domain projects as it does to economic redevelopment projects. If we are going to reform eminent domain law, I suggest that we reconsider first what the Constitution really means by “just compensation.”