existing businesses outside of the community, business failures, and loss of sales or visitor volumes," conditions which the Supreme Court of Nevada considered sufficient to declare downtown Las Vegas blighted.[35] Under such an absurdly expansive definition of blight, a blight condemnation would be no different than a pure economic development condemnation.

Even worse, serious abuses are possible in situations where property is condemned in slum-like areas that really are "blighted" in the narrow sense of the term. Historically, such condemnations have often been used to expel residents of poor or minority neighborhoods from their homes for the benefit of white upper and middle class interests.[36] Between 1949 and 1980, some 3.6 million people were expelled from their homes in this way, as a result of federal government-sponsored "urban renewal" blight condemnations.[37] This toll far exceeds the human cost of *Poletown*-style "pure" economic development takings. Any ban on economic development takings will be only partially effective if not coupled with tougher judicial scrutiny of blight condemnations.

B. Public control

A second possible loophole is *Hathcock's* exception for condemnations where there is some sort of "public control" over the property at issue.[38] While I would not argue that public control should never be allowed to justify condemnation, there is a serious danger of abuse if courts fail to specify how *much* control is required. An obvious possibility is that a mere fig leaf of control might be used to push through a taking that in reality serves only the interests of GM, Trump, or whoever happens to be the new private owner. Moreover, even a high degree of public control on paper might not be enough to prevent abuse if the underlying problem is a political process that has been "captured" by interest groups. Regardless of how much "control" public officials may have, it will not prevent abuse if those officials are serving the interests of the new owners rather than those of the public at large.[39]

Conclusion

Even if courts across the country follow Michigan's example and ban economic development takings, there is a possibility that the exceptions to the ban might swallow the rule. That said, *Hathcock* is still an important sign of progress, even as the Supreme Court's decision in *Kelo* is a setback. No single decision can address all the shortcomings of public use doctrine. But it is essential that we at least move in the right direction. That is the best way to avoid future *Poletowns*.

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[35] *Id.* at 13.
[36] For detailed evidence and discussion, see Somin, *supra* note 8, at Part IV.
[37] *See id.*
[38] *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 782 (Mich. 2004).
[39] For a more detailed critique of this aspect of *Hathcock*, see Somin, *supra* note 3, at 1031–32.

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EMINENT DOMAIN AND SECONDARY RENT-SEEKING

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Until recently, the conventional wisdom had been that the Fifth Amendment's public-use requirement is "a dead letter."[1] If that was once true, it appears that it no longer is. There are signs indicating that the public-use requirement is about to be resurrected. The most tangible signs, of course, are two recent cases. The first is *County of Wayne v. Hathcock*,[2] where the Michigan Supreme Court reversed its earlier decision in the infamous case of *Poletown Neighborhood Council v. City of Detroit*.[3] The second is *Kelo v. City of New London*,[4] where the U.S. Supreme Court recently affirmed that the exercise of the eminent domain power for the purpose of private economic development does not necessarily violate the public-use requirement.[5] The common denominator of both of these, and other recent cases,[6] is that they involve uses of the state's eminent domain power to condemn residential land in order to promote local economic development in economically distressed communities. This was also, of course, the same scenario described in *Poletown*, a case that has been an anathema to commentators at both ends of the political spectrum.

Things have gotten out of hand lately with respect to the eminent domain power. The Right has known this for years, and with the increasingly frequent use of the state's eminent domain power to replace residential neighborhoods with big-box stores or the like, the Left may be getting the message as well. The economic-

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[1] Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986–1987).
[2] 684 N.W.2d 765 (Mich. 2004).
[3] 304 N.W.2d 455 (Mich. 1981).
[4] 843 A.2d 500 (Conn. 2004), *aff'd* 125 S.Ct. 2655 (2005).
[5] 125 S.Ct. at 2662–63.
[6] *See, e.g.*, Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003); Bailey v. Myers, 76 P.3d 898 (Ariz. Ct. App. 2003); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

development public-use question puts political Progressives between a rock and a hard place. On the one hand, Progressives believe that property should be used to serve collective interests, the common welfare, and that, as a very general proposition, subordination of individual property rights to the common weal is legitimate. On the other hand, Progressives tend to agree with libertarians, and disagree with legal economists, in their belief that the individual right of property isn't simply an economic right. From the Progressive point of view, social wealth is one purpose but not the only purpose to be served by property rights. Individual property rights are also about self-development, belonging, and the conditions for civic participation. Resulting from this, the utilitarian side of the Progressive is relatively unbothered by eminent domain and, indeed, regards the power as usually positive. Therefore, Progressives counsel against intense judicial scrutiny into whether the public-use limitation has been satisfied. But the non-utilitarian side, what we might call the Hegelian side of the Progressive, is quite concerned about eminent domain and believes that inquiry into public-use should be more than trivial because monetary compensation, even if it is just, isn't always enough to make the landowner whole.

What I'd like to do is to engage in a very preliminary and tentative thought experiment about how this type of political Progressive might get out of this box, or break this impasse regarding the public-use requirement. The principal form of analysis for this experiment is one that you wouldn't expect from a Progressive; it is drawn from a law-and-economics model of public use that was developed a number of years ago. I suggest that this device, which focuses on rent-seeking behavior in exercises of eminent domain, may (emphasize may) serve both economic and political values.

I. Background: Two Suggested Public-Use Alternatives to the Status Quo

Several different tests have been offered in recent years. Richard Epstein argued that "public use" means "public goods."[7] I don't have time here to give a full critique of Epstein's approach, but suffice it to say that while I think the approach is certainly plausible, I do think it gives insufficient deference to the determination of democratically-elected government bodies. Moreover, even if one agrees with the approach on normative grounds, the fact is that it is very unlikely to gain the approval of many courts, including the Supreme Court.

A more feasible approach is one that was proposed several years ago in a justly influential article by Tom Merrill.[8] This approach focuses on the question whether the decision to exercise the power of eminent domain was the result of what Merrill calls "secondary rent-seeking."[9] By that term he means efforts by interest groups to acquire (or defeat) a legislative grant of eminent domain. As

[7] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 168–69 (1985).
[8] Merrill, *supra* note 1.
[9] *Id.* at 86.

Merrill points out, from an economic perspective, eminent domain is a device designed to overcome rent-seeking behavior by property-owners when government seeks to acquire large parcels of land for public projects such as roads, airports, and the like. In this environment, where the seller can extract economic rents from the buyer, eminent domain can be justified as a means facilitating economically efficient forced sales of land. One problem with this model, however, is that because the current formula for compensation—which measures the amount of compensation due on the basis of the condemnee-landowner's opportunity costs—allocates all of the surplus generated by the condemnation (the increase in the land's value after the condemnation) to the condemnor and none to the condemnee, there are incentives for interest groups or individuals to engage in rent-seeking behavior to capture the taking's surplus. Where the level of such secondary rent-seeking is sufficiently high, eminent domain, as Merrill puts it, "may inadvertently produce the very type of socially inefficient resource allocation it was designed to avoid."[10] I suggest that the problem of secondary rent-seeking may be a basis for developing a useful test of whether and when the exercise of eminent domain for the purpose of municipal economic development violates the public use limitation.

II. The Basis for Judicial Deference

Operating within the constraints of existing doctrine, the starting point is the principle of judicial deference expressed in *Berman v. Parker*.[11] Both economic and political considerations support this principle. From a political viewpoint, in a democratic society, we assume that ordinarily, the will of the people—the *vox populi*—should determine proper governmental ends. To the extent that the public use requirement is a matter of determination of government ends, legislatures, not courts, should make the determination whether a taking serves a legitimate government purpose. So long as the condemnation is the genuine result of the ordinary processes of majoritarian democratic politics, courts should not go around second-guessing legislatures. This is the idea behind the Supreme Court's statement in *Berman* that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[12] That conception of the legislature's role led the Court to conclude that the role of courts in "determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one."[13] More recently, economist William Fischel has expressed a somewhat similar view regarding the role of courts in determining whether exercises of the eminent domain power are valid because they are for "public use."[14] Fischel writes:

> [T]he public use limitation is not solely a matter for judges to decide under constitutional standards. Rational democratic bodies are capable of re-

[10] *Id.*
[11] 348 U.S. 26, 32 (1954).
[12] *Id.*
[13] *Id.*
[14] WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995).

> sponding to the potential for inefficiency and unfairness of using eminent domain. The legal burden of proving that a democratic body is insensitive to unfair exercises of eminent domain should not be insuperable, but there are reasons to defer to the government.[15]

But the public-use requirement may be understood another way, as a matter of means rather than ends. This is the interpretation that Merrill offers. Assuming that the legislature's objective is legitimate, the question is whether its judgment regarding the use of eminent domain as the means to achieving that end is legitimate. If the government wants some land so that a business and technology park can be built, fine and good, but is condemnation rather than consensual sale a legitimate means to acquiring the land? Looking at the public-use restriction from this choice-of-means perspective, there is an economic reason for deference: ordinarily, the state's power of condemnation is self-regulating because of the costs associated with it. As Fischel states, "Eminent domain may be expansive, but it is also expensive."[16] Merrill notes that "[g]overnment officials frequently complain about the costs and delays of eminent domain."[17] Because of these costs, when governments decide to acquire land for some (legitimate) end, they usually do so through market transactions. Eminent domain, when used, is typically the more efficient means to the legitimate ends. Hence, there is no need for robust judicial scrutiny of the public-use requirement. The *Berman* deference principle seems justified viewed from the perspective of means as well as from the ends perspective.

But deference is one thing; giving up is another. While there certainly are good principled reasons for courts to be deferential to the decisions of democratically elected bodies to exercise their eminent domain power, the Constitution itself places a check on how much deference courts must show. The public-use requirement places an obligation on courts to step in when the legislative bodies are, in Fischel's words, "insensitive to unfair exercises of eminent domain."[18] The whole question, though, is when exercises of eminent domain power are "unfair."

Let's get one thing straight at the outset: fairness in the context of the just compensation clause can't mean *always* protecting the holdout. The whole point of the clause is to allow forced sales to the government, even—or, one should say, *especially*—when dealing with the private owner who won't take an objectively fair price for her property. Still, fairness is relevant and must be taken into consideration along with considerations of aggregate benefits to society. Eminent domain is an extreme power, and both fairness and aggregate social welfare require that it be exercised only when the expropriation is for a genuinely "public use" rather than for the economic gains of a single private firm or small group of individuals or firms.

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[15] *Id.* at 77.
[16] *Id.* at 74.
[17] Merrill, *supra* note 1, at 80.
[18] Fischel, *supra* note 14, at 77.

The question that cases like *Kelo, Hathcock,* and *Poletown* raise is, may the state ever exercise its eminent domain power by taking from *A* and giving to *B*, where *B*, like *A*, is a private party or parties? Should it be the case that every exercise of eminent domain that results in transferring the condemned land from one private owner to another is always a violation of the public use requirement? The deferential approach used by the Supreme Court in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*[19] clearly says no. So long as the primary purpose of the government's exercise of its condemnation power was to benefit the public in some way, the fact that a private individual or individual incidentally benefited does not make the taking illegitimate.[20] The courts in *Kelo, Poletown,* and other economic development cases in which courts found that the public use requirement was met relied on this basic framework.

This framework seems right to me insofar as it rejects any sort of categorical rule. We ought to reject both a *per se* rule saying that the use of eminent domain for municipal economic development is always unconstitutional and one saying that condemnation followed by retransfer to a private party is always permissible wherever the government concludes that the local economic community benefits such as increased tax revenues would result. The correct result lies somewhere in between these two extremes, and reaching that result necessarily means that we engage in a case-specific inquiry of the sort that the Connecticut court did in *Kelo.* The question then becomes, what standard should be applied to such a problem? Furthermore, is the standard developed by the Connecticut court in *Kelo* satisfactory?[21]

This is where the focus on secondary rent-seeking may prove useful. While taking from *A* and giving to *B*, another individual or firm, shouldn't be unconstitutional *per se*, the situation does pose the potential for abuse of the taking power. Cases involving the exercise of eminent domain taking from *A* and giving to *B* in the name of "community economic development" may involve secondary rent-seeking; courts in these cases should abandon the principle of extreme deference and closely investigate the circumstances surrounding the exercise of eminent domain to determine whether the taking was the result of rent-seeking by private individuals or firms. As Merrill argues: "In cases where eminent domain is most likely to foster secondary rent-seeking behavior—*where one or a small number of persons will capture a taking's surplus*—courts should closely scrutinize a decision to confer the power of eminent domain."[22]

Judicial rejection of government exercises of the eminent domain power on the basis of secondary rent-seeking serves both economic and political purposes. As

[19] 467 U.S. 229 (1984).
[20] *Id.* at 243–44.
[21] Kelo v. City of New London, 843 A.2d 500, 541 (Conn. 2004), *aff'd* 125 S.Ct. 2655 (2005).
[22] Merrill, *supra* note 1, at 87 (emphasis added).

I have indicated, and as Merrill argues, condemnation that results from rent-seeking by interest groups subverts the very economic rationale behind the eminent domain. The costs of rent-seeking offset, perhaps entirely, the gains from the exchange. When the private agent that has succeeded in this competition over the legislature's power to expropriate is a corporate firm or combination of firms, the exercise of the eminent-domain power is little more than a form of corporate welfare. While there may be public benefits, as well as private benefits to the corporate firm, eminent domain cannot be justified on economic grounds if those benefits are merely incidental to the private gains.

Moreover, at least some account should be taken of the political process that led to the exercise of the state's eminent domain power. The public-use requirement should be understood to focus, at least in part, on the pathologies of the political process. Specifically, when the exercise of the eminent domain power is the result of rent-seeking behavior by private beneficiaries, it should be struck down as unconstitutional. Under those circumstances, judicial deference to the *vox populi* isn't warranted because the condemnation isn't, in fact, the result of the *vox populi*. The act of condemnation was not the product of popular will but the will of a private investor or small group of investors. It is a distortion of the processes of ordinary democratic politics.

The hard question, then, is how do we know whether and when an act of condemnation is the result of secondary rent-seeking rather than an outcome of the regular process of majoritarian politics? Merrill cautions against exaggerating the secondary rent-seeking problem.[23] Eminent domain, he argues, is a less attractive target of interest group rent-seeking than, say, tax abatement because tax abatement doesn't involve the offsetting expenditures that eminent domain does. While he does not develop the point, he suggests that the risk of secondary rent-seeking is greatest in two situations: cases involving delegation of the eminent domain power to one or several private parties and those where condemnation is followed by retransfer to one or few private parties.[24] Citing *Poletown* as an example, Merrill suggests that retransfer cases are especially prone to rent-seeking if the price charged by the government on retransfer is less than the compensation award, based on the opportunity cost formula.[25]

This strikes me as a very useful rule of thumb for courts to use. The mere fact that a government charged less on the retransfer than the amount of the condemnation award shouldn't lead a court to conclude that the taking was necessarily not for a public use; it should, however, be strong evidence that secondary rent-seeking may have occurred and lead to heightened judicial scrutiny. Perhaps this

[23] Merrill, *supra* note 1, at 87.
[24] *Id.*
[25] *Id.* at 88 n.91.

set of facts in a case should even trigger a rebuttable presumption against finding a public use.

Applying this approach, how do the economic development cases stack up? The conventional wisdom is that the easiest economic development cases in which to sustain the public-use requirement are the blight cases. There, the elimination of harmful urban conditions is thought to confer a direct and substantial benefit to the public.[26] Should *Kelo* be treated differently because, as the Connecticut court there recognized, it is not a blight case?[27]

To begin with, I think it is a mistake to think that there's a categorical difference between blight cases and non-blight economic development cases. In *Kelo*, the city of New London was (and still is) seriously economically distressed. The condemned land and the surrounding area may not be a slum, but the area is clearly experiencing severe economic problems and needs a boost. Rather than treating cases like *Kelo* and blight cases as fundamentally different, it's more realistic to view them as differing only in degree.[28]

One needs to know more about the facts, but it seems likely that the Connecticut court got it right in *Kelo*. There are good reasons to doubt that secondary rent-seeking played much, if any, role in the case. There doesn't seem to be much room to doubt that as in blight cases, the primary purpose of the condemnation was for the public's benefit and that any private benefit was incidental. *Kelo* involved a very different set of circumstances than some other economic-development cases. Strictly speaking, there is no retransfer of the condemned land. The development corporation created by the city will own the land located within the development area and will enter into ground leases with private developers with respect to some but not all of the parcels within the development. The condemned land, or at least a significant portion of it, will be physically integrated with a public park. None of the condemned land is to be retransferred to Pfizer, although Pfizer clearly stands to gain from the development, which is adjacent to Pfizer's new research facility. This is a case of a *bona fide* public-private partnership in which both sides stand to benefit from the overall project. We have a very detailed set of findings of fact by the trial documenting the partnership, so that there's no good reason to believe that the development agency was just a shill for Pfizer.

These facts make the case very different from other economic-development cases that the Connecticut court distinguished. In one case, for example, a municipal parking authority condemned land ostensibly to construct a new parking ga-

[26] *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).
[27] Kelo v. City of New London, 843 A.2d 500, 531–32.
[28] Also, a finding of blight shouldn't be controlling because the benefited private party, acting alone or in cahoots with the city, can manufacture this "blight." This appears to have occurred, for example, in *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), where the city (St. Louis) found blight based on a study in which lawyers for the benefited private party (Target Corp.) actively participated.

rage.[29] The plan provided, however, for the parking authority to transfer the garage to a neighboring newspaper company. The plan was for the newspaper company to build an expanded facility on the site. The parking authority would pay the newspaper for the air rights over the land and build a garage there. The court concluded that this was an unconstitutional use of the eminent domain power because the primary purpose was to keep the newspaper company there rather than to build a parking garage.[30] In retransfer cases like this, condemnation seems rather clearly to be the result of secondary rent-seeking.

The same analysis suggests that *Kelo* differs materially from *Poletown* and that while the Connecticut court got it just about right in *Kelo*, the Michigan court probably got it wrong in *Poletown* (but correct in reversing itself in the recent *Hathcock* case). The reasons why I'm inclined to think that *Poletown* was wrongly decided from the perspective that I've just laid out are the following: (1) In *Poletown*, unlike *Kelo*, condemnation *was* followed by a retransfer to a private firm. After the city of Detroit condemned the land, it transferred ownership to GM, which wanted to use it to build (ironically) a new assembly plant. In *Kelo*, however, there was no retransfer of ownership to Pfizer. (2) More tellingly, in *Poletown* the price the city charged GM was below the amount of the condemnation award, which was based on the standard opportunity cost formula. That is probative evidence that GM was engaged in secondary rent-seeking. (3) There is evidence that in *Poletown* the city had provided GM with a number of subsidies designed to influence its plant location decision.[31] Such subsidies, if they were in fact provided, would considerably strengthen the view that the exercise of eminent domain there was the product of secondary rent-seeking and that the siting decision may well not have been efficient. We have no comparable evidence of such inducements being offered by the development agency in *Kelo*. Pfizer had already decided to locate its research facility in the New London Mills site before the development agency decided to condemn the parcels located in the adjacent Fort Trumbull area, and the trial court specifically found that the development agency had not offered any sweeteners to Pfizer to induce its decision. The bottom line, then, is that in *Kelo*, we lack grounds to apply a heightened degree of judicial scrutiny into whether the taking was for a public use.

A second reason to be concerned about the use of eminent-domain power in the name of economic development is the destruction of established and functioning neighborhoods. High scrutiny into the public-use requirement may also be warranted when the effect of the development is to sacrifice an entire functioning residential community. This occurred in *Poletown*, and that is the main reason why many Progressives think the *Poletown* decision was wrong. On the other hand, in situations where there is no longer a functioning neighborhood, condemnation

[29] Wilmington Parking Auth. v. Land With Improvements, 521 A.2d 227 (Del. 1987).
[30] *Id.* at 233–34.
[31] Merrill, *supra* note 1, at 112 (citing an unpublished paper by Victor Goldberg).

does not harm the progressive values of respect for community integrity and self-development. Whatever residential function the area continues to serve has been stripped away by severe economic deterioration.

This residential community loss factor can also be expressed in law-and-economics terms. In addition to focusing on secondary rent-seeking, Merrill argues that heightened scrutiny may also be justified where the owner's subjective losses—those not compensated by awards based on the standard opportunity cost formula—are high.[32] Under some circumstances, eminent domain may be economically inefficient because the owner's loss exceeds the surplus value created by the condemnation. This scenario becomes more likely as the number of condemned owners increases. Part of the subjective loss, in some cases a major part, is the loss of community, personal identity, and a sense of belonging; *Poletown* is the obvious example. The subjective losses in that case were very high, indeed, quite possibly even higher than the surplus value generated by the taking in favor of GM's plant.

[32] *Id.* at 84.