NYU JOURNAL OF LAW & LIBERTY

THE CASE AGAINST ECONOMIC DEVELOPMENT TAKINGS

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The assignment given me by the organizers of this symposium was to discuss the general philosophy of property rights and the two most important recent public use takings decisions: *Kelo v. City of New London*[1] and the Michigan Supreme Court's overruling of the notorious *Poletown* case in *County of Wayne v. Hathcock*.[2]

Obviously, it is not going to be possible both to present a general theory of property rights and discuss these cases in the brief time allotted. All I will say about general theory is that there are two ways to defend property rights: point out all the wonderful things property owners can do if their rights are properly protected—entrepreneurship, innovation, the development of civil society, and so on—or focus on the bad things that happen if government violates property rights. I have to confess that I don't know much about entrepreneurship or the other great things people can do with property, so I will focus on the second element—the harmful consequences of failing to protect property rights and leaving government largely unfettered.

In Part I, I explain why economic development takings—the kind that occurred in *Poletown, Hathcock,* and *Kelo*—should be forbidden by the courts. Part II shows that even if there were a judicial ban on economic development takings,

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[1] 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

[2] 684 N.W.2d 765 (Mich. 2004), *rev'g* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

there would still exist a danger that it would be circumvented unless proper precautions are taken.

I. Dangers of Economic Development Takings

Economic development takings occur when the government condemns property through the power of eminent domain and then transfers that property to a new private owner, citing the possibility of "economic development" as the sole justification. The intended new use is to improve the local economy, increase employment, or increase tax revenue. The most famous case of this type was probably the 1981 *Poletown* decision in which Detroit condemned the homes of about 4,200 people and transferred the property to General Motors for a new factory.[3] In a widely criticized decision, the Michigan Supreme Court approved these condemnations.[4] In August 2004, the Michigan Supreme Court overruled *Poletown* and forbade economic development takings under the public use clause of the Michigan state constitution.[5]

The *Kelo* case,[6] recently decided by the U.S. Supreme Court, held that the Fifth Amendment's Public Use Clause does not prohibit economic development takings. My contention is that economic development takings should indeed be banned.

A. Interest group "capture" of the eminent domain process

Perhaps the most important reason to forbid economic development takings is that if the economic development rationale is accepted, it creates a tremendous opportunity for powerful interest groups to manipulate the eminent domain process for their own benefit. In *Poletown*, for example, a powerful corporation, General Motors, used the eminent domain process to effect the transfer of an enormous amount of property to itself primarily for its own benefit. It is not by accident that we see a transfer of the property of relatively poor and working class people to GM. The company was much more politically powerful, particularly in Michigan, than the people who lost property in this transaction.

Other cases follow a similar pattern. For example, in 1998, an elderly woman's house was condemned for transfer to Donald Trump so that Trump could build a parking lot for one of his casinos.[7] And there are numerous similar cases.[8]

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[3] For details on the number of homes condemned, see Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1006 n.5 (2004).

[4] *Poletown*, 304 N.W.2d at 459–60 (Mich. 1981).

[5] *Hathcock*, 684 N.W.2d at 783–87.

[6] Kelo v. City of New London, 125 S. Ct. 2655 (2005).

[7] *See* Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (striking down this taking).

[8] For other examples, see Dana Berliner, *Public Power, Private Gain: A Five Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003),

The underlying point is that some political factions and organizations are more powerful than others; by allowing government free rein to transfer property from one hand to another, the politically powerful are likely to gain at the expense of the weak.

While economic development takings are not the only types of condemnation vulnerable to this kind of interest group "capture," they are particularly prone to it for several reasons. First, the economic development rationale is so broad that it can justify nearly any transfer of property to a private, for-profit business. Almost any business can successfully argue that if you give them more property, they will make more money, which might in turn increase employment levels, raise tax revenue and so forth. As the *Hathcock* court pointed out:

> Poletown's "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion of plans of any large discount retailer, "megastore," or the like.[9]

A similar point was made recently by the Illinois Supreme Court in a decision that forbade economic development takings in that state.[10]

A second serious problem is that economic development takings are nontransparent and difficult for the lay public to judge. It is almost impossible for ordinary voters to figure out whether a factory built by GM really is going to produce some economic development or not—especially as compared to alternative uses of the same property by its current owners or a third party that might purchase the land at some future date.

This danger is of course a subset of the problem of political ignorance more generally. For understandable reasons, most citizens know very little about politics and public policy.[11] But the danger is more serious in the case of economic devel-

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http://www.castlecoalition.org/report/pdf/ED_report.pdf. Berliner was one of the attorneys representing Susette Kelo and the other New London property owners. *See also* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. (forthcoming 2007).

[9] *Hathcock*, 684 N.W.2d at 786.

[10] *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., LLC, 768 N.E.2d 1, 9–10 (Ill. 2002), (rejecting the economic development rationale in part because any lawful business could potentially take advantage of it).

[11] *See* Ilya Somin, *Political Ignorance and the Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–15 (2004) (discussing implications of political ignorance for

opment takings than in many other areas of public policy, including most other takings. With condemnations for traditional public uses such as roads or bridges, voters can usually see a tangible result, such as a new highway, whose impact they can immediately visualize and assess in at least a rough, intuitive way. In the case of economic development takings, the "benefit" is an intangible increase in economic activity that may take many years to materialize. Even then, it may be almost impossible for non-experts to determine whether economic conditions in the area would have been as good or better had the project never been built. Because the process is not very transparent, it is difficult to assess the purported benefit without an enormous investment of time, energy, and expertise. As a result, voters are rarely, if ever, able to punish government officials for undertaking economic development takings that eventually fail to pay off.

Third, there exists what economists call a "time horizon" problem.[12] It usually does not become clear for at least a few years whether a particular economic development project is really going to benefit the area. By then, most of the incumbent politicians that approved condemnation at the time may no longer be in office. Even if the relevant decision-makers are still in power, a significant backlash is improbable because public attention is likely to have moved on to other issues—if indeed it ever focused on the condemnation in the first place. If you are a local politician, you know that you can immediately get a substantial political payoff from benefiting GM. Ten years later when it turns out that the factory doesn't work out so well, the voters might be unhappy—but you probably won't be in office. And even if you are, voters might not associate your name with a decision made long ago. If you are an office-holder who wants to win reelection, your incentives are fairly clear.

In fact, that is precisely what happened in *Poletown*. General Motors and the mayor claimed that there would be over 6,000 jobs created by the new factory.[13] In reality, throughout the 1980s, the factory never employed even 3,000, far from approaching the kinds of economic benefits that were promised.[14] But by the time this became evident, many of the politicians who were in office in 1981 were no longer there. And by the late 1980s, public opinion was understandably focused on more immediate issues than on the merits of a condemnation decision made back in 1981. Thus, the political leaders who approved the *Poletown* condemnations made

democracy and legal theory); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413 (1998).

[12] For discussions of time horizon problems among politicians, see, e.g., John Lott & Robert Reed, *Shirking and Sorting in a Political Market with Finite-Lived Politicians*, 61 PUB. CHOICE 75 (1989); Gertrud Fremling & John R. Lott, *Time Dependent Information Costs, Price Controls, and Successive Government Intervention*, 5 J. L. ECON. & ORG. 293 (1989).

[13] *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 468 n.6 (Mich. 1981) (Ryan, J., dissenting) (reprinting letter from GM Chairman to the Mayor of Detroit assuring the city that "approximately 6000" jobs would be created).

[14] *See* Somin, *supra* note 3, at 1012–14.

off well by gaining the political support of GM and the United Auto Workers, even though the community was harmed overall.[15]

B. Lack of legally binding obligations to provide the economic benefits that supposedly justified condemnation.

A second serious shortcoming of economic development takings is that there is no legally binding requirement that the new private owner actually produce the economic development that was promised.[16] For instance, when GM promised 6,000 jobs but created no more than 3,000, they suffered no legal consequences, nor did the government officials who made the decision.

Kelo is remarkably similar to *Poletown* in this respect. As the Connecticut Supreme Court dissent points out, "[t]here are no assurances of a public use in the development plan [under which the owners' property was condemned]; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized."[17] Other states that allow economic development condemnations also fail to require either the government or the new owners to actually provide promised public benefits.[18]

If you are not legally bound to make good on the promises you make, that creates a tremendous incentive to over-promise. This need not take the form of brazen lying. In fact, I am far from certain that GM was actually lying in 1981. But human beings have a tremendous incentive and psychological tendency to overestimate the extent to which (literally in this case) "what is good for GM is good for America."[19] If you are a GM executive, even if you are also a good and honest person, you will probably have a tendency to come to believe that over time. The same is true for representatives of other interests that benefit from the condemnation

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[15] *See id.* at 1012–21 (discussing costs and benefits of the *Poletown* condemnations).

[16] *See id.* at 1012–13 (discussing the weaknesses of the *Poletown* decision).

[17] Kelo v. City of New London, 843 A.2d 500, 602 (Conn. 2004) (Zarella, J., dissenting in part, concurring in part).

[18] *See, e.g.*, Gen. Bldg. Contractors v. Bd. of Shawnee County Comm'rs of Shawnee County, 66 P.3d 873, 882–83 (Kan. 2003) (upholding economic development condemnation for purpose of building industrial facility for later transfer to private owners with whom no development agreement had yet been reached); City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 373–74 (N.D. 1996) (following *Poletown* approach and concluding that economic development takings will be upheld so long as the "primary object" of the taking is "economic welfare"); City of Minneapolis v. Wurtele, 291 N.W.2d 386, 390 (Minn. 1980) (endorsing the constitutionality of economic development takings and holding that "a public body's decision that a [condemnation] project is in the public interest is presumed correct unless there is a showing of fraud or undue influence"); *cf.* Vitucci v. New York City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (N.Y. App. Div. 2001) (upholding an economic development taking although the property, originally condemned for the purpose of building a school, was designated for a food production facility, because "as long as the initial taking was in good faith, there appears to be little limitation on the condemnor's right to put the property to an alternate use upon the discontinuation of the original planned public purpose").

[19] *See* STEVEN PINKER, HOW THE MIND WORKS 421–23 (1999) (explaining how deception is more effective if those who seek to deceive actually believe their own lies, as a result of which self-interested self-deception may be a common genetic tendency of humans).

process. Given that there is no reality check, it is easy to overestimate the benefits of condemnations that serve your interests. Simultaneously, it is very difficult for courts to analyze the evidence in a way that sifts out the overestimates and correctly assesses the true level of expected development.

C. Ignoring the costs of condemnation

When courts assess economic development takings in those states where they are permitted, they take account of the claimed benefits of the taking, but almost always ignore the costs. In *Poletown*, for example, some 4,200 people lost their homes, numerous small businesses were destroyed, and a significant number of churches, hospitals and schools were shut down.[20] In addition to the obvious humanitarian impact, all of this destruction surely had a negative economic impact on the community. Furthermore, some $250 million in public funds was spent to finance the condemnation process—funds that could have been used to promote development in other, less destructive, ways.[21] Yet the *Poletown* majority said not one word about any of these costs. Likewise, the *Kelo* majority overlooked the costs of the taking. In *Kelo*, the Connecticut Supreme Court conceded that the plaintiff property owners in that case would suffer serious harm if forced out of their homes and businesses.[22] Furthermore, some $80 million in taxpayer money had been allocated to the development project, without any realistic prospect of a commensurate return from the project.[23] Yet the *Kelo* court refused to consider these massive costs, claiming that "the balancing of the benefits and social costs of a particular project is uniquely a legislative function."[24] The U.S. Supreme Court majority endorsed this deferential approach, emphasizing its refusal to "second-guess the wisdom of the means the city has selected to effectuate its [development] plan."[25] If courts weigh the claimed benefits of takings, completely ignore the costs, and then don't even require the government and the new owners to actually provide the benefits that they promise, virtually any condemnation can be justified. Unfortunately, that is exactly what tends to happen in those jurisdictions that permit economic development takings.

D. Weaknesses of the "holdout" rationale for condemnation[26]

The main argument used to justify economic development takings is that certain kinds of beneficial large-scale projects will not be built if one allows "holdout" owners to prevent them. If, for example, a massive new factory requires the

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[20] *See* Somin, *supra* note 3, at 1017–18.
[21] *Id.* at 1018.
[22] *See Kelo*, 843 A.2d at 511 (noting that two of the plaintiffs testified that their families had "lived in their homes for decades" and other plaintiffs had put enormous amounts of time, effort, and money into their property).
[23] *Id.* at 598 (Zarella, J., dissenting in part, concurring in part).
[24] *Id.* at 541 n. 58.
[25] *Kelo*, 125 S.Ct. at 2658 (2005).
[26] *See* Somin, *supra* note 8, at § I.E (providing a more in depth analysis of the holdout problem and how it can be overcome without the use of eminent domain).

amalgamation of a large amount of property held by numerous disparate owners, then the factory might not be built if even one person in the area chooses to "hold out" for the maximum possible price or refuses to sell altogether. Private developers utilize a wide variety of mechanisms to circumvent this problem without invoking eminent domain.[27] The simple empirical fact that numerous large development projects do get built throughout the country without the benefit of eminent domain undermines the argument in favor of such takings. As the *Hathcock* court points out: "the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce" that did not require "the exercise of eminent domain or any other form of collective public action for their formation."[28] In fact, nine states forbid economic development takings completely,[29] and several others significantly restrict them.[30] Yet there is no evidence that these prohibitions have hindered economic development.

E. Property and Political Power

The last point covered in this Part is the claim that we don't really need to provide special judicial protection for property rights because there is no reason to believe that property owners are systematically disadvantaged in the political process.[31] I actually agree with this point. Property owners are not systematically disadvantaged compared to other political actors; indeed, often the reverse may be true. But the relevant question is not whether property owners in general are disadvantaged. Rather, it is whether those owners who are likely to be targeted for condem-

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[27] For a more detailed discussion, see *id.* at Part III.

[28] County of Wayne v. Hathcock, 684 N.W.2d 765, 783–84 (Mich. 2004).

[29] The nine states are Arkansas, Florida, Illinois, Kentucky, Michigan, Maine, Montana, South Carolina, and Washington. *See* Georgia Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a "projected economic benefit" cannot justify a condemnation); Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 9–11 (Ill. 2002), *cert. denied*, 537 U.S. 880 (2002) (holding that a "contribu[tion] to positive economic growth in the region" is not a public use justifying condemnation). *See, e.g.*, Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *In re* Petition of Seattle, 638 P.2d 549, 556–57 (Wash. 1981); Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of *A* is condemned merely to enable *B* to build a factory."); Karesh v. City of Charleston, 247 S.E.2d 342, 344–45 (S.C. 1978) (striking down taking justified only by economic development); City of Little Rock v. Raines, 411 S.W.2d 486, 493–95 (Ark. 1967) (holding that private economic development project is not a public use); Hogue v. Port of Seattle, 341 P.2d 171, 186–87 (Wash. 1959) (denying condemnation of residential property so that agency could devote it to what it considered a "higher and better economic use"); Opinion of the Justices, 131 A.2d 904, 906 (Me. 1957) (holding that condemnation for industrial development to enhance economy is not a public use); City of Bozeman v. Vaniman 898 P.2d 1208, 1214–15 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project).

[30] *See, e.g.*, Merrill v. City of Manchester, 499 A.2d 216, 217–18 (N.H. 1985) (finding that condemnation for industrial park is not a public use where no harmful condition was being eliminated); Opinion of the Justices, 250 N.E.2d 547, 558–59 (Mass. 1969) (finding that economic benefits of a proposed stadium were not enough of a public use to justify condemnation).

[31] *See, e.g.*, WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (2001) (arguing that property owners dominate the political processes of most local governments).

nation are disadvantaged relative to those interests that stand to benefit from takings.

For example, the question in *Poletown* is not whether Detroit property owners in general were disadvantaged, but whether the relatively poor residents of Poletown were disadvantaged relative to GM. In the Trump case, the issue is whether an old lady living alone was disadvantaged relative to Donald Trump. When you frame the question in that way—which I think is the right way—it becomes clear that there is a tremendous imbalance of power and that therefore judicial intervention might be justified. Indeed, in cases where such an imbalance is absent, it is unlikely that an economic development condemnation would have occurred in the first place. Given equal political power, the property owners in question would have had enough clout to use the political process to protect themselves.

II. The Threat of Circumvention

This Part sounds a note of pessimism, or at least caution. Even in states where courts do ban economic development takings, we are unlikely to fully eliminate the kinds of abuses that I described above. There are several ways to circumvent bans on economic development takings that could easily undermine the utility of a ban if they are not closely monitored. As the *Hathcock* court itself points out, a ban on economic development takings does not forbid all condemnations that transfer property to private parties. In particular, *Hathcock* still permits private-to-private condemnations for the purpose of alleviating "blight" and in situations where the transferred property is subject to "public control."[32]

A. Blight

In many states, the concept of "blight" has been expanded so far that it can apply to virtually any property. For instance, just five years ago, a New York appellate court held that the Times Square area is blighted and therefore one could justify taking of property for transfer to the *New York Times* to expand their headquarters.[33] In another recent blight decision, the Nevada Supreme Court held that downtown Las Vegas is blighted, thereby permitting condemnation of property for the purpose of building a parking lot servicing several Las Vegas casinos.[34] If major commercial areas such as Times Square and downtown Las Vegas are "blighted," then so is virtually every other neighborhood in the United States. If these neighborhoods are "blighted," than no amount of prosperity can protect against such a designation. After all, virtually any area, no matter how successful, occasionally experiences "downward trends in the business community, relocation of

[32] *Hathcock*, 684 N.W.2d at 782–83 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478–80 (Mich. 1981) (Ryan, J., dissenting)).
[33] W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).
[34] Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 12–15 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004).

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).