1. It is a good example of how state constitutional law can be more protective of individual rights than the federal norm under the U.S. Constitution. Hathcock, along with decisions by some other state courts, has placed a more restrictive reading on “public use” than have the federal courts.

2. The Hathcock court moved away from the supine deference to legislative declarations that have too often characterized the judicial response to questions of “public use.” The court rightly insisted on making an independent assessment of the purposes for which eminent domain may be employed. If ownership of property is subject to unfettered legislative discretion, then all private property is in effect held at the sufferance of lawmakers. That outcome is inconsistent with the fundamental right of individuals to own property.

3. Hathcock sharply contradicts the often repeated canard that judicial enforcement of the constitutional rights of property owners serves only the wealthy and business interests. In fact, the outcome in Hathcock vindicated the right of individual homeowners to retain their land in the face of plans to construct a business and technology park. It demonstrates that a principled defense of property rights can protect the weak and vulnerable.

“Public use” jurisprudence remains unsettled, but there are signs that some state courts are beginning to rein in open-ended exercise of eminent domain. Although the federal courts are still largely deferential to legislative determinations of “public use,” the recent grant of review by the Supreme Court in Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), cert. granted, 125 S. Ct. 27 (2004), of a proposal to use eminent domain for economic development may indicate a willingness to curb the taking of property under a stricter reading of the Fifth Amendment. This incipient trend toward meaningful judicial review of “public use” is congruent with the high standing of property ownership in our constitutional order and the historic link between property and individual liberty.

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Poletown Overruled

Public Use: What Should Replace the Rational Basis Test?

By David L. Callies

The Fifth Amendment to the U.S. Constitution prevents government from taking private property unless for a public use. The federal standard for determining such a use is broadly stated in Hawaii Hous. Auth. 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 on 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. 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, because his property was demonstrably unblighted its taking was not for a public use: “Property may of course be taken for redevelopment which, standing by itself, is innocuous and unoffending, … [I]t is not for the courts to oversee the choice of boundary line.” Id. at 35. Most state courts followed the federal lead in virtually emasculating the public use requirement either in theory (Hawaii Hous. Auth. v. Lyman, 704 P.2d 888 (Haw. 1985)) or in practice (Poletown Neighborhood Council v. City of Detroit, 304 N.W. 2d 455 (Mich. 1981) (allowing the condemnation of a viable residential neighborhood for an automobile body plant)). Commencing in early 2000, however, a trickle of decisions struck down compulsory purchases of private land when the land itself was unblighted and the stated public purpose was for generalized economic development. See,
e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); Daniels v. The Area Plan Commission of Allen County, 306 F.3d 445 (7th Cir. 2002); Avalonbay Communities, Inc. v. Town of Orange, 775 A.2d 284 (Conn. 2001); Southwestern Ill. Dev. Auth. v. National City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002). Most spectacularly, the Michigan Supreme Court recently overruled the Poletown case 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.

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 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 constitutions.” Id. at 520. The Kelo case has drawn national attention because the U.S. Supreme Court has accepted a petition for certiorari and will decide it in the current Term.

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. There is broad agreement in both cases, however, 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?

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 (Midkiff) test when it condemns unblighted property in an unblighted area for generalized economic benefit. This conclusion is particularly appropriate 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 Comm’n, 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, Prob.& Prop., Nov./Dec. 2003, at 30. 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 Ninth 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, Diarmuid F., concurring in part and dissenting in part).}

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**The Misplaced Flight to Substance**

By Thomas W. Merrill

Courts and commentators have struggled for years to come up with a substantive test for what kinds of condemnations are for a “public use.” Does public use mean government ownership and control of property after it is taken? This would preclude delegation of eminent domain to common carriers and utilities. Does public use mean public access to the property after it is taken? This would preclude using eminent domain to acquire facilities off-limits to the public, like prisons.

Faced with these problems of under-inclusion, courts have gravitated to the idea that public use means public purpose. The U.S. Supreme Court adopted a broad public purpose definition as a matter of federal constitutional law in Berman and Midkiff. See Berman v. Parker, 348 U.S. 26 (1954); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). Nearly all state courts have followed suit. The result is that virtually any project that has a plausible public interest justification satisfies the public use requirement, as currently defined.

Yet the siren song of devising some judicially imposed substantive limit on eminent domain dies hard. We are currently witnessing renewed enthusiasm for the substantive approach. The most prominent example is County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004), which advances a new, multi-part definition of public use as a substantive constraint on the use of eminent domain.

Simplifying, Hathcock holds that public use means either (1) public ownership, or (2) use-by-the-public, or (3) a public purpose related to an adverse condition of the property itself, such as blight. Notice the innovation here: instead of embracing public purpose as an open-ended alternative to public ownership or public access, the court applies public purpose as a supplement to public ownership and public access but gives it a new, more restrictive meaning. The public purpose prong is now limited to the elimination of “bads,” like blighted property. It cannot be extended to encompass the provision of “goods,” like expanding the economy or the tax base. Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), cert. granted, 125 S. Ct. 27 (2004), is now pending before the Supreme Court. Taking a cue from Hathcock, the petitioners in Kelo have argued that the Supreme Court should adopt a similar multi-part public use test as a matter of federal constitutional law.

What's wrong with Hathcock's new multi-prong substantive test for public use? Several things.

First, the new test has no principled legal justification. Hathcock rests on a bizarre type of originalism. The current version of the Michigan Constitution was ratified in 1963. The court asked: What would a legally sophisticated reader of the constitutional text in 1963 understand by the term “public use?” The answer: Such a reader would have examined Michigan decisional law on the subject and would have understood that law to comprise only those uses that had been previously recognized by the Michigan judiciary before 1963, namely, public ownership, public access, and elimination of blighted property. Use of eminent domain for any other purpose would have been understood to be impermissible.

This is an implausible construction of what a legally sophisticated Michigan voter would have assumed in 1963. Hathcock referred to three different iterations of the Michigan Constitution—1850, 1908, and 1963. Each version used the same phrase, “public use.” Between 1850 and 1908, the meaning of public use evolved, coming to include, for example, condemnations for railroad purposes. Susan v. Williams, 2 Mich. 427 (1852). Between 1908 and 1963, the meaning of public use evolved further, coming to include, for example, condemnations of blighted urban land. In re Slum Clearance, 50 N.W.2d 340 (Mich. 1951).