THE CHANGING LANDSCAPE AND RECOGNITION OF THE PUBLIC USE LIMITATION: IS *Hathcock* THE PRECURSOR OF *Kelo*?

Alan T. Ackerman[*]

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* J.D. University of Michigan, 1972; B.A. Michigan State University, 1968. Mr. Ackerman is a practicing attorney in Southfield, MI. He served as counsel for the property owners in *Wayne County v. Hathcock*, 684 N.W.2d 765 (2004). This article was prepared in conjunction with Mr. Ackerman's presentation at the *Hathcock* Symposium held at Michigan State University College of Law on November 12, 2004.

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INTRODUCTION

On September 28, 2004, the United States Supreme Court granted a property owner's application for leave from a Connecticut Supreme Court decision upholding the constitutionality of the community's taking of property with the specified purpose of creating jobs by selling the property to a private industrial user.[1] As the petitioner land owners in *Kelo* express in their brief requesting leave, the critical question for the Court to determine is whether a taking for purely economic development by a city violates the public use clause of the Fifth Amendment.[2] In reaching its decision, it is likely that the Court will find that this type of taking is rationally related to a legitimate government interest and is consequently constitutional – thereby leaving it to the states to impose more restrictive requirements on the condemnation processes and purposes.

If the Court does find takings for purely economic development in non-blight areas to be constitutional under the federal Constitution, states will continue to have the ability to develop and implement expansive practices for takings under the state constitutions. In the now famous case, *Poletown Neighborhood Council v. Detroit*,[3] the Michigan Supreme Court upheld the constitutionality of the taking of private property for the construction of a General Motors automotive plant. Just as in *Kelo* the proffered public use in *Poletown* was the revitalization of the struggling local economy. Over the past twenty years, many states have followed Michigan's lead in applying an expansive version of the public purpose clause of the federal Constitution and corresponding state constitutional provisions.

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1. Kelo v. City of New London and New London Development Company, 843 A2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27, 73 USLW 3178, 73 USLW 3204 (U.S. Conn. Sep 28, 2004) (No. 04-108).

2. U.S. Const. 5th Amendment.

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In *County of Wayne v. Hathcock*,[4] the Michigan Supreme Court reversed *Poletown*, thereby reinstating the historically more restrictive standard of public use. Based on United States Supreme Court decisions in Berman[5] and *Midkiff*, it is probable that the Court will apply the more expansive interpretation of the public purpose clause to the federal Constitution. If this is the case, the duty to protect the traditional rights of private property owners will rise or fall on the interpretation of state constitutional provisions. Just as other states followed Michigan's lead in expanding the functional definition of public use, this article argues that they should follow its lead in its efforts to constrict the definition of public use in *Hathcock*.

Part I of this article will discuss *Kelo* from a historical perspective, briefly examining the history of federal takings and the United States Supreme Court's deference to state control over condemnation purposes and procedures. Part II will analyze the *Kelo* parties' briefs from a practical perspective and provide insight into the strengths and weaknesses of each side's arguments. Part III will explain why the United States Supreme Court is likely to hold that the taking in *Kelo* does not violate the federal Constitution – thereby continuing to reserve the power in the states to make such determinations. Part IV concludes with the background of *Hathcock* from an insider's perspective and an argument for why other states should apply the Michigan Supreme Court's reasoning.

I. THE POWER TO TAKE UNDER THE FEDERAL CONSTITUTION: A RECOGNIZED GOVERNMENTAL POWER BUT SUBJECT TO THEORETICAL LIMITATIONS

The Fifth Amendment to the United States Constitution clearly recognizes two sometimes countervailing concepts. First, it recognizes the power of the government to take private property for public use. Second, it recognizes a private right to just compensation for property taken under the recognized governmental power. As in *Kelo*, when the governmental power and private right recognized in the Fifth Amendment clash, a number of conflicting underlying policies are implicated. Among these various policies is the notion that judicial interpretation of public use is separate and apart from the legislative function. The second public policy is that legislative determinations of public use are to be upheld unless clearly invalid or if they are shown to be clearly outside the parameters of legislative discretion. The policies easily collide, given courts' responsibility of review of the validity of

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the public use, while at the same time recognizing that deference must be given to the legislative body that approved the taking. While some may claim that the payment of just compensation is all that is necessary to provide constitutional protection from the sovereign's right to expropriate property, our judiciary must maintain its control over determinations of whether property is being taken for an appropriate public use; and if not taken for a public use, the court must bar the taking even if just compensation is paid.

A. The Taking Clause Does Not Establish Despotic Powers

Most frequently cited in recent newspaper articles is the characterization of the power to take as a "despotic power," a quotation cited from *VanHorne's Lessee v. Dorrance*.[6] However, this notion is formed without appreciation for the two words in the total context of the case. As in the case of *Swan v. Williams*,[7] *Dorrance* recognizes that public purposes and public exigencies should be proportionately shared rather than excessively burdening individuals:

> Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large. The English history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation.[8]

The *Dorrance* court keenly appreciated the constitutional limitations on the legislature's power to take for public use, further noting:

> The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not ex gratia from the legislature, but ex debito from the constitution. It is sacred; for, it is further declared, that the legislature shall have no power to add to, alter, abolish, or infringe any part of, the constitution. The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall to and no further.[9]

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6. 2 U.S. 304; 2 Dal 304; 1 L.Ed 391 (Cir. Pa. 1795).
7. 2 Mich 425 (1852).
8. 2 U.S. 304 (1795).
9. 2 U.S. 304, 311; 2 Dal 304; 1 L.Ed 391 (Cir. Pa. 1795).

While clearly stating that the private right to own property is constitutionally granted, a further reading of *Dorrance* identifies three ways property can constitutionally be affected: (1) by the parties, either by stipulation between the legislature and the proprietor of the land; (2) by commission mutually elected by the parties; or (3) by the intervention of a jury.[10] The court also notes that the legislature may resort to the process of taking for "public exigencies."

Dorrance describes the "despotic power" of the right to take property not as one of despots, but quite simply one of the legislative branch. Specifically, Justice Patterson, explained that payment of just compensation is not enough when there is not a public use.[11] In comparison *Dorrance* notes that the British Parliament has complete control of all law and all rights.[12] *Dorrance* then notes that Congress does not have such broad legislative discretion. To the contrary, the Constitution creates rights, and the legislature only can act within that creation. The life-giving principle and the death-doing stroke must receive from the same hand.[13]

The *Dorrance* court considers this constitutional limitation on the federal government as one of the "first principles of fundamental laws."[14] Thus, the oft quoted notion that the takings power is simply a "despotic power" and therefore in some way undemocratic, misapprends the message of *Dorrance*.

B. No Federal Limits on the State Legislatures Prior to the Fourteenth Amendment

Despite the importance of private property rights recognized in *Dorrance*, pre-Civil War precedent provided that the Fifth Amendment was intended to serve as a limitation on the exercise of the takings power of the United States only and was not applicable to the state legislatures.[15] Notably,

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11. 2 U.S. 304, 318; 2 Dal 304; 1 L.Ed 391 (Cir. Pa. 1795). "When the Legislature undertake to give away what is not their own, when they attempt to take the property of one man, which he fairly acquired, and the general law of the land protects, in order to transfer it to another, even upon complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical exactness, and scrutinized with all the severity of legal exposition." *Id*.

12. *Dorrance* notes that the British Parliament has never overreached and misapplied the power of taking a property right because of the common law view that property rights are to be retained. 2 U.S. 304, 318; 2 Dal 304; 1 L.Ed 391 (Cir. Pa. 1795).

13. 2 U.S. at 309; 2 Dal 304; 1 L.Ed 391 (Cir. Pa. 1795). "[t]he Constitution fixes limits to the exercise of the legislative authority, and prescribes the orbit within which it must move."

14. 2 U.S. at 309; 2 Dal 304; 1 L.Ed 391 (Cir. Pa. 1795).

15. Barron v. The Mayor and City Council of Baltimore, 32 U.S. 243 (1833).

the pre-civil war case of *Barron v. The Mayor and City Council of Baltimore*, expressly recognized that a state could chose to provide a takings clause that was less protective of private ownership in its constitution.[16] If the rule of Barron was still to apply, i.e., there was no Fourteenth Amendment application of due process, the Supreme Court could find that the taking in *Kelo* was based upon a Connecticut constitutional provision and therefore valid. Under such circumstances, the taking would simply be an exercise of the state's control of eminent domain.[17]

C. Fourteenth Amendment Limitations on States' Taking Power

The absolute state discretion established in Barron has been eliminated by the Fourteenth Amendment which imposes the Fifth Amendment Due Process obligations on the state. *Kelo* represents the most recent episode in the Supreme Court's efforts to determine what standard states would be held to under the Fifth Amendment. Essentially, the Court has held that at a minimum the states must provide the same protection to property owners as the federal government, however, states are free to provide more protection via state constitutional provisions. Consequently, in predicting what the United States Supreme Court will hold in *Kelo*, one must identify the federal standard the Court will apply.

1. *The Federal Public Use Standard*

Under the federal Constitution, "there is inherent authority to appropriate the property of the citizen for the necessities of the State."[18] The question in *Kelo* is not simply whether there is a transfer of property from Party A to Party B, but whether there is a public use in the transfer. It is important to note that where the exercise of the eminent domain power was deemed rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.[19] In *Kelo* the Supreme Court must determine if a taking for an indirect public purpose, such as expanding the tax base, satisfies the public use requirement and is rationally

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16. Barron v. The Mayor and City Council of Baltimore, 32 U.S. 243 (1833).

17. For example, if *Kelo* been decided prior to the 14th Amendment the United States Supreme Court would not have jurisdiction because Connecticut would not be subject to the restrictions of the 5th Amendment. *See Barron*, 32 U.S. 243.

18. Cooley's Constitutional Limitations 356-357.

19. *See* Berman v. Parker, *supra*; Rindge Co. v. Los Angeles, 262 U.S. 700 (1923); Block v. Hirsch, 256 U.S. 135 (1921); *Cf.* Thompson v. Consolidated Gas Corp., *supra* (invalidating an uncompensated taking).

related to a legitimate governmental interest. Essentially the Court must distinguish public use from public purpose as being the difference between the governmental need for property for a direct public use and the notion that there is a public purpose putting the property to private use that results in the collection of public taxes.

In *B & QR Co. v. Chicago*[20] the Supreme Court was first required to determine whether "due process of law" for the Fourteenth Amendment required Illinois to pay just compensation pursuant to the Fifth Amendment. While extending the Fifth Amendment to the states, the Supreme Court held that the Fourteenth Amendment required just compensation and a fair procedure before a state takes property. In the decision, the Court notes: "Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means . . . the right of the owner to be compensated if his property be wrested from him and transferred to the public."[21] However, relying upon *Loan Association v. Topeka*,[22] the Court clarified that any taking by a state exclusively for the benefit of a private party violated the Fifth Amendment's public use requirement.[23]

2. *Public Use in the Destruction of Economic Dislocations Cause by Oligopoly*

In *Hawaii Housing Authority v. Midkiff*, the Court set forth its most comprehensive analysis of the standard in which the Public Use Clause of the Fifth Amendment is applicable to the State:

> The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the Public Use Clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State. We conclude that it does not.[24]

In reading the above Midiff quotation, one may conclude that the Fifth Amendment Public Use Clause permits the states to transfer land from one private party to another. However, the specific circumstances of *Midkiff* are

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20. 166 U.S. 226 (1897).

21. 166 U.S. 226, 236.

22. 20 L Wall. 655, 663.

23. *Loan Association v. Topeka*, 20 L. Wall. 655, 663. Justice Miller stated that: "No court . . . would hesitate to adjudge void any statute declaring that 'the homestead now owned by A should no longer be his, but should henceforth be the property of B.'" *Id.*

24. 467 U.S. 229, 231 (1984).

one in which the federal government has always clearly recognized a public policy relating to restraints on property alienation through oligopolistic property control. This is analogous to the public policy favoring avoidance of restraints against alienation, a policy which has been favored from Colonial times. The aristocratic ownership of title to fees present in the European system was never acceptable to our Founding Fathers. Because of the controlled land ownership, the Hawaii legislature found the necessity for the condemnation of the fee simple ownership because the concentrated land ownership unrealistically inflated land prices, therefore injuring the public tranquility and welfare.[25]

Under the statutory provision, the Hawaii Housing Authority could not sell to any one purchaser more than one lot, nor could it operate at a profit. The Ninth Court reversed a District Court finding that the Housing Act was constitutional, after the District Court found that the Act was within the parameters of the state's Police Powers. The Supreme Court upheld the Hawaii taking, holding that it fell within the traditional Police Power and a public use was involved. Relying on its review of *Berman v. Parker*,[26] the *Midkiff* court applied the often cited language included in the Berman discussion of "public use":

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, or each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . . [27]

Unfortunately for the landowners in the *Kelo*, the Court noted that once the "public purpose" has been established, the means of executing a project is for legislature and the legislature alone to determine. Consequently, once the legislature deemed the transfer of the property to industrial users for the purpose of revitalizing the local economy, the legislature was free to use the traditional police power of eminent domain to accomplish the purpose. Once a court finds the "object" or goal is within the legislative authority, the exercise of eminent domain will merely be a legitimate means to an end. The

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25. 467 U.S. at 232.
26. 348 U.S. 26 (1954).
27. 348 U.S. 26, 32 (1954) (citations omitted).

question in *Kelo* is whether the legitimate legislative "object" or goal of obtaining and maintaining the economic enhancement of a community is enough under the public use clause of the Fifth Amendment.[28]

Underlying the judicial limitation on a legislative finding of a need as a "public use" is an impracticable application of judicial restraint upon which our judicial system is premised. The *Midkiff* court went on to note that:

> In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'[29]

However, even with such judicial deference, the *Midkiff* court fully recognized that there are situations in which there is no "public purpose," and under such circumstances, even with compensation, the condemnation action could not be upheld. The taking of property for the benefit of another private person without justifying for public purpose, even when compensation is paid, is not constitutional. To be sure, the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[30] Thus, in *Missouri Pacific R.R. Co. v. Nebraska*,[31] where the "order in question was not, and was not claimed to be . . . a taking of private property for a public use under the right of eminent domain,"[32] the Court invalidated a compensated taking of property for lack of a justifying public purpose.

Starting with Missouri Pacific as a baseline, *Midkiff* represents the most deferential treatment of a legislative determination of public use. The *Midkiff* court held that the Hawaii Act was clearly constitutional. Here, the people of Hawaii had attempted, much as the settlers of the original colonies did, to

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28. *Id.*

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

Id.

29. 467 U.S. at 232 citing United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896).

30. Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937). *See*, *e.g.*, Cincinnati v. Vester, 281 U.S. 439, 447 (1930); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251-252 (1905); Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 159 (1896).

31. 164 U.S. 403 (1896).

32. 164 U.S. 403, 416 (1896).

reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[33] Redistribution of a fee simple that was perceived to correct deficiencies in the market was held to be a "rational exercise of the eminent domain power."[34]

The *Midkiff* court also found that the immediate transfer to private individuals did not mean there was a simple private purpose. Rather, in relying upon *Rindge v. Los Angeles*,[35] the Court held that:

> It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.' In following the public policy of allowing the legislature the legislative delegation for eminent domain, the United State Supreme Court held that the government did not have to purchase the property itself, rather: . . . it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.[36]

The Court concluded that: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases."[37]

D. Lack of a Bright Line Test

Although clearly representing an expansive interpretation, *Midkiff* does not provide a bright line test as to when a public purpose becomes a Public Use within the constitutional limitation. While the Court provided great deference to legislative decision making, it retained the traditional power as the final arbiter of the constitutionality of statutory enactments. Although the Court offered no bright line test, it did look to the historical public policy of voiding the monarchic control of property via land disposition constraints as within the police power right to pay just compensation for a "Public Use" for the general health and welfare of the community.

Most importantly for the land owners in *Kelo*, in its recognition of the Rindge case, the *Midkiff* court noted that not all members of the public have to benefit from a project. Yet, it remains a policy underpinning of takings that when the legislature deals with public transportation or uses in which aggregation supports the general community, almost absolute breadth of

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33. 467 U.S. at 242.
34. 467 U.S. at 242.
35. 262 U.S. 700, 707 (1923).
36. 467 U.S. at 244 (quoting 262 U.S. 700, 707 (1923)).
37. 467 U.S. at 245.

legislative discretion will be granted deference. The question of whether condemnation for economic development and increased taxes falls within the parameters of public purposes will be dealt with in *Kelo*. It is likely that the Court will continue to take the position that legislative determinations of public use be analyzed on a case-by-case basis. The notion that a Public Use is to be determined on a case-by-case basis sounds strikingly similar to the fact determination on a case-by-case basis in regulatory takings. Without a bright line test, this may be a future focal point of numerous decisions as we try to fathom the landscape of taking for Public Use. Consequently, a brief discussion of the parties' arguments in *Kelo*, may be beneficial for understanding the Court's decision and preparing for future cases.

II. SUMMARY OF THE PARTIES' ARGUMENTS IN *KELO*

A. Appellant-Landowner's Brief

The Appellant has prepared a brilliant Application for Leave. It appropriately distinguished the situation at hand from the urban renewal/blight removal condemnations upheld by *Berman v. Parker*.[38] The issue appropriately presented by the Appellants is simply whether "the U.S. Constitution authorizes the exercise of eminent domain to help the government increase its tax revenue and to create jobs."[39]

The Appellant also noted the Connecticut court has misapplied the Supreme Court decisions of Berman and *Midkiff* in finding that an expansion of eminent domain authority to include takings for private economic development projects were contemplated by the Fifth Amendment. Rather, the comments presented by the dissenting Justice expressed serious concerns with the majority opinion, noting that achieving a "public benefit" is not necessarily a "public use."

The Connecticut Supreme Court recognized that there are widely divergent positions taken by the various State Supreme Courts for determining whether condemnation for private development fulfilled the constitutions' public use requirement. However, many of the cases cited do not deal with the United States Constitution or federal cases, but rather interpret only state constitutions. The opinion also noted that a number of other states, including Delaware and North Dakota, have applied the "heightened scrutiny" test of *Poletown*.[40] In *Kelo*, the Connecticut Supreme Court rejected even the

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38. 348 U.S. 26 (1954).
39. *Kelo*, Appellant's Brief.
40. *Poletown*.

heightened scrutiny test, explicitly rejecting the notion that the benefits had to be "clear" and "significant".

Additionally, the Appellants noted that the situation in *Kelo* was distinct from *Midkiff* and Berman. The Petitioners carefully noted that this was not a police power case in which there was a claim of a blight designation requiring the eminent domain proceeding to continue. In Berman, the United States Supreme Court noted that almost two-thirds of the dwellings were sub-standard, almost 60% of the dwellings had outside toilets, over 60% had no baths, and 83% lacked central heating.[41] *Midkiff* was carefully and properly noted as distinguishable because the regulation of the oligopolistic land holdings in the form of transfers was "a classic exercise of a State's police powers."[42] Perhaps best argued by the Appellant's brief was the statement that "if all private businesses are 'public uses', then it is hard to imagine what could be a private use."[43] The brief then cited the dissent in the lower court:

> The majority has created a test that can aptly be described as the "Field of Dreams" test. The majority assumes that if the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough. Thus, the test is premised on the concept that "if you build it, [they] will come," and fails to protect adequately the rights of private property owners.[44]

The brief parallels the *Hathcock* brief to the extent that it looks to the Court to at least modify the existing law, or to carefully distinguish the economic taking cases, which ostensibly are for the general benefit of the economic betterment of the community, from pure police power cases for blight or contamination removal.

The Petitioner's reply brief was filed after the *Hathcock* ruling. The brief absolutely refutes the proposed claims in the Respondent brief that there are very few states involved and the issue is of a relatively minor import.

B. Respondent City of New London's Brief

The New London brief is an invitation for reversal. No attempt to seriously apply a Federal Constitutional definition of public use is included. Rather, the writer emphasizes various state constitutional and statutory

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41. 348 U.S. 26, 30 (1954).
42. 467 U.S. 229, 242.
43. Petitioner's brief at 25.
44. 583 A2d at 543.

provisions. The United States Constitution is barely referred to in the brief. The question presented by New London brief fails to recognize the meaning of "public use" as the determinative issue, when it states:

> Does the Takings Clause of the Fifth Amendment contemplate that an economically distressed city may satisfy the Clause's public use requirement if that city employs its eminent domain power to condemn private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, as long as the proposed condemnation is rationally related to the accomplishment of those goals?[45]

The response was simply an invitation to grant leave. However, rather than dealing with the factual basis that New London was undergoing severe physical deterioration, unprecedented vacancies and aged and depleted housing stock, the brief discussed how there would be large increased property tax and other revenues available to a community if a redevelopment occurred. The brief maintained that the economic revitalization of a distressed city is a purpose which satisfies the public use requirement of both the United States and Connecticut Constitutions, thereby avoiding a *Berman v. Parker*[46] defense.

The Respondent city presented a claim that deference to a legislative determination of public use is effectively absolute, inflexible, and non-reviewable, premised upon a shallow reading of Berman and *Midkiff*. They cite the comment in Berman that: "the public interest has been declared in terms well-nigh conclusive,"and rely on *Midkiff* stating that:

> [T]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one" was to leave the Courts with nothing but close to absolute deference. The notion that the legislative judgment of what is a public use should be upheld "unless the use be palpably without reasonable foundation.[47]

Yet, that a police power is involved is recognized in the brief in its citation of *Midkiff*, that "the (public use) requirement is thus coterminous with the scope of a sovereign's police powers."[48] A close reading of *Midkiff* and Berman reveals that in the two U.S. Supreme Court cases:

> Whether the purpose to be served by a condemnation is the elimination of blight (Berman), the dissolution of an oligarchic property ownership structure (*Midkiff*), or the revitalization of a depressed city through the creation of thousands of jobs and an increase in tax and other revenues, the principle remains the same: Unless the proffered public use is "palpably without reasonable foundation," a reviewing court

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45. Respondent's Brief.
46. 348 U.S. 30 (1954).
47. Respondent's Brief citing *Midkiff* at 240.
48. 467 U.S. 240 (quoting *Berman* at 348 U.S. at 32).

> should not to beyond its established role and second guess the legislature's determination of public use or a city's good-faith attempt to achieve it.[49]

The notion that economic health of the community is a basic part of the uncertain police power simply is not argued.

Finally, the police power in its various manifestations in the constitutional framework are described in the brief, without comment as to whether economic enhancement of the community by taking is among the allowed uses of the power.

> Although that power is not readily susceptible of a complete definition, it clearly encompasses the traditional function of legislative government to enact economic, commercial and social legislation. *Midkiff*, 467 U.S. at 239-40. After all, among the diverse activities that this Court has held to fall within the police power are: public safety; see *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 439 (2002); control over advertising; see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); the establishment of regulatory or licensing schemes; see *Cleveland v. United States*, 531 U.S. 12, 21 (2000); and the compensation of personal injuries through tort remedies; see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).[50]

In an affront to both the United States Supreme Court and the Institute for Justice, the Respondent attacked the Petitioner as "manufacturing a massive conflict among the states regarding the scope of the public use requirement under the federal constitution."[51] Even Michigan is foolishly cited as if the *Hathcock* opinion did nothing of substance to the indefatigable "decision" because it "construes only the Michigan constitution."[52] The various state cases are not distinguished in the brief, nor is there a recognition that we must at some point deal with the federal constitutional provision of what is the meaning of public use, and how it is to be applied in a constitutional framework.

The complete divergence in the focus of the parties' brief demonstrates the fundamental issue involved in protecting private property owners. The Petitioners argue that the federal Constitution provides protection from takings that are not for public use. Specifically, they argue that a taking from a private property owner and the subsequent transfer to another private party for the stated purpose of economic development is not a valid public use under the Fifth Amendment. Respondents argue as if this issue as previously been settled in their favor and that the legislature's determination of public use should be afforded absolute judicial deference. If the United States Supreme Court holds that the taking is a valid public use, based on the nature of the

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49. Does this come from the Respondent's Brief?
50. Respondent's Brief.
51. Respondent's Brief.
52. Respondent's Brief.

arguments in the briefs, the rights of private property owners will rise and fall on the interpretation of state constitutions, just as they did in Hatchcock.

III. *HATHCOCK*: A RETURN TO REALITY AND CONSTITUTIONAL PROTECTION

The recent case of *County of Wayne v. Hathcock*[53] reversed *Poletown Neighborhood Council v. Detroit*[54] in reinstating the historical standard of public use. If the United States Supreme Court does not hold in *Kelo*, that a state's taking of private property to sell the property to a private business for the purpose of increasing taxes violates the federal Constitution, states are free to, and should, follow Michigan's lead and provide more protection to private property owners. An overview of Michigan public use precedent, an explanation of the facts of Hatchcock, and an analysis of how the Michigan Supreme Court held that such a taking violated the Michigan Constitution may be useful to protect the rights of private property owners in other states.

A. *Poletown*: An Expansive Interpretation of the Pubic Use Clause

In the *Poletown* case, the Plaintiff *Poletown* Neighborhood Council did not challenge the declaration of the legislature that programs to alleviate and prevent conditions of unemployment and to preserve and develop industry and commerce are essential public purposes. Nor did they challenge the proposition that legislation to accomplish this purpose falls within the constitutional grant of general legislative power in the Michigan Constitution 1963, art 4, § 51, that "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern."[55] *Hathcock* presented the challenge.

Simply put, the *Poletown* Plaintiff only challenged the constitutionality of using the power of eminent domain to condemn one person's property to convey to another private person in order to bolster the economy. The argument was that the benefit is only incidental to the public, and therefore not a public use.

The *Poletown* majority cited *Gregory Marina Inc. v. Detroit*[56] in support of the standard that there should be no reversal unless the determination of public need or purpose is palpable and manifestly arbitrary and incorrect.[57] Further, the Plaintiff conceded that the project was the type contemplated by

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53. 471 Mich. 445; 684 N.W.2d 765 (2004).
54. 410 Mich. 616; 304 N.W.2d 455 (1981).
55. Const. 1963, art. 4, § 51.
56. Citation.
57. 471 Mich. 445; 684 N.W.2d 765 at [redacted] (2004).

the legislature and the Act was followed. The *Poletown* majority relied on the position of Justice Cooley that the law does not so much regard the means as the need when discussing eminent domain. The Michigan Supreme Court then noted that "this further limits our review."[58] Finally, with an indication of the practical policy issues involved in the case, the *Poletown* majority recognized the seriousness of the economic affairs in 1980 when it noted in the opinion:

> If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project. The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited.[59]

The court then used the term of "heightened scrutiny" when there are specific private benefits, as here.[60] However, in Hatchcock the property owners claim there should be no distinction when we know that there is private benefit to be made at some future uncertain date.

Neither *Poletown* nor Hatchcock relied upon the general condemnation procedure and delegation, but rather the specifics of the Economic Development Corporation Act.

Dissenting in *Poletown*, Justice Fitzgerald's noted that the proposed condemnation clearly exceeds the government's authority to take private property through the power of eminent domain.[61]

Of great interest to Justice Fitzgerald was the standard of review and the requirement that the finding of a public road private use is a judicial question.[62] In looking at slum clearance, he noted that the principal purpose is one of clearing a bad area out.

Justice Ryan, distinguished eminent domain cases, stating there is no commitment to minimal judicial review:

> Instead, it has always been the case that this Court has accorded little or no weight to legislative determinations of "public use". "Whether the use for which land is sought to be acquired by condemnation is a public one is a judicial question.[63]

Justice Ryan opined that the Court has never employed the minimal standard of review being used by the majority in the case. An independent

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58. 471 Mich. 445; 684 N.W.2d 765 (2004) PINPOINT

59. 471 Mich. 445; 684 N.W.2d 765 PINPOINT.

60. 471 Mich. 445; 684 N.W.2d 765 (2004).

61. *Poletown*, 410 Mich. at 638-39.

62. 410 Mich. at 638-39.

63. *Poletown*, 410 Mich. at 667 citing General Development Corp v. Detroit, 322 Mich. 495, 498; 33 N.W.2d 919 (1948); *accord*, Lakehead Pipe Line Co v. Dehn, 340 Mich. 25, 39-40, 64 N.W.2d 903 (1954); Cleveland v. Detroit, 322 Mich. 172, 179; 33 N.W.2d 747 (1948); Board of Health of Portage Twp. v. Van Hoesen, 87 Mich. 533, 539; 49 N.W. 894 (1891).

determination of what constitutes a public use for which the power of eminent domain may be utilized has always been the rule.[64] For ease of reference, in what he called the instrumentality of commerce exception to pure public use, Justice Ryan included avenues of commerce, such as highways, railways and canals.[65] Justice Ryan also understood the distinction of federal takings under the federal taking clause. Applying his understanding of the federal taking clause may have provided a different result on the applicability of the Michigan statutory framework

Justice Ryan then notes that the only authorities that even arguably support this type of taking are the "slum clearance" cases.[66] In those cases, the decision to exercise the power is made entirely apart from consideration relating to the private corporation taking the property on at a future date. Justice Ryan also discusses three standard requirements.[67] The first standard requirement is the necessity of an extreme sort otherwise impracticable based upon the indispensability of collective action.[68] The second standard requirement is the continuing accountability to the public, being a condition of use of the police power. This is for such circumstances as where there are regulations. A complete panoply of regulations affects those railroads, utilities, toll activities, and other government-created franchises.[69] The third standard requirement was in choosing the land; there were facts of independent public significance. Examples are where the location of the blight is and urban renewal or the conditions of the river and natural conditions in placing roads or bridge improvements.[70]

In Detroit International Bridge Corporation,[71] it was noted that although the statute did not expressly prohibit private uses of land by the corporations, the obligation to preserve the public purpose was implied from acceptance of the right of eminent domain.

Similar to the situation in Hatchcock, where there was no certainty how the County was going to sell the property or how the user was going to use the property, Justice Ryan had trouble with the notion that once the property was given to General Motors, that General Motors had absolute and sole control.[72] As a foreshadowing of Hatchcock, Justice Ryan maintained that the

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64. 410 Mich. 669.
65. 410 Mich. 616; 304 N.W.2d 455 (1981).
66. 410 Mich. 616; 304 N.W.2d 455 (1981).
67. 410 Mich. 616; 304 N.W.2d 455 (1981).
68. 410 Mich. 616; 304 N.W.2d 455 (1981).
69. 410 Mich. 616; 304 N.W.2d 455 (1981).
70. 410 Mich. 616; 304 N.W.2d 455 (1981).
71. Cite.
72. 410 Mich. 616; 304 N.W.2d 455 (1981).

appropriate way to move forward with the type of condemnation contemplated in economic development situations is by Constitutional amendment.[73]

1. *Hathcock*

Mr. *Hathcock* and a number of other owners were located in an area south of Detroit Metropolitan Airport designated by Wayne County (the County) as the Pinnacle planned development. It was to include everything from hotels to a downtown shopping-dining area to offices and a golf course. The Pinnacle Aeropark Project was initiated by the Detroit Wayne County Metropolitan Airport Authority as part of the plans to expand the number and length of runways in the late 1980s. With the creation of an expanded Detroit Wayne County Metropolitan Airport, Wayne County recognized that the decibel (noise) ratings would increase to unsafe levels for adjacent residential owners. The County therefore performed a Part 150 Noise Study. For those areas at the higher decibel ratings, owners had a choice of voluntary sale of their homes to the government or a noise abatement (sound-proofing) program in which grants would be provided to reduce effects of increased noise. In the early 1990s, over $20 million dollars was funded by the partial grant of the Federal Aviation Administration noise funds in order to purchase neighboring properties through voluntary sales. Subsequently, the County purchased approximately another 500 acres of non-adjacent parcels scattered throughout the area in what can be described as a "checkerboard pattern".

As part of the FAA funding, Wayne County agreed to utilize the properties acquired in the Noise Program for an economically productive use. From this promise, the County attempted to purchase the remaining approximate 300 acres. The acreage consisted of approximately 46 parcels. About 25 properties were voluntarily purchased under the threat of condemnation, and the approximate 20 remaining properties were served with condemnation complaints pursuant to MCL 213.51 et seq., Act 87 of 1980, commonly known as the Uniform Condemnation Procedures Act. Two owners did not challenge the public use and will be dealt with through the just compensation process, which may include a trial. The remaining nine owners of approximately 15 parcels challenged the condemnation and were part of the *Hathcock* decision.

The County would act as a private developer to begin the development. However, the goal was to sell the property to private developers with the hope that the private developers would make a profit. County witnesses testified that the final end users for the project were not known and would not be

73. 410 Mich. 616; 304 N.W.2d 455 (1981).

known until the project was finally developed, if ever. Testimony presented by the County also illustrated that the Airport was viewed as a major engine for economic development and was a critical part of the community's growth. At the same time, the growth in the region was already substantial, with low unemployment rates prevailing.

The Wayne County Board of Commissioners passed the resolution required to begin condemnation proceedings on July 12, 2000. The property owners challenged the necessity of the project. The County's Resolution of Necessity and Declaration of Taking sets forth the following ostensible purposes of the condemnation:

> (i) The creation of jobs for its citizens, (ii) the stimulation of private investment and redevelopment in the County to ensure a healthy and growing tax base so that the County can fund and deliver critical public services, (iii) stemming the tide of disinvestment and population loss; and (iv) supporting development opportunities that would otherwise remain unrealized . . . .[74]

After the resolution was passed, the question to resolve was whether the stated purposes were constitutional under the Michigan Constitution. A careful analysis of the language and history of the relevant provisions was critical in Hatchcock's outcome.

2. *Michigan Constitutional Provisions*

a. 1908 Constitution

The 1908 Michigan Constitution provided an additional layer of protection in the form of a process in which both just compensation and necessity would be determined by the factfinder.

> Sec. 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.[75]

Under Act 149 of 1911, MCL 213.21, et seq., which was used in the vast majority of cases after approval of the 1908 Constitution, the jury was the proper finder of both necessity and just compensation.

The requirement for a jury determination of necessity had multiple purposes. Among the purposes were that the jury could determine that the project could not be justified given the costs required in the payment of just compensation. The question of whether the costs were too high for the project

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74. Cite to the Resolution.
75. Mich. Const. Article XIII, Section 1.

itself compared to the public good effectively could be determined by the jury. Additionally, under the slow-take procedure of MCL 213.21, as it existed prior to partial repeal by Act 87 of 1980, the condemnor had the opportunity to revoke the condemnation proceeding and not take the property if the costs were too great until the lapse of six days after the jury rendered its verdict.

Part of the problem of "public use" and "public purpose" interchangeability was created by the 1908 constitutional provision allowing a jury to be finder of both necessity and just compensation. The process was modified by the 1963 Constitution, yet cases continued to cite *Gregory Marina v. Detroit*,[76] in support of the proposition that a "public purpose" was enough for a condemnation to be held valid as a public use.

b. 1961 Constitutional Convention

Although not specifically cited, one can assume that the Michigan Supreme Court was well aware of what occurred at the 1961 Constitutional Convention, which culminated in approval of the 1963 Michigan Constitution. The minutes of the Constitutional Convention are not considered sole and individual sources of the final constitutional meaning, however, as noted in *Silver Creek Drain Dist. v. Extrusions Division*[77]:

> [T]he second important rule of constitutional construction . . . requires consideration of "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished...." Soap & Detergent, 415 Mich 745, quoting Traverse City School Dist, supra, 384 Mich 405. Of course, the most instructive tool for discerning the circumstances surrounding the adoption of the provision is the floor debates in the Constitutional Convention record. However, we have noted previously that consideration of the debates is limited because "[t]hey are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures." *Regents of the Univ of Michigan v. Michigan*, 395 Mich 52, 59-60; 235 N.W.2d 1 (1975). Nevertheless, we have said that they are particularly helpful "when we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept."[78]

The dispute between the majority and the dissent centered upon whether the plain meaning was one of a technical legal meaning of "public use" a general understanding that everyone could agree upon.[79] The application of public use under the Michigan Constitution is one of technical/legal meaning

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76. 378 Mich. 364; 144 N.W.2d 503 (1966)
77. 469 Mich. 1222; 668 N.W.2d 145 (2003).
78. 469 Mich. 1222; 668 N.W.2d 145 (2003).
79. 471 Mich. 445; 684 N.W.2d 765 (2004). DISSENT

as understood by the writers at the time of the passage of the Michigan Constitution. However, without regard to the methodology of reading "public use," it is noteworthy that the original proposal in the Constitutional Convention dealt directly with whether "public use" was "public purpose" in the form of exclusion. Proposal 67, introduced on April 18, 1961 at page 2580 which states: "In the exercise of the power of eminent domain private property shall not be taken or damaged by the public nor by any corporation for public use or purpose without the necessity being first determined . . .," is the original proposed language for condemnation proceedings.

Subsequently, "purpose" was specifically taken out. Yet, demonstrating that a difference between the terms existed, "purpose" remains in the tax provision of Article VII, Section 21, which states: "Each city and village is granted power to levy taxes for public purposes." One may only conclude that "public purpose" was intentionally removed from the eminent domain clause of the 1963 Michigan Constitution.

Further, the only definition given of the language "or purpose" is in the original Committee report. The report finds this provision as follows: "`Or purpose' was added to broaden the power of eminent domain and therefore resolve doubts as to the extent of a public use."[80] The change was intended to conform to the then established judicial interpretation. Apparently, in adopting the language of the 1963 Constitution, the legislature rejected the broaden power and the "purpose" it was used in the taxing context. However, it is important to note that the Michigan Constitutional Convention minutes discuss blight removal, highways, and other valid police powers as examples of "public use" in the discussions of eminent domain.[81] At no time did the *Hathcock* owners claim that valid police power actions were outside the "Public Use" limitation.

c. 1963 Constitutional Provision

Article X, Section 2 of the 1963 Constitution provided:

> Private property shall not be taken for public use without just compensation therefor being made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

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80. Report at 2581.
81. Convention Minutes.

3. *The Hatchcock Appellant Brief and the Necessity Challenge Process*

Act 87 of 1980, MCL 213.51 et seq., placed the determination of necessity solely for review by the court.[82] Michigan procedure provides that a party may challenge "necessity" for the time provided to answer the complaint. In *Hathcock*, the owner presented two arguments for a finding of no necessity. The first claim was that the statute Wayne County utilized, MCL 213.23, did not provide Wayne County with the statutory authority to condemn for an industrial park purpose. The second was that in applying *Poletown*, under "strict scrutiny" or otherwise, a public use was not a "public purpose" and that as such the public use standard of Michigan Constitution 1963, Article X, Section 2, was violated. In the alternative, the owner claimed that *Poletown* should be reversed and the prior 150 years of case precedent appropriately applied.

The necessity challenge process was premised upon a short motion, with one paragraph challenging necessity and asking for the evidentiary hearing mandated by the statute. After approximately 40 hours of hearings over seven weeks, Judge Michael Sapala wrote a well-reasoned 0pinion finding that Act 149 of 1911, MCL 213.21, properly authorized the condemnation premised upon the resolution passed in July, 2000. Further, the trial court held that the strict scrutiny standard of *Poletown* was the appropriate standard in the subject taking. The trial court opinion concluded that, even under the strict scrutiny standard of *Poletown*, Wayne County had fulfilled the requirements premised upon the substantial economic benefit to the community.

a. Act 149 Delegation Argument

The County utilized MCL 213.23, which provides:

> Any public corporation or state agency is authorized to take private property necessary for public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act.

The property owners maintained that the criteria must be satisfied before a public corporation is authorized to exercise the power of eminent domain.

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82. MCL 213.56.

The owners claimed the County did not fulfill the statutory requirements because the first phrase of the provision that "[a]ny public corporation or state agency is authorized to take private property," should not be read alone. The owners maintained that the phrase must be read with the remainder of the sentence, which imposes a series of restrictions on that power. Additionally, it must be read together with the second and third sentences in the provision, which shed light on the first sentence's meaning. Like many statutes with complex and lengthy sentence structures, this one requires careful analysis - in terms of its text, grammatical structure, and context.

The owners' argument continued that MCL 213.23 would not itself confer on counties the power of eminent domain for general public purposes. It merely declares that a county may condemn land for public purposes if the taking of privately held land is "within the scope of its powers." The text does not define the scope of the condemning authority's powers; it directs the reader elsewhere to determine this. This reading of the phrase is confirmed by analysis of the second and third sentences of MCL 213.23. The second sentence authorizes a "state agency or division thereof or the office of governor or a division thereof" to acquire lands by "purchase, condemnation or otherwise."[83] The third sentence then discusses "the unit," a phrase which refers back to "such unit," which in turn refers back to "a state agency or a division thereof or the office of the governor or a division thereof." The third sentence does not refer to or encompass any "public corporation."[84] The specific authorizing language in the last sentence provides that "[f]or purposes of condemnation the unit may proceed under the provisions of this act."[85] Only "the unit," may proceed under the provisions of MCL 213.23 for purposes of condemnation. Thus, when the state agency looks to the scope of its powers to condemn, it can point to the second and third sentences, which specifically empower such units to condemn property "under the provisions of this act."[86] Under this argument, Wayne County and other public corporations would not be empowered to condemn property by the second and third sentences. Other entities, such as Wayne County, are therefore allowed to "institute and prosecute proceedings" only if the power to condemn can be located in some other statute.

The 1980 passage of Act 87 of 1980, MCL 213.51 et seq., repealed the procedural provisions of Act 149 of 1911, MCL 213.21 et seq. However, what appears as "substantive" portions remained for the State to always have the authority to file under the Act. Note that the state has always utilized, and

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83. MCL 213.23.
84. MCL 213.23.
85. MCL 213.23.
86. MCL 213.23.

can always utilize, Act 149 for any taking it deems as "public" simply by obtaining the government appropriation. This precisely follows the procedure of the United States in authorization of agencies: once there is an appropriation, public use is effectively unchallengeable.

The owners claimed that MCL 213.23 should be reviewed in its historical perspective. MCL 213.23 was enacted in 1911, shortly after the Constitution of 1850 was replaced by the Constitution of 1908. The 1850 Constitution had provided a special exemption for the commissioners of highways. This protection was eliminated in 1908, thus prompting the legislature to enact special legislative authority allowing state agencies and divisions to condemn property once an appropriation for the purpose of acquiring lands for a public purpose was made. The second and third sentences accomplish this. However, this same level of legislative authority was not granted to all public corporations by the express terms of MCL 213.23. Instead, other entities were authorized to take property "within the scope of [their] ¼ powers," that is, as allowed by other statutes.[87]

Act 149 of 1911 was the procedural act allowing "slow-take" condemnations in Michigan. The slow-take provision was repealed by Act 87.[88] The advantage of the slow-take procedure was the opportunity for the government to reject a jury's condemnation award. This allowed fiscal responsibility in the process, although it could create unfair harm to an owner who suffered through the expense of a condemnation proceeding in a successful defense against the condemnation.

It was the owner's contention that the "unit" language of the statute was intended to act as the enabling legislation for state agencies only, and not for local agencies. This would be akin to how the federal condemnation procedure works, whereby once an allocation is made by Congress for acquisition as part of a public project, the necessity is effectively unchallengeable.

The owners viewed MCL 213.21 as a general statutory procedural authority, delegating only powers that are essential or indispensable to objects and purposes of the local government; therefore not delegating the right to condemn property for purposes that are not essential or indispensable. Reliance was placed upon *Lansing v. Edward Rose Realty*.[89]

The owners relied upon *Lansing v. Edward Rose Realty*, advancing the argument that it stood for the proposition that MCL 213.21 et seq. was a statute delegating only powers that are essential or indispensable to the objects and purposes of local government. Thus, the right to condemn for purposes

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89. 442 Mich. 626, 634-9; 502 N.W.2d 638 (1993).

that are non-essential or indispensable for the local government are not allowed.

The *Hathcock* Court rejected the argument that there was not an appropriate statutory delegation. Rather than finding the statute as a coupler for all but state agency "units", the court held:

> On the basis of the foregoing analysis, we conclude that the condemnations sought by Wayne County are consistent with MCL 213.23 and that this statute is a separate and independent grant of eminent domain authority to public corporations such as Wayne County. If the authority to condemn private property conferred by the Legislature lacked any constitutional limits, this Court would be compelled to affirm the decisions of the circuit court and the Court of Appeals. But our state Constitution does, in fact, limit the state's power of eminent domain. Therefore, it must be determined whether the proposed condemnations pass constitutional muster.[90]

Along with finding that the statutory authorization existed in MCL 213.21 et seq., the court also limited precedent as to whether "necessary" even existed under the 1963 Michigan Constitution and, if existing as under the 1908 Constitution, whether the need for the property really had to be one of a "near future" or "reasonably immediate use."[91]

Equally inapposite was the owner's claim that the project had not reached a stage where the property was necessary because the required approvals by local communities had not been reached, wetland permits had not been obtained from the Michigan Department of Environmental Quality for wetland mitigation, and the Environmental Impact process had not been completed. The court quickly disregarded the arguments as one of other than a speculative project proposed by the government given the land that had already been acquired and the efforts that had been expended.[92]

In challenging the question of whether the economic redevelopment and increased tax base was not a public improvement, the court quickly noted that economic development was part of the County charter and therefore "within the scope of its powers." [93]

Furthermore, subsequent to the enactment of MCL 213.23, the legislature passed a series of laws granting specific condemnation powers. These later enactments would be superfluous if counties and other state and local government bodies were already generally empowered by MCL 213.23 to condemn land for any public purpose. Yet the legislature is presumed to know of and to legislate in harmony with existing laws.[94] Additionally, the

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90. 471 Mich. 445; 684 N.W.2d 765 (2004).
91. 471 Mich. 445; 684 N.W.2d 765 (2004).
92. 471 Mich. 445; 684 N.W.2d 765 (2004).
93. 471 Mich. 445; 684 N.W.2d 765 (2004).
94. Nummer v. Treasury Dep't, 448 Mich 534, 553 n 23; 533 N.W.2d 250 (1995);

legislature is presumed not to have intended to do useless things, still less to have done them consistently over half a century and more.[95]

The owners claimed that 1966 PA 295 is particularly telling in this respect, because it was enacted at the very same legislative session as 1966 PA 351, which amended MCL 213.21 et seq. Surely the strength of the presumption that the legislature knows of and legislates in harmony with existing law increases when the prior legislation at issue came up before the very same session of the legislature, the same committees held hearings, debated the language of the bill, and sent it to the floor of each house for further debate and voting, where the same senators and representatives that passed the first bill also approved the second. Indeed, both contemporaneous, prior, and subsequent legislation on the same subject is important in appreciating that MCL 213.23 did not delegate general authority to take property for any public purpose. As was held in In re Macomber,[96] "In construing an ambiguous enactment it is held proper to consider not only acts passed at the same session of the legislature or other acts to which the act in question refers, but also acts passed at prior and subsequent sessions. . .."[97]

The legislature amended MCL 213.23 at the same session it adopted a different and specific statute granting authority to the same governmental bodies to condemn land for public highway purposes.[98] If Public Act 149, MCL 213.23, were sufficient to alone empower counties to condemn private property for any public purpose, then the legislature would not have had any need to adopt a separate act to do the same thing. But they were not sufficient. Thus, the legislature's adoption of these other acts empowered counties to exercise eminent domain for these purposes. The property owners' reading of the statute harmonizes this complex body of law and gives content to all of the words in MCL 213.23.[99]

Clearly, the court perceived the County to have broad powers under the Home Rule Act and the constitutional delegation of Home Rule. The owners

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Lenawee Co. Gas & Electric Co. v. City of Adrian, 209 Mich. 52, 64; 176 NW 590 (1920); Nemeth v. Abonmarche Development, Inc., 457 Mich. 16, 43; 576 N.W.2d 641 (1998). Robinson v. Shatterproof Glass Corp., 238 Mich. App. 374, 380; 605 N.W.2d 677 (1999).

95. Gross v. General Motors Corp., 448 Mich. 147, 164; 528 N.W.2d 707 (1995); Recorder's Court of Detroit v. Detroit, 134 Mich. App. 239, 243; 351 N.W.2d 289 (1984); Haas v. City of Ionia, 214 Mich. App. 361; 543 N.W.2d 21 (1995).

96. 436 Mich. 386, 395 n.5; 461 N.W.2d 671 (1990).

97. 436 Mich. 386, 395 n.5; 461 N.W.2d 671 (1990) citing 2A Sands, Sutherland Statutory Construction (4th ed), § 51.03, p 469.

98. Barnhart v. Grand Rapids, 237 Mich. 90, 95; 211 N.W. 97 (1926); Grand Rapids v. Barth, 248 Mich. 13, 17; 226 N.W. 690 (1929).

99. *See* Glover v. Parole Bd., 460 Mich. 511; 596 N.W.2d 598 (1999); G. C. Timmis & Co. v. Guardian Alarm Co., 468 Mich. 416; 662 N.W.2d 710 (2003).

qualm was, given that there could be a broad application provided to a Home Rule county, whether MCL 213.23, limiting the act itself as the sole act necessary for "units" of state agencies to apply to local governmental agencies.

Effectively, by knowing that it had to find the statute constitutional in order to get to the reversal of *Poletown*, the construction of the statute affected itself of being the innocent bystander necessarily harmed in order to get to the criminal target.

B. Appellant's *Poletown* Challenge

The owner presented a two-part argument. First, that it is under *Poletown*, the County had not sustained its burden of proving that the transfer of condemned property to private interests primarily advanced a public rather than private interest.[100] At best, it did not meet the *Poletown* or "public purpose" test. The owner noted the "heightened scrutiny" standard under *Poletown*.[101] It noted that *Poletown* held that the public benefit must not be a primary benefit conferred by the condemnation, but must be "clear and significant" rather than "speculative or marginal."[102] It was for this reason that the court rejected a City attempt to obtain easements to enable a private company to run cable television lines to individual apartments, with the Michigan Supreme Court reasoning that the interests being advanced by such a project were predominantly private rather than public.[103]

The enormity of the consequence of a "no build" in the *Poletown* project in 1981, at a time of a decimated city of Detroit and southeast Michigan caused by the first of the Middle East oil boycotts, was self-evident. The owners were careful to note that the Pinnacle case did not involve the elimination of a blighted area, where it would be maintained that the public purpose achieved merely by raising existing dangerous structures and conditions, with resale to private ownership being secondary, was a totally dissimilar circumstance, relying on In re: Slum Clearance.[104] In a like fashion, in *Tolksdorf* the Michigan Supreme Court found that the private road condemnations, with the intent "to convey an interest in land from one private person to another" served a primarily private rather than public interest and,

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100. 471 Mich. 445; 684 N.W.2d 765 (2004).

101. 471 Mich. 445; 684 N.W.2d 765 (2004) citing Neighborhood Council v. Detroit, 410 Mich. App. 634-635.

102. 471 Mich. 445; 684 N.W.2d 765 (2004).

103. Lansing v. Edward Rose Realty, 42 Mich. 626, 634-5, 638-9; 502 N.W.2d 638 (1993).

104. 331 Mich. 714, 720-722; 50 N.W.2d 340 (1951).

therefore, the statute providing for private road condemnations by townships was unconstitutional.[105]

Then the *Tolksdorf* Court framed the constitutional issue as "whether the public interest advanced here, access to landlocked property, is the predominant interest advanced."[106] The court was unconvinced that the act was primarily concerned with the public interest because it did "not impose a limitation on land use that benefit[ed] the community as a whole."[107] Instead, it gave "one party an interest in land the party could not otherwise obtain."[108] The court determined that the "taking authorized by the act appears merely to be an attempt by a private entity to use the state's powers 'to acquire what it could not get through arm's length negotiations with defendants.'"[109]

C. Wayne County Appellee Brief

Wayne County claimed that after the noise abatement and voluntary purchases, the only problem was that 46 parcels were left in which the owners "refused to sell their land."[110] The County claimed that this made a meaningful development impossible without compulsory acquisition.

In its well-reasoned brief, the County explained how the project was an outgrowth of the airport renovation and expansion, with $21 million dollars utilized to purchase land for noise mitigation through voluntary purchases.

The County maintained that Act 149 allowed the taking because the "public purpose" was to be defined by the statute itself. Apparently taking as its last position the County that the noise abatement program was aimed at improving the health and welfare of the general residents in the County, the County argued that the statute allowed the County to condemn private property without additional statutory support. Had a greater emphasis on the

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105. *Tolksdorf* v. Griffith, 464 Mich. 1, 9; 626 N.W.2d 163 (2001).

106. 464 Mich. at 9.

107. 464 Mich. at 10.

108. 464 Mich. at 10.

109. *Id.* quoting Edward Rose Realty, 192 Mich. App. 551, 558; 481 N.W.2d 795 (1992), *aff'd* 442 Mich. 626; 502 N.W.2d 638 (1993) (stating "[t]he private roads act was unconstitutional because it authorized a taking of private property for a predominantly private purpose." *See also In re* Brewster Street Housing Site in City of Detroit, 291 Mich. 313, 334; 289 N.W.2d 493 (1939) ("the State has no power and authority under the power of eminent domain, or otherwise, to take the property of one man and give it to another"); City of Center Line v. *Chmelko*, 164 Mich. App. 251, 254; 416 N.W.2d 401 (1987) (concluding that the taking primarily served private purposes, and that any public benefits were incidental). *Tolksdorf*'s view of what constitutes a "private" and "public" purpose in the eminent domain context applies with equal force.

110. 471 Mich. 445; 684 N.W.2d 765 (2004).

police power been taken, a different Michigan Supreme Court opinion may have resulted.

In the Michigan Supreme Court, the County claimed that without the properties no project could occur. Contrary to this position, within ten weeks of the Supreme Court July 31 hearing, the County stated that it would move forward with the project despite the failure to purchase the properties.[111] In its press discussions, the County contradicted its position presented to the Supreme Court that the project required the subject properties in claiming that "these issues would not be impediments to a successful completion of the project."[112] The County successfully argued that the plain language of Act 149 authorized the taking given that this activity was within the general health and welfare of the community. While a condemning agency may not "wield" its power of eminent domain as an agent for private interests[113], in this situation there was not a purchase being made for a single user. To the contrary, the proposal was to redevelop for unknown end users.

The County also noted that the *Poletown* public purpose analysis was revisited by *Edward Rose* in which there was a requirement for something other than a specific and identifiable interest.[114] As there was no known purchaser for the property, there was no specific and identifiable interest.

The County went on to note the troubling case of *Prince George's County v. Collington Crossroads*,[115] However, if one were to read the Collington Crossroads case closely, one would find that there was a clear distinction in both the Maryland constitutional/statutory framework and in the original intent of the Prince George's County condemnation.[116] In Maryland, all condemnations, even on the local level, are approved by state legislative resolution.[117] This empowers the state with control of takings. Further, the original taking in Collington Crossroads contemplated an airport development, with industrial development necessary to pay for the cost of the airport construction.[118]

Wayne County claimed that even applying a *Poletown* strict scrutiny standard, the Pinnacle Project was within the "public purpose" spectrum and, therefore, should be affirmed. The Fifth Amendment to the United State

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111. (Detroit News and Detroit Free Press, October 3, 2004.)

112. (Detroit News and Detroit Free Press, October 3, 2004.) For a contrary position, see page 20 of the County brief maintained on the Supreme Court website at www.

113. City of Centerline v. *Chmelko*, 164 Mich. App. 251; 416 N.W.2d 401, 402 (1987).

114. 471 Mich. 445; 684 N.W.2d 765 (2004) PINPOINT.

115. 339 A2d 278 (1975).

116. 339 A2d 278 (1975).

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118. 339 A2d 278 (1975).

Constitution is guidance for determining the meaning of the Michigan provision without regard to a recognition that the provision had specific meaning at the constitutional convention. The County argued that a historical and textual analysis of the public use requirement would be satisfied when there is a public benefit shown.

For the Appellant owners, the most troubling area of the County's argument related to the reliance on *Swan v. Williams*,[119] The cited language reflected the notion that there were "necessities" which were part of the public use analysis.

> The necessities change with the progress of society. That which would have satisfied the public demands a few years since, may perhaps now be wholly inadequate or useless. As new discoveries are made in science and adapted by art to the uses and wants of community, and its ever-changing conditions, laws must adapt themselves to the existing state of things, not arbitrarily, but by natural gradations....government must adapt itself to the existing condition and wants of society, or its efficiency is destroyed.[120]

The County concluded that *Poletown* accurately reflected precedent in relying on the owner's position.

> Relying on Justice Ryan's dissent, Defendants claim that *Poletown* was a radical departure from precedent. Further, they claim that the *Poletown* Court "ignored the historically consistent and textually faithful public use test." This is just not true. Granted, for the *Poletown* majority the transfer of property to a private entity, in and of itself, did not destroy the public use of the taking. However, as is discussed above, this concept was not a new one. See Slum Clearance, supra; Lakehead Pipeline Company, supra; Detroit International Bridge Company, supra; Swan, supra. For more than a century before *Poletown* this Court sanctioned takings where a private entity would not only use and own the condemned land, but the public could be denied access. The notion that the "public use" requirement must be flexible in order to meet the modem needs of communities was recognized as early as 1852, when the Swan Court stated that as society grows and changes, "the laws must adapt themselves to the existing state of things, not arbitrarily, but by natural gradations." Swan, supra at 438.[121]

The County's attack on the positions of Justice Ryan and Justice Fitzgerald was that they had "fallen prey" to "convenient fiction" when it stated in its brief:

> Both Justice Ryan and Defendants have fallen prey to what Justice Cooley termed the "convenient fiction" of the creation of a so-called exception to the public use requirement. Id. While Justice Ryan opposed the use of eminent domain in *Poletown*, he readily admitted that there do exist circumstances where "condemnation

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119. 2 Mich 427 (1852).
120. 2 Mich 427 (1852).
121. 471 Mich. 445; 684 N.W.2d 765 (2004).

> of property for transfer to private corporations" is allowed. *Poletown*, supra at 670. The fiction that Justice Ryan created and is relied upon by Defendants does not withstand scrutiny, however. Justice Ryan excused the use of eminent domain in cases like Swan, Lakehead Pipeline, and Detroit International Bridge Company, as an exception to the general rule, where, in fact, these cases are not exceptions at all - they are the rule. Justice Ryan's inconsistency is belied by his acceptance of the use of eminent domain in the Slum Clearance cases. There, the Justice ignores the public use requirement altogether and focuses only on the public purpose underlying the takings. Apparently, in some situations, even Justice Ryan would authorize condemnation where the "object" of eminent domain was not to confer a private benefit, but instead to promote a public purpose. *Poletown*, supra at 672-673.[122]

The County maintained that *Poletown* should not be reversed because there is no reason to overrule the public purpose test. In any event, the County claimed that if *Poletown* were to be reversed, it should be done retroactively only. The County argued that the *Poletown* "public purpose test" had worked to date given that there were a number of cases which did not fulfill the requirements of *Poletown*.[123] Further, considering the County had already spent $20 million dollars on "legal expenses, condemnation proceedings, zoning coordination, etc.", and at $31 million dollars for earlier property acquisitions made to a voluntary purchases, the project should be completed.[124]

The *Poletown* case was cited in support of the position that private property may only be taken for a public use.[125] The brief continued: "The Court remained cognizant that, as the Swan Court noted over a century ago, the 'government must adapt itself to the existing condition and wants of society, or its efficiency is destroyed.'"[126] The County's brief maintained that there were a number of factors relevant to a determination of whether public purpose exists: (1) whether there is a specific and identifiable private interest; (2) whether the municipality of the private interest initiated the project; (3) the level of involvement of this private interest in the acquisition process; (4) the extent of the public benefit; (5) the extent of the private benefit; (6) the level of control that the condemning authority will retain after condemnation; and (7) the degree of public use of the finished project.[127]

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122. 471 Mich. 445; 684 N.W.2d 765 (2004).

123. 471 Mich. 445; 684 N.W.2d 765 (2004).

124. 471 Mich. 445; 684 N.W.2d 765 (2004).

125. Brief citing Neighborhood Council v. Detroit, 410 Mich. App. at 632-633, citing Berman v. Parker, 348 U.S. 26, 32; 75 S. Ct. 98, 99 L. Ed. 27 (1954).

126. Brief citing Swan, at 438.

127. Brief

The problem case for condemnees of *Prince Georges County v. Collington Crossroads*,[128] was heavily relied upon as an appropriate out-of-state case which should be relied on by the Michigan Supreme Court. This case was perceived by Justice Fitzgerald, in his *Poletown* opinion, as an anomaly case. Interestingly, the premise of why Collington Crossroads can be dealt with and distinguished from the Michigan constitutional provision of public use is the very reason that the owners claim that the general enabling statute, Act 149 of 1911, was not appropriate for this specific taking.

Maryland follows a rule whereby the Legislator in the district where a public improvement is to occur moves forward to seek state legislative approval for the expropriation of property. In Massachusetts, the state legislative body also must specifically pass the Act enabling a specific condemnation project. This is akin to the federal system in which it is deemed to be a public use once the Congress enacts legislation to appropriate funds for the purchase or eminent domain acquisition of property. The first issue before the Michigan Supreme Court was this specific procedural distinction between the federal/ eastern seaboard utilization of the eminent domain grant being provided by specific legislation for the taking versus the general enabling act for the state government. What the *Hathcock* owners believe was specific legislation for other than specific State and local truly "public" utilizations that was the first issue before the Michigan Supreme Court. While the Michigan Supreme Court recognized that the application of Prince Georges County[129] should not apply in Michigan as to the notion that an end private developer does not provide for the public use contemplated by the Constitution, the court was unable to differentiate that the Constitution contemplated the legislature specifically allowing substantive enactments for each public use. Further, if one were to revisit the Collington Crossroads situation, the original condemnation was for a basic transportation facility, being an airport, built in an area which would be surrounded by industrial land necessary to raise the tax monies to build the airport. What occurred in the Collington Crossroads case was that the industrial project moved forward, but the governmental agency simply could not construct the airport, in all likelihood due to the changing demographic and environmental standards for airport construction in this country during the 1960s and 1970s.

The Wayne County brief appropriately recognized that one would need to search the original meaning attributed to the words of the Constitution.[130]

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128. 275 Md. 171, 172; 339 A.2d 278, 279 (1975).

129. 275 Md. 171, 172; 339 A.2d 278, 279 (1975).

130. Michigan United Conservation Clubs v. Secretary of State, 464 Mich. 359; 630 N.W.2d 297 (2001).

Swan was also relied upon in the notion that the "progress of society" and the need to "adapt" were basic premises of the Constitution.[131]

One could envision a situation in which the Michigan Constitution would say: "Private property shall not be taken for public use or purpose as presently contemplated or as necessary for future contemplated public uses or purposes, as somewhat defined and adapted to future needs of society after payment of just compensation." One could also talk with marbles in their mouth.

The County brief continued that there is no reason for *Hathcock* to overrule *Poletown* in that undue hardship would occur after the great expense had already been made.[132] The brief concluded that the *Poletown* public purpose tested has been successful to date given that reversals have been made of proposed public takes in *Adell*, *Tolksdorf*, *Chmelko*, and *Edward Rose*.[133] Without noting the concurrence in Lucas, which claimed that *Poletown* should be reversed, reliance is also placed on the Lucas decision. The brief noted that there was no identified or individual private company instigating development or taking the property citing the trial court's position that "the present taking is even more supportable than the one in *Poletown*."[134]

The brief concluded that even the dissenters of the *Poletown* decision would have found the situation acceptable. Noting that Justice Fitzgerald "approved of the result in Prince Georges County", noting the participation of private entities in the condemnation proceedings "are distinguishable" and that in each it was the governmental unit that selected the site in question for commercial or industrial development.[135] "By contrast, the project before us was initiated by General Motors Corporation's solicitation of the City for its aid in locating a factory site."[136] The County then claimed that there were facts of independent significance given the acquisitions that had occurred on a voluntary basis or through the noise mitigation project. Further, there was an alleged claim that controls would be made for future use of the property, thereby limiting the issues of continued government control.

D. *Poletown* Reversal

A number of the amicus briefs maintained that there was effectively no latitude in reviewing a legislative decision, even if an abuse occurred.

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131. Swan.
132. County Brief.
133. Cite to the brief and to each of the cases.
134. Brief pinpoint.
135. Brief.
136. *Poletown* at 644.

However, the Court, simply by reversing the *Poletown* decision and reinstating 130 plus years of precedent, recognized that a legislative body cannot redefine for itself the meaning of the limiting constitutional phraseology of "public use." The judiciary is a final arbiter of the meaning of the constitution.[137] Thus, a legislative determination of public use must be judicially vetted as reasonable,[138] and the public interest to be advanced must be real and must predominate over any private interest to be benefited.[139] There must be "substantial evidence" that the public benefit is "clear and significant."[140] Under such circumstances, even if *Poletown* were to be upheld, the requirements of *Poletown* simply could not be applied to the *Hathcock* facts.

E. Text of the Taking Clause

The text of the taking clause speaks of "public use."[141] The common understanding of this term confirms that it is not synonymous with the phrase "public purpose." As early as 1871, Justice Cooley observed that a "public use" only existed "where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare."[142] In other words, Cooley identified a "public use" as one in which the government takes property to supply "its own needs" or one in which the government takes property to furnish "facilities for its citizens."[143] This common understanding coincides with the traditional use of eminent domain for government office buildings or for public facilities for its citizens, such as schools or parks. It does not coincide with a use by private entities that is neither to be open to the public nor owned by it.

This view of "public use" as encompassing a limitation on the power to take private property is strengthened by analysis of the dictionary definitions of the words as understood and used at the time. Eighteenth century dictionaries defined public and private as opposites.[144] Public meant that which "belonging to a state or nation is not private ¼ general ¼ regarding not

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137. Durant v. State Bd of Education, 424 Mich. 364, 392; 381 N.W.2d 662 (1985).

138. General Development Corp. v. Detroit, 322 Mich. 495, 498; 33 N.W.2d 919 (1948); Lakehead Pipe Line Co. v. Dehn, 340 Mich. 25, 39-40; 64 N.W.2d 903 (1954); Bd. of Health of Portage Twp. v. Van Hoesen, 87 Mich. 533, 539; 49 N.W. 894 (1891),

139. Lansing v. Edward Rose Realty, *supra*, 442 Mich. at 634-635.

140. *Poletown*, *supra*, 410 Mich. at 434-435.

141. Michigan Const 1963, art 10, § 2.

142. Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 533 (2d ed 1871).

143. Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 533 (2d ed 1871).

144. See Kochan, at 61-62.

private interest but the good of the community."[145] The word "use" also incorporated limits because it implied that the property must be used by the public. In other words, the "public use requirement traditionally meant that the property had actually to be used by the public."[146]

Thus, Justice Cooley, in discussing the scope of eminent domain power emphasized that taking property to convey it to private parties would be unlawful:

> If taken for a purely private purpose, it would be unlawful. Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises: the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.[147]

Cooley argued that property could be transferred to private entities only in recognized areas of eminent domain such as the construction of public ways, a common carrier, or public goods.[148]

A long line of cases in Michigan maintains that takings may not be for private use unless as an incidental beneficiary to the public use.[149] *Poletown* reversed this long line of cases expressing serious concern when private property is taken for the benefit of private parties.[150]

Justice Ryan warned that *Poletown* amounted to "judicial approval of municipal condemnation of private property for private use."[151] According to Justice Ryan, the "real controversy which underlies this litigation concerns the propriety of condemning private property for conveyance to another private party because the use of it by the new owner promises greater public 'benefit'

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145. Johnson, *A Dictionary of the English Language* (1755) as quoted in Kochan at 61.

146. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM L R 873, 891 (1987). *See also* Richard Epstein, Takings: Private Property and the Power of Eminent Domain 29, 162-181 (1985). *See generally* James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (1998).

147. Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 533, 585-86 (2d ed. 1871).

148. Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 533 (2d ed. 1871).

149. *See* Ryerson v. Brown, 35 Mich. 333, 338-339; Swan v. Williams, 2 Mich. 427 (1852); Board of Health of the Twp. of Portage v. Van Hoesen, 87 Mich. 533; 49 N.W. 894 (1891); Lakehead Pipe Line Co., Inc. v. Dehn, 340 Mich. 25; 64 N.W.2d 903 (1954); Shizaz v. Detroit, 333 Mich. 44, 50; 52 N.W.2d 589 (1952).

150. Neighborhood Council v. Detroit, 410 Mich App 634-635.

151. 410 Mich. at 646.

than the old use."[152] Justice Ryan distinguished public use and public purpose, explaining that each concept could be traced to the separate jurisprudences of the taking and the taxing clauses.[153] Reviewing the history of Michigan law in these areas, Justice Ryan pointed out that under the majority's "unsound and improvident decision, the separate jurisprudences of two constitutional provisions have merged into one as though it was always so."[154]

He explained that the only way to accomplish a transfer of private property to a private owner for private use would be through a constitutional amendment, "The sudden and fundamental change in established law affected by the Court in this case, entailing such a significant diminution of constitutional rights, cannot be justified as a function of judicial construction; the only proper vehicle for change of this dimension is a constitutional amendment."[155]

F. Potential Results of *Hathcock*

Although, *Hathcock* clearly invalidates purely economic takings it is important to consider what other results it may or may not have on condemnation in Michigan and elsewhere. *Hathcock* will not limit takings available and created by the valid exercise of police powers; i.e. brownfield remediations, and blight clearance. The net effect of the *Hathcock* decision may be that areas which most need rehabilitation will still be able to avail themselves of eminent domain powers, albeit that fair market value will have to be paid.

In many Michigan urban areas, especially the city of Detroit, the city has acted as an effective "broker of record" by utilizing its eminent domain authority to acquire and assemble properties for redevelopment. Although seemingly beneficial, this process, whereby the city views itself as the "honest broker" by condemning simply destroys the supply-demand market. This is because the basic standards of supply and demand recognize that the market prices diminish when demand is artificially limited. Entities will have no interest in seeking out properties and creating a market for viable development so long as the reasonable investor fears a third-party developer will obtain City assistance, be it acquisition by a condemnation or tax abatements not available to the first developer. A prime example of this is analyzing the economics of 150 W. Jefferson in Detroit when compared to One Detroit Center project aggressively subsidized by governmental tax incentives and

152. 410 Mich. at 647.
153. 410 Mich. at 662-665.
154. 410 Mich. at 659.
155. 410 Mich. at 683.

earlier eminent domain proceedings which created the assemblage for development. One should also recognize that *Hathcock* is a state of Michigan Constitutional decision only. This writer would have you believe, and does believe, the public use is limited to true public uses or activities which are either within the police power, as fully contemplated in the *Midkiff* decision, instrumentality of commerce, historically perceived public use (such as governmental buildings), or franchised utilities regulated by governmental agencies.

In the oral argument, the Court asked whether it could reach a reversal of *Poletown* if the statutory provisions were upheld. In response, my *Hathcock* co-counsel, Mary Massaron Ross, knew that if there was a reversal on the statutory ground, that *Poletown* could still be dealt with at a later time because judicial economy would recognize that, when refiled, the same issues would again arise three years from now. The court did not have to deal with this conflict, although it did recognize:

> If it were correct that the county lacks statutory authorization to condemn defendants' properties, this Court need not–and must not, under well-established prudential principles–determine whether the takings also violate our Constitution.[156]

The Court terminated the statutory protections and limitations which the owners believe were, at least in part, intended to mirror the federal procedure whereby the legislative appropriation was enough to create a clear finding of public use. The Court fully recognized that if it had found the statutory requirement had not been fulfilled and that there was not an appropriate delegation for this take as "within the scope of the government's powers",[157] the constitutional issue of whether *Poletown* should be voided would not have occurred.

As property owners look to the future, it is likely that the Court will be asked to revisit its decision of the intent of MCL 213.23. One could argue that this is a foolhardy challenge to the court, but one may also recognize that the atmosphere in not only the Michigan judiciary but in perceptions throughout the nation that governments have gone too far in taking private property for essentially private use. When offered the opportunity to review the limits of the legislative intent, the court may very well view the 2004 decision on the statute in *Hathcock* as overreaching in its statutory application, as *Poletown* was in the 1981 constitutional application of public use.

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156. 410 Mich. at 662-665.
157. 410 Mich. at 662-665.

Finally, while Michigan courts traditionally interpreted "public use" to have a narrower meaning than "public purpose."[158] The challenge is ultimately whether the "exigencies" or "necessities" of assemblage for the general public improvement, whether in the circumstance of a community mill in the 1830s, a railroad in the 1850s, or economic development in the 21st Century, are to be compared. Given that exigent circumstances means something for the general welfare of a community, pure economic enhancement has now been held not to be within the contemplated parameters of a valid exercise of a taking for "public use".

CONCLUSION

One of the potential problems with the Petitioner brief in *Kelo* is that there is an incomplete recognition that the public use clause applied in many of the state court decisions was intended to cover only the state public use standards in the respective state and is not intended to deal with the federal determination of public use. The definition of the extent of public use has never been fully dealt with by the United States Supreme Court. To the contrary, the flexible rule being coterminous with the police power makes it very hard to establish a comprehensive test.

A state court certainly may look at the federal constitutional language, where similar, to ascertain the meaning of its own constitution. However, it would be very hard for a reader of the federal Constitution to parse the constitutional language from a state constitution drafted years after the states approved the United States Constitution.

A persistent issue in takings cases is that we have a constant reference to exigent circumstances wherein there is a dramatic public need not otherwise contemplated. Thus, a central question will be–when does an exigent circumstance that justifies a taking exist?. A key to the decision may come down to the *Midkiff* notion: "But where 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."[159]

The judicial deference "is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State Legislatures are as

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158. *See*, *e.g.*, Swan v. Williams, 2 Mich. 427 (1852); Board of Health of the Twp. of Portage v. Van Hoesen, 87 Mich. 533; 49 N.W. 894 (1891); Lakehead Pipe Line Co., Inc. v. Dehn, 340 Mich. 25; 64 N.W.2d 903 (1954); Shizaz v. Detroit, 333 Mich. 44, 50; 52 N.W.2d 589 (1952).

159. *See* Berman v. Parker, Rindge v. Los Angeles, 262 U.S. 700 (1923); Block v. Hirsh, 256 U.S. 135; 467 U.S. at 241.

capable as Congress of making such determinations within their respective spheres of authority."[160]

One might argue that what *Dorrance* states is that the legislature will never overreach. After all, even in England, where there is no Constitution and the rule of majority prevails in the most dangerous sense via Parliamentary Legislative decision, no effort is ever made to take property for other than public use. By this language, we have this perception of a natural law or contract between the citizens of a community in which the community will not abuse that sacred right to property ownership. Yet, the notion of "exigency" could always lead one to find risks of going outside the parameters of rational protection of the individual owner.

The *Dorrance* language is not intended to hold that the "despotic power" and the power to take for public use is to be read so that no takings may occur. To the contrary, the takings for public property use for private corporations, such as dams and mill roads, are generating a public benefit whose very existence depends upon the use of the land which can only be assembled through the coordination of the central government, or where the private entity remains accountable to the public for the use of the property, such as a utility franchise and when the selection of the land is totally based upon a specific public concern and independent public significance. This is the language relied upon in *Hathcock*, which the *Kelo* Supreme Court may well think about, not because of the Michigan Constitution having a bearing on the federal constitutional provision, but rather, because a recognition that the Michigan Supreme Court took a hard look at what the intent of "public use" was.

The police powers and its coterminous relationship with the eminent domain power may be limited because police powers are generally retained by the states. The police powers are held by the states unless shown to the contrary by the clear intention of Congress.[161]

An argument might be made that there is a right of the reserved police power requiring that the retention of the police power to the states requires a state determination of public use prevails. The question would be whether federalism allows the state to determine the basic economic policies within its own jurisdiction. If one is to argue the economics of the State, there will be a simple logical extension that intra-State commerce becomes effectively part of the inter-State commerce system. If so, the federal government could control. Yet, *Midkiff* took jurisdiction, at least to the extent of saying that the constitutional public use applied and was fulfilled in the state action remedying clear economic dislocation.

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160. 467 U.S. at 244.

161. *See* Bell South Telecommunications v. City of Mobile, citing National Solid Waste Management v. Alabama Department of Environmental Management, 910 F.2d 713.

On the other hand, the United States Constitution has been used to limit state actions in relation to the police power from the earliest days of our republic. With all this, clearly the issue that emerges is the distinction of the state's retention of the police power may be subservient to the basic constitutional limitation of the Fifth Amendment. Otherwise, one could argue that criminal procedures in the states which are more restrictive of individual rights should prevail over federal regulation given that there is a police power reserved to the State.

Undoubtedly, it would be difficult for the United States Supreme Court to arrive at a definitive ruling. It was quite simple in the situation of *Berman v. Parker*, where blight clearance and long-term planning over a blighted area were of great public significance. However, the propriety of the governments taking may not apply to the pure economic benefit of the community wherein the community becomes the new "market maker."

A true distinction exists between the community as an arbiter attempting to consolidate properties otherwise totally impossible to assemble, which was allowed under Michigan precedent, as compared to situations in which the government is a pro-active participant in the determination of economic development in total disregard of individual property rights.

The United States Supreme Court could potentially find that the constitutional authors never contemplated Public Use as intended to allow governments simply to purchase property to sell to third parties for what governments consider to be "economic redevelopment" or community benefit. If the United States Supreme Court finds this, it is likely to reach the same result as occurred in *Hathcock*.

Midkiff reviews the factual basis of the particular case setting in a fashion somewhat analogous to the case-by-case analysis scenario of *Penn Central v. New York*,[162] but there has been no test (such as the three-pronged balancing test for regulatory takings), yet provided for the determination of "public use." At some point, a bright line test may be made. However, for now, we have the difficult balancing act of allowing legislatures to make the determination of property that should be taken, and upheld by the Courts so long as there is some reasonable basis. The language of *Midkiff* frequently cited is:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.[163]

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162. 438 U.S. 104 (1978).

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The language is strikingly similar to a case-by-case factual basis analysis, with "outer limits" yet to be determined.

In *Kelo* we have the argument that the "public use" requirement is thought coterminous with the scope of a sovereign's police powers. Yet, we have the discussion in *Midkiff* that what has been traditionally viewed as a police power is "an attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts."[164] Arguably, we have the same fact-by-fact individual assessment for public use in condemnation and regulatory takings, which is somewhat akin to the notion of clear lack of definition for "takings" in the just compensation portion of the eminent domain clause.

Do we have effectively a case-by-case factually based determination of what is "public use" or do we have a situation in which the court gives basic and complete deference to the factual findings of the legislative body? It is arguable that whatever the legislature is capable of "speaking about" is a definition of the public interest. Yet, is there a social contract under the constitution which contemplates a limitation on what the legislature can do? Given the notion that the government cannot take property from A just to give it to B, we know there are limitations. The question is, how far do the limitations go? For many years there was a notion of the "incidental" benefits to the private interest when there is a basic contemplated desire to help the public interest as the reason for a taking.

In case after case we have had a judicial upholding of legislation to avoid injuries to the health, morals or safety of the community, which allows a line in flux rather than a bright line rule of what the limitations are for public use.

This may all change with the Supreme Court's review of *Kelo*.

The fact that the police power and eminent domain are coterminous leaves one with two quandaries. First, if the police power is undefined, so is the power of eminent domain, thereby expanding the notion of public use. Second, one is left with the question of when is an action a Police Power action which does not require just compensation under the public use? Is it only when there is a total loss of value? This undefined process is the point of conflict which has yet to be dealt with.

What we have is a competitive imbalance. One could argue that to take what might be called a "statist" position, that government should intervene in economics. Clearly, the *Midkiff* court recognized when the economics to be intervened with are economic inefficiencies, which are oligopolies, nee monopolies, the intervention is simple. The question is one of when there is a poor economy, should the government intervene in order to make the

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164.

properties provide for a higher and better use in economic terms for the community? The economic hopes, whether for general benefit and jobs or increased tax dollars, likely are an irrelevancy. But rather, there is a notion is that the government intervention is the relevant factor. Balanced against this is the conflicting attitude of "free enterprise" solutions being available. However, "free enterprise" contemplates an open and competitive market and reasonable buyers and sellers with full knowledge of the marketplace. Are there circumstances where the "knowledge" is so well known that the market is inherently inefficient because of the effective single person or multi person monopoly control?

What we have are comparative inefficiencies. In all likelihood, the Court, when it finally provides a bright line test, will ascertain that the comparative inefficiencies are to be determined on a case-by-case basis. What is required is a specific court-defined explanation of the basis for review.