Strikes That, Reverse It: County of Wayne v. Hathcock: Michigan Redefines Implementing Economic Development through Eminent Domain

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STRIKE THAT, REVERSE IT:* COUNTY OF WAYNE v. HATHCOCK: MICHIGAN REDEFINES IMPLEMENTING ECONOMIC DEVELOPMENT THROUGH EMINENT DOMAIN

I. INTRODUCTION

Across the country, from Charleston, West Virginia to Las Vegas, Nevada, communities are facing the aggressive employment of eminent domain.1 Eminent domain refers to the power of government to seize property from landowners.2 The government’s power is constrained only by constitutional requirements of public use and just compensation.3


2. See Ely, supra note 1, at 31 ("It [eminent domain] requires that individual owners relinquish their property without their consent."). For further discussion on eminent domain, see infra notes 27–45 and accompanying text.

3. See U.S. CONST. amend. V, cl. 4 (providing federal limits on eminent domain authority). For a further discussion of federal limitations on eminent domain authority, see infra notes 46–68 and accompanying text. State constitutions also incorporate public use and just compensation limitations on eminent domain authority. See, e.g., CONN. CONST. art. 1, § 11 ("The property of no person shall be taken for public use, without just compensation therefor."); NEV. CONST. art. I, § 8,

(341)
Generally, just compensation can be ascertained; therefore, the extent of government eminent domain authority turns on satisfaction of the public use requirement.\textsuperscript{4} Despite the preeminent role of public use in eminent domain, the precise confines of the requirement have proved elusive, leaving the term "public use" without a distinct definition.\textsuperscript{5}

A prominent issue facing state and local governments across the country is the validity of eminent domain as a tool for economic development.\textsuperscript{6} The use of eminent domain as a means of spurring economic development has been justified by various state constitutions: cl. 6 ("Private property shall not be taken for public use without just compensation having been first made . . . ."); N.J. Const. art. I, § 20 ("Private property shall not be taken for public use without just compensation."); N.Y. Const. art. I, § 7(a) (same); Pa. Const. art. I, § 10 ("[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."); W. Va. Const. art. III, § 9 ("Private property shall not be taken or damaged for public use, without just compensation . . . ."). For a complete list of state eminent domain statutes, see 2A NICHOLS ON EMINENT DOMAIN § 7.01[1], n.3 (Julius L. Sackman ed., 3d ed. 2004) [hereinafter NICHOLS].

\textsuperscript{4} See Russell A. Brine, Note, Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry, 71 CORNELL L. REV. 428, 441–42 (1986) (viewing just compensation as primary restraint on government because government will only utilize eminent domain to extent it is willing and able to pay for it). The author argues that the just compensation limitation threatens to become ineffective when condemned property is intended for a private party and that party provides the funding rather than the government. See id. (asserting that arrangement in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), where land was transferred to private persons who provided funding, undermined limitation on government's ability to pay for land); see also Southwestern Ill. Dev. Auth. v. Nat'l City Env., L.L.C., 768 N.E.2d 1, 4 (Ill. 2002) (noting that transferee automobile racetrack agreed to pay all of development authority's expenses incurred for acquisition of property), cert. denied, 537 U.S. 880 (2002). The author foresees a particular threat in transfers where a resource rich corporation is the transferee. See Brine, supra, at 442 (emphasizing corporations' easy access to capital, which could facilitate and increase takings). This note focuses exclusively on the public use requirement.

\textsuperscript{5} See 1 NICHOLS, supra note 3, § 1.11 (discussing multiple definitions of public use). One commentator advocates a more extensive definition of public use as a means of providing better guidance for the courts. See Camarin Madigan, Article, Taking for Any Purpose?, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 179, 196 (2003) (arguing that United States Supreme Court should develop test to determine what fulfills public use). Another commentator suggests that public use cannot and should not be defined. See 2A NICHOLS, supra note 3, § 7.08 (arguing that attempts to limit eminent domain by defining public use narrowly are ineffective).

\textsuperscript{6} See Ferris, supra note 1 (reporting that eminent domain proponents argue condemnation of land by private entity will reinvigorate city center); Pristin, supra note 1 ("[N]ew London city authorities said the condemnations were justified because the city, one of Connecticut's poorest, had endured three decades of economic decline . . . and had few options for increasing its tax base to help pay for schools and services."); Smith, supra note 1 ("Mayor James Quinn said Wednesday that the city [authorized use of eminent domain] . . . to assist Goodman Properties LLC, which wants to build the 500,000-square-foot shopping center . . . . This is a $40 million project that is very beneficial for the city tax ratables."); Twyman, supra note 1 (writing that Philadelphia's Neighborhood Transformation Initiative was designed to "strengthen[ ] the city's tax base by luring new residents" and that Camden, New Jersey's eminent domain plans involved "a 10-year, $1.2 billion rede-

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velopment generally refers to situations where property is taken by governmental authority and then transferred to a private party under the premise that subsequent development will benefit the public in ways such as increasing tax revenue and generating employment. Courts have taken different positions on whether eminent domain may be used for economic development. The question arising in these cases is whether the forced transfer of property from one private party to another private party to facilitate economic development constitutes a public use.

In its recent decision in *County of Wayne v. Hathcock*, in which the County of Wayne sought to use eminent domain to build a business park, the Michigan Supreme Court overturned its landmark decision in *Poletown Neighborhood Council v. City of Detroit*, which had approved the use of an economic development plan that would relocate as many as 1,200 families to make way for new homes, retail stores, a marina and a golf course.

7. See Ely, supra note 1, at 31 ("Such actions increasingly involve the taking of one person’s property for the benefit of private developers that will presumably use the land in a manner consonant with a scheme for economically desirable activity."). For examples of economic development cases, see infra note 8 and accompanying text.

8. See, e.g., 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1129–31 (C.D. Cal. 2001) (preventing use of eminent domain where city and development agency attempted to condemn land of 99 Cents Only Store to allow for expansion of wholesale retailer Costco in order to prevent Costco from relocating to another city), dismissed and remanded, 60 Fed. Appx. 123 (9th Cir. 2003); *Kelo v. City of New London*, 843 A.2d 500, 508, 520 (Conn. 2004) (finding that economic development satisfies public purpose requirement for both Connecticut and federal constitutions and consequently upholds condemnation of New London neighborhood for creation of hotel and office space), cert. granted, 125 S. Ct. 27 (2004); *Southwestern Ill. Dev. Auth.*, 768 N.E.2d at 9 (preventing development agency from taking land from owner who intended to use it as landfill in order to give it to automobile racetrack to build parking garage, but acknowledging that as a general proposition court has found economic development to be "an important public purpose"); *Ga. Dept. of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (denying county’s right to use eminent domain to condemn property for development of marine terminal because not sufficiently public).

Supporters of economic development defend the practice of utilizing the power of eminent domain. See Brief of Amicus Curiae of National Congress for Community Economic Development at 1, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070–78) (asserting that "the power of economic domain is an essential tool, albeit a tool of last resort, for achieving communities' social and economic goals"), available at http://www.law.georgetown.edu/gelpi/takings/courts/briefs.htm. National Congress for Community Economic Development ("NCCED"), an advocacy group for the community development industry, argues that eminent domain power is necessary where the land is crucial to development and resistance of property owners or attempts by property owners to extort greater compensation could undermine projects. See id. at 5 (describing market concerns).

9. See, e.g., *Kelo*, 843 A.2d at 531 (Conn. 2004), (determining that economic development may satisfy public use requirement). For a discussion of *Kelo*, see infra notes 69–73 and accompanying text.


The Poletown decision paved the way for the use of eminent domain as a means of fostering economic development. Although the Hathcock decision overruled Poletown, the court did not prohibit the use of eminent domain for economic development. Rather, the court set out three circumstances under which the taking of property and its transfer to a private party may be characterized as a public use. The court did not craft a finite definition of public use, rather it relied on Michigan precedent to delineate broad principles for determining what constitutes a public use when there is a private beneficiary. In addition, the court rejected the deference to legislative determinations of public use adopted by Poletown.

The court's refined interpretation curbs eminent domain power in Michigan. The Hathcock decision is part of a renewed trend of limiting government eminent domain authority. The court's consideration of when a taking subsequently transferred to a private party is a public use may prove instructive for other jurisdictions. At a minimum, the court's decision to overrule Poletown may give pause to jurisdictions currently seeking to employ eminent domain to facilitate economic development.

12. See Hathcock, 684 N.W.2d at 787 (overruling Poletown).
13. For a discussion of the impact of Poletown, see infra notes 74, 76 and accompanying text.
14. For a discussion of how economic development can be accomplished within the Hathcock reasoning, see infra notes 146–57 and accompanying text.
15. For public use determinations made by the Hathcock court, see infra text accompanying notes 127–28.
16. See Hathcock, 684 N.W.2d at 780–83 (discussing what constitutes public use). The court adopted Justice Ryan's dissenting analysis in Poletown, which set forth the circumstances in which a taking had historically been considered a public use. See id. at 781 (approving of Justice Ryan's reasoning).
17. For a discussion of the level of deference applied by the Hathcock court, see infra notes 193–98 and accompanying text.
18. For a discussion of Michigan's newly articulated limitations on eminent domain, see infra notes 146–98 and accompanying text.
19. See Kelo v. City of New London, 843 A.2d 500, 581 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part) (noting that "there is a gathering storm of public debate as to whether the use of eminent domain to acquire property for private economic development in non-blighted areas is justified"), cert. granted, 125 S. Ct. 27 (2004); Berliner, supra note 1, at 3 ("For many years, courts simply rubber-stamped any use of eminent domain. In recent years, however, courts have ruled against the government in a sizable minority of the cases where the owners do challenge the condemnation.").
20. For a discussion of the reasoning of Hathcock, see infra notes 146–98 and accompanying text.
21. See, e.g., Tim Keller, Editorial, Michigan Ruling 3rd Strike for Giants' Coronado Site, ARIZ. REPUBLIC, Aug. 31, 2004, at 6 (asserting that Arizona courts appear ready to follow reasoning in Hathcock, which likely means that Scottsdale will be unable to take private property to build training facility for San Francisco Giants). According to the Institute for Justice, forty-one states have filed or threatened takings for private parties and the most often cited public purpose is expected employment and tax benefits. See Berliner, supra note 1, at 2, 7 (arguing...
This Note considers the viability of economic development as a public use in light of the Hathcock decision. Part II examines eminent domain generally and then considers federal constitutional limits on public use. Part III summarizes the facts of the Hathcock case. Part IV critically reviews the Hathcock court's analysis of the public use limitation and suggests that economic development is still an acceptable public use under certain circumstances. Finally, Part V considers the influence Hathcock may have on other jurisdictions' determinations of whether economic development constitutes a public use.

II. BACKGROUND

A. Historical Background

Eminent domain represents the power of the government to take property for public use without the consent of the owner. The power of eminent domain is inherent in the sovereign, limited only by federal and state constitutions. Eminent domain necessarily implicates a conflict between government power and property rights. See County of Wayne v. Hathcock, 684 N.W.2d 765, 769 (Mich. 2004) (contrasting right of property owners to be secure in their property and right of government to take land for public use). One author characterizes property ownership as a fundamental right "essential to the preservation of liberty." Thomas J. Coyne, Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?, 60 NOTRE DAME L. REV. 388, 396 (1985); see also Ely, supra note 1, at 32 ("The framers of the Constitution and Bill of Rights believed that security of property rights was necessary for the enjoyment of individual liberty . . . therefore . . . they sought to restrict the exercise of eminent domain . . . ").
state constitutionally imposed requirements of public use and just compensation. 28 By negative implication, the public use requirement prohibits a transfer of property for purely private use. 29

The sovereign's power to take property for public welfare has been traced to the time of the Romans. 30 In the United States, colonies exercised the power of eminent domain. 31 As America developed, governments took property for uses such as mills, private roads and iron works. 32 The states even used their eminent domain authority to acquire land on behalf of the federal government, until the federal government began exercising the authority on its own behalf in 1875. 33 The evolution of state and federal eminent domain authority has been defined by the interpretation of the public use limitation. 34

The public use limitation has been interpreted in two ways, as a public use and as a public benefit. 35 The public use interpretation, which is con-

28. See Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599, 602–03 (1949) ("[T]he power of eminent domain is an inherent attribute of sovereignty and exists without constitutional recognition; therefore, constitutional provisions relating to eminent domain must be construed as limitations upon, rather than grants of, power.").

While eminent domain power rests with the sovereign, this power may be delegated to other agencies or private individuals rather than being directly exercised by the state. See H. P. Kucera, Eminent Domain Versus Police Power—A Common Misconception, in INSTITUTE ON EMINENT DOMAIN 21 (Robert A. Wilson ed., 1959) (describing eminent domain as "an inherent power of the sovereignty. . . . the sovereign may grant it to whomever it may think proper . . . and deny it to all others"); see also Hathcock, 684 N.W.2d at 774–76 (approving delegation of eminent domain authority from state to county); Kelo v. City of New London, 843 A.2d 500, 552 (Conn. 2004), cert. granted, 125 S. Ct. 27 (2004).

29. See Lewis, supra note 27, § 157 (stating that courts agree that takings may not be for private purpose); 2A Nichols, supra note 3, § 7.01[5] ("Today, it is well settled in every state that the prohibition against the taking of property for the public use without just compensation implicitly, but nonetheless definitely, forbids a taking of property for purely private uses."); Ely, supra note 1, at 32 (discussing evolution of prohibition on transfers for private use from concept of natural law to foundation in Due Process Clause).

30. See 1 Nichols, supra note 3, § 1.12[1] (noting that concept of sovereign's authority to take property for public use dates back to Roman times). The introduction of the term eminent domain is attributed to a 1625 work by Hugo Grotius entitled De jure Belli et Pacis. See id. (relating history of eminent domain).

31. See Ely, supra note 1, at 32 (discussing use of eminent domain in colonies).

32. See 2A Nichols, supra note 3, § 7.01[3] (providing history of eminent domain); Ely, supra note 1, at 32 (discussing initial uses of eminent domain in American colonies).

33. See Comment, supra note 28, at 599 n.3 (noting that first federal eminent domain case occurred in 1875 and discussing origins of federal eminent domain jurisprudence).

34. For a discussion of the public use requirement, see infra notes 35–42 and accompanying text.

35. See Lewis, supra note 27, § 165 (expounding distinction between public use and public benefit); 2A Nichols, supra note 3, § 7.02[2-3] (explaining public use meaning versus public benefit meaning); Brine, supra note 4, at 429–31 (describing difference between public use and public benefit approach).
sidered the narrow reading, restricts takings to situations in which the public will have access to the condemned property and be able to use it.\(^{36}\) This narrow understanding encompasses condemnations for public facilities such as highways, railroads and post offices.\(^{37}\) In contrast, public benefit represents a more expansive interpretation that refers to situations when the public receives an advantage or benefit from the condemnation.\(^{38}\) The public benefit interpretation encompasses economic and social benefits that the public receives from the condemnation.\(^{39}\) Unlike the narrow interpretation, the public does not actually have to access or use the property after the taking; rather, the people benefit from redistribution of the property.\(^{40}\) For example, many states justified the use of eminent domain to take the land surrounding mills because it contributed to the economy.\(^{41}\) The takings permitted the mills to flood neighboring property, facilitating the function of the mills and promoting commerce, which benefited the community.\(^{42}\)

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\(^{36}\) See Lewis, supra note 27, § 164 (discussing restrictive meaning of public use); 2A Nichols, supra note 3, § 7.02[2] (explaining narrow definition of public use); Comment, supra note 28, at 603–08 (discussing narrow public use test and its drawbacks).

\(^{37}\) See Ely, supra note 1, at 33 (discussing condemnation for railroads).

\(^{38}\) See Lewis, supra note 27, § 165 (discussing more permissive meaning of public use); 2A Nichols, supra note 3, § 7.02[3] (explaining broad definition of public use).

\(^{39}\) For an example of economic and social benefits, see infra note 42 and accompanying text.

\(^{40}\) See 2A Nichols, supra note 3, § 7.02[3] (noting broad meaning of public use includes enhancing resources, industry or productivity); see also Lewis, supra note 27, § 165 (discussing more permissive meaning of public use). The author advocates for a narrow application of public use. See id. § 165 (explaining disadvantages of public benefit interpretation). The author criticizes the broad approach. See id. ("[Public benefit] places the whole matter ultimately in the hands of the judiciary . . . under a particular statute [public use] may be readily determined from an inspection of the statute, but whether a particular improvement will be of public utility is a question of opinion . . . .").


\(^{42}\) See Kelo v. City of New London, 843 A.2d 500, 522 (Conn. 2004) (discussing Olmstead v. Camp, 33 Conn. 532 (1866), in which Connecticut Supreme Court allowed mill owner to flood neighbor’s land as public use), cert. granted, 125 S. Ct. 27 (2004). “It would be difficult to conceive a greater public benefit than garnering up the waste waters . . . to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the state.” See id. at 522 n.31 (quoting Olmstead, 33 Conn. at 550–51). The Connecticut court took the broad view of the public use limitation when it concluded that public access to the mill was not required in order to exercise eminent domain. See id. at 522 (noting broad application of public use). For further discussion of states exercising eminent domain for local mills, see Ely, supra note 1, at 33 (discussing state action relating to mills).
Courts play a distinct role in defining the public use requirement of eminent domain. Generally, courts defer to legislative determinations of public use because the legislature is considered more capable of assessing whether the proposed use constitutes a public use sufficient to justify a condemnation. Ultimately, whether a legislature’s pronouncement of public use satisfies the constitutional requirement resides with the courts.

B. Federal Constitutional Interpretation of the Public Use Limitation

Judicial interpretations of the Fifth Amendment of the United States Constitution define the parameters within which states may exercise eminent domain power. As federal eminent domain jurisprudence developed, the United States Supreme Court moved from the narrow public use interpretation to the broad public benefit interpretation of the public use limitation. Eventually, the Court explicitly adopted the broad public benefit meaning in reference to the states’ eminent domain power. In its most recent decisions, the Court broadened the public benefit interpretation even further by equating states’ eminent domain power with their police power, effectively removing federal limitations on states’ eminent domain authority. Under this expansive approach, the Court has approved the transfer of property to private parties as consistent with public use.

43. For a discussion of the judiciary’s role in condemnation cases, see infra notes 57, 63 and accompanying text.

44. For a discussion of judicial deference, see infra note 57 and accompanying text.

45. See 2A Nichols, supra note 3, § 7.03[11] (“If, after giving due respect to a legislative declaration, a court considers the purpose not to be reasonable or connected to a valid public use, it is the duty of the court to declare the act authorizing the taking as unconstitutional.”).

46. See U.S. Const. amend. V, cl. 4 (“[N]or shall private property be taken for public use, without just compensation.”). The Takings Clause of the Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. See Coyne, supra note 27, at 388 n.1 (citing Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 227 (1897)) (“Since 1897, the public use and compensation requirements of the fifth amendment have applied to the states through the fourteenth amendment.”).

47. See Comment, supra note 28, at 610 (noting that early federal exercises of eminent domain, such as taking land for parks, satisfied narrow public use test, but that later takings found support in public benefit definition).

48. See id. at 609 (“In 1916 the Supreme Court expressly repudiated the ‘use by the public’ test as applied to state takings and thereafter consistently refused to recognize it.”).

49. For an analogy of eminent domain to police power, see infra notes 55, 57, 65 and accompanying text.

50. For a discussion of the most recent United States Supreme Court decisions regarding public use limitations, see infra notes 51–68 and accompanying text.
In a 1954 case, *Berman v. Parker*, the Court upheld the transfer of property to a private party when the District of Columbia condemned the property in an effort to remove blight. The District of Columbia planned to transfer some of the condemned property to private entities, which would assist with redevelopment efforts. The owners of an unblemished store within the blighted area argued that the taking was invalid because the property was being taken for private use. The Court found that Congress's determination that the condemnations served a public purpose satisfied the public use requirement. Moreover, the Court deferred to Congress's assessment that private parties were essential to achieving the goal of eliminating blight and redeveloping the neighborhood. Although the final determination of public use remains with the judiciary, the Court analogized the power of eminent domain to the police power and declared that its power of review was severely limited.

52. See id. at 35–36 (finding public use requirement satisfied by public benefit of blight removal and neighborhood revitalization).
53. See id. at 33 (explaining purpose of redevelopment efforts and means established to accomplish elimination of blight). Congress, acting in its capacity as city government for the District of Columbia, authorized the redevelopment of the district through the District of Columbia Redevelopment Act of 1945 ("Redevelopment Act"). See id. at 28 (identifying statutory authority for condemnations). The Redevelopment Act sought to eliminate the blight that threatened the public health, safety and welfare of the city's inhabitants. See id. at 29 (noting goals of Redevelopment Act). Congress declared that eliminating blight in the city and redeveloping the area was a public use and that the task of redevelopment could not be accomplished without private entities. See id. (describing steps necessary to accomplish goals of Redevelopment Act). Congress authorized the establishment of the District of Columbia Redevelopment Land Agency ("Agency") and delegated the power of eminent domain to it. See id. (discussing establishment of Agency for purpose of eliminating blight). After the approval of a comprehensive plan, the Agency had the authority to begin acquiring land. See id. at 30 (explaining procedure set forth in statute for development). Once land was acquired, the Agency was to transfer the land intended for direct public use to public agencies and sell or lease the rest of the land to private entities. See id. (noting statutory preference for implementing redevelopment through private entities over public agencies).
54. See id. at 31 (presenting owners' argument that taking their property violated their rights because their land was used for business, was not blighted housing and would be transferred to private entity for private use).
55. See id. at 32 (discussing legislative role in assessing public use). The Court asserted that Congress lawfully exercised police power over the District of Columbia and could use the interests of public health, safety and welfare to justify the decision to improve the city environs through exercise of its eminent domain power. See id. at 33 (acknowledging congressional authority to set agenda for city and holding that Fifth Amendment does not impede those efforts).
56. See id. (defending transfer to private entity). "[T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise . . . or so the Congress might conclude." Id. (citations omitted).
57. See id. (discussing eminent domain as means for achieving redevelopment). For the Court, eminent domain was simply a means by which Congress
The Court expanded the meaning of public use even further in *Hawaii Housing Authority v. Midkiff*. In *Midkiff*, the Court reviewed the Hawaii Land Reform Act of 1967, which permitted Hawaiian officials to redistribute land in order to fragment a local land oligopoly. The state viewed the oligopoly as an impediment to the free market economy of the state. The state proposed a solution—taking the property of the majority lessors and transferring ownership to the lessees. The Supreme Court upheld the condemnations as a valid public use.

The Court reiterated a strong deference to legislative findings of public purpose, affirmed limited court review and announced that the government's use of eminent domain only had to be "rationally related to a conceivable public purpose." Under this standard, the determination of may implement redevelopment, which it is empowered to promote pursuant to its police power over the District of Columbia. See id. at 32 (discussing congressional police power authority). One commentator has criticized the Court's allusion to police power in reference to the scope of eminent domain as unhelpful. See Ely, supra note 1, at 34 ("This observation seemingly confused the extent of regulatory authority with the eminent domain power and has bedeviled analysis of the public use limitation ever since.").

The *Berman* decision is noted for the deference accorded to legislative determinations of public use. See Coyne, supra note 27, at 391 (describing limited review established by *Berman* as most deferential of Court's decisions, withstanding times of war). The *Berman* court asserted that the congressional determination of public use should be accorded significant deference. See *Berman*, 348 U.S. at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."). The Court further stated: "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." Id.


59. See id. at 232–34 (discussing facts underlying Hawaii's attempt to redistribute land). In Hawaii at that time, the majority of land was owned by a small percentage of landowners who leased it to the remaining population. See id. at 232 (noting that according to Hawaii legislature 49% of land was government owned and 47% was controlled by seventy-two private owners).

60. See id. at 232 (associating disproportionate property ownership with irregular real estate market, high land prices and injury to public welfare).

61. See id. at 233–34 (outlining procedures by which Hawaii arranged for transfer of land from majority landowners to minority tenants).

62. See id. at 245 (upholding condemnations as rational effort by legislature to combat severely disproportionate land ownership, not attempt to target specific landowners). The Court found that the state's attempt to redistribute property was a valid exercise of police power. See id. at 241–42 ("Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.").

63. See id. at 241 ("[T]he 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.'" (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896))). The Court maintained that courts have the ability to review legislative assertions of public use; however, the Court sought to prevent courts from overstepping their authority and making determinations that rightly belong to the legislature. See id. at 240–41 (clarifying role of courts vis-à-vis legislative decision making). The Court also specifically noted that deference to legislative decisions encompasses decisions made by state legislatures. See id. at 244 (explaining that deference stems from American system of
public use did not depend on whether the intended public benefit materialized—in this case altering the Hawaiian housing market—rather, the analysis focused only on whether the goal itself was reasonable. The breadth of the *Midkiff*/*Berman* standard is underscored by the Court's expansion of the *Berman* police power reference—the *Midkiff* court declared that eminent domain authority is "coterminous with the scope of a sovereign's police powers." Moreover, the Court held that the benefit of the condemnation did not have to be universally available; a public benefit may satisfy the public use requirement even if only some members of the community benefit. Finally, the Court explained that a transfer to a pri-

government that puts legislatures in better position to determine public needs and whether eminent domain properly fulfills those needs. One commentator considered the impact of such deference and asserted that, while such deferential treatment did not guarantee that the condemnation would be upheld, the deference provided a "strong presumption of constitutionality." See Coyne, supra note 27, at 393 (discussing consequences of deferential standard of review).

64. See *Midkiff*, 467 U.S. at 242 (stating that whether public purpose is fulfilled is not concern that courts address). A court's role is to consider whether the legislature rationally thought that the condemnations would accomplish the goals. See *id.* (addressing role of courts in validating eminent domain power).

65. See *id.* at 240 (equating eminent domain with scope of police power). The Court used the police power to explain the breadth of the term public use, but police power remains a distinct concept from eminent domain. See Kucera, supra note 28, at 6-7 (distinguishing between police power and eminent domain). One commentator addressed the distinction between eminent domain and police power:

It may be said that the state takes property under the eminent domain power because it is useful to the public, and under the police power because it is harmful or because the property itself is the cause of the public detriment. The real difference is that the police power when exercised within its legitimate limits requires no compensation whereas eminent domain recognizes a right to compensation. They have one element in common, and that is force—under police power a person is ordered not to do or to do; under eminent domain he is obliged by law to sell.

*Id.* Equating the reach of eminent domain with police power represents a shift from previous views of public purpose. See Lewis, supra note 27, § 163 (representing view that public use requirement is limitation that prevents eminent domain from encompassing full police power). Another commentator discussed the effect of the public use requirement on the scope of eminent domain power:

As the [eminent domain] power is by its nature limited to such purposes as promote the general welfare, it is evident that the words public use, if they are to be construed as a limitation, cannot be equivalent to the general welfare or public good. They must receive a more restricted definition.

*Id.* (describing public use limitation as having less breadth than promoting general welfare, which is police power).

66. See *Midkiff*, 467 U.S. at 244 ("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." (quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923))). The Court utilized the broad interpretation of public use, not the narrow one. See *id.* (rejecting narrow reading of public use); see also Lewis, supra note 27, § 161 (addressing required interaction of public and condemned property in order to qualify as public use).
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private party did not, by itself, invalidate a taking. The Midkiff decision represents a firm step toward the states' increasingly unrestrained eminent domain power.

In 2004, the Court granted certiorari to Kelo v. City of New London, a case in which the City of New London sought to condemn land for a new business and residential development. Kelo presents the Court with an opportunity to address whether economic development satisfies the fed-

67. See Midkiff, 467 U.S. at 243-44 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.").

68. See Brine, supra note 4, at 441 ("[The Midkiff] rational basis test yields wide latitude to the government in the use of eminent domain. Consequently, a considerable expansion of state taking power could result if state courts choose to follow the Midkiff approach."). The Midkiff ruling arguably expanded the reach of the Berman decision. See id. at 428 (noting that Berman is last case before Midkiff to address public use requirement of eminent domain); see also Mark C. Landry, The Public Use Requirement in Eminent Domain—a Requiem, 60 TUL. L. REV. 419, 430 (1986) (arguing that condemnee would be unlikely to succeed in proving that there is no rationally related public purpose for taking as required under Midkiff). The Court may be reconsidering the scope of the public use requirement that it set forth in Midkiff. For a discussion of Supreme Court developments in that area, see infra notes 69-73 and accompanying text.

69. 125 S. Ct. 27 (2004).

70. See Kelo v. City of New London, 843 A.2d 500, 509-11 (Conn. 2004) (providing facts of New London's condemnation actions against property in Fort Trumbull neighborhood), cert. granted, 125 S. Ct. 27 (2004). The city intended to capitalize on the recent arrival of a Pfizer global research facility by building office space, a hotel, a conference center and new residences near the Pfizer complex. See id. at 508-09 (explaining that city drafted various development plans regarding site). The stated goal of the development included providing the city with tax and revenue and creating jobs. See id. at 509 (conveying information from city's development plan). Several homeowners resisted, sought an injunction and then appealed the trial court's denial of the injunction claiming, inter alia, that the trial court erred in finding that the condemnations fulfilled state and federal public use requirements. See id. at 508 (presenting background of case).

The Connecticut Supreme Court analyzed its historically broad interpretation of public use under the state constitution, which included cases where blight and instrumentalities of commerce constituted public use, and reviewed the broad approach taken by the United States Supreme Court on the same issue. See id. at 522-35 (reviewing Connecticut and federal approaches to public use). The court concluded:

[E]conomic development plans that the appropriate legislative authority rationally has determined will promote significant municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution.

Id. at 531. The Kelo court cited similar rulings in other states and discussed Poletown in detail. See id. at 528 n.39 (discussing cases).

In response to concerns that allowing economic development to satisfy public use creates a great potential for abuse, the Kelo court asserted that judicial review prevents excessive abuse. See id. at 535-36 (addressing concerns about abuse of eminent domain power by emphasizing courts' ability to check such abuse). But see Berliner, supra note 1, at 5 (emphasizing difficulties condemnees face to bring or sustain actions to fight condemnations).

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eral Constitution’s public use requirement. Specifically, the Court may (i) approve the broad public use interpretation applied by the Connecticut Supreme Court in *Kelo*, (ii) follow a more restrictive approach like that set forth in *Hathcock* or (iii) devise a new scheme for assessing economic development as a public use. While the Michigan Supreme Court decided *Hathcock* under Michigan law, the Supreme Court’s interpretation of the federal public use requirement in *Kelo* may affect that ruling.

C. Poletown and Its Implications

In 1981, *Poletown* demonstrated how aggressively a state could implement eminent domain under the broad public benefit approach to the public use limitation. In *Poletown*, the Michigan Supreme Court held that the transfer of property to a private party for economic development satisfied the public use requirement of the Michigan Constitution. The ruling changed the national landscape of eminent domain practice and served as the basis for similar rulings across the country.

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71. See Eminent Domain: *Kelo* v. New London, Conn., 73 U.S.L.W. 3102 (Aug. 10, 2004) (providing question presented in *Kelo* petition for certiorari, which was granted). On behalf of the homeowners in *Kelo*, the Institute for Justice petitioned the United States Supreme Court for certiorari with the following question: “What protection does Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve local economy?” See id. (reporting question presented).

72. See Iver Peterson, *As Land Goes to Revitalization, There Go the Old Neighbors*, N.Y. TIMES, Jan. 30, 2005, at 29 (“The courts, including the Supreme Court, have generally supported [the] argument that economic growth amounts to an overriding public benefit. But now [some] property rights campaigners and civil rights advocates are hoping that the Supreme Court’s decision to hear the New London case could signal a shift.”).

73. For a discussion of relationship between federal and state eminent domain jurisprudence, see supra note 46 and accompanying text.

74. See Susan Crabtree, *Public Use in Eminent Domain: Are There Limits After Oakland Raiders and Poletown?*, 20 CAL. W. L. REV. 82, 83 (1984) (“The *Poletown* decision is a sharp departure from economic and residential redevelopment cases wherein only slum clearance satisfied the public use element necessary for condemnation.”); Editorial, *Poletown and Property*, N.Y. SUN, Aug. 3, 2004, at 10 (“*Poletown* was the country’s first major decision that said a government could seize property and transfer it to private businesses.”); Editorial, *Supreme Court Restores Sanctity of Property Rights*, DETROIT NEWS, Aug. 4, 2002, at 10A (“*Poletown* opened the door for land to be taken from one private owner and given to another private party.”); see also Coyne, supra note 27, at 397 (describing *Poletown* as “the most egregious use, or abuse, of the taking power in recent history”).


76. See, e.g., *Kelo* v. City of New London, 843 A.2d 500, 528 n.39 (Conn. 2004) (“We conclude that *Poletown* warrants further discussion because it illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit.”), cert. granted, 125 S. Ct. 27 (2004); Jennifer Maude Klemetsrud, Note, *The
In 1980, General Motors ("GM") informed the City of Detroit it intended to close two Detroit plants. GM indicated that it would build another plant if a site could be found that satisfied its criteria. The only area satisfying the company's criteria encompassed the Poletown neighborhood. Some members of the community resisted the city's efforts to take their property, suing the city in a case that ultimately reached the state supreme court. The appeal to the Michigan Supreme Court concerned whether the use of eminent domain was unlawful because the city was taking private property for a private, and not a public, use.

The court defined the issue before it as "whether the proposed condemnation is for the primary benefit of the public or the private user." The court began its analysis by noting that the "terms [public use and public purpose] have been used interchangeably in Michigan statutes" to

Use of Eminent Domain for Economic Development, 75 N.D. L. Rev. 783, 808 (1999) (discussing influence of Poletown in elucidating meaning of public use in City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365 (N.D. 1996)); Tresa Baldas, Landmark Eminent Domain Case Overturned; Widespread Effects Seen in Ruling Limiting Powers of Cities to Seize Land, NAT'L L.J., Aug. 9, 2004, at 4 ("[Poletown] has been cited favorably in 10 courts nationwide, and long [been] used by municipalities to justify employing eminent domain for revitalization."); Poletown and Property, supra note 74 ("State courts around the country cited the precedent [Poletown] to support the use of eminent domain for 'economic development' purposes.").

77. See Poletown, 304 N.W.2d at 460 (Fitzgerald, J., dissenting) (noting that GM intended to close Cadillac and Fisher Body plants in Detroit).

78. See id. (Fitzgerald, J., dissenting) (describing GM's requirements for suitable site to build new assembly complex).

79. See id. (Fitzgerald, J., dissenting) (explaining how GM and city chose area to condemn).

80. See id. at 461 (Fitzgerald, J., dissenting) (relating history of case). The trial court ruled in favor of the city in a trial on the merits. See id. (Fitzgerald, J., dissenting) (noting facts of case). As a result, Michigan could initiate condemnation actions under the "quick take" statute. See id. (Fitzgerald, J., dissenting) (same). The Michigan Supreme Court agreed to hear the case prior to its review in the state court of appeals. See id. (Fitzgerald, J., dissenting) (explaining procedures that brought case to supreme court). The court also issued an injunction pending the determination of the case. See id. (Fitzgerald, J., dissenting) (noting actions of court).

81. See id. (Fitzgerald, J., dissenting) (relating history of case). The case presented a second issue—whether the lower court had erred in ruling that the neighborhood did not fall under the protections of the Michigan Environmental Protection Act—that is not relevant to this Note. See id. (Fitzgerald, J., dissenting) (finding that environmental act did not refer to society and culture of people).

82. See id. at 458 (assessing substance of case). The landowners did not question that programs prescribed by the Michigan legislature to combat systemic unemployment served a public purpose. See id. (indicating that landowners agreed that program would benefit public). They questioned only whether procuring land for a private party with the goal of improving the economy served a public purpose. See id. (recounting that landowners disputed manner of implementing program). The court noted that the parties agreed on the law: "All agree that condemnation for a public use or purpose is permitted. All agree that condemnation for a private use or purpose is forbidden." Id. Thus, the court had to address whether the benefit to GM from the plant constituted an incidental or primary benefit. See id. (identifying decisive issue).
mean public benefit. The court adopted the position that it only exercises a limited review of the legislature's determination of public purpose. Nonetheless, the court held that a transfer that bestowed both public and private benefits required the court to "inspect[] with heightened scrutiny the claim that the public interest is the predominant interest being advanced." Specifically, the court noted that "[s]uch public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature."

The court found that the city had introduced enough evidence of economic distress to support its assessment that the taking would provide a public benefit significant enough to constitute a public use. At the time, Michigan faced unemployment levels of 14.2% in the state, 18% in Detroit and 30% for Detroit's black residents. According to the plans, GM intended to employ roughly 6,150 people at the plant and would provide property tax revenue of $15 million. The taking would displace 3,438 residents, destroy 1,176 structures and cost the city $200 million. The court characterized the benefits GM would receive—including the

83. See id. at 457 (explaining relation of public use and public purpose according to Michigan precedent). "The term 'public use' has not received a narrow or inelastic definition by this Court in prior cases." Id. For a discussion of the inconsistency in the Poletown court's assertion of a distinction between public use and public purpose, see infra note 137 and accompanying text.

84. See id. at 458-59 (discussing limited review because of presumption of validity). The legislature delegated its power to determine what constituted a public purpose to the municipality. See id. at 459 (explaining how municipality could exert power reserved for legislature). The court further limited its review because the economic development in question fell within the types of projects considered by the legislature to be for a public purpose and the required delegation procedures had been properly followed. See id. (declaring court's minimal power of review).

85. See id. at 459-60 (discussing need for heightened scrutiny when private interest is benefiting from eminent domain action).

86. Id. at 460 (noting court's position regarding public benefit requirement).

87. See id. at 459 (explaining that dire need of city allowed transfer to private party to be viewed as incidental benefit to private party). The court relied on a statement by Justice Cooley, noting that "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and . . . the law does not so much regard the means as the need." Id. (citing People ex rel. Detroit & Howell R.R. Co. v. Salem Township Bd., 20 Mich. 452, 480-81 (1870)) (emphasis added). Under the standard of "some public good," the court found the benefit to Detroit significant. See id. (explaining position of court in determining sufficient public use).

88. See id. at 465 (Ryan, J., dissenting) (citing statistics of Detroit's economic conditions at time of Poletown).

89. See id. at 467 (Ryan, J., dissenting) (citing environmental impact study's description of plan to retain GM jobs and its impact on tax rolls).

opportunity to purchase the site for only $8 million—as merely incidental.\textsuperscript{91} Ruling for the city, the court affirmed the city's right to employ eminent domain to condemn property and transfer it to a private party for anticipated economic benefits.\textsuperscript{92} These public benefits largely failed to materialize—for example, at the height of its operations, the plant employed fewer than 3,000 employees.\textsuperscript{93} Twenty-three years later, perhaps with the knowledge that the anticipated Poletown benefits did not come to fruition, the court reconsidered this revolutionary holding in \textsl{Hathcock}\.\textsuperscript{94}

### III. FACTS OF \textbf{COUNTY OF WAYNE v. HATHCOCK}

For more than a decade, the Detroit Metropolitan Wayne County Airport has been undergoing a $2,000,000,000 renovation.\textsuperscript{95} As the airport expanded, concern arose that noise from the resultant additional air traffic would disturb the surrounding landowners.\textsuperscript{96} In response to these concerns, the County of Wayne introduced a plan to buy property near the airport.\textsuperscript{97} The county received funding for its plan from the Federal Aviation Administration ("FAA").\textsuperscript{98} This arrangement stipulated that land purchased with FAA funds had to be put to "economically productive use."\textsuperscript{99} In an effort to satisfy the FAA requirement, the county developed a plan, called the Pinnacle Project, to construct a 1,300-acre business and technology park.\textsuperscript{100} The county anticipated that the project would promote the economy and increase employment.\textsuperscript{101} In order to build the

\begin{itemize}
  \item \textsuperscript{91} See \textsl{Poletown}, 304 N.W.2d at 459 (viewing benefit to GM through land redistribution as incidental when compared with city's economic benefits).
  \item \textsuperscript{92} See id. at 460 (holding legislative determination of public purpose included transfer of property to private entity).
  \item \textsuperscript{93} See Ilya Somin, \textsl{Poletown Decision Did Not Create Desired Benefits}, \textsl{Detroit News}, Aug. 8, 2004, at 13A (speculating that more jobs may have been lost than gained due to taking of businesses in Poletown). In addition, the majority of the land acquired in \textsl{Poletown} was actually used for landscaping. See Nader & Hirsch, \textit{supra} note 90, at 222 n.109 (stating that less than half of land taken in \textsl{Poletown} was actually utilized for plant and parking).
  \item \textsuperscript{94} For a discussion of the \textsl{Hathcock} court's reasoning, see \textit{infra} notes 111–45 and accompanying text.
  \item \textsuperscript{95} See County of Wayne v. Hathcock, 684 N.W.2d 765, 770 (Mich. 2004) (discussing airport renovations). The renovation included a new terminal and a new runway. See id. (relating facts of airport renovation); see also \textsc{MetroAirport.com}, \textit{Gaining Altitude}, at http://www.metroairport.com/ (describing implementation of capital improvement plan to improve Detroit's airport) (last visited Nov. 21, 2004).
  \item \textsuperscript{96} See \textsl{Hathcock}, 684 N.W.2d at 770 (discussing concerns about airport noise).
  \item \textsuperscript{97} See id. (describing program to buy surrounding land).
  \item \textsuperscript{98} See id. (noting that Wayne County received $21 million grant from FAA for noise abatement program).
  \item \textsuperscript{99} See id. (discussing Wayne County's agreement with FAA).
  \item \textsuperscript{100} See id. (identifying FAA agreement as impetus for Pinnacle Project and crediting Jobs and Economic Development Department with idea of business park). The business park would include a conference center, hotel and recreational facility. See id. (providing details about intended park).
  \item \textsuperscript{101} See id. at 770–71 (noting county's assertion that project will "create thousands of jobs, and tens of millions of dollars in tax revenue, while broadening
park, the county began to purchase land through voluntary sales.\textsuperscript{102} Approximately 300 acres short of its goal for the park, the county turned to eminent domain proceedings to acquire the final forty-six properties needed.\textsuperscript{103} Of those forty-six properties, twenty-seven owners agreed to sell based on new offers by the county.\textsuperscript{104} The county initiated condemnation actions against the landowners of the final nineteen properties.\textsuperscript{105}

Faced with condemnation, the landowners sought review of the action in the county circuit court.\textsuperscript{106} Relying on \textit{Poletown}, the trial court determined that the Pinnacle Project fulfilled the public use requirement of eminent domain.\textsuperscript{107} Although the court of appeals affirmed the trial court's ruling,\textsuperscript{108} the concurring opinion urged that \textit{Poletown} be over-

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\textsuperscript{102} See id. (describing county's attempts to acquire property). The county had initially purchased 500 acres of noncontiguous land through the noise abatement program. See id. (providing facts of case). The Pinnacle Project was designed to create a 1,300-acre park that would include the 500 acres purchased with the FAA funds. See id. (noting county's expectations for park). Through the second round of voluntary sales, the county acquired an additional 500 acres of land, bringing the total land held by the county to over 1,000 acres. See id. (detailing county's efforts before resorting to eminent domain).

\textsuperscript{103} See id. ("The county apparently determined that further efforts to negotiate additional voluntary sales would be futile and decided instead to invoke the power of eminent domain."). The Wayne County Commission authorized the use of eminent domain through a Resolution of Necessity and Declaration of Taking. See id. (reciting procedures followed for eminent domain action).

\textsuperscript{104} See id. (noting that remaining parcels were appraised and, using appraisals, county had made written offers to remaining landowners); see also Uniform Condemnation Procedures Act, Mich. Comp. Laws § 213.51-.77 (2004) (establishing requirements for condemnations).

\textsuperscript{105} See id. (stating that Wayne County brought proceedings under Uniform Condemnation Procedure Act ("UCPA") in April 2001).

\textsuperscript{106} See id. (identifying argument by landowners that taking was not necessary). The landowners offered three arguments: (1) the County did not have the statutory authority to use eminent domain in this instance; (2) condemnation of these properties did not satisfy the necessary requirement in the statute; and (3) the condemnation was unconstitutional because the taking was not for a public purpose. See id. (listing landowners' arguments).

\textsuperscript{107} See id. (presenting trial court's holding that "the takings were authorized by MCL 213.23, that the county did not abuse its discretion in determining that condemnation was necessary, and that the Pinnacle Project served a public purpose as defined by \textit{Poletown}"). The court also denied the landowner's motions for reconsideration. See id. (noting denial of reconsideration).

\textsuperscript{108} See County of Wayne v. Hathcock, Nos. 239438, 2003 WL 1950233, at *6 (Mich. App. Apr. 24, 2003) (finding trial court did not err and upholding condemnation); see also Hathcock, 684 N.W.2d at 771 (indicating that state court of appeals affirmed trial court ruling). The court of appeals held that the condemnations did not violate Michigan statutes or the state constitution and were consistent with \textit{Poletown}. See id. at 771-72 (noting findings of court of appeals).
ruled. The landowners appealed to the Michigan Supreme Court, which requested the parties address whether Poletown violated the state constitution and should be overturned.

IV. Analysis

A. Narrative Analysis

For the Michigan Supreme Court, Hathcock reflected the conflict between government authority and property rights inherent in eminent domain. Assessing the validity of the county’s attempt to take property for the Pinnacle Project, the court found the condemnations satisfied the statutory requirements, but violated the state’s constitution, and the court overruled Poletown.

1. Statutory Analysis

The court began by analyzing the Michigan statute that authorizes the taking of private property. The court’s analysis addressed three issues: “whether the proposed condemnations are necessary for public purposes, "

109. See Hathcock, 2003 WL 1950233, at *7-9 (Murray, J., concurring) (“[I] believe with all due respect . . . that the [Michigan] Supreme Court’s decision in [Poletown] was wrongly decided with respect to its constitutional determination that the power of eminent domain can be utilized to take private property and convey it for the use of other private entities in the name of improving the economy.”); see also Hathcock, 684 N.W.2d at 772 (“Judge Murray, joined by Judge Fitzgerald, concurred with Presiding Judge O’Connell, but opined that Poletown was poorly reasoned, wrongly decided, and ripe for reversal by this Court.”).

110. See Hathcock, 684 N.W.2d at 772 (granting landowners’ appeal and asking parties to address specific questions). The Michigan Supreme Court instructed the parties to address specific issues: (1) whether plaintiff has the authority, pursuant to MCL 213.23 or otherwise, to take defendants’ properties; (2) whether the proposed taking, which are [sic] at least partly intended to result in later transfers to private entities, are for a “public purpose,” pursuant to Poletown Neighborhood Council v Detroit, and (3) whether the “public purpose” test set forth in Poletown is consistent with Const. 1963, art 10, § 2 and, if not, whether this test should be overruled.

Id. (citations omitted).

111. See id. at 769 (“We are presented again with a clash of two bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property, on the one hand and, on the other, the state’s authority to condemn private property for the commonwealth.”).

112. See id. at 770 (summarizing holding).

113. See id. at 772 (indicating that court begins with statutory analysis to avoid unnecessary constitutional analysis). The court reviews statutory construction de novo. See id. (explaining standard of review). The Michigan condemnation statue provides that “[a]ny public corporation or state agency is authorized to take private property necessary for a 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.” Mich. Comp. Laws § 213.23 (1998). Under the UCPA, the court may only review the determination that a condemnation was necessary. See Hathcock, 684 N.W.2d at 772 (explaining limits on standard of review under UCPA).
whether those purposes are within the scope of the county's powers, and whether the takings are 'for the use or benefit of the public.'"114 Regarding necessity, a court must defer to a public corporation's finding of necessity unless the opposing party establishes "fraud, error of law, or abuse of discretion."115 Finding the defendants' arguments unpersuasive, the court declined to disturb the determination of necessity.116 The court found that the condemnations fell within the scope of the county's powers, though the power was subject to constitutional and legislative constraints.117 Finally, the court was not convinced that the condemnations would fail to benefit the public within the meaning of the statute, saying "[t]here is ample evidence in the record that the Pinnacle Project would benefit the public."118 Defendants did not dispute that the project benefited the public; rather, they argued that any public benefits were outweighed by the private benefits.119 The court disagreed and upheld the project as a valid exercise of eminent domain under the statute.120

114. Hathcock, 684 N.W.2d at 773.

115. See id. at 776 (defining court's role in necessity questions).

116. See id. at 776–78 (refuting defendants' three arguments). The defendants argued first that the county had not proven necessity because the county did not have a specific purchaser or proof that the land would be used now or in the future; second, the county had not fulfilled all of the procedural hurdles; and finally, the county did not show that the business park was necessary for public use. See id. (discussing defendants' arguments). The court held that the lack of a specific buyer did not undermine the necessity and that the requirement for immediate use was based on a case involving a prior version of the constitution that had an explicit requirement for immediate use and, further, was distinguishable because the county did have immediate plans to develop the park. See id. at 777 (responding to defendants' first argument). The failure to fulfill all of the procedural requirements was not dispositive because the statute did not require that all procedures must be fulfilled to establish necessity. See id. (responding to defendants' second argument). The defendants did not brief the question of whether the county had proven necessity, but, nonetheless, the court held that the argument was an unacceptable attempt to shift the burden to the plaintiff. See id. at 777–78 (responding to defendants' third argument).

117. See id. at 774–76 (analyzing authority of county to use eminent domain). The analysis addressed two distinct issues: whether the county had the authority to use eminent domain in general, and whether it could employ eminent domain in this particular case. See id. at 773 (noting that issue of scope of county's powers raised question of whether county had power of eminent domain at all, and, if so, whether county had power in this specific instance).

118. See id. at 778 (discussing benefit to public). Both the plaintiffs and the defendants agreed that the condemnations would benefit the public. See id. (noting defendants did not question benefits of plan).

119. See id. (describing defendants' reliance on balancing test from City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638 (Mich. 1993)). The court disputed the defendants' reliance on Edward Rose, because that case was not based on Mich. Comp. Laws § 213.23 (1998), the statute at issue in Hathcock. See id. ("Moreover, Edward Rose nowhere suggests that the 'public use or benefit' element of MCL 213.23 requires a balancing of public and private benefits, or that public benefits must predominate over private ones under this statute.").

120. See id. (discussing defendants' argument).
2. **Constitutional Analysis**

Although the condemnations were statutorily valid, the court held that the condemnations violated Michigan’s constitutional restriction regarding public use.121 The validity of condemnations depends on the breadth of the public use requirement.122 The majority defined “public use” by reference to how the ratifiers of the 1963 constitution who were “sophisticated in the law” would have understood the term.123 The court declined to develop a definition of public use, but rather restricted its interpretation to whether the condemnations in *Hathcock* were consistent with the “sophisticated in the law” meaning of public use.124 Public use, as defined by pre-1963 jurisprudence, did not prohibit the transfer of property to private parties, but did prohibit the transfer of property to private parties for private use.125

To establish when the Michigan Constitution permits property to be transferred to a private party, the court adopted Justice Ryan’s dissenting

121. *See id.* at 787 (holding that proposed condemnations “do not pass constitutional muster”). “While the proposed condemnations satisfy the broad parameters established by MCL 213.23, it must also be determined whether these condemnations pass the more narrow requirements of our Constitution.” *Id.* at 776. The Michigan Constitution states “private property shall not be taken for public use without just compensation.” Mich. Const. art. 10, § 2.

122. *See Hathcock,* 684 N.W.2d at 779 (addressing argument that condemnations do not satisfy public use requirement).

123. *See id.* at 779–81 (explaining process of constitutional analysis). The court determined that “public use” is a term of art that must be analyzed according to its “technical, legal sense” rather than according to the plain language of the constitution. *See id.* (“We can uncover the common understanding of art. 10, § 2 only by delving into this body of case law, and thereby determining the ‘common understanding’ among those sophisticated in the law at the time of the Constitution’s ratification.”). Because the term public use had been incorporated in the 1850, 1908 and 1963 versions of the Michigan Constitution, the majority found that an analysis of the term required ascertaining the judicial interpretations that were the underpinnings of the ratifiers’ understanding of public use in 1963. *See id.* at 780 (identifying public use as “a positive limit on the state’s power of eminent domain” in multiple constitutions).

By contrast, Justice Weaver rejected the majority’s attempt to define public use as a legal, technical term. *See id.* at 789 (Weaver, J., concurring in part, dissenting in part) (“Unlike the majority, I would employ the long-established method of constitutional interpretation that restrains judges by requiring them to ascertain the common understanding of the people who adopted the constitution.”). In Justice Weaver’s view, the interpretation of public use should be the common understanding of the “learned and unlearned” rather than the “elitist” approach adopted by the majority. *See id.* (Weaver, J., concurring in part, dissenting in part) (“The majority’s focus on the understanding of the ‘sophisticated in the law’ is elitist; it perverts the primary rule of constitutional interpretation—that constitutions must be interpreted as people, learned and unlearned, would commonly understand them.”).

124. *See id.* at 781 (declining to create “single, comprehensive definition of ‘public use’”).

125. *See id.* (illustrating spectrum of judicial decisions on transfers to private parties).
analysis in *Poletown*. The court identified three categories where such a transfer satisfies the public use requirement.

[T]he transfer of condemned property to a private entity... would be appropriate in one of three contexts: (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.

The first category—a public necessity of the extreme sort—refers to situations where the private party's use of the land will provide a public benefit (e.g., highways and railroads) and can only be achieved if the government uses its eminent domain power. The second category—public accountability—permits a transfer to a private party when some controls ensure that the private party will remain accountable to the public. The third category—condemnation as a public use—encompasses situations where the public use is not how the property will be used after the taking, but rather is the condemnation itself (e.g., clearing a slum is the public use, making what happens to the property after the clearing incidental).

126. *See id.* ("Accordingly, we conclude that the transfer of condemned property is a 'public use' when it possess [sic] one of the three characteristics in our pre-1963 case law identified by Justice Ryan.").

127. *See id.* at 781–83 (explicating criteria for public use). The court adopted these criteria from the dissent of Justice Ryan in the *Poletown* case. *See id.* at 781 ("Justice Ryan's *Poletown* dissent accurately describes the factors that distinguish takings . . . .").

128. *Id.* at 783. Despite disputing the majority's adoption of the three categories, Justice Weaver reached the same categories through her analysis of the case law. *See id.* at 794–98 (Weaver, J., concurring in part, dissenting in part) (distilling principles regarding eminent domain from cases). Rather than adopt the three categories approach, Justice Weaver advocated a case-by-case approach where the facts of the case are considered in the context of the common understanding of public use. *See id.* at 798 (Weaver, J., concurring in part, dissenting in part) (advocating case-by-case approach to protect rights of property owners).

129. *See id.* at 781–82 (discussing first characteristic generally and example of railroads more specifically). "This Court has held that the exercise of eminent domain in such cases—in which collective action is needed to acquire land for vital instrumentalities of commerce—is consistent with the constitutional 'public use' requirement." *Id.* at 782.

130. *See, e.g., Lakehead Pipe Line v. Dehn, 64 N.W.2d 903, 912 (Mich. 1954)* (approving of controls state maintained over pipeline that was created through eminent domain). For further discussion of *Lakehead Pipe Line*, see infra notes 174–75 and accompanying text.

131. *See id.* at 783 (providing example of slum clearance in which city's goal was to remove property that endangered public welfare and resale of property resulted in incidental private benefit). "[T]he act of condemnation itself, rather than the use to which the condemned land eventually would be put, was a public use." *Id.* The "facts of independent public significance" represent a motive for the con-
The court established that the Pinnacle Project did not fall within any of these categories. The project was not reliant on the government's eminent domain intervention for its existence. Moreover, the project lacked any formal control that would ensure its continued utility for the public. Finally, the actual condemnation did not serve any public purpose because it was not intended to clear slums or end blight. Thus, the court held that the county's plan to transfer property to a private party was unconstitutional.

3. Reconsidering Poletown

The court's analysis then shifted to Poletown, upon which both the circuit court and the state court of appeals had placed significant reliance when ruling for the county. The court described Poletown as "most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence." Specifically, the court criticized two departures the decision made from past case law: first, the Poletown court adopted limited judicial review of legislative determinations of public use and, second, it accepted general economic benefits as a valid public use. Rejecting that limited court review and advocating condemnation that is not based on the future use of the land, e.g., public health. See id. (detailing meaning of "facts of independent public significance").

132. See id. ("[T]he Pinnacle Project and the subsequent transfer of those properties to private entities—implicates none of the savings elements noted by our pre-1963 eminent domain jurisprudence.").

133. See id. at 783–84 (averring that business and industrial parks are plentiful and do not depend on eminent domain).

134. See id. at 784 (stating that plaintiff's plan would allow private parties to pursue their own economic agenda without any guarantees that business will contribute to economy).

135. See id. (finding benefit to public will accrue from private use of land, not from act of condemning land).

136. See id. (concluding ratifiers "sophisticated in the law" would not have viewed Pinnacle Project as valid exercise of eminent domain power).

137. See id. at 784–87 (examining reasoning in Poletown). The Hathcock court first noted an internal inconsistency in the Poletown opinion regarding the property owners' argument that a distinction existed between public use and public purpose. See id. at 784 (noting inconsistency in Poletown reasoning). This distinction provided the foundation for the property owners' argument that Detroit's condemnation action represented a public purpose, which did not satisfy the constitutional public use requirement. See id. (describing property owners' argument). The Poletown court then claimed that the property owners admitted that the constitution allowed property to be taken for public use or purpose. See id. ("The [Poletown] majority therefore contended that plaintiffs waived a distinction they had 'urged' upon the Court."). Such an admission would have undermined the landowners' argument. See id. (noting property owners' argument depended on distinction). The Hathcock court noted that the inconsistency allowed the Poletown court to skirt the issue of whether the transfer of private property to another private party constituted a public use. See id. at 784–85 (identifying inconsistency in Poletown reasoning).

138. Id. at 785.

139. See id. at 785–86 (identifying departures from past jurisprudence).
greater judicial review, the Hathcock court asserted that the Poletown court improperly relied on persuasive authority to reach its holding, which was inconsistent with Michigan precedent.\textsuperscript{140} "[T]his Court has \textit{never} employed the minimal standard of review in an eminent domain case which is adopted by the [Poletown] majority."\textsuperscript{141}

The court also found that Michigan precedent did not support the Poletown court's finding that a general contribution to local economic welfare was sufficient to satisfy the public use requirement.\textsuperscript{142} The Hathcock court considered such a lax public use standard to be a threat to property owners.\textsuperscript{143} "After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."\textsuperscript{144} Consequently, the court overruled Poletown and restated its conclusion that the county's proposed condemnations violated the Michigan Constitution.\textsuperscript{145}

\textbf{B. Critical Analysis}

The Hathcock ruling provides a lens for examining the issue of taking property from one private party and transferring it to another in the name

\begin{itemize}
  \item \textsuperscript{140} See id. (indicating disapproval of Poletown analysis). The Hathcock court reasoned that the Poletown court improperly relied on two cases, Gregory Marina, Inc. v. City of Detroit, 144 N.W.2d 503 (Mich. 1966), and Berman v. Parker, 348 U.S. 26 (1954), to limit its authority over eminent domain decisions because both were merely persuasive authority vis-à-vis Michigan's eminent domain clause. See id. at 785 (discussing Poletown decision to limit review). Rather, under Michigan precedent, the Michigan Supreme Court had not previously used a minimal standard of review. See id. ("Notwithstanding explicit legislative findings, this Court has always made an independent determination of what constitutes a public use for which the power of eminent domain may be utilized" (quoting Poletown, 304 N.W.2d at 475 (Ryan, J. dissenting))).
  \item \textsuperscript{141} Id. (quoting Poletown, 304 N.W.2d at 475 (Ryan, J., dissenting)).
  \item \textsuperscript{142} See id. at 786 (discussing lack of precedent for Poletown decision).
  \item \textsuperscript{143} See id. (asserting that allowing transfer of property to private party because private party "might" contribute to economy eviscerates constitutional limitations on eminent domain power).
  \item \textsuperscript{144} Id.
  \item \textsuperscript{145} See id. at 787 (overruling Poletown). The court expressed the view that the rationale of the Poletown decision would lead to unchecked use of eminent domain power. See id. at 786 (discussing potential impact of Poletown decision). Justice Weaver supported the decision to overrule Poletown. See id. at 788 (Weaver, J., concurring in part, dissenting in part) (explaining her reasoning).
  \item The court applied its decision retroactively to "all pending cases in which a challenge to Poletown has been raised and preserved." Id. Justice Weaver concurred with the retroactive application of the decision. See id. at 798 (Weaver, J., concurring in part, dissenting in part) (indicating support for decision to apply holding retroactively). Justices Cavanagh and Kelly, in separate opinions, dissented from the retroactive application of Hathcock. See id. at 799--800 (Cavanagh, J., concurring in part, dissenting in part) (asserting that retrospective application of decision would unfairly penalize county for reliance on Poletown; Justice Kelly agreed).
\end{itemize}
of economic development. Both Poletown and Hathcock indicate that courts believe economic development can be sustained as a public use; the cases diverge on the appropriate measures needed to assure that the public use requirement is satisfied. Although the Michigan court did not address the federal interpretation of public use explicitly, it adopted a more restrictive approach to public use under Michigan’s constitution than the United States Constitution currently requires. The elements of the Hathcock approach—the three categories and a reduced level of deference—together strike an appropriate balance between permitting economic development and protecting property rights.

1. Categories

The Hathcock court did not reject economic development as a legitimate public use. Rather, it provided a categorical framework for courts.

146. For a discussion of the significance of the Poletown decision, see supra notes 74, 76 and accompanying text. Poletown is considered a flashpoint of the national move toward allowing economic development to constitute a public use. For a discussion of that national shift, see supra notes 74, 76 and accompanying text. The overruling of Poletown and the reasoning of Hathcock encourage reflections on the implications of repudiating such a significant case and raise considerations about current trends in eminent domain. See, e.g., Dean Starkman, Michigan Upholds Property Rights in Broad Ruling, WALL ST. J., Aug. 2, 2004, at A6 (“In a decision with wide implications for property rights nationally, the Michigan Supreme Court ruled that state and local governments may not take property from one private owner and give it to another purely for the purpose of economic development.”); Supreme Court Restores Sanctity, supra note 74 (“Michigan’s Supreme Court restored the sanctity of private property rights . . . . The original case was a blow to constitutional protections.”).

147. For a discussion showing that the Poletown court agreed that economic development served a public use and that the Hathcock court accepted the Pinnacle Project as a valid public purpose under the statutory interpretation, see supra notes 87, 118 and accompanying text.

148. See Ely, supra note 1, at 34 (noting that some states took more restrictive approach though most followed the Supreme Court on public use). For a discussion of the relationship between federal and state public use requirements, see supra note 46 and accompanying text. Here, the Hathcock approach was more limited than the state’s police power allowed. Compare Haw. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) (equating scope of public use with scope of police power and advocating deference), with Hathcock, 684 N.W.2d at 783 (establishing three categories under which transfer to private party satisfies public use requirement and rejecting deferential review).

Changes may develop in the federal scope of the public use clause because the United States Supreme Court recently granted certiorari in Kelo v. City of New London, 125 S. Ct. 27 (2004) (granting certiorari for question of whether economic development with possible tax and job benefits constitutes public use under Fifth Amendment). For a discussion of Kelo, see supra notes 69–73 and accompanying text.

149. For an analysis of the Hathcock court’s framework for ensuring the public use requirement is satisfied for condemnations, see infra notes 150–98 and accompanying text.

150. See Hathcock, 684 N.W.2d at 787 (concluding that condemnations in this case do not satisfy public use, but not stating that economic development cannot be public use). Despite the court’s rejection of the Pinnacle Project, the court in
to assess the appropriateness of economic development as a public use.\textsuperscript{151}

The majority identified three general categories where a condemnation that is transferred to a private party is a public use.\textsuperscript{152} Each of the court’s categorical distinctions can support some form of economic development.\textsuperscript{153} The public necessity and the condemnation as a public use categories are both widely accepted as public uses.\textsuperscript{154} At the same time, its statutory analysis explicitly acknowledged the benefits to the public from the project. See id. at 778 (noting support for anticipated benefits of project).

151. For the court’s language describing that categorical framework, see supra text accompanying note 128. The ruling, however, does not represent the only theory about how to balance economic development and property rights. See, e.g., Ely, supra note 1, at 36 (arguing that burden of proof should be on condemner rather than condemnee and takings where private party benefits should engender increased scrutiny).

152. For a discussion of the categories adopted in Hathcock, see supra notes 129–31 and accompanying text. While Justice Ryan’s dissent in Poletown identified these categories as common elements of cases dealing with instrumentalities of commerce, the Hathcock court adopted them wholesale as instances where a taking that is transferred to a private party constitutes a public use. See Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 476 (Mich. 1981) (Ryan, J., dissenting) (describing exception to general rule that property may not be transferred to private corporations, which “might be denominated the instrumentality of commerce exception, [which] has permitted condemnation for the establishment or improvement of the avenues of commerce—highways, railroads, and canals, for example”). Consequently, the Hathcock majority’s approach, which does not require the condemnation to be an instrumentality of commerce, is broader than Justice Ryan’s formulation in Poletown. Compare Poletown, 304 N.W.2d at 477–78 (Ryan, J., dissenting) (“Examination of the cases involving the instrumentalities of commerce exception reveal that three common elements appear in those decisions that go far toward explicating and justifying the use of eminent domain for private corporations . . . .”), with Hathcock, 684 N.W.2d at 781 n.56 (“Although Justice Ryan viewed these common elements as ‘exceptions’ to the general rule against condemnations for private use, the three exceptions reflect concepts that are incorporated into the definition of ‘public use,’ given the principles of constitutional interpretation articulated above.”).

153. See Hathcock, 684 N.W.2d at 783 (listing criteria for public use). One commentator suggests that the court did not make clear whether the criteria represented a conjunctive test. See Posting of Patrick A. Randolph, Jr., dirt@umkc.edu, to propertyprof@lists.washlaw.edu (Aug. 3, 2004) (on file with Villanova Law Review) (“Although the editor is uncertain, he believes that the court intended that all three of these requirements must be satisfied if a condemnation for private use is carried out.”). The court, however, discusses the three categories as independent of each other. See Hathcock, 684 N.W.2d at 783 (“[T]he transfer of condemned property to a private entity . . . would be appropriate in one of three contexts: (1) . . . ; (2) . . . ; and (3) . . . .” (emphasis added). The designation “one of three contexts” seemingly overrides the use of the conjunctive “and” in the list of the three contexts, indicating a choice of categories. See id. (listing criteria for public use) (emphasis added). The court also stated: “Accordingly, we conclude that the transfer of condemned property is a ‘public use’ when it possess [sic] one of the three characteristics in our pre-1963 case law identified by Justice Ryan.” Id. at 781 (emphasis added).

154. See Ely, supra note 1, at 33 (“[S]tate legislatures commonly granted canal, turnpike, and railroad companies the authority to exercise eminent domain.”). In Swan v. Williams, the Michigan Supreme Court recognized historical examples of the public necessity category. See Swan v. Williams, 2 Mich. 427, 432 (1852)
economic development opportunities are limited by the narrow scope of these categories.\textsuperscript{155} In contrast, public accountability provides communities with flexibility to seek economic development for uses that do not fall within the other categories.\textsuperscript{156} The expansiveness of this category will be determined by judicial review.\textsuperscript{157}

a. Public Necessity

The first category adopted by the Michigan court was public necessity requiring government intervention.\textsuperscript{158} The court defined this category as including instrumentalities of interstate commerce such as railroads, highways and canals.\textsuperscript{159} The court referred to \textit{Swan v. Williams},\textsuperscript{160} where the power of eminent domain was upheld for the purpose of developing a railroad.\textsuperscript{161} The \textit{Swan} court viewed the construction of the railroad as a public use because its purpose was to further communication and transportation, both of which were accessible to the public; the revenue generated for the railroad, a private interest, was incidental to the public benefit.\textsuperscript{162}

b. Public Accountability

The second category requires that the public retain some element of control over the condemned properties.\textsuperscript{163} Although the court did not indicate what type of control would have been necessary for the Pinnacle

\textsuperscript{\textcopyright VILLANOVA LAW REVIEW 366 Villanova Law Review, Vol. 50, Iss. 2 [2005], Art. 7 [Vol. 50: p. 341]}
Project to satisfy public use, the court cited its previous cases, *Board of Health v. Van Hoesen*, 164 *Berrien Springs Water Power Co. v. Berrien Circuit Judge*165 and *Lakehead Pipe Line Co. v. Dehn*, 166 as representative of the extent of control necessary to sustain a condemnation action.167

In *Van Hoesen*, the court rejected public use arguments raised in an attempt to take land for the expansion of a cemetery.168 The *Van Hoesen* court stated that, "[t]o justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public must avail itself of that use."169 The court in *Berrien Springs* blocked a condemnation by a private water power company.170 The *Berrien Springs* court rejected the taking because the company had the option to retain exclusive control over the power generated.171 The potential for the condemned property's private use becoming the dominant use led the court to reject the taking.172 "The taking is not limited to what is required by the public necessities. . . and the law contains no provision by which the taking can be limited to such public necessities."173 By contrast, in *Lakehead Pipe Line*, the court upheld the taking of a right-of-way for an oil pipeline.174 The court approved of the controls the state maintained and

164. 49 N.W. 894 (Mich. 1891).
165. 94 N.W. 379 (Mich. 1903).
166. 64 N.W.2d 903 (Mich. 1954).
167. See *Hathcock*, 684 N.W.2d at 784 ("[T]he Pinnacle Project is not subject to public oversight to ensure that the property continues to be used for the commonwealth after being sold to private entities."). The court did not elaborate on the necessary amount of control needed, but cited *Van Hoesen, Berrien Springs* and *Lakehead Pipe Line*. See id. at 782 (discussing past cases).
168. See *Van Hoesen*, 49 N.W. at 896–97 (arguing public would not exercise any control over property, rather property would only be subject to will of corporation).
169. Id. at 896. The *Van Hoesen* court specifically noted that the public did not have a right to buy the land, the public did not maintain any control over the property and the property could be sold to private individuals who could in turn sell the land for a profit. See id. at 896–97 (quoting *In re Deansville Ass'n*, 66 N.Y. 569 (1876), which rejected cemetery as public use).
170. See *Berrien Springs*, 94 N.W. at 381 (preventing condemnation).
171. See id. at 380 ("And it is equally certain that, if the power be alternative and optional, either for a public or for a private use . . . it cannot be upheld." (quoting Attorney Gen. v. City of Eau Clare, 37 Wis. 400, 437 (1875))).
172. See id. ("It seems too plain for discussion that if the Legislature grant an equivocal power, subject to the election of the grantee, for either one or other of two purposes, the one lawful and the other unlawful, the power cannot be upheld upon the chance its being lawfully applied." (quoting *City of Eau Clare*, 37 Wis. at 437)).
173. Id. at 381.
174. See *Lakehead Pipe Line* v. Dehn, 64 N.W.2d 903, 910–12 (Mich. 1954) (concluding that state had authority to exercise eminent domain over property for operations proposed by plaintiff). Lakehead had been unable to purchase land for a right-of-way to build a pipeline to transport oil from Canada and to transport Michigan oil within Michigan. See id. at 906 (noting plaintiff's inability to obtain right-of-way to construct pipeline). The company sought to condemn the land
found that "the state has a certain measure of authority over plaintiff's operations." 175

The Hathcock court's reference to these cases indicates that if a condemnor imposes a mechanism of public accountability, the condemnor will be able to execute a condemnation predicated on economic development. 176 Public accountability provides the state flexibility to authorize condemnations that do not satisfy the public necessity or condemnation as public use categories. 177 From a property rights standpoint, the effectiveness of this category depends on how restrictive the courts require control to be. 178

under Michigan statutory authority regulating the oil industry and conferring the power of condemnation. See id. at 907–08 (providing statutory language supporting plaintiff's contention that condemnation of defendant's property was authorized).

175. Id. at 912. The court was satisfied that the public had sufficient control. See id. ("Not only has the plaintiff submitted itself to State jurisdiction with reference to the operations immediately contemplated, but it has pledged itself to transport in intrastate commerce if given an opportunity to do so.").

176. See, e.g., Berman v. Parker, 348 U.S. 26, 29–30 (1954) (noting statutory controls). In Berman, the Supreme Court did not specifically address whether retaining control can enable a condemnation to be a public use. See id. at 30 (describing court's analysis). It is worthwhile to note, however, that the Court quoted language from the District of Columbia Redevelopment Act that required purchasers and lessees of the condemned land to conform to the comprehensive plan developed pursuant to the Act. See id. ("The lessees or purchasers will carry out the redevelopment plan and that 'no use shall be made of any land or real property included in the lease or sale nor any building or structure constructed erected thereon' which does not conform to the plan." (quoting District of Columbia Redevelopment Act of 1945, 60 Stat. 790 (1954), §§ 7(d), 11)); Kelo v. City of New London, 843 A.2d 500, 545 (Conn. 2004) ("[T]he terms of the development plan providing parcel-specific land uses, to which private developers participating in this project must adhere, provide significant control over the destiny of the parcels."), cert. granted, 125 S. Ct. 27 (2004); Ga. Dept. of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (asserting that condemnation at issue does not incorporate the "level of public control required [by] Karesh" and contrasting Goldberg v. City Council of Charleston, 254 S.E.2d 803 (S.C. 1979)). In Karesh v. City Council of Charleston, 247 S.E.2d 342 (S.C. 1978), the Supreme Court of South Carolina, under its narrow public use treatment, declared that the city's efforts to condemn land for a parking garage where the garage would be under a long-term lease to the developer did not satisfy the public use requirement. See Ga. Dept. of Transp., 586 S.E.2d at 856 (discussing Karesh). By contrast, in Goldberg, the court held that the same garage satisfied the public use requirement when the city owned and operated the garage. See id. (contrasting Goldberg). Contra Kelo, 843 A.2d at 583 (Zarella, J., dissenting in part) (criticizing majority's reliance solely on statutory and contractual provisions as control and advocating that test should also include whether public will actually benefit as determined by trial court without deference to legislature).

177. For a discussion of the public necessity and condemnation as public use categories, see supra notes 158–62 and infra notes 179–85 and accompanying text, respectively.

178. For an explanation of the deference used by the court in public use cases, see infra notes 193–98 and accompanying text.
The third category concerns condemnations where the condemnation itself represents the public use. In these circumstances, the condemnation serves two functions: elimination of blight and redevelopment. The elimination of blight is the public use and the resultant economic development is merely an added benefit. In these situations, the private benefit is deemed incidental to the goal of improving public welfare by eliminating blight. The Hathcock court illustrated this category by referencing *In re Slum Clearance*. In that case, the court upheld the use of eminent domain "for the purpose of eliminating housing conditions detrimental to the public peace, health, safety, morals and welfare, and to aid in replanning and reconstruction of the area involved." The court held the primary purpose was removing blight, making the resale of land incidental.

While these categories can stand alone, they are not mutually exclusive. When discussing the public accountability category, the Hathcock court acknowledged the Swan case as an example of both public accountability and public necessity. The Swan court approved the governmental control imposed on the railroad, emphasizing a provision that "secure[d]... all such rights to the use of this road by others" and noting that

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180. See, e.g., *In re Slum Clearance*, 50 N.W.2d 340, 341 (Mich. 1951) (stating that condemnation served to clear slum and reconstruct area); see also Berman, 348 U.S. at 29 (noting purpose of redevelopment agency is to use eminent domain to take property for "the redevelopment of blighted territory in the District of Columbia" (quoting District of Columbia Redevelopment Act of 1945, § 5(a))). For further discussion, see infra notes 183–85 and accompanying text.

181. See Hathcock, 684 N.W.2d at 783 (explaining third category as "meaning that the underlying purposes for resorting to condemnation" is public use). For the proposition that the act of condemning is the public use, not the ultimate disposition of the land, the court cites *In re Slum Clearance*, where the controlling public purpose for condemning properties was removing blight. See id. (discussing *In re Slum Clearance* as example of third category).

182. See id. (noting that city’s purpose in *In re Slum Clearance* was to remove blight, thus, subsequent sale of land to private parties was incidental).

183. 50 N.W.2d 340 (Mich. 1951).

184. See id. at 341 (noting purpose of condemnation proceedings that gave rise to suit).

185. See id. at 343 (explaining public benefit). The *In re Slum Clearance* court rejected the defendant’s reliance on *Van Hoesen*, indicating that the holding in *Van Hoesen* did not establish a blanket prohibition against allowing public corporations to condemn. See id. at 342 (discussing holding in *Van Hoesen*). The court also distinguished *Berrien Springs*, explaining that the concomitant conflicting public, private uses in *Berrien Springs* differed from sequential public, private uses in *In re Slum Clearance*. See id. at 343 (distinguishing *Berrien Springs*).

186. For a discussion of the disjunctive nature of the common elements test, see supra note 153 and accompanying text.

187. See Hathcock, 684 N.W.2d at 782 n.61 (noting Justice Ryan’s reference to control in *Swan*).
both the government and public could rely on the courts to enforce the act's requirement that the land be used only for a railroad.\footnote{See Swan v. Williams, 2 Mich. 427, 439–40 (1852) (finding that statutory authority of railroad provided for sufficient control to preserve public use).}

Having held that only these three categories justify transferring condemned land to a private party, the \textit{Hathcock} court criticized \textit{Poletown}'s acceptance of a general economic contribution as a public use.\footnote{For a discussion of that criticism, see \textit{supra} notes 142–44 and accompanying text.} The \textit{Hathcock} court viewed the economic benefits in \textit{Poletown} as “vague” and considered condemnation that “might contribute to the economy’s health” an insufficient public use.\footnote{See id. (dismissing \textit{Poletown} court’s position that general economic benefit meets public use requirement).} Nonetheless, this was a fact-based criticism; the court did not entirely dismiss the concept of economic development as public use.\footnote{“Justice Cooley was careful to point out that the Court was not ruling out the possibility that ‘incidental benefits to the public’ might, in some cases, ‘justify an exercise of the right of eminent domain.’” (quoting Ryerson v. Brown, 35 Mich. 333, 339 (1877)).} Although the court overruled \textit{Poletown} because a general economic benefit alone did not fit within the three categories, the court did not foreclose the possibility that \textit{Poletown} would have been sustained had it also fallen within one of the categories, such as public accountability.\footnote{See id. (indicating that general economic benefit that does not also fall within one of categories is insufficient to satisfy public use clause).}

\section{Judicial Review of Public Use Determinations}

For the Michigan Supreme Court, the overruling of \textit{Poletown} corrected an aberration in its eminent domain jurisprudence.\footnote{See \textit{Hathcock}, 684 N.W.2d at 786 (characterizing \textit{Poletown} as “radical and unabashed departure” from precedent).} The \textit{Hathcock} court rejected \textit{Poletown}'s minimal standard of review for eminent domain cases.\footnote{See \textit{id.} (rejecting minimal review).} Adopting Justice Ryan’s dissenting analysis in \textit{Poletown}, the \textit{Hathcock} court agreed that the deference the \textit{Poletown} court showed the legislative determination of public purpose was not based on controlling authority.\footnote{See \textit{id.} (noting that cases relied on by \textit{Poletown} majority were not binding authority for Michigan court).} “Notwithstanding explicit legislative findings, this Court has always made an independent determination of what constitutes a public use for which the power of eminent domain may be utilized.”\footnote{\textit{Id.} (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 475 (Mich. 1981) (Ryan, J., dissenting)), \textit{overruled by Hathcock}, 684 N.W.2d at 787).}

The \textit{Hathcock} majority affirmed that “[q]uestions of public purpose aside, whether the proposed condemnations were consistent with the Constitution’s ‘public use’ requirement was a constitutional question squarely...
within the Court's authority." Thus, the court reasserted its power to assess the constitutionality of the purported public use of the condemnation, which provides property owners the protection of limited deference without foreclosing economic development as a valid public use.198

V. IMPACT

Within the scope of the federal public use requirement, state courts determine the breadth of eminent domain authority under their state constitutions, which results in varied outcomes.199 Frequently, courts are faced with determining whether economic development constitutes a public use.200

The Hathcock ruling illustrates the Michigan court's efforts to find the balance between property owners' rights and the government's eminent domain power by imposing a stricter public use requirement.201 Given the notoriety of Poletown, its demise symbolizes an effort to impose greater restrictions on eminent domain and a rejection of general economic benefit as a public use.202 Yet, economic development as a means of improving communities should not be readily dismissed as not fulfilling a public use.203

197. Id.

199. See generally Berliner, supra note 1, at 10-217 (reporting states' various approaches to eminent domain and providing examples of condemnation activity in each state). For a discussion of the relationship between federal and state interpretations of public use, see supra note 46 and accompanying text. For court rulings regarding eminent domain, see supra note 8 and accompanying text.

200. For different state interpretations of the public use limitation, see supra note 8 and accompanying text.

201. See Hathcock, 684 N.W.2d at 786-87 (adopting test for transfer of property to private parties based on public uses accepted before 1963 while not explicitly rejecting or accepting economic development as public use). The court did not, as the NCCED feared, erect constitutional limitations that would permanently bar communities from achieving their goals. See Brief of Amicus Curiae of National Congress for Community Economic Development at 26-27, County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070-78) (urging court not to create restriction that in effect would completely impede development), available at http://www.law.georgetown.edu/gelpi/takings/courts/briefs.htm.

202. For a discussion of the impact of Poletown's reversal, see supra note 146 and accompanying text.

203. See Hathcock, 684 N.W.2d at 778 (acknowledging benefits that Pinnacle Project would have based on evidence in record); Ely, supra note 1, at 32 ("The Takings Clause was little debated at the time of its ratification, but nothing indicates that the framers envisioned a departure from settled practice . . . . Given the
The Hathcock decision provides three categories of public use that enable economic development under certain circumstances. Public accountability provides jurisdictions with flexibility because courts can determine the degree of control required by their state constitutions. By imposing an element of governmental control, a state may use eminent domain as a means of achieving community economic development while simultaneously preventing rampant abuse of property rights. The rejection of minimal judicial review enables Michigan courts to assess whether condemnations satisfy the constitutional requirement of public use, thereby further protecting property owners. Thus, the Michigan ruling does not prevent the use of economic development for eminent domain, it merely requires that the economic development fall within three categories—public necessity, public accountability or condemnation as a public use—and pass judicial review.

VI. CONCLUSION

Communities strive to foster their economies and protect property rights—often balancing conflicting interests. When the use of eminent domain to facilitate economic development is contested, courts differ on colonial experience, one cannot reasonably formulate a categorical rule that private property could never be taken for developmental purposes. Alternatively, another commentator argues that economic development should be left to the legislatures and should not be determined by the courts. See Madigan, supra note 5, at 194 ("Therefore, the court should leave the issues of development to the politics of the legislature. The legislators, elected individuals, are publicly accountable to their constituents."). The legislature makes informed decision-making through lobbying efforts and public hearings, which provide information the courts do not have. See id. at 194 (asserting that court should not have intervened in 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), dismissed and remanded, 60 Fed. Appx. 123, 125 (9th Cir. 2003) (vacating appeal because case rendered moot)).


205. For a discussion of imposing control as a means of limiting public use, see supra notes 163–78 and accompanying text.

206. For a discussion of cases from other jurisdictions that address control, see supra note 176.

207. For a discussion of the public accountability category, see supra notes 163–78 and accompanying text.

208. For a discussion of the court’s rejection of limited judicial review, see supra notes 193–98 and accompanying text.

209. For a critical discussion of the categorical approach and standards of judicial review, see supra notes 146–98 and accompanying text.

210. For a discussion of the conflict stemming from economic interests and eminent domain, see supra notes 6–9 and accompanying text.
whether economic development satisfies the constitutional requirement of public use.\textsuperscript{211} To serve the divergent interests of the public and the property owners, courts must find a balance that facilitates economic development without unnecessarily infringing on property rights.\textsuperscript{212} The \textit{Hathcock} decision presents one such approach for balancing these interests; it remains to be seen whether the Supreme Court will approve the broad public use approach in \textit{Kelo}, support the more restrictive \textit{Hathcock} holding or delineate a new test.\textsuperscript{213}

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\begin{itemize}
\item \textsuperscript{211} For a discussion of cases discussing public use, see \textit{supra} note 8 and accompanying text.
\item \textsuperscript{212} For a discussion of examples of courts’ efforts to balance economic and property interests, see \textit{supra} note 8 and accompanying text. The United States Supreme Court will have the opportunity to define the appropriate balance or create a new test entirely when it rules on \textit{Kelo}. \textit{See} \textit{Kelo v. City of New London}, 125 S. Ct. 27 (2004) (granting certiorari).
\item \textsuperscript{213} For an analysis of the \textit{Hathcock} court’s approach, see \textit{supra} notes 149–98 and accompanying text. \textit{See also} \textit{Kelo}, 125 S. Ct. 27 (providing Court with occasion to consider whether economic development satisfies public use requirement).
\end{itemize}