RECONSIDERING *POLETOWN*: IN THE WAKE OF *KELO*, STATES SHOULD MOVE TO RESTORE PRIVATE PROPERTY RIGHTS

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INTRODUCTION: FOUNDATIONS OF EMINENT DOMAIN

According to John Locke, governments are primarily created to protect private property.[1] While many citizens in contemporary times would claim that other roles of government are more important, such as promoting the general welfare, providing for the common defense, or building infrastructure, Locke's views were very influential in the founding of our government.[2] The Founders believed that protecting private property ownership was a "prime purpose" of government and a key to "preserv[ing] the liberty this new nation yearned to achieve."[3]

While the protection of private property is certainly important in this country, this protection is neither absolute nor as secure as most citizens might think. In fact, property ownership in the United States is under attack from many fronts, private and governmental. First, due to common law nuisance theories, owners cannot use their property in a way that unnecessarily injures their

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1. Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 55 n.50 (1999).

2. *Id.* at 55–56; Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public–Private Taking,"—A Proposal to Redefine "Public Use,"* 2000 L. REV. MICH. ST .U. DET. C.L. 639, 645 (stating that the theories of John Locke helped to inspire the governmental structure of the United States).

3. Lazzarotti, *supra* note 1, at 55–56; *see also* Henry Lamb, *Government Grabbing Homes—Who'll Be Next?*, WORLD NET DAILY, Oct. 16, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=40950 (quoting John Adams' words that "[p]roperty must be secured or liberty cannot exist"); *see also* Kelo v. City of New London, 125 S. Ct. 2655, 2672 (2005) (O'Connor, J., dissenting) (quoting Alexander Hamilton at the Philadelphia Convention as saying, "the security of Property" is one of the "great objects of Government").

neighbors.[4] Second, the government can enforce high taxes on property[5] or pass zoning regulations that can significantly diminish the property's value.[6] While these requirements and governmental powers can prevent owners from getting the most out of their land, they are not the most egregious governmental assault on property rights. That title must go to the government's power of eminent domain, pursuant to which the government may entirely divest landowners of their property.[7]

The power of eminent domain[8] is the power of the government to take away someone's home or business for its own ends.[9] The Fifth Amendment to the United States Constitution provides private property owners with two protections from this vast takings power.[10] First, the government's taking of property must be for a "public use."[11] Second, the government must pay property owners "just compensation."[12] While the meaning of just compensation is often litigated, the Supreme Court has given broad deference to state and federal legislatures to determine what constitutes a public use.[13] Thus, the Court has often allowed the

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4. *See generally* JOSEPH W. SINGER, PROPERTY LAW 305–08 (3d ed. 2002). Interference with your neighbor's property is considered unreasonable under nuisance law if it involves "substantial harm that an owner should not have to bear for the good of society." *Id.* at 307. Nuisance claims are typically brought against owners whose activities pollute their neighbors' property. *Id.* at 306. Other nuisances can be noise, blasting or vibrations, and even allowing property to become overrun by drug dealers. *Id.* at 306–07.

5. *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 472 (Mich. 1981) (Ryan, J., dissenting) (noting that government has the power to tax property), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

6. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

7. *Poletown*, 304 N.W.2d at 481 (Ryan, J., dissenting) (noting that "taxation and eminent domain are different in kind," and that "[e]minent domain is a far more intrusive power"); *see also Kelo*, 125 S. Ct. at 2685 (Thomas, J., dissenting) (noting the irony that the Court takes a serious view of its duty to review cases in other areas of the law that involve private homes, like searches and seizures, but in eminent domain where the government may actually tear down someone's home, the majority would have us believe that "we are not to 'second-guess the City's considered judgments'").

8. For a thorough history of the eminent domain power dating back to feudalism in Europe, see generally Lazzarotti, *supra* note 1.

9. Dana Berliner, *Public Use, Private Use—Does Anyone Know the Difference?*, *in* INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 789, 791 (ALI-ABA Course of Study, Apr. 22–24, 2004), *available at* SJ052 ALI-ABA 789 (Westlaw).

10. U.S. CONST. amend. V ("[N]or shall private property be taken for *public use*, without *just compensation*." (emphasis added)).

11. *Id.*; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (stating that the Court has repeatedly noted that "one person's property may not be taken for the benefit of another private person without a justifying public purpose").

12. U.S. CONST. amend. V; *see also* Berman v. Parker, 348 U.S. 26, 36 (1954) (stating that the Fifth Amendment requires just compensation as the price of a taking).

13. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005) (noting that "our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power"); *Midkiff*, 467 U.S. at 241 (holding that a statute just has to be "rationally related to a conceivable public purpose"); *Berman*, 348 U.S. at 32 ("[W]hen the

government to take a citizen's private property and transfer it to other private entities that the government claims can put that property to a better use.[14]

One recent example of the Supreme Court's continued failure to protect private property rights came in the much-publicized *Kelo v. City of New London* decision.[15] The condemnation in *Kelo* involved homeowners and business owners in Connecticut whose properties were condemned when the City of New London decided to redevelop an area adjacent to the site of a major drug corporation's new global research facility.[16] The City of New London, Connecticut proposed to take the property and hand it over to other private parties to build up seven different parcels.[17] One parcel included a waterfront hotel and conference center, along with marinas and a walkway.[18] The other parcels included new private residences, a Coast Guard museum, a research and office park, retail, and other research and development facilities.[19] The Connecticut Supreme Court held that economic development could be a valid public use and that the takings were primarily intended to benefit the public interest, rather than private entities.[20] In a five-to-four decision, the U.S. Supreme Court affirmed the Connecticut Supreme Court, agreeing that "public use" includes economic development despite the fact that a private developer ultimately received the property.[21]

Because the federal courts have not interpreted the U.S. Constitution to provide much protection, it is up to the states to protect private property holders. Indeed, the U.S. Supreme Court invited this action in *Kelo*, emphasizing that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[22] Nearly all state constitutions include wording similar to the federal Constitution regarding the state's power of eminent domain.[23] However, while states can interpret their constitutions to provide more protection

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legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

14. *See Kelo*, 125 S. Ct. at 2665–66 (allowing private homes to be seized and given to private developers in the name of economic development); *Midkiff*, 467 U.S. 226 (allowing land to be taken from its owners and given to the private citizens leasing the property in order to break up the small group of private landowners in Hawaii); *Berman*, 348 U.S. 26 (allowing property that was not blighted to be taken and redeveloped by a private developer as part of an overall slum clearance plan).

15. 125 S. Ct. at 2655.

16. Kelo v. City of New London, 843 A.2d 500, 508 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

17. *Id.* at 509.

18. *Id.*

19. *Id.*

20. *Id.* at 508.

21. *Kelo*, 125 S. Ct. at 2655. The Court reasoned that "public use" really means "public purpose" and thus allowed the condemnations and upheld "its longstanding policy of deference to legislative judgments in this field." *Id.* at 2663.

22. *Id.* at 2668.

23. Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 410 n.7 (1983) (noting that every state constitution except that of North Carolina includes restrictions on eminent domain similar to that in the U.S. Constitution).

than the federal Constitution, many have not yet done so.[24] If courts continue to abdicate their role as the protector of individual rights, then big government and powerful corporations will continue to run roughshod over the property interests of small landowners. Allowing the legislature such broad constitutional leeway to define the protections of private property defies the necessary checks and balances implicit in our system of government.[25]

This Note focuses on the second part of the protection that the Constitution offers private property holders: that the taking must be for a public use. This Note primarily examines two Michigan cases which have proved influential in the debate over public use. Part I examines Public Use Clause doctrine including a brief look at its development and its current status. Part II examines the Michigan Supreme Court's 1981 decision in *Poletown Neighborhood Council v. City of Detroit* and its effects.[26] Legal scholars generally consider this case to be the most extreme example of a taking for "public use" and the first case where a court defined public use as any public benefit, including the generation of tax revenues and jobs.[27] Part III analyzes the Michigan Supreme Court decision in *County of Wayne v. Hathcock* and its effects. The *Hathcock* decision in July, 2004 overruled *Poletown* and redefined what constitutes a public use under the Michigan Constitution.[28] This case breathed new life into the Michigan public use clause and provides a much greater level of protection to private property holders in Michigan than property owners in other states enjoy. Part IV looks at anticipated outcomes from *Hathcock* and makes recommendations that may help tame the despotic power of eminent domain.

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24. *See, e.g.*, Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005); City of Duluth v. Minnesota, 390 N.W.2d 757 (Minn. 1986); Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003); *see also* Lazzarotti, *supra* note 1, at 61 (noting that "the majority of modern courts support a broad interpretation of public use").

25. The drafters of the U.S. Constitution set up a system of government that involves checks and balances between the three branches of government. For example, the legislature passes laws, and the judiciary reviews them for their constitutionality. Marbury v. Madison, 5 U.S. 137 (1803). Additionally, the President is commander in chief of the armed forces, U.S. CONST. art. II, § 2, cl. 1, but the legislature controls the purse strings and decides when to fund the military, U.S. CONST. art. I, § 8, cls. 12–13. Thus, allowing the legislatures to interpret the public use requirement in the Constitution without check from the judiciary invites abuse.

26. 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, the City of Detroit proposed using its eminent domain power to condemn an entire neighborhood, which was then razed to make room for a General Motors Plant. *Id.* at 457. The public use for that taking was the economic benefit that it would provide. *Id.* at 459.

27. *Court States Poletown Condemnation Was "Erroneous,"* VA. NEWS SOURCE, Aug. 2, 2004 (printout on file with Author) ("Poletown was the first major case allowing condemnation of areas in the name of jobs and taxes. The Court literally rewrote the book with this decision." (quoting Dana Berliner of the Institute for Justice)).

28. *Hathcock*, 684 N.W.2d at 787 (Mich. 2004) (holding that economic benefits did not qualify as a public use and explicitly overruling *Poletown*).

This Note primarily posits that because *Poletown* had such a major effect on the erosion of private property rights in Michigan and many other states, its reversal by *Hathcock* may similarly shift the balance back and cause states to apply a more stringent public use requirement in order to protect private property rights. The U.S. Supreme Court failed to require this more stringent public use requirement in *Kelo v. City of New London*.[29] However, individual states remain free to provide more protection for private property holders, and *Hathcock*'s approach provides an effective compromise between the necessity of the power of eminent domain and the importance of people being secure in their property.

I. PUBLIC USE CLAUSE DOCTRINE—PAST AND PRESENT

A. History

The power of eminent domain has existed for hundreds of years, and governments have employed this power to acquire land for important public purposes.[30] Some evidence demonstrates that the power of eminent domain dates back to Roman times, yet it was likely that English legislative history and theories of natural law had the most influence in the drafting of the Fifth Amendment to the U.S. Constitution.[31] In light of the importance of property rights, the Takings Clause of the Fifth Amendment was the first of the amendments in the Bill of Rights to be incorporated into the Fourteenth Amendment[32] and thus applied to the states in 1897 through the decision in *Chicago, Burlington & Quincy Railroad v. Chicago*.[33] In addition to the protections from state power provided by the Fourteenth Amendment, state constitutions provide additional safeguards for property owners.[34] Both the state and federal protections guard against unlawful government acquisition of private property by requiring that such takings be for public use.[35]

The definition of what constitutes a public use has relaxed considerably over the years.[36] At first, it meant that the public must own the property.[37] Now, private parties can own the land so long as the land serves a controlling governmental purpose.[38] Historically, even property that went to private owners had to be open to public use.[39] For example, governments could use the power of

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29. Kelo v. City of New London, 125 S. Ct. 2655 (2005).
30. *See generally* Lazzarotti, *supra* note 1, at 53–54.
31. *Id.*
32. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 391–92 (2001).
33. 166 U.S. 226 (1897).
34. Mansnerus, *supra* note 23, at 410 n.7.
35. U.S. CONST. amend. V; Mansnerus, *supra* note 23, at 410 n.7.
36. Mansnerus, *supra* note 23, at 410.
37. *Id.*; Jennifer J. Kruckeberg, Note, *Can Government Buy Everything? The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 545 (2002) (stating that the public use clause allowed government ownership of places open for communal access by the general public including parks, sewer systems, hospitals, highways, and roads).
38. Mansnerus, *supra* note 23, at 410.
39. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 479 (Mich. 1981) (Ryan, J., dissenting) (noting that railroads that used the power of eminent

eminent domain on behalf of railroads, but the trains had to either carry passengers or allow all people to ship goods on the rail line.[40] Other private parties that were able to use eminent domain to take individuals' private property included public utilities, such as water and electricity providers, and other public transportation providers, such as streetcar operators.[41]

In moving beyond the actual public use requirement, the power of eminent domain was invoked for "slum clearance," where government seized blighted[42] property for cleanup and redevelopment.[43] These cases cited removal of "blight, danger and disease" as the public purpose that justified condemning the blighted property.[44] Additionally, municipal governments argued that when owners allowed their land to become blighted, they were harming others and creating a nuisance.[45] These "slum clearance" cases were somewhat different than the subsequent set of cases where the landowners were using their property reasonably, productively, and lawfully, yet the municipality argued that other private parties could put the land to better use.[46]

This final step in the expansion of the public use doctrine took place under the guise of many different purposes in many different courts. For example, in *Berman v. Parker*, the Supreme Court allowed the government to condemn a department store that was not blighted as part of a broader redevelopment scheme, which covered neighboring property that was blighted.[47] Also, in *Hawaii Housing Authority v. Midkiff*, the Supreme Court upheld a land redistribution scheme set up by the Hawaii legislature in which land was taken from large landowners and given to parties who had previously been leasing the land.[48] In *Poletown*, the

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domain were subject to a variety of regulations, including "equal and fair access to use of the railroad"), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

40. WILLIAM MEADE FLETCHER ET AL., *Eminent Domain: Public Use*, *in* 6A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2914.3 (2003).

41. *Id.*

42. The Supreme Court has equated blight with the substandard housing conditions that Congress defined in the District of Columbia Redevelopment Act of 1945, Pub. L. No. 592 § 3, 60 Stat. 790. Berman v. Parker, 348 U.S. 26, 28 n.1 (1954) (noting that while the Act did not define "slums" or "blighted areas," it defined "substandard housing conditions" as "the conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants").

43. *See* Kruckeberg, *supra* note 37, at 546–47.

44. *Poletown*, 304 N.W.2d at 477 (Ryan, J., dissenting) (stating that the primary purpose of eminent domain when used in slum clearance is to rid the area of the blight that may cause disease and other dangers).

45. *See supra* note 4 (discussing nuisance theory).

46. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); *Berman*, 348 U.S. at 26; Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005); *Poletown*, 304 N.W.2d at 455; Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003).

47. 348 U.S. at 26.

48. 467 U.S. 229.

Michigan Supreme Court allowed the City of Detroit to take over an entire working class neighborhood that was not blighted in order to convey the land to General Motors to build an assembly plant.[49] The "public use" in *Poletown* was the creation of jobs and tax revenues.[50] *Poletown* essentially opened the door in Michigan for the government to transfer private property from one citizen to another any time a better use could be identified.[51] Most recently, in *Kelo*, the U.S. Supreme Court effectively agreed with the reasoning in *Poletown* and ruled that economic development is a valid "public use" under the U.S. Constitution.[52] *Kelo*'s reasoning is problematic because most businesses provide some economic benefit of higher value than a residence, thereby leaving all personal residential and small business property vulnerable to government acquisition and redistribution.[53]

The foregoing cases demonstrate the current, and dire, state of the public use doctrine. In federal courts, public use has largely been read out of the Fifth Amendment.[54] The courts have interpreted "public use" to mean "public purpose," rather than "used by the public," which could allow the government to employ eminent domain power for any purpose that the legislature creates.[55] In fact, while the purpose of the Fifth Amendment was to limit takings, the Supreme Court has treated it as if takings were favored and not merely permitted.[56] The Court began this mischief in *Berman*, in which the Court stated that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[57] Additionally, the Court stated that the role of courts in determining public purpose is an "extremely narrow" one.[58]

Later, in *Midkiff*, the Supreme Court further lessened its ability to check governmental overreaching by establishing a mere rational basis standard for reviewing public use.[59] The Court stated that in order to be valid, a statute need only be "rationally related to a conceivable public purpose."[60] Under this standard, it appears that anything short of "naked redistributionism (to reward one's friends

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49. 304 N.W.2d 455.

50. *See id.* at 459.

51. County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004) (stating that if the rationale from *Poletown* was followed, then all property would be at risk that the government could find that a new discount retailer, megastore, or other business would put a citizen's land to better use).

52. Kelo v. City of New London, 125 S. Ct. 2655, 2665–66 (2005).

53. Berliner, *supra* note 9, at 808. Berliner notes that any home would generate more tax dollars as a Costco. *Id.* Therefore, "if the promise of greater jobs or profits is enough to take someone's property, then almost no one is safe." *Id.*

54. *See, e.g.*, *Kelo*, 125 S. Ct. 2655; Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954). *Kelo*, *Midkiff*, and *Berman* gave broad deference to the legislature's determination of what constituted a public use.

55. *See Kelo*, 125 S. Ct. at 2662.

56. *See* Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 213 n.45 (2004).

57. 348 U.S. at 32.

58. *Id.*

59. *Midkiff*, 467 U.S. at 229.

60. *Id.* at 241.

and punish one's enemies, for example)" will pass the public use test.[61] A rational basis test dooms virtually all claimants.[62] Also, in *Kelo*, the Court said that the judiciary should afford "legislatures broad latitude in determining what public needs justify the use of the takings power."[63] Finally, while the courts leave the definition of public use up to legislative determination, the determination of what constitutes "just compensation" is a judicial function.[64] The reason for this disparate treatment of two phrases in a single constitutional sentence is unknown.[65] Under current federal jurisprudence, the Court has never held a compensated taking to be proscribed because it was lacking in public use.[66]

As of now, the lack of protection offered by the federal courts has left to the states the responsibility of protecting private property from nonpublic use takings.[67] Many state courts have likewise abdicated to legislatures, granting legislative declarations of public use a presumption of constitutionality.[68] Many courts feel that they should not interfere unless the condemnation is "clearly, plainly, and manifestly of a private character, or the declaration by the legislature is manifestly arbitrary or unreasonable, involves an impossibility, or is palpably without reasonable foundation, or was induced by fraud, collusion, or bad faith."[69] Thus, in many states, the role of the judiciary in determining public use is quite limited.[70] However, some states do provide a larger degree of judicial protection. For example, a few require that the public as a whole have access to the property.[71] Additionally, where the benefit to a private party at the expense of another greatly outweighs any public benefit, some states have narrowed the public use doctrine.[72] Finally, some state constitutions require thorough judicial review of purported public uses.[73]

In all, the limited protection provided by both federal and most state courts has allowed a device, used for centuries to smooth the way for public works

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61. Nader & Hirsch, *supra* note 56, at 213.

62. *Id.* at 212 n.41; *see also* CHEMERINSKY, *supra* note 32, at 533 (noting a "strong presumption in favor of laws that are challenged under the rational basis test").

63. Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005).

64. Gideon Kanner, *That Was the Year That Was: Recent Developments in Eminent Domain Law*, *in* LAND USE INSTITUTE PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 87, 98 (ALI-ABA Course of Study, Aug. 17–19, 2000), *available at* SF08 ALI-ABA 87 (Westlaw).

65. *Id.*

66. Kulick, *supra* note 2, at 652; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

67. For a recommendation of the proper standard for public use, see discussion *infra* Part IV.

68. 29A C.J.S. *Eminent Domain* §§ 27, 28 (2004).

69. *Id.* § 28.

70. *Id.*

71. FLETCHER, *supra* note 40, § 2914.100 n.13 (Georgia, South Dakota, among others).

72. Kruckeberg, *supra* note 37, at 557 (Mississippi, New Jersey, among others).

73. Lazzarotti, *supra* note 1, at 66. State constitutions that have the provision for primary judicial review include Missouri, Arizona, Colorado, and Mississippi. *Id.* at 66 n.152. The Washington Constitution also includes the provision. WASH. CONST. art. I, § 16.

and to ease urban blight, to become a marketing tool for governments seeking to lure bigger businesses. The extreme deference of the courts to legislative determinations of public use can be seen in *Poletown* and the cases that relied on it to take private property from one citizen to give to another in the name of economic development.[74]

B. Scope of Eminent Domain Abuses

Before examining *Poletown* in detail, it is necessary to look at the scope of the problem and the many dangers that occur when the government can take private property at its pleasure to attract businesses, increase employment, and raise tax receipts. First, the scope of the problem is staggering. Dana Berliner of the Institute for Justice has authored a revealing study on this issue.[75] Her research revealed that during a five-year period ending in 2002, there were more than 10,000 filed or threatened condemnations of private property on behalf of other private parties in the United States.[76] Additionally, at the time Berliner wrote her article, there were more than 4000 properties that were "currently living under threat of private use condemnation."[77] These condemnations were spread over a broad number of states; with forty-one of fifty states having at least one filed or threatened condemnation for private parties.[78]

While these statistics are impressive, it is also important to keep in mind that each of these cases represents a person's home or business potentially being taken away and given to another private party that claims to be able to put the land to a better use. For example, in *Poletown*, an entire working class neighborhood was moved, including 4200 people, 600 businesses, and 16 churches.[79] Other

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74. *See* Berliner, *supra* note 9, at 791–92; *see also, e.g.*, Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005); Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227 (Del. 1986); Craig v. Kennebec Reg. Dev. Auth., No. Civ.A.RE-00-032, 2001 WL 1715952 (Me. Super. Apr. 2, 2001); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981); City of Duluth v. Minnesota, 390 N.W.2d 757 (Minn. 1986); Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003).

75. Berliner, *supra* note 9, at 801. This study purported to "document and quantify the uses and abuses of eminent domain for private parties." *Id.* at 802. Berliner examined court papers and other published accounts covering the five-year period from January 1, 1998 to December 31, 2002. *Id.* Despite the numbers reported in this study, there were undoubtedly many condemnations that were missed, as many go unreported. *Id.* at 803. In Connecticut, which is the only state that reports the numbers of redevelopment condemnations, the courts listed 543. *Id.* Yet, only thirty-one were found reported in newspapers. *Id.* If this trend is similar in other states, then the numbers of actual or threatened condemnations for private parties would be many times higher. *Id.*

76. *Id.* There were exactly 10,282 filed or threatened condemnations: 3722 condemnations filed, and 6560 condemnations threatened. *Id.*

77. *Id.* (reporting that 4032 properties were threatened by private use condemnation at the time of the article).

78. *Id.*

79. Ilya Somin, Poletown *Decision Did Not Create Desired Benefits; New Ruling Protects Weak from Government Abuses; Michigan Court Fuels Fight About Future of Urban Development*, DETROIT NEWS, Aug. 8, 2004, at 13A.

examples include the destruction of a black middle-class neighborhood in Atlantic City to build a tunnel to a casino; the removal of a woman in her eighties from her home of fifty-five years to expand an auto dealership; the condemnation of a family's home in Florida so the manager of a new golf course development could live in it; and the designation of homes in Ohio as blighted because they did not have two-car garages.[80] While there are many more examples available, these few help to illustrate the human costs of eminent domain abuses.

C. Dangers from Eminent Domain Abuses

In addition to taking residents from their homes, government use of eminent domain can cause other harms. For example, residents may experience psychological impacts after being uprooted from a longtime home.[81] Additionally, every time a tightly knit community is removed, its unique identity is destroyed forever.[82] Finally, costs in other newer neighborhoods might exceed what residents receive as "just compensation" for their current homes, leaving them unable to afford a comparable residence.[83]

Even if the government is unsuccessful in its condemnation effort, simply threatening condemnation can cause problems for the citizens involved. First, it creates tremendous uncertainty for property owners while they fight the condemnation proceedings.[84] Landowners are unlikely to fix up homes, and business owners will not try to expand with the threat of condemnation hanging over their heads.[85] It is this pressure and the monetary costs required to fight dispossession that eventually force most people to give in and settle for whatever the government decides is "just compensation," even if they have a strong case and do not want to leave.[86] While the valuation of just compensation is beyond the scope of this Note, it is important to mention that the compensation received by owners who lose their property to takings is not always just. For example, the government does not pay homeowners for sentimental value or for the benefits of remaining in a close-knit community.[87] Likewise, the government will not compensate businesses for the goodwill that they have established within the community nor the easy access offered to longtime customers.[88]

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80. Berliner, *supra* note 9, at 804. Other examples listed include condemning homes for a shopping center and parking lot in Texas and forcing the people to move while the spouses in two of the houses were dying from cancer; evicting four elderly siblings in Connecticut from their home of sixty years to make way for an industrial park; and condemning a bus company in New Jersey to make way for a Walgreens. *Id.*

81. *Id.* at 807.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *See id.*

87. *Id.*

88. *Id.* at 807–08.

Usually, these eminent domain abuses hurt the people least likely to fight back.[89] Typically, the government flexes its muscle "on behalf of the prosperous and powerful, while the property owners who get muscled out are not rich or politically connected."[90] This leads to a "wholesale looting of both private resources and public funds to benefit small groups of wealthy, well-connected insiders who are able to borrow the government's power of eminent domain in an open effort to enrich themselves at public expense."[91] Not only do the property owners take a hit in this, but all taxpayers end up spending money to finance these private interests.[92] One can trace some of this large scale "looting" back to 1981 and General Motors' efforts in *Poletown*.

II. *POLETOWN* AND ITS PROGENY

Justice Ryan, dissenting in *Poletown*, perhaps said it best when he remarked, "This is an extraordinary case. The reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations."[93] Indeed, the Michigan Supreme Court decision that forced 4200 people from their homes in a tightly knit, working-class neighborhood in order to make way for a new General Motors assembly plant has had a "reverberating clang," not only for the property owners forced to leave their homes and businesses, but also for the people of Michigan and many other states.

Poletown was an extraordinary case, both in the circumstances surrounding the action and in the scope of the proposed condemnation. The case came before the Michigan Supreme Court at a time of economic decline, when the unemployment rate in Detroit was eighteen percent and many manufacturers were leaving the rust belt states for the cheaper cost of doing business and warmer weather of the sun belt states.[94] It was against this backdrop that General Motors

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89. *See* Timothy Sandefur, *This Land is Not Your Land*, NAT'L REV. ONLINE, Aug. 23, 2004, http://www.nationalreview.com/comment/sandefur200408230840.asp [hereinafter Sandefur, *This Land*]; Timothy Sandefur, *Poletown Condemnation Case Has Ruled Too Long in Michigan*, DETROIT FREE PRESS, Feb. 10, 2004 (printout on file with Author) [hereinafter Sandefur, *Poletown Condemnation*]; *see also* Kanner, *supra* note 64, at 92–96.

90. Sandefur, *Poletown Condemnation*, *supra* note 89.

91. Kanner, *supra* note 64, at 96.

92. For example, in *Poletown*, it is estimated that the cost of clearing and preparing the land totaled more than $200 million dollars with GM buying it for only $8 million. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455, 469 (Mich. 1981) (Ryan, J., dissenting), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). Other estimates put the total cost of the project to taxpayers at more than $300 million. Nader & Hirsch, *supra* note 56, at 219.

93. *Poletown*, 304 N.W.2d at 464–65 (Ryan, J., dissenting). Justice Ryan wanted to show "how easily government, in all of its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means." *Id.* at 465.

94. *Id.* The unemployment rate in Michigan as a whole was around 14.2%, but among black citizens in Detroit it was almost 30%. *Id.* In addition, important companies like Chrysler were "on the ropes," and the other automakers had just reported the largest financial losses in their history. *Id.*

("GM") approached the City of Detroit (the "City") with plans to build a new, "next generation" assembly plant in Detroit.[95] In exchange for locating the plant there, GM wanted the City to find a suitable site for the facility and use its power of eminent domain to acquire the site.[96] Additionally, GM asked the City to prepare the area, give them tax breaks and concessions, and sell the property to them at a reduced price.[97] In exchange, the City was promised 6000 jobs and the opportunity to receive millions in tax receipts.[98]

With the helpful guidance of GM, the City found an acceptable location that had the proper dimensions as well as access to a railroad line.[99] Unfortunately, the acceptable location was already inhabited by a "tightly-knit residential enclave of first- and second-generation Americans," whose homes were their most treasured investments.[100] This "stable ethnic neighborhood [was] the unchanging symbol of the security and quality of their lives."[101] Many powerful people in Detroit extolled the promise of new tax revenues, new jobs, and new opportunities for businesses around the plant.[102] Meanwhile, the inhabitants of a "little known inner-city neighborhood of minimal tax base significance" were seemingly forgotten.[103] Accordingly, these residents sued the city to prevent the condemnations of their homes.[104]

The primary question in *Poletown* was whether promoting industry and commerce by taking property from private parties and giving it to a corporation was proper under the Michigan Constitution.[105] In order for the court to find that this taking was constitutional, the increased jobs and taxes would have to qualify as a public use.[106] The trial was conducted very quickly because GM had provided the City with imminent deadlines.[107] The case was argued before the Michigan Supreme Court on March 3, 1981, with the court delivering its decision on March 13, 1981.[108] The court ruled that "public use" and "public purpose" were synonymous and that the "right of the public to receive and enjoy the benefit of the use" determined whether the use was public or not.[109] The court used a deferential standard, stating that the legislature was responsible for determining what

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95. *Id.* at 466.
96. *Id.* at 466–67.
97. *Id.* at 469.
98. *Id.* at 467.
99. *Id.* at 467–68.
100. *Id.* at 470.
101. *Id.*
102. *Id.* at 471.
103. *Id.*
104. *Id.*
105. *Id.* at 457 (majority opinion). The Michigan Constitution states, "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." MICH. CONST. art. X, § 2.
106. *Poletown*, 304 N.W.2d at 457.
107. *Id.* at 467 (Ryan, J., dissenting) ("Unquestionably cognizant of its immense political and economic power, General Motors also insisted that it must receive title to the assembled parcel by May 1, 1981.").
108. *Id.* at 455 (majority opinion).
109. *Id.* at 457 (citation omitted).

constitutes a public use, and its determination should only be reversed where it is "palpable and manifestly arbitrary and incorrect."[110] The court found that alleviating unemployment and revitalizing the economy were the primary purposes of the condemnation, while the benefit to GM was merely incidental.[111] While the court paid lip service to a "heightened level of scrutiny,"[112] it appears that it gave the legislative determination only a rational basis level of review.[113]

This ruling had many effects on the citizens of Detroit, particularly those who resided in Poletown. First, the government displaced 4200 people when it bulldozed 600 homes and sixteen churches to make way for the new GM plant.[114] In addition, the city and state provided GM benefits in an amount between $200 million and $300 million to encourage building the facility.[115] In the end, perhaps the worst consequence for Detroit citizens was that the actual benefits from the new GM plant were much less than promised. Instead of keeping 6000 people employed, GM reduced its goal to 3000 and even then only if "economic conditions" permitted.[116] Accordingly, more people from Poletown were displaced than GM intended to employ at the newly established plant.[117] Some writers have estimated that the actual results were even worse, and that, overall, the project actually destroyed more jobs than it created.[118]

While Justice Ryan had hoped that the "precedential value of this case [would] be lost in the accumulating rubble" of the demolition of the condemned structures in the Poletown neighborhood,[119] this, unfortunately, was not the case. In Michigan alone, more than twenty-five cases cite *Poletown* as authority for condemnation efforts.[120] Certainly, countless other properties were condemned in the name of *Poletown* without the residents ever filing a lawsuit.[121] Also, other states have adopted the *Poletown* rationale and have allowed condemnation in the

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110. *Id.* at 459 (quoting Gregory Marina, Inc. v. Detroit, 144 N.W.2d 503 (1966)).

111. *Id.*

112. *Id.* at 459–60 (stating that where eminent domain "is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced").

113. Kulick, *supra* note 2, at 652.

114. Somin, *supra* note 79, at 13A.

115. *Poletown*, 304 N.W.2d at 469 (Ryan, J., dissenting) (stating that the cost to Detroit was more than $200 million); Nader & Hirsch, *supra* note 56, at 219 (stating that the cost was over $300 million by the time it was totaled up).

116. Nader & Hirsch, *supra* note 56, at 220 n.97.

117. *Id.*

118. *Court States Poletown Condemnation was "Erroneous,"* *supra* note 27.

119. *Poletown*, 304 N.W.2d at 482 (Ryan, J., dissenting).

120. *See, e.g.*, Toklsdorf v. Griffith, 626 N.W.2d 163 (Mich. 2001); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638 (Mich. 1993); McKeigan v. Grass Lake Twp. Supervisor, 587 N.W.2d 505 (Mich. Ct. App. 1998); Bieker v. Suttons Bay Twp. Supervisor, 496 N.W.2d 398 (Mich. Ct. App. 1992); City of Detroit v. Vavro, 442 N.W.2d 730 (Mich. Ct. App. 1989); City of Detroit v. Lucas, 446 N.W.2d 596 (Mich. Ct. App. 1989); City of Detroit v. Michael's Prescriptions, 373 N.W.2d 219 (Mich. Ct. App. 1985).

121. *See* Berliner, *supra* note 9, at 807 (noting that many people faced with the prospect of condemnation fail to file lawsuits and just give up rather than fight the government).

name of jobs and taxes.[122] In fact, the courts in at least ten other states have cited *Poletown* as support for their efforts to condemn private property in the name of economic development.[123] In contrast, *Poletown* was distinguished by only a few courts in other states, and disagreed with by none.[124]

In addition to its precedential value, *Poletown* is cited to, and often reprinted, in every major textbook on property.[125] This may cause future lawyers to believe that a private taking for the benefit of private parties is acceptable. *Poletown* was clearly a disaster for private property rights in many parts of the country. It essentially rendered "one's ownership of private property . . . forever subject to the government's determination that another private party would put one's land to better use."[126]

III. TURNING THE TIDE—*HATHCOCK* OVERRULES *POLETOWN*

A. The Case

Thankfully, Justice Ryan's concerns in his dissent in *Poletown* were only partially realized. While the *Poletown* decision did sound with a "reverberating clang," it did not survive for generations. On July 30, 2004, the Michigan Supreme

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122. Editorial, *"We Overrule* Poletown," LAS VEGAS REV.-J., Aug. 3, 2004, at 10B, *available at* http://www.reviewjournal.com/lvrj_home/2004/Aug-03-Tue-2004/opinion/24449762.html.

123. The ten states were Connecticut, Delaware, Maine, Minnesota, Nevada, North Carolina, North Dakota, Ohio, New Jersey, and New York. *See In re* Persky, 134 B.R. 81 (Bankr. E.D.N.Y. 1991); Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005); Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227 (Del. Supr. 1986); Craig v. Kennebec Reg. Dev. Auth., No. Civ.A.RE-00-032, 2001 WL 1715952 (Me. Super. Apr. 2, 2001); City of Duluth v. Minnesota., 390 N.W.2d 757 (Minn. 1986); Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1 (Nev. 2003); Twp. of West Orange v. 769 Assoc., L.L.C., 800 A.2d 86 (N.J. 2002); Maready v. City of Winston-Salem, 467 S.E.2d 615 (N.C. 1996); City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365 (N.D. 1996); City of Toledo v. Kim's Auto & Truck Serv., Inc., No. L-02-1318, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003).

124. *See* Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445 (7th Cir. 2002) (distinguishing *Poletown*); Kelo v. City of New London, No. 557299, 2002 WL 500238 (Conn. Super. Ct. Mar. 13, 2002) (same); *In re* Condemnation by Minneapolis Cmty. Dev. Agency, 582 N.W. 2d 596 (Minn. Ct. App. 1998) (same).

125. *See Court States Poletown Condemnation was "Erroneous," supra* note 27; *see also* BARLOW BURKE, ANN M. BURKHART & R.H. HELMHOLZ, FUNDAMENTALS OF PROPERTY LAW 201 (1999); SINGER, *supra* note 4, at 1179 (3d ed. 2002); Dana Berliner, *Home, Safe Home*, WASH. TIMES, Sept. 5, 2004, at B4 (quoting D.C. Mayor Anthony Williams, who stated that, according to his memory of law school, *Poletown* is cited "in every property law textbook as one of the three most important and influential eminent domain decisions in U.S. history").

126. County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004); *see also* Somin, *supra* note 79, at 13A.

Court overturned *Poletown* in *County of Wayne v. Hathcock*,[127] in what many have hailed as an important victory for private property holders everywhere.[128]

In *Hathcock*, the City of Detroit sought to condemn property surrounding the Detroit Metropolitan Airport (the "Airport") in order to build a "state-of-the-art business and technology park" on a 1300-acre site adjacent to the airport.[129] This technology park, dubbed "The Pinnacle Project" ("the Project"), would include hotels, a recreational facility, a conference center, and parcels for businesses.[130] The Project arose out of an expansion at the Airport, which added a new terminal and runway.[131] The expansion increased concern over noise pollution close to the Airport and so, in order to obviate this problem, the Federal Aviation Administration agreed to provide money for a voluntary program to buy out neighboring properties.[132] One of the conditions for these funds was that Wayne County (the "County") would put the property to economically viable use, hence the creation of the Project.[133] The proponents of the Project stated that the development would create thousands of jobs and millions in tax revenues while enhancing the image of the County and helping it diversify away from manufacturing businesses.[134]

The original voluntary program resulted in the purchase of approximately 500 acres in a checkerboard pattern south of the airport.[135] However, in order to proceed with the Project, Wayne County needed to come up with a 1300-acre contiguous parcel of land.[136] The County managed to purchase an additional 500 acres on a voluntary basis.[137] This left forty-six parcels that the County needed to acquire.[138] Once condemnation proceedings began, twenty-seven of these owners agreed to sell upon receiving new offers, which left nineteen holdouts.[139] These nineteen landowners filed a motion to review the necessity of these

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127. 684 N.W.2d at 787 (holding that economic benefits were not a valid public use, overruling *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981)).

128. *See Attorney Alan Ackerman Hails Michigan Supreme Court's Unanimous Reversal of "*Poletown*" Decision That Established Precedent for Eminent Domain Abuses Nationwide*, BUS. WIRE, Aug. 3, 2004, *available at* http://www.findarticles.com/p/articles/mi_m0EIN/is_2004_August_3/ai_n6139177 [hereinafter *Attorney Ackerman*]; Henry Lamb, *At Last, a Property-Rights Victory*, WORLD NET DAILY, Aug. 7, 2004, http://worldnetdaily.com/news/articles.asp?ARTICLE_ID=39846; Somin, *supra* note 79, at 13A; Editorial, *supra* note 122, at 10B.

129. *Hathcock*, 684 N.W.2d at 770.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 770–71. Expert testimony at trial claimed that the Pinnacle Project would create 30,000 jobs and provide an additional $350 million in tax revenue to the county. *Id.* at 771.

135. *Id.* at 770.

136. *Id.* at 771.

137. *Id.*

138. *Id.*

139. *Id.*

condemnations.[140] The trial court, relying on *Poletown*, held that the Project served a public purpose.[141] A three-judge panel in the Michigan Court of Appeals agreed that *Poletown* was controlling and that under its standard, the park qualified as a public use.[142] However, in an interesting twist, two of the three judges on the panel who ruled in favor of the condemnations, because they were bound by precedent, nonetheless opined that *Poletown* was "poorly reasoned, wrongly decided, and ripe for reversal" by the Michigan Supreme Court.[143]

The Michigan Supreme Court agreed to take the appeal and asked the parties to brief three main issues.[144] Only the third question is relevant to this Note: "[W]hether the public purpose test set forth in *Poletown* . . . is consistent" with the Michigan Constitution and, "if not, whether this test should be overruled."[145] The court answered this question by stating that, "in order to vindicate [Michigan's] Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law," it had to overrule *Poletown*.[146] It also decided that instead of only applying prospectively, the new rule should apply to the condemnation at issue in *Hathcock* and other cases pending in Michigan courts.[147] All of the justices agreed that *Poletown* should be overruled, although two justices thought the new rules should only apply prospectively,[148] and one justice thought that the court's new reasoning was suspect.[149]

The court's rationale for overruling *Poletown* was based on its interpretation of article X, section 2 of the 1963 Michigan Constitution.[150] This provision states that the government can use the power of eminent domain only for a "public use."[151] The court ruled that its previous interpretation of "public use" in *Poletown* did not conform to the common understanding of that term at the time the constitution was ratified.[152] The court stated that "public use" does not bar all transfers of condemned property to private parties.[153] However, it does bar

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140. *Id.*
141. *Id.*
142. *Id.* at 771–72.
143. *Id.* at 772.
144. *Id.* The court asked the parties to: (1) look at whether there was statutory authority for the takings; (2) whether the transfers were consistent with the rule in *Poletown*; and (3) whether *Poletown* and its test for public use should be overturned. *Id.* A final question was whether the new rule, if any, should apply retroactively or proactively. *Id.*
145. *Id.*
146. *Id.* at 787.
147. *Id.* at 788.
148. *Id.* at 799–800 (Cavanagh, J., concurring in part and dissenting in part); *id.* at 800 (Kelly, J., concurring in part and dissenting in part).
149. *Id.* at 788–89 (Weaver, J., concurring in part and dissenting in part).
150. *Id.* at 770 (majority opinion).
151. MICH. CONST. art. X, § 2 ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.").
152. *Hathcock*, 684 N.W.2d at 770.
153. *Id.* at 781.

transferring condemned property to private entities for a private use.[154] So, the court set out to determine in what types of situations the resulting use would be sufficiently public in order to constitute a public use. To answer this question, the court said that a "transfer of condemned property is a 'public use' when it possesses one of the three characteristics in our pre-1963 case law identified by Justice Ryan" in his dissent in *Poletown*.[155]

The resulting test looks to see if the transfer of private property from its owner to another private citizen using the government's power of eminent domain falls under one of three acceptable public uses. First, condemned land can be transferred to a private entity if the situation involves "public necessity of the extreme sort otherwise impracticable."[156] This includes situations where the existence of the project depends on land that can only be assembled by the coordination of a central government.[157] Some examples include instrumentalities of commerce, such as highways, railroads, and canals.[158]

Second, if the private entity that receives the transfer of condemned land remains "accountable to the public in the use of that property," then it is an acceptable public use.[159] The court provided an actual example of a petroleum pipeline that had "pledged itself to transport in intrastate commerce" petroleum products for the benefit of the state.[160] The pipeline was regulated by the Michigan Public Service Commission, such that the government could enforce the obligations to the public that resulted.[161]

Finally, land can be transferred to a private entity when the selection of the land is based on a public concern.[162] This means that the reasons for condemning the land, rather than its subsequent use, must satisfy the public use requirement.[163] These are usually "slum clearance" cases, in which the primary benefit of the condemnation is not the economic return of redevelopment, but rather the removal of dangerous, blighted conditions.[164] The important inquiry in these cases is whether the land was selected on the basis of facts that had

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154. *Id.*

155. *Id.*

156. *Id.* (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting) ("The exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.")).

157. *Id.*

158. *Id.* Central coordination is required because these instrumentalities of commerce typically need a long, narrow strip of land. *Id.* If the government is not involved, then one landowner along the way could prevent the benefit to the public by holding out for an unreasonable amount of compensation. *Id.* at 781–82.

159. *Id.* at 782.

160. *Id.*

161. *Id.*

162. *Id.* at 782–83.

163. *Id.* at 783.

164. *Id.*

"independent public significance," such as the need to "remedy urban blight for the sake of public health and safety."[165]

In applying these categories to the Pinnacle Project, the court found that the proposed condemnation for private parties failed to fall under any of the exceptions.[166] First, this was not a case where the only way that the land could be assembled was through central government coordination.[167] The court noted that the country is full of office parks, hotels, shopping centers, and places of entertainment and commerce that were built without the aid of eminent domain.[168] Second, there was no plan for ongoing governmental monitoring of the private entities after the developers received the land.[169] Rather, the plan called for the private entities to pursue their own financial welfare like any other for-profit enterprise.[170] Finally, there was nothing about the condemnation itself that served the public good.[171] Unlike in slum clearance cases, there were no facts of independent public significance in the choice of the land and no evidence that the property was blighted.[172]

B. Potential Negative Implications of Hathcock

The impacts of *Hathcock* are likely to be far reaching. As in any significant judicial decision, there are potential downsides for Michigan and any other state that adopts similar restrictions on government's power of eminent domain. First, restricting eminent domain could put states at a disadvantage to other states that have less restrictive standards.[173] In Michigan, for example, it is likely that GM would have built its plant in another state, depriving Michigan of jobs and tax revenues.[174] In addition to the GM plant, critics point to other projects that would not have progressed to completion had *Hathcock* been the law when they were proposed.[175] Mark Zausmer, who represented Wayne County in *Hathcock*, stated that "there would have been no Fox Theater development, and in all likelihood there would have been no new stadiums."[176] Additionally, he claims that this decision will hamstring Michigan's ability to compete for jobs and development projects in the future.[177] John Mogk, a professor of land use law at Wayne State University, says that "no other city with which Detroit competes has

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165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 783–84.
169. *Id.* at 784.
170. *Id.*
171. *Id.*
172. *Id.*
173. *See* Tresa Baldas, *Landmark Eminent Domain Case Overturned*, NAT'L L.J., Aug. 9, 2004, at col. 1, *available at* 8/9/04 Nat'l L.J. 4 (Westlaw).
174. *See id.*; *see also* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 466 (Mich. 1981) (Ryan, J., dissenting) (noting that if the condemnation was not approved, GM would look outside the region to build its plant).
175. Baldas, *supra* note 173.
176. *Id.*
177. *Id.*

such limitations" placed on its ability to obtain land for redevelopment.[178] Finally, for projects that do get built, *Hathcock* is likely to increase the cost of land used in the redevelopment efforts.[179]

Second, critics claim that the ruling is an example of activist judges trying to strip legislatures of their traditional power to determine what constitutes public use.[180] They decry the decision for placing Michigan takings law outside of federal constitutional analysis by providing more protection under the Michigan Constitution than the Supreme Court has provided under the U.S. Constitution.[181] They argue that the eminent domain power serves an essential function in society by permitting the government to overcome imperfections in the market that would otherwise "stymie rational economic and social development."[182]

Next, critics of the decision claim further problems are likely to arise from the tightened "public use" standard. For example, some scientists believe that the decision will cause environmental problems by increasing suburban sprawl.[183] This would occur, they argue, because without the opportunity to redevelop downtown areas, businesses and people will move farther away from the city to where land can be assembled for projects.[184] This sprawl increases traffic, causes habitat loss, degrades water, destroys wetlands, hurts air quality, increases climate change, and raises noise problems.[185] In addition, critics of *Hathcock* argue that the public reaps huge benefits when government and private enterprise act as partners, even when the private enterprise benefits to a large extent.[186] Finally, critics hope that the ruling will not be adopted outside of Michigan, thereby jeopardizing development projects elsewhere.[187]

In rebuttal, advocates of the decision argue that the impact will not be negative. First, many of these redevelopment deals are not economically efficient.[188] If the private party or entity sponsoring a project cannot afford to buy property on the open market, then perhaps the project is not economical and should

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178. John Gallagher, *Poletown Seizures are Ruled Unlawful; State Supreme Court Restricts Government Rights to Take Land*, DETROIT FREE PRESS, July 31, 2004, at 1A.

179. *Id.*

180. Baldas, *supra* note 173.

181. *Id.*

182. Brief Amicus Curiae of Nat'l Congress for Cmty. Econ. Dev. at 4, County of Wayne v. Hathcock, 671 N.W.2d 40 (Mich. 2004) (Nos. 124070–124078), 2004 WL 1041554.

183. *Id.* at 14–15.

184. *See id.* at 12–14.

185. *Id.* at 13.

186. Michigan Mun. League's Brief as Amicus Curiae at 33–34, County of Wayne v. Hathcock, 671 N.W.2d 40 (Mich. 2004) (Nos. 124070–124078), 2003 WL 23353320.

187. Baldas, *supra* note 173.

188. Kulick, *supra* note 2, at 647 (stating that the *Poletown* model leads to significant costs to society because it encourages markets to work in an economically inefficient manner by lowering costs for firms and creating a subsidy to the private transferee).

not be undertaken.[189] Also, as an alternative to condemnation through eminent domain, some argue that government can use other means to encourage economic redevelopment.[190] Incentives such as tax benefits or direct subsidies could be used to help the area attract or retain a corporation.[191] The benefit of these types of incentives is that they spread the burden among a larger group of people.[192] All the taxpayers in the community will have to sacrifice for the public good rather than just the politically unconnected citizens whose property rights happen to be in the way of "progress."[193]

C. Positive Implications of Hathcock

Despite a few potential downsides to the *Hathcock* decision, there are many positive implications. First and foremost, this decision will stop some land grabs in Michigan, those that do more to benefit private individuals and companies than the public.[194] Thus, it is a major step forward in the battle to protect citizens' constitutional property rights.[195] Also, the case may help bring publicity to the problem of eminent domain abuses and show the public that there are alternative approaches that are superior to the reasoning of the *Kelo* decision. Many people in the United States have not been affected by the abuses of eminent domain and are therefore unaware of or unconcerned with the problem.[196] Once these Americans learn that their property is insecure, they may be more amenable to helping others.[197] Many nonlegal periodicals have discussed *Hathcock* and its significance.[198] In addition to the publicity in newspapers, textbooks will no longer cite to the *Poletown* decision as a legitimate use of eminent domain power.[199] This may reduce the number of unjust condemnations, as municipal legal advisors may not see the power of eminent domain as broadly as some of their predecessors did.

Several other benefits are likely to flow from *Hathcock*. First, it provides a workable framework for future eminent domain cases, which this Note will explore further in Part IV. Second, it will prevent new cases in other states from invoking *Poletown* as justification for takings based on perceived economic benefits. This may help to further reduce eminent domain abuse. Next, it may

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189. *See id.* at 649 (stating that all of society suffers when these inefficient projects are undertaken).

190. Nader & Hirsch, *supra* note 56, at 227.

191. *Id.*

192. *Id.*

193. *See id.*

194. *See Court States Poletown Condemnation Was "Erroneous," supra* note 27; Somin, *supra* note 79.

195. Somin, *supra* note 79, at 13A.

196. *See* Lazzarotti, *supra* note 1, at 73.

197. *See id.*; *see also* Berliner, *supra* note 9, at 798–800.

198. *See, e.g.*, Berliner, *supra* note 125, at B4; Editorial, *supra* note 122, at 10B; Daniel Fisher, *Robbing Peter to Deed Paul*, FORBES, July 26, 2004, at 60; Gallagher, *supra* note 178; Tim Keller, *Michigan Ruling 3rd Strike for Giants' Coronado Site*, ARIZ. REPUBLIC, Aug. 31, 2004, at Scottsdale Republic North 6; Lamb, *supra* note 128; Sandefur, *This Land*, *supra* note 89.

199. Berliner, *supra* note 125, at B4 (writing that the impacts of *Hathcock* are likely to be far reaching, including the rewriting of textbooks).

cause other courts to revisit their approach to public use doctrine, particularly those that relied on *Poletown*.[200] *Hathcock* may also make other communities and states think twice before taking property from private citizens to give to other private parties or businesses.[201] Finally, *Hathcock* may signal the start of a trend toward actually requiring a valid public use.

It is necessary to consider whether *Hathcock* is a turning point in the country's eminent domain law or just a bump in the road. The case is clearly a tremendous win for property owners,[202] and there is some indication that jurisprudence in other locations is starting to favor a more robust public use requirement. Like *Hathcock*, four other recent cases have sought to rein in the power of eminent domain. For example, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, a federal district court in California ruled that a city unconstitutionally abused its power of eminent domain by trying to take a small store's property to make room for the expansion of a Costco because the expansion was not a public purpose.[203] In other cases, a federal district court in California, [204] the United States Court of Appeals for the Seventh Circuit,[205] and a state court in Illinois,[206] all invalidated takings on public use grounds. If viewed in isolation, it may seem unlikely that one state's court can turn the tide on the many eminent domain abuses of the past century. However, in conjunction with the cases above,

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200. *See* Keller, *supra* note 198, at Scottsdale Republic North 6 (opining that the *Hathcock* decision will make city leaders in Scottsdale rethink their attempt to use eminent domain to acquire property for a spring training facility).

201. *See* Lamb, *supra* note 128 (stating that the *Poletown* reversal must be putting a monkey wrench in many communities' plans to condemn property under the guise of economic benefit). Lamb states that the decision will have "profound implications for all future eminent domain actions." *Id.* The reversal is "undoubtedly causing gastronomical distress in municipalities and economic development agencies across the country that are, at this moment, processing hundreds of eminent domain condemnations for 'public benefit,' rather than for 'public use.'" *Id.*

202. *Attorney Ackerman*, *supra* note 128.

203. 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (holding that the city's attempt to placate Costco through eminent domain was an unconstitutional abuse of the eminent domain power under the Fifth Amendment of the U.S. Constitution because the taking would be for purely private purposes).

204. Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d. 1203 (C.D. Cal. 2002). In this case, the court ruled that an eminent domain proceeding to take land from a church in order to develop a major discount retailer such as Costco was unconstitutional because there was no valid public use. *Id.* at 1229–30. The worst part about this case was that the city first turned down the application of the church to build a facility on its land due to zoning issues, and then when it could not buy the land from the church, the city moved to condemn the land because it thought the redevelopment was a better use for the property than a church, which would provide little tax revenue. *Id.* at 1228–29.

205. Daniels v. Area Plan Comm'n., 306 F.3d 445 (7th Cir. 2002). The court ruled that the stated public purpose—for a developer to remove vacant houses and create a commercial zone that might be an asset to the community—did not satisfy the Fifth Amendment's public use requirement. *Id.*

206. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002) (holding that a privately owned racetrack could not use eminent domain power to acquire adjacent land in order to build a parking facility that would help it expand and provide economic benefits to the city).

the *Hathcock* decision could be the start of a real return to the protection of private property envisioned when the Founders placed limitations on the government's power of eminent domain. After all, it was one case, *Poletown*, that was a major turning point in the other direction.[207]

In the end, the potential benefits of the *Hathcock* decision outweigh the potential harm, and private property owners everywhere should feel a little more secure in their homes or businesses. Justice Young, writing for the court, summarized the unifying theory of *Hathcock* and the public use question overall by stating that, "[I]f 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."[208]

IV. RECOMMENDATIONS AND ANTICIPATED RESULTS FROM *HATHCOCK*

While *Hathcock* is a good first step to ensuring that the courts will protect Americans' property rights, governments and citizens still have work to do. First, because it is a decision by the Michigan Supreme Court based on the Michigan Constitution, *Hathcock* only establishes binding precedent in Michigan. The rest of the country is not protected by a *Hathcock*-like decision. The U.S. Supreme Court failed to provide this protection to private property holders in *Kelo*, and therefore *Hathcock* provides a vital alternative approach.[209] Without *Hathcock*, other state courts would likely follow the U.S. Supreme Court's lead in allowing continued takings of private land for private use. Now, the other states have two distinct choices when interpreting their own constitutions. Legislatures should pass tough legislation, and state courts should take action to provide additional protection under their individual state constitutions. There is some indication that this process has already started, largely as a backlash to the Supreme Court's decision in *Kelo*.[210] This Note advocates that either the state legislatures or the state supreme courts adopt the three categories of valid takings by private parties spelled out in *Hathcock*. In addition, when private property is taken from one private party and given to another, courts should apply a higher level of scrutiny than the rational

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207. *See Attorney Ackerman*, *supra* note 128 (stating that the *Poletown* decision effectively opened the door for many property condemnation abuses all over the country).

208. County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004).

209. Kelo v. City of New London, 125 S. Ct. 2655 (2005).

210. The public outcry to the Supreme Court's decision in *Kelo* has been strong. *See* John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1. Texas, Alabama, and Delaware all passed bills limiting the right of government to seize property and turn it over to private development soon after *Kelo*. *Id.* They are not alone. In fact, "[i]n a rare display of unanimity that cuts across partisan and geographic lines, lawmakers in virtually every statehouse across the country are advancing bills and constitutional amendments to limit use of the government's power of eminent domain to seize private property for economic development purposes." *Id.* Even in Connecticut where the *Kelo* controversy arose, bills have been introduced to stop the very kind of land grabs involved in the case. *Id.*

basis review currently applied by the U.S. Supreme Court.[211] Finally, the eminent domain issue should continue to be publicized so that people will be encouraged to lobby against these abusive practices by states and municipalities.

A. Workable Standards for Eminent Domain Actions

The individual state legislatures or state supreme courts should either pass legislation or interpret state constitutions to allow private property to be condemned and given to other private citizens only if the taking falls under one of the three categories outlined in *Hathcock*.[212] It is important to note that these categories only apply when the property is actually condemned and then given to another private citizen in order to generate public benefits.[213] When the property is retained by the government for uses such as a firehouse, park, or school, courts do not dispute that the taking qualifies as a public use.[214] By containing eminent domain in cases where the condemned property is given to private parties to situations that fall under one of the three categories in *Hathcock*, the government can strike an appropriate balance between its need for eminent domain power and the right of private property holders to be secure in their homes and businesses.

The first category in which the transfer of condemned land to a private citizen constitutes a public use is when the transaction involved is a "public necessity of the extreme sort otherwise impracticable."[215] In other words, only those enterprises that generate public benefits, those whose very existence depends on land that only a centralized government can acquire will qualify.[216] Some examples of these enterprises are "highways, railroads, canals, and other instrumentalities of commerce," gas lines, and utilities.[217] Government coordination is required for these facilities because these instrumentalities of commerce must generally follow more or less straight lines in order to be economical and provide the best possible public use.[218] Therefore, in order to avoid the "logistical and practical nightmare" that could be created if eminent domain was not used, these types of eminent domain actions are considered proper public uses.[219]

The second category from *Hathcock* is where the private entity "remains accountable to the public in its use of that property."[220] In *Poletown*[221] and

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211. *See Hathcock*, 684 N.W.2d at 786.
212. *Id.* at 781–83.
213. *See id.* at 781.
214. *See* Berliner, *supra* note 9, at 791; Editorial, *supra* note 122, at 10B; Sandefur, *This Land*, *supra* note 89.
215. *Hathcock*, 684 N.W.2d at 781.
216. *Id.*
217. *Id.*
218. *See id.* at 781–82.
219. *Id.* at 782.
220. *Id.*
221. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 480 (Mich. 1981) (Ryan, J., dissenting) (stating that General Motors would be accountable not to the public but rather to its stockholders), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

Hathcock,[222] there would have been no public oversight of the property once it was turned over to the private corporation. Rather, the courts expected that the entities would try to maximize their profits, as all for-profit entities must, regardless of how their decisions would affect the public. The court in *Hathcock* gave an example of when a taking did fall under this category, telling of a pipeline case in which it had approved the taking.[223] In *Lakehead Pipeline Co. v. Dehn*,[224] the court concluded that the state had retained enough control over a petroleum pipeline on condemned property to ensure that the company would remain accountable. Because the plaintiff had "pledged itself to transport in intrastate commerce," the pipeline was regulated by the Michigan Public Service Commission, and the state could enforce the obligations of the pipeline owner if it needed to, the taking was considered to be for a public use.[225] In essence, as long as the public retains some level of real control over the property, and the enterprise on the property benefits the public, the taking is constitutional under the Public Use Clause.[226]

The third and final category where condemned land can be given to private parties and qualify as a public use occurs when the "selection of the land to be condemned is itself based on public concern."[227] Basically, the selection must be based on "facts of independent public significance."[228] This means that the purposes for condemning the land itself, rather than the subsequent use, must constitute a public use under the state constitution.[229] The best example of this would be a slum clearance case, where the major purpose of the condemnation is removing unsafe or unsanitary housing in order to improve public health and safety.[230] The redevelopment of the property once the blight is removed is a secondary concern to the benefit achieved by clearing the property.[231]

Advocates of eminent domain reform worry that the third category may still allow abuses. The aspect with the most potential problems is the definition of blight, which may be interpreted differently by the government than the average citizen. Some municipalities find property blighted where the homes do not have a two-car attached garage, where the side yards are "too small," and where diverse ownership breaks up property blocks.[232] Therefore, the courts must be vigilant in instituting a reasonable definition.[233] A good definition might categorize blight as

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222. *Hathcock*, 684 N.W.2d at 784 (stating that the county intended the "entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise").

223. *Id.* at 782.

224. 64 N.W.2d 903 (Mich. 1954).

225. *Hathcock*, 684 N.W.2d at 782 (quoting *Dehn*, 64 N.W.2d at 912).

226. *See id.*

227. *Id.* at 782–83.

228. *Id.* at 783.

229. *Id.*

230. *Id.*

231. *See id.*

232. Berliner, *supra* note 9, at 806.

233. *See* Kruckeberg, *supra* note 37, at 548.

property that creates dangerous conditions and harms the health and public welfare of citizens.[234]

B. Increased Standard of Review

When private property is condemned and given to other private citizens, the courts should use a higher standard of review. The *Poletown* court paid lip service to "heightened scrutiny" in cases where the condemnation obviously benefits "specific and identifiable private interests."[235] The court, however, did not actually apply a heightened standard of review.[236] This should be corrected. When courts look at a taking that benefits a private party to determine whether it qualifies as a public use under one of the three categories from *Hathcock*, the court needs to employ a heightened level of scrutiny.

Some commentators have argued that the standard of review should be raised to strict scrutiny.[237] Under strict scrutiny, condemnations for private parties would pass muster only if there was a compelling purpose for the taking and the taking was the least restrictive way to accomplish that purpose.[238] Supporters of strict scrutiny claim that this higher standard will ensure that the "project is vital and can be accomplished by no other means."[239] They argue that this high standard is necessary due to the extraordinary act of transferring private property from one party to another.[240] They feel that applying strict scrutiny is the only way that the public use clause of the constitution can be squared with the "Framers' understanding of the critical importance of property rights."[241] While this standard would certainly protect property rights, it is probably too harsh because it would hamstring government efforts to provide for the general welfare.

Courts need to find a middle ground between the total deference given legislatures today and the strict scrutiny advocated by some commentators. This middle ground should balance the "duty of the legislature to promote the general

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234. *See id.*

235. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459–60 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). The court said it would "inspect with heightened scrutiny the claim that the public interest is the predominant interest being advanced." *Id.* In addition, the public benefit must be "clear and significant." *Id.* at 460.

236. Kulick, *supra* note 2, at 651.

237. *Id.*; Nader & Hirsch, *supra* note 56, at 224. The Nader note takes a slightly different approach to strict scrutiny, advocating applying strict scrutiny when one of three conditions exists. *Id.* First, strict scrutiny should be used anytime land is transferred to a private party. *Id.* Second, strict scrutiny should be used if the interest of the individual whose land is taken is particularly strong and just compensation will not suffice. *Id.* Finally, strict scrutiny should be used if the party is not strong politically. *Id.* If only the first category is present, then heightened scrutiny should still exist but maybe not to the extent it would if the first category was combined with one of the others. *Id.* at 224–25.

238. Kulick, *supra* note 2, at 653.

239. *Id.* at 681.

240. *Id.*

241. *Id.* at 680 (quoting Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 306 (2000)).

welfare and the responsibility of the courts to protect" individual rights.[242] This new, higher standard of review, in combination with limiting takings for private parties to the three categories available in *Hathcock*, would be an effective way to balance the needs of the public with the rights of private property holders.

C. Increased Publicity

Finally, citizens should continue to highlight eminent domain abuses in order to encourage grassroots action. The more people know about the danger to their home or business from the power of eminent domain, the more likely they are to get involved.[243] This involvement can include lobbying the government to use the power responsibly, organizing grassroots efforts to fight individual cases of eminent domain abuse, and convincing developers to abandon unpopular projects.[244]

These grassroots efforts have had some success. For example, in Mesa, Arizona, citizens voted to restrict the ability of the city to condemn property.[245] Also, in Missouri, voters overturned three ordinances that would have allowed for condemnations to make way for large private developments.[246] In addition, public opposition can cause developers to pull out of unpopular projects.[247] In Pittsburgh, public outcries helped prevent a large urban mall from being built.[248] In New York, citizen opposition helped to prevent the condemnation of a neighborhood that would have made way for a department store.[249] All of this opposition and activism has helped protect private parties from unjust condemnations, making cities and developers think twice before undertaking a project.[250]

CONCLUSION

Federal and state governments should continue to have the power of eminent domain, as laid out in both the federal and state constitutions. However, new life should be breathed into the public use clauses of these constitutions, providing the protection for private property owners that was envisioned by the drafters of the U.S. Constitution. The U.S. Supreme Court has failed to provide protection from eminent domain abuses committed by governments across the country. Given its extreme deference to the legislatures' determinations of public use, the Court has effectively read the Public Use Clause out of the Constitution.

Therefore, it is up to the states to provide protection for private citizens' right to keep their homes or businesses. In the past, state courts have followed the lead of the Supreme Court in being deferential to public use determinations by the legislature. Perhaps the most egregious example of this was the decision in

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242. Lazzarotti, *supra* note 1, at 70.
243. *See* Berliner, *supra* note 9, at 798; Lazzarotti, *supra* note 1, at 73.
244. Berliner, *supra* note 9, at 798–800.
245. *Id.* at 798.
246. *Id.*
247. *Id.* at 799.
248. *Id.*
249. *Id.*
250. *Id.* at 800.

Poletown. Now that *Poletown* has been overruled, hopefully other states will follow Michigan's example in providing a tougher definition of public use. Courts across the country should adopt the three categories of acceptable condemnations for private parties laid out in *Hathcock* instead of the near limitless discretion of *Kelo*. This definition of public use will provide the best balance between the need governments have to condemn property for worthwhile projects and the individual rights of the private property holder.

Justice Kuehn of the Illinois Appellate Court summed up the issue eloquently when he said:

> If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain. If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.[251]

251. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 710 N.E.2d 896, 906 (Ill. App. 1999) (Kuehn, J., specially concurring).

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