RETHINKING EMINENT DOMAIN IN MICHIGAN

I. INTRODUCTION

In the past decade, the State of Michigan and its citizens have witnessed significant events in the perpetual evolution of the legal, social, and economic landscapes of the region. Such changes are evident as entire cities for the first time in their history face the harrowing challenges of avoiding bankruptcy,[1] community leaders are indicted for widespread public corruption,[2] and most surprising of all, the Detroit Lions made it to the playoffs.[3] In the midst of these developments and adjustments, two events had a resonating impact on Michigan's eminent domain doctrine and the property rights of the state's citizens.[4]

The first change occurred in July 2004, when the Michigan Supreme Court digressed from years of state and federal precedent[5] and overruled the landmark case of *Poletown Neighborhood Council v. City of Detroit*.[6] As the court ruled contrary to the customary view of public takings,[7] it circumscribed the utility of the eminent domain doctrine that local

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1. *See* Darren A. Nichols, *Detroit Crisis May Force Sale of Crucial Assets*, DETROIT NEWS, Feb. 13, 2012, at A1.

2. *See* John Wisely, *In Speech, Robert Ficano Apologizes for Scandal Swirling Around His Administration*, DETROIT FREE PRESS, Feb. 29, 2012, http://www.freep.com/article/20120229/NEWS02/120229051/Robert-Ficano-gives-state-of-the-county-address. *See also* Tresa Baldas & M.L. Elrick, *Kwame Kilpatrick Pocketed $10,000 Bribe, Feds Say*, DETROIT FREE PRESS, Nov. 17, 2011, http://www.freep.com/apps/pbcs.dll/article?AID=/20111117/NEWS01/111170502/Kwame-Kilpatrick-pocketed-10-000-bribe-feds-say.

3. *See Detroit Lions Clinch First Playoff Appearance Since 1999 with Win Over Chargers*, AOL SPORTING NEWS (Dec. 24, 2011), http://aol.sportingnews.com/nfl/story/2011-12-24/detroit-lions-clinch-first-playoff-appearance-since-1999-with-win-over-chargers.

4. The Michigan Supreme Court overruled a twenty-year-old precedent in Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004) (overruling Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)), and the Michigan legislature amended the state constitution as seen throughout this Note. *See* MICH. CONST. art. X, § 2.

5. *See, e.g.*, City of Detroit v. Lucas, 446 N.W.2d 596 (Mich. Ct. App. 1989). *See also* Berman v. Parker, 348 U.S. 26 (1954).

6. *Poletown Neighborhood Council*, 304 N.W.2d at 455.

7. *See, e.g., Berman*, 348 U.S. at 32-34 (standing for the proposition that government may further the public interest by eminent domain, although doing so benefits one private entity at the expense of another, as long as government is acting reasonably within its broad police power to further the public interest).

governments enjoyed for over twenty years.[8] In issuing its rule, the court stymied the efforts of local developers and community leaders that tried to facilitate an economic rebirth of a stagnant (if not regressing) community.[9] Despite the concern of financially distressed municipalities and declining economic bases, the court was not persuaded by the projected benefits to the community[10] and ultimately held in favor of the private landowners.[11]

The second change occurred in 2006 after the state legislature volleyed in response to the judiciary's action by facilitating the ratification of an amendment to the state constitution.[12] The new amendment incorporated the court's holding into state law.[13]

As this Note will discuss, the coupling of these changes from the judiciary and legislature have dramatically impacted the state's jurisprudence toward eminent domain and the doctrine's effective application. In response, some scholars argue that these changes were unjustified and impede the efforts of communities to better regulate themselves.[14] Indeed, eminent domain is necessary to the continued development of a dynamic society.[15] This Note argues that despite the Michigan legislature's intent to clearly delineate the constitutional prohibitions of eminent domain, the current statutory framework has ambiguities that require the court's interpretation. Accordingly, the court has held that determination of when a taking is permissible requires introspection of those sophisticated in the law, which connotes the court itself.[16] Thus, by the authority granted in the constitution,[17] the court now

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8. *Hathcock*, 684 N.W.2d at 781-84, 787 (narrowing the definition of "public use" in abrogation of the broad definition put forth over two decades earlier in *Poletown*, 304 N.W.2d at 459).

9. *See id.* at 788 (finding in favor of private landowners upon determination that the taking did not advance the "public use"). *See also id.* ("The development is projected to bring jobs to the struggling local economy.").

10. *Id.* at 770. The county determined the Pinnacle Project would create 30,000 jobs and generate $350 million in tax revenues. *Id.* at 771. Such benefits, the county argued, would accelerate "economic growth and revenue enhancement." *Id.*

11. *Id.*

12. *See* MICH. CONST. art. X, § 2. *See also* S.J. Res. E, 93d Leg., Reg. Sess. (Mich. 2005), *available at* http://www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/senate/pdf/2005-sNJR-E.pdf.

13. MICH. CONST. art. X, § 2.

14. *See, e.g.*, John E. Mogk, *Eminent Domain and the "Public Use": Michigan Supreme Court Legislates an Unprecedented Overruling of Poletown in* County of Wayne v. Hathcock, 51 WAYNE L. REV. 1331, 1367-68 (2005).

15. *Id.* at 1334.

16. *Hathcock*, 684 N.W.2d at 781.

17. *See infra* text accompanying note 60.

has the power to decide what it believes to be a public use taking, with only the limitation of the two express reservations in the constitution.[18]

Part II of this Note will begin with an overview of the legal landscape of eminent domain based on the interplay between federal and state requirements. Because states derive their sovereign power to govern from the reserved authority of the U.S. Constitution,[19] this Note first addresses the delegated powers to the federal government regarding the Takings Clause.[20] After establishing the federal baseline limitations imposed on the use of eminent domain, Part II will outline Michigan's development of the doctrine. In particular, it will illustrate the shift in the court's ideology from a liberal to restrictive application of eminent domain.

Part III argues that despite the current understanding of eminent domain, Michigan state courts still have a chance to revitalize the doctrine's use in accordance with the constitution.[21] This Note analyzes two distinct approaches that permit a taking of private property based on the law's framework. Without requiring a new amendment to the constitution, Part III will propose arguments that a court can adopt to avoid a finding of unconstitutional use of eminent domain for redevelopment.

Part IV concludes that despite current beliefs that the use of eminent domain for economic development is impermissible, constitutional interpretation leads to a contrary result. The 2006 amendment to the Michigan constitution restricted the state's taking power.[22] Thus, under limited circumstances, local governments in Michigan are permitted to take private property for economic revitalization and community enhancement.[23]

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18. The Michigan Constitution of 1963, Article X, Section 2 prohibits a court from finding "economic development or enhancement of tax revenues" to be "public use" purposes. MICH. CONST. art X, § 2. Besides these prohibitions, there is no other state constitutional or statutory restriction on eminent domain. *See* MICH. COMP. LAWS ANN. § 213.23 (West 2007). The rest is up to the court to decide.

19. U.S. CONST. amend. X.

20. U.S. CONST. amend. V.

21. Mogk, *supra* note 14.

22. MICH. CONST. art. X, § 2.

23. Jaclyn S. Levine & Polly A. Synk, *Condemnation as a Tool of Brownfield Redevelopment after Hathcock*, MICH. BAR. J. Nov. 2005, at 37, 38-39.

II. BACKGROUND

A. Federal Courts' Disposition on the Use of Eminent Domain for "Public Purposes"

Protecting United States citizens' right to own private property, the Taking Clause of the Fifth Amendment to the U.S. Constitution prohibits the government from taking private property "for public use, without just compensation."[24] However, the U.S. Supreme Court maintains a broad interpretation of this concept, and recognizes the use of eminent domain as a constitutionally exercisable governmental power.[25] The Supreme Court first adopted a liberal interpretation of the "public use" concept in *Berman v. Parker*, when the Court permitted the District of Columbia to institute a plan condemning blighted private property and reselling it to private owners for redevelopment.[26]

In its *Berman* decision, the Court "equated 'public use' with 'public welfare'"[27] and recognized that governments have inherent police power[28] to govern municipal affairs.[29] Given that blighted property can create nuisances and hazards to a community, the Court upheld the taking of private property as a valid use of legislative power.[30] With deferential review of the exercise of police power, the Court acknowledged, the "concept of the public welfare is broad and inclusive" and it is within the legislature's discretion to engineer the development of the community.[31] If the government determines a taking is "within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end . . . [Thus], the means by which it will be attained is also for Congress to determine."[32] Finding that the government classified the taking as being for a public purpose despite the disposition of the

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24. U.S. CONST. amend. V.

25. *See* Berman v. Parker, 348 U.S. 26, 33 (1954); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242-43 (1984); Kelo v. City of New London, Conn., 545 U.S. 469, 483-84 (2005).

26. *Berman*, 348 U.S. at 28-29, 35-36.

27. Trent L. Pepper, Note, *Blight Elimination Takings as Eminent Domain Abuse: The Great Lakes States in* Kelo*'s Public Use Paradigms*, 5 AVE MARIA L. REV. 299, 303 (2007).

28. The U.S. Constitution "reserve[s] a generalized police power to the states" "to provide for the health, safety and welfare of the citizen[s]" without any express statutory or constitutional state provisions. 16A C.J.S. *Constitutional Law* § 611 (2012).

29. *Berman*, 348 U.S. at 32.

30. *Id.* at 32-33.

31. *Id.* at 33.

32. *Id.*

property to a private party, the Court found no violation of the Fifth Amendment as it refused to "reappraise" the government's decision.[33]

The Supreme Court reaffirmed its "deferential approach to legislative judgments"[34] in 1984 when it upheld a Hawaii statute in *Hawaii Housing Authority v. Midkiff*.[35] The statute transferred fee title from lessors to lessees "to reduce the concentration of [land] ownership."[36] The Court acknowledged that a "purely private taking could not withstand the scrutiny of the public use requirement . . . ."[37] However, the Court held the taking to be for "public use" as it reasoned, "[t]he 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. The Court long ago rejected any literal requirement that condemned property be put into use for the general public."[38] The Court concluded that a state's taking of property for the "purpose of eliminating the 'social and economic evils of land oligopoly' qualified as a valid public use."[39] The Court found "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[40] Therefore, the fact that the property immediately transferred to private parties after condemnation did not invalidate the public nature of the taking.[41]

Lastly, in its 2005 landmark decision of *Kelo v. City of New London*, the Supreme Court reiterated its broad interpretation of "public use" found in the progeny of its earlier decisions.[42] The Court affirmed the City of New London's development plan as a valid "public use" taking, as the plan acquired property from unwilling sellers using eminent domain to revitalize an economically distressed city.[43] Relying on the aforementioned cases, the Court found "no basis for exempting economic development from . . . [the] broad understanding of public purpose."[44] As in *Berman*, where the Court refused to speculate as to the city's judgment about the development plan, the Court in *Kelo* "decline[d] to second-

33. *Id.*
34. *Kelo*, 545 U.S. at 482.
35. *Haw. Hous. Auth.*, 467 U.S. at 244.
36. *Id.* at 232.
37. *Id.* at 245.
38. *Id.* at 243-44.
39. *Kelo*, 545 U.S. at 482 (quoting *Midkiff*, 467 U.S. at 241-42).
40. *Midkiff*, 467 U.S. at 244. *See also Kelo*, 545 U.S. at 482.
41. *Kelo*, 545 U.S. at 482. *See also Midkiff*, 467 U.S. at 244.
42. *Kelo*, 545 U.S. at 480, 483.
43. *Id.* at 472, 483-84.
44. *Id.* at 485.

guess the City's determination as to what lands it needs to acquire in order to effectuate the project."[45]

After reviewing the reasoning posited in each decision, it is clear that the Supreme Court established a precedent that liberally upholds any taking as consistent with the Fifth Amendment,[46] provided it is "rationally related to a conceivable public purpose."[47] Thus, with regards to rights derived from the U.S. Constitution, it is difficult to prove a violation of the Takings Clause once the government has declared the taking a necessity for public purposes. However, the Supreme Court did emphasize in *Kelo* that nothing in its decisions "precludes any State from placing further restrictions on its exercise of the takings power."[48]

B. Federal Jurisprudence Yields to State Determination

As a pervading theme throughout federal cases, the Supreme Court has continually embraced the notion of federalism, in which the Court demonstrates deferential respect to "state legislatures and state courts in discerning local public needs."[49] Consequently, a taking that passes constitutional muster under the laws of the United States may fail under state constitutions, which may maintain stricter requirements than the "federal baseline."[50] For example, states such as Montana, Nevada, Utah, California, and Michigan impose restrictions on excessive use of condemnation in addition to the Fifth Amendment.[51] However, this Note focuses on Michigan's restrictions and how state courts can interpret them to parallel their federal counterparts, despite their facially restrictive appearance.

1. The Development of Michigan's Eminent Domain Doctrine

Prior to current eminent domain doctrine, Michigan case law evinced legal acceptance of the "public use" taking similar to that displayed by

45. *Id.* at 488-89 (citing *Berman*, 348 U.S. at 35-36.

46. *Id.* at 494 (O'Connor, J., dissenting).

47. *Id.* at 490 (Kennedy, J., concurring) (quoting *Haw. Hous. Auth.*, 467 U.S. at 241.

48. *Kelo*, 545 U.S. at 489.

49. *Id.* at 482 ("Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation . . . .").

50. *Id.* at 489.

51. *See* Larry Morandi, *Eminent Domain Legislation: Post-Kelo Update*, NAT'L CONF. STATE LEG. (Jan. 1, 2012), http://www.ncsl.org/documents/natres/EminentDomainPost-Kelo.pdf. *See also* DAVID CALLIES ET AL., CASES AND MATERIALS ON LAND USE 612 (5th ed. 2008) (listing four main categories in which these additional state restrictions commonly fall).

the Supreme Court in *Berman*.[52] The State's 1963 constitution mimics the language of the Fifth Amendment to the U.S. Constitution.[53] The Michigan Constitution states in pertinent part: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."[54] Complementary to the state constitution, the Michigan legislature enacted MCLA Section 213.23, which authorizes public corporations and state agencies 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 and to institute and prosecute proceedings for that purpose."[55]

Broadly interpreting both provisions of state law, the Michigan Supreme Court in *Poletown Neighborhood Council v. Detroit* ruled that the city's taking of private property and subsequent conveyance to General Motors Corporation was a valid and authorized taking for "public use."[56] Although a private party would use the subject land for the construction of an assembly plant, the court found the property would "promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state[.]"[57] Reasoning that the term "public use" has "not received a narrow or inelastic definition[,]" the court held that the public economic and tax benefits derived from the redevelopment plan were the primary purpose of the condemnation;[58] any benefits received by General Motors were incidental to the taking and did not forbid the governmental condemnation.[59]

In further support for the permissive taking, the court in *Poletown* reiterated the deference to state legislatures fostered by the Supreme Court in *Berman*.[60] The *Poletown* court found that the Michigan legislature delegated authority to the local municipalities to determine what a "public purpose" is.[61] Consequently, the court limited its review to only when a municipality's determination was "manifestly arbitrary

52. *See* Mogk, *supra* note 14, at 1339 (citing Michigan's Economic Development Corporations Act, MICH. COMP. LAWS ANN. § 125.1602 (West 2005), and Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004)).

53. U.S. CONST. amend. V.

54. MICH. CONST. art. X, § 2 (amended 2006). *See also* U.S. CONST. amend. V.

55. MICH. COMP. LAWS ANN. § 213.23(1) (West 2004) (amended 2006).

56. *Poletown* , 304 N.W.2d at 457.

57. *Id.*

58. *Id.*

59. *Id.* at 459.

60. *See id.* (citing *Berman*, 348 U.S. at 32).

61. *Id.* at 459.

and incorrect."[62] Conversely, in *Poletown*, the court stated that the benefit received by the municipality was "a clear and significant one and sufficient to satisfy [the] Court that such a project was an intended and a legitimate object of the Legislature . . . ."[63] Therefore, the court established the precedent that a taking would be a valid "public use" condemnation if the project, as determined by the municipality, would secure public benefits through economic development.[64] This ruling stood for over twenty years until 2004 when the Michigan Supreme Court revisited that holding in *County of Wayne v. Hathcock*.[65]

2. *The State of Michigan's Current Application of the Eminent Domain Doctrine*

The Michigan Supreme Court in *Hathcock* overruled *Poletown*, holding Wayne County's taking of private land for the purposes of constructing a business and technology park was unconstitutional.[66] The proposed park, known as the Pinnacle Project, was the county's attempt to decrease its high industrial dependence for economic stability by transitioning into a twenty-first century service and technology arena for national and international businesses.[67] Although the county acquired some of the land from voluntary sellers, it initiated condemnation proceedings on the remaining property.[68] The proceedings were initiated on the belief that the condemned land was necessary for the park, and that the "Pinnacle Project served a public purpose as defined by *Poletown*."[69] After finding the county had power to condemn and the taking met the statutory authorization for eminent domain, the court nonetheless found the taking was unconstitutional.[70]

The court departed from years of state and federal precedent of deference to government and broad interpretation of the "public use" concept.[71] Espousing an interpretation of the Michigan Constitution that redefined the concept's meaning, the court relied on Justice Ryan's dissenting opinion in *Poletown* to classify when a taking is within the

62. *Poletown*, 304 N.W.2d at 459 (quoting Gregory Marina, Inc. v. City of Detroit, 144 N.W.2d 503, 516 (Mich. 1966)).
63. *Id.*
64. *Id.*
65. 684 N.W.2d 765.
66. *Id.* at 784.
67. *Id.* at 770-71.
68. *Id.* at 771.
69. *Id.*
70. *See generally Hathcock*, 684 N.W.2d 765.
71. *See supra* Parts II.A, II.B.

meaning of "public use."[72] Instead of interpreting the constitutional text by applying the term's plain meaning—derived from the voters who ratified it as opposed to the convention that framed it—the court took a different approach at the behest of Justice Cooley's[73] earlier indoctrination.[74] Reasoning that the term "public use" is a technical or legal term of art, the court defined the concept by looking at the "common understanding" of the term as interpreted by those "sophisticated in the law."[75] The court did not contemplate the term's

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72. *See Hathcock*, 684 N.W.2d at 783 (citing *Poletown Neighborhood Council*, 304 N.W.2d at 455 (Ryan, J., dissenting).

> [A] transfer of condemned property to a private entity . . . [constitutes "public use"] 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 . . . .

Id.

73. Former Michigan Supreme Court Justice Thomas M. Cooley helped establish the permissible boundaries of the state's eminent domain doctrine in the nineteenth century. *See* Laura Bassett, Note, *Taking(s) in the Big Picture: The Impact of Prop. 4's Eminent Domain Restrictions on Urban Redevelopment in Michigan*, 53 WAYNE L. REV. 899, 904-05 (2007). The *Hathcock* court relied heavily on Justice Cooley's standard of interpretation for constitutional provisions on eminent domain. *Hathcock*, 684 N.W.2d at 779. According to Justice Cooley, the correct "common understanding" of a constitutional text was that interpretation, "which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people . . . in the sense most obvious to the common understanding . . . ." *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 81 (1868), quoted in *In re* Proposal C., 185 N.W.2d 9 (Mich. 1971)) (internal quotations and original emphasis omitted). However, the *Hathcock* court found that "public use" was not a plain meaning word, but rather a "technical or legal term[] of art requiring a technical, legal interpretation." *Id.* (citing Silver Creek Drain Dist. v. Extrusions Div., Inc., 663 N.W.2d 436, 440 (Mich. 2003). Reaching this conclusion, the court then applied Justice Cooley's reasoning that technical words and words of art can only be interpreted by "canvassing legal precedent" regarding the understanding of the words. *Id.* (citing COOLEY *supra*, at 130-33). Therefore, to properly interpret the meaning of "public use" the court found it necessary to consider how the judiciary, being "sophisticated in the law," understood the term throughout judicial history. *Id.* at 780-81.

74. *See Hathcock*, 684 N.W.2d at 779. *See also* Mogk, *supra* note 14, at 1364-67 (asserting that the court's reliance on originalism was inappropriate in the context of eminent domain and that the court misconstrued Justice Cooley's text).

75. *See Hathcock*, 684 N.W.2d at 779-81. Reaching this conclusion, the court applied Justice Cooley's reasoning that technical words and words of art can only be interpreted by "canvassing legal precedent" regarding the understanding of the words. *Id.* (citing COOLEY, *supra* note 73, at 130-33). Therefore, to properly interpret the meaning of "public use" the court found it necessary to consider how the judiciary, being

meaning as understood by the common layperson at the time of the constitution's ratification.[76]

With a retrospective analysis of the legislature's intent circa 1963, the court stated that condemned property may only be transferred to a public entity if it meets at least one of the three categories defined by Justice Ryan's dissent in *Poletown*.[77] First, transferring the condemned land to a private individual is permissible if the land involved "public necessity of the extreme sort otherwise impracticable."[78] This means the "[use] of eminent domain for private corporations [is] limited to . . . enterprises that generate[] public benefits whose [entire] existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving."[79] Thus, for example, the government can transfer land to a corporation for the construction of a railroad or highway.[80]

Second, a transfer of property is "consistent with the constitution[al] 'public use' requirement when the private entity remains accountable to the public in its use of that property."[81] The court expounded on this point, quoting Justice Ryan's dissent in *Poletown* that "[l]and cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*"[82] Unlike the first category which has a more definitive bright-line test, the court decided this second classification on a case-by-case basis, leaving room for arguments on both sides.[83]

Lastly, the court found a taking is based on "public use" "when the [parcel of land] . . . condemned is . . . based on public concern."[84] In the court's opinion, this means "the property must be selected on the basis of 'facts of independent public significance,' meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the [state] [c]onstitution's public use

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"sophisticated in the law," understood the term throughout judicial history. *Id.* at 780-81. *See also, supra* note 61 and accompanying text.

76. *See Hathcock*, 684 N.W.2d at 781-83 (examining earlier case law to define "public use").

77. *Id.* at 781-83 (citing *Poletown*, 304 N.W.2d at 478-80 (Ryan, J., dissenting)).

78. *Id.* at 781 (quoting *Poletown*, 304 N.W.2d at 478).

79. *Id.* (quoting *Poletown*, 304 N.W.2d at 478).

80. *Id.* at 781-82 (citing *Poletown*, 304 N.W.2d at 478).

81. *Id.* (citing *Poletown*, 304 N.W.2d at 479).

82. *Hathcock*, 684 N.W.2d at 782 (quoting *Poletown*, 304 N.W.2d at 479).

83. *See generally id.* (contrasting the court's holdings in Bd. of Health v. Van Hoesen 49 N.W. 894 (Mich. 1891) with Lakehead Pipe Line Co. v. Dehn 64 N.W.2d 903 (Mich. 1954)).

84. *Id.* at 782-83 (citing *Poletown*, 304 N.W.2d at 478).

requirement."[85] Illustrating such a use of eminent domain, the court refers to In re *Slum Clearance,* where private land was taken to "remedy urban blight for the sake of public health and safety."[86] The court concluded that using eminent domain for the "controlling purpose" of effectuating the government's police power is constitutionally valid, despite a subsequent resale of the land.[87] After reviewing this final class in conjunction with the prior two, the court found the Pinnacle Project failed to meet the requirements in each category, and consequently was a prohibited use of eminent domain.[88]

Shortly thereafter in 2006, the Michigan Legislature amended Article X, Section 2 of the Michigan Constitution when it codified part of the court's holding from *Hathcock.*[89] Adding to the state constitution's takings clause, the legislature enhanced the specificity of the section's requirement for compensation, burdens of proof, and what constitutes "public use."[90] However, for the purposes of this Note, the important language is:

> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.[91]

Based on the foregoing amendments, whereby the State of Michigan incorporated the holding from *Hathcock,* the use of eminent domain for the purposes of economic revitalization will no longer be recognized as "public use" if the property is transferred to a private entity.[92] However, this Note argues that notwithstanding the recent legal development on eminent domain, it is still permissible for local governments to exercise the doctrine in accordance with the law to promote community redevelopment and economic revitalization.

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85. *Id.* at 783 (quoting *Poletown,* 304 N.W.2d at 480).

86. *Hathcock,* 684 N.W.2d at 783 (citing *In re* Slum Clearance, 50 N.W.2d 340 (Mich. 1951)).

87. *Id.* (citing *In re* Slum Clearance, 50 N.W.2d 340).

88. *Id.* at 783-84.

89. *See* MICH. CONST. art. X, § 2.

90. *See generally id.*; *see also* S.J. Res. E, 93d Leg., Reg. Sess. (Mich. 2005).

91. MICH. CONST. art. X, § 2.

92. John Camp, *How Public is Your Benefit? Michigan Reverses Course on the Usage of Eminent Domain,* 52 WAYNE LAW REV. 243, 260-61 (2006).

III. ANALYSIS

A. Despite the Perceived Narrowing of the Michigan Constitution, Statutory Interpretation Can Permit Broader Application of the Eminent Domain Doctrine

Contrary to some scholarly arguments,[93] the current Michigan jurisprudence toward eminent domain is not as drastically restricted as anticipated. The text of Article X, Section 2 of the Michigan Constitution limits the use of eminent domain with two sentences.[94] The first restriction prohibits a taking of private property "for *transfer* to a private entity for the purpose of economic development or enhancement of tax revenues."[95] The second restriction immediately follows as the constitution incorporates the holding of *Hathcock* into Michigan law.[96] Besides these two express limitations, the constitution permits the exercise of eminent domain restrictions.[97] As long as local governments

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93. *See, e.g.*, M. Ryan Kirkham, *County of Wayne: The Resurrection of the Public Use Limitation on the Power of Eminent Domain*, 32 N. KY. L. REV. 215, 224-30 (2005) (arguing that the *Hathcock* court was correct in overruling *Poletown*, and that the standards adopted by the *Hathcock* court will limit potential abuses of eminent domain); David Schultz, *Economic Development and Eminent Domain After* Kelo*: Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41, 73 (2006) (summarizing the implications the *Hathcock* opinion has on legal landscape in Michigan).

94. *See* MICH. CONST. art. X, § 2 .

> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution . . . .

Id.

95. *Id.* (emphasis added). This Note argues that the word "transfer" requires title of the condemned property to transfer to a private individual in order for this constitutional restriction on eminent domain to apply. As long as title does not transfer to a private party (meaning the government still holds legal title), then the constitution does not prohibit a taking for economic development. Any prohibition on such a taking will have to be derived from the second sentence, which implements the holding and analysis of *Hathcock*. *See infra* Part III.A.3.

96. *See* MICH. CONST. art. X, § 2 ("Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment . . . ."). *See also* PATRICK J. WRIGHT, MACKINAC CTR. FOR PUB. POLICY PROPOSAL 4: A LEGAL REVIEW AND ANALYSIS 1 (2006), *available at* http://www.mackinac.org/archives/2006/s2006-09.pdf (stating the 2006 amendment "directly enshrine[s] the Hathcock [sic] decision in Michigan's Constitution").

97. *See* Mary Massaron Ross, *Public Use: Does* County of Wayne v. Hathcock *Signal a Revival of the Public Use Limit to the Taking of Private Property?*, 37 URB. LAW 243, 264 (2005) (arguing that *Hathcock* "did not end all use of eminent domain" and there still

operate within the confines of the Michigan Constitution's mandate, then the municipalities should be able to exercise their condemnation power without interference from an activist judiciary attempting to broaden the scope of the constitution's restrictions.[98] Therefore, the following constitutional interpretations identify the boundaries in which local governments can operate without breaching the proscriptions of the law, yet still use eminent domain to help their communities.

1. The Michigan Constitution Only Defines What is NOT a Public Use Taking and Fails to Enumerate What IS a Public Use Taking

After the 2006 amendment to the Michigan constitution, it appeared local municipalities would be severely restricted from using eminent domain to acquire land that directly or derivatively benefited private parties.[99] Although the federal interpretation of the U.S. Constitution recognized a taking for the purposes of economic development,[100] the Supreme Court indicated *Kelo* did not preclude the states from "placing further restrictions on its exercise of the takings power."[101] Embracing this notion of federalism, Michigan's legislature imposed greater restrictions on the state's eminent domain doctrine when it ratified the constitutional clauses cited above, refusing to recognize a "public use" taking for the "enhancement of tax revenues" or "for the purpose of economic development."[102] However, when adopting this, the legislature did not create a bright-line test for what is considered a taking for public use.[103] Based on the Michigan Supreme Court's former constitutional interpretations[104] and the constitutional clause which provides, "[p]rivate

remains other potential uses for the doctrine as the "parameters of this *Hathcock* test remain to be clarified in future litigation").

98. State constitutions are documents of limitation as opposed to their federal counterpart, which is a document of authoritative grant. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983). Because the state constitution is a document of limitation, any authority not expressly limited in the document should not be unjustly curtailed. *Id.* The court should not attempt to judicially legislate from the bench when the legislature and the people of the state have not demanded greater restrictions.

99. *See* generally CITIZENS RESEARCH COUNCIL OF MICH., STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT PROPOSAL 2006-04: EMINENT DOMAIN (2006), *available at* http://crcmich.org/PUBLICAT/2000s/2006/rpt342.pdf.

100. *See generally* Kelo v. City of New London, Conn. 545 U.S. 469 (2005).

101. *Id.* at 489.

102. *See* MICH. CONST. art. X, § 2.

103. *Id.* Note how the amendment gives an apophasis definition of the term "public use," giving only examples of what is not "public use." *Id.*

104. *See* Cnty of Wayne v. Hathcock, 684 N.W.2d 765, 780-81 (Mich. 2004) (explaining that the common meaning of "public use" is determined by "those

property otherwise may be taken for reasons of pubic use *as that term is understood on the effective date* of the amendment,"[105] the constitution leaves some room to debate what constitutes a "public use." As a result, there are two possible interpretations[106] of the state constitution that permit a local government greater flexibility in exercising its eminent domain authority.

2. A Public Use Taking is Constitutionally Acceptable When Government Condemns Land and Transfers it to a Private Entity If the Condemnation Itself is Based on "Facts of Independent Public Significance"

While Article X, Section 2 of the Michigan Constitution only identifies what is specifically excluded from being considered a public use taking, it adopts by way of the clause, "as that term is understood on the effective date[,]" Justice Ryan's three-factor test from his *Poletown* dissenting opinion.[107] As the Michigan Supreme Court illustrated in *Hathcock*, Justice Ryan's third factor would allow a local government to condemn land and transfer it to a private entity, even if that entitles the private party to incidental benefits not shared by the public.[108] Such a taking is within constitutional limits provided the selection process itself is based on public concern.[109] Any subsequent use or transfer of the land to a private party is incidental to the transaction and is of no relevance to the constitutional considerations.[110] As long as the act of condemning the land was in furtherance of the public interest, the courts will not interfere with this decision.[111]

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sophisticated in the law at the time of the Constitution's ratification"). *See also* City of Novi v. Robert Adell Children's Funded Trust, 701 N.W.2d 144, 149-50 (Mich. 2005) (declining to accept that the law provides a "single, comprehensive definition of public use, and instead finding the court must use Justice Ryan's three factor test adopted in *Hathcock* to understand the meaning of "public use").

105. MICH. CONST. art. X, § 2 (emphasis added).

106. These two interpretations are based on Justice Ryan's dissenting opinion in *Poletown*, which laid out a three factor test that the Michigan Supreme Court adopted in *Hathcock* and again recognized in *Robert Adell Children's Funded Trust*. *See Hathcock*, 684 N.W.2d at 781-83. *See also Robert Adell Children's Funded Trust*, 701 N.W.2d at 149-50.

107. *See* MICH. CONST. art. X, § 2. *See also Hathcock*, 684 N.W.2d at 781-83 (holding the term "public use" is understood to mean one of the three factors Justice Ryan identified in his *Poletown* dissent).

108. *Hathcock*, 684 N.W.2d at 782-83.

109. *Id.*

110. *Id.*

111. *Id.* at 783.

The leading example of such a permissible taking is the government's use of eminent domain to eradicate blight.[112] In 1951, the State Supreme Court first considered whether a taking of land in Detroit to remove health, crime, and fire hazards was a proper and reasonable use of the city's police power.[113] The court found the purpose of the condemnation proceeding was not to acquire property for resale, but rather to "remove [the] slums for reasons of the health, morals, safety and welfare of the whole community."[114] Because the controlling purpose of the condemnation of the land was based on enforcing the government's police power duties, any subsequent resale to a private party was to abate part of the cost of clearance and "ancillary to the real purpose of the condemnation."[115] Thus, for purposes of defining public use, the court held slum clearance was constitutionally permissible.[116]

Reconsidering the use of eminent domain again in 2004, the Michigan Supreme Court cited the 1951 case, In re *Slum Clearance in City of Detroit*, as a perfect example of Justice Ryan's interpretation of public use, and the court reaffirmed slum clearance as a permissible taking.[117] Concerned with uncovering the common understanding of the meaning of the law, the court adopted an originalist interpretation of the constitution.[118] By looking to the common understanding of those "sophisticated in the law" at the time of the constitution's ratification, the court found any condemnation for the sake of health and public safety satisfies the requirement of "facts of independent public significance,"[119] "despite the fact that the condemned properties would inevitably be put to private use."[120] However, the court did not limit the application of this third category of allowable takings exclusively to blight. Instead, the court used slum clearance as an illustrative example of what constitutes "facts of independent public significance,"[121] yet failed to give a

112. *See id.*

113. *In re* Slum Clearance in City of Detroit, 50 N.W.2d 340, 343-44 (Mich. 1951).

114. *Id.* at 344.

115. *Id.* at 343.

116. *Id.* at 344.

117. *Hathcock*, 684 N.W.2d at 782-83.

118. *Id.* at 779-81.

119. *Id.* at 783 (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting). "Facts of independent public significance" means that "the underlying purposes for restoring to condemnation, rather than the subsequent use of condemned land" must be attributable to factors such as the need to promote health and safety, among others. *Id.* at 783-84.

120. *Id.*

121. *Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

definitive definition for that requirement.[122] Thus, there may be other situations where the government can use eminent domain to take private land, and then later resell the acquired property to a private entity, so long as the condemnation itself was based on facts of independent public significance.[123]

a. "Facts of Independent Public Significance" can be Expanded to Incorporate Other Issues Beyond Blight

Based on a combined textualist and originalist interpretation of the law, the Michigan Supreme Court may expand its holding beyond blight and recognize a local government's condemnation of land for other purposes of public necessity and protection as facts of independent public significance. As the court held in In re *Slum Clearance* and later adopted in *Hathcock*, takings of property for reasons of health, morals, safety and welfare of the community are judicially enforceable grounds.[124] Additionally, both the constitutional limits[125] and the statutory grant[126] of authority to condemn land recognize there are other factors that constitute public significance. Without an exclusive restriction to slum clearance, there is room for interpretation that a local government may condemn land in order to effectuate the government's duty to protect the health, welfare, moral, and safety of its public.[127] As such, a local government could condemn land if it determined that a taking was still a matter of public necessity, regardless of if it did not meet the criterion of blight.[128]

If such a textualist interpretation is accepted, then local governments' use of eminent domain will not be as severely restrained as originally anticipated.[129] Being that Michigan is a home rule state,[130] the

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122. *See id.* at 782-83.

123. *Id.* at 783 (quoting *Poletown*, 304 N.W.2d at 478).

124. *See In re* Slum Clearance in City of Detroit, 50 N.W.2d 340, 344 (Mich. 1951). *See also Hathcock*, 684 N.W.2d at 782-83.

125. *See* MICH. CONST. art. X, § 2. Pursuant to the third paragraph of Article X, Section 2 of the Michigan Constitution, the condemning authority can take private property for other public concerns and not just eradication of blight. *Id.*

126. MICH. COMP. LAWS ANN. § 213.23 (West 2007) (granting the authority for taking of private property, subsection 2(c) indicates that facts of independent public significance include blight, but are not exclusively limited to that factor).

127. Levine & Synk, *supra* note 23, at 38-39.

128. *Id.*

129. *See* Bassett, *supra* note 73, at 904-05.

130. The state constitution grants local governments in Michigan the power and authority to adopt resolutions and ordinances relating to the governments' concerns. *See* MICH. CONST. art. VII, § 2. Instead of exercising only those powers explicitly granted by

constitution grants local governments the power and authority to protect their communities in furtherance of the governments' police power.[131] Pursuant to this obligation to protect citizens, the legislature and state citizenry recognize a need for these powers to be liberally construed in order to bestow on local governments the authority to effectuate the necessary changes.[132] The only constraints on this power are the enumerated limitations codified in the state constitution and compiled laws.[133] Absent any statutory bar or constitutional limitation, local governments are authorized to act with broad discretion when protecting the public.[134] Thus, when determining what is a public necessity—a fact of independent public significance as required by the restrictions on eminent domain—local governments are only barred from considering takings based on economic development or enhancement of tax revenues.[135] Any other factors reasonably decided by the government as a public need are within the constitutional bounds of acceptable eminent domain use.[136]

A textualist interpretation aids in defining what is an acceptable consideration of public use. As a matter of statutory construction, the cannon *expressio unius est exclusio alterius* operates to exclude from consideration a ban on public use taking that is not listed in the series of restrictions.[137] Because the constitution specifically lists a grouping of economically motivated purposes, it is sensible to infer a non-economic purpose, such as public protection, was meant to be excluded from the restriction on eminent domain.[138] It would be logical then, based on a textual interpretation, that a local government may condemn land for the

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the state legislature, the local governments can act unless explicitly prohibited by state law. *Id.* Thus, local governments have the authority to define their own powers and to "exercise authority without first obtaining permission from the legislature." LYNN BARKER & CLAYTON GILLETTE, LOCAL GOVERNMENT LAW CASES AND MATERIALS 314-16 (Robert C. Clark et al. eds., 4th ed. 2010).

131. *See* MICH. CONST. art. VII, § 2.

132. *See* MICH. CONST. art. VII, § 34.

133. *Id.*

134. *See generally* MICH. CONST. art. VII.

135. *Id.*

136. *See* City of Novi v. Robert Adell Children's Funded Trust, 701 N.W.2d 144, 151-52 (Mich. 2005) (holding that the city will determine the necessity of the taking and review of its decision is limited to allegations of fraud, error of law, or abuse of discretion).

137. *See* Barnhart v. Peadbody Coal Co., 537 U.S. 149, 168 (2003) (explaining the meaning of the maxim *expressio unius est exclusio alterius*).

138. *Id.* (reasoning that the canon *expressio unius* does not apply to every statutory listing, but only applies when the expressed items are "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence").

independent public concern of protecting the community from property that threatens the health, safety, welfare, and morals of the community.[139] Absent an expressed statutory prohibition to the contrary, a court should not "in the ordinary course impose [its] own coercive sanction."[140] It is neither the duty nor the right of courts to determine the scope of a public necessity when condemning land; rather, it is within the sole discretion of the public agency such as the local government to make that determination.[141] As long as the public agency condemns the land based on facts it determines to be of public necessity, any subsequent disposition of the property should be irrelevant to the court's review of public use taking.[142]

b. Even a Non-Textualist Interpretation Permits a Broad Understanding of "Facts of Independent Significance"

However, assuming *arguendo* the Michigan Supreme Court refuses to adopt a textualist interpretation of the constitution,[143] the aforementioned reasoning still permits a liberal exercise of eminent domain. As the law was originally understood at the time of the constitutional amendment, the legislature allowed local governments to condemn and acquire blighted properties on an area-wide basis pursuant to the Blighted Area Rehabilitation Act.[144] If an area endangers the health, safety, morals, or general welfare of a municipality, the taking of the property is permissible if necessary for the area's rehabilitation.[145] The Act enables governments to take property that, although not severely blighted itself, is needed in order to combat growing blight in the general vicinity. [146] If the law restrained the government from taking the less blighted property, such a restriction on eminent domain would impede the efforts to eradicate the severe blight which infected the surrounding properties.[147] Thus, to avoid any unnecessary constraints on the

139. *See* In re *Slum Clearance in City of Detroit*, 50 N.W.2d at 344.

140. *Barnhart*, 537 U.S. at 159 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)).

141. *Robert Adell Children's Funded Trust*, 701 N.W.2d at 152.

142. *Id.* ("The only justiciable challenge following the agency's determination [of a public necessity] is one based on "fraud, error of law, or abuse of discretion.").

143. A textualist approach differs from an originalist approach in that a textualist approach limits Justice Ryan's third category solely to blight.

144. MICH. COMP. LAWS ANN. § 125.71(1) (West 1986). *See generally* Berman v. Parker, 348 U.S. 26 (1954). *See also* CITIZENS RESEARCH COUNCIL OF MICH. *supra* note 99, at 13.

145. MICH. COMP. LAWS ANN. § 125.71(1)-(3) (West 2007).

146. *See* MICH. COMP. LAWS ANN. §125.72(a) (West 2007).

147. *See id.*

government's obligation to protect its communities, the original law gave a liberal interpretation to the definition of blight.[148] When determining if a property was blighted, therefore contributing to a general area of wide blight, the legislature mandated that the "conditions that constitute blight are to be broadly construed."[149] This gave municipalities liberal discretion in determining when land could be condemned.[150]

A continuation of such interpretation is not only consistent with the current constitutional grants of authority, but also rational to the original understanding of those sophisticated in the law at the time of the amendment. Despite the appearance that the law has changed slightly—the constitutional amendment replaces an area-wide blight condemnation process in exchange for a determination on an individual parcel basis[151]—this alteration is still reconcilable with the original understanding.[152] The Act, which pre-dates the amendment to the constitution and has not been repealed, identifies what the legislature considered to be blight.[153] Before adoption of the new amendment, the legislature required every property be condemned based on blight, permitting varying degrees of severity in order to condemn larger areas.[154] Nonetheless, each property was subject to a blight analysis.[155] Due to the liberal interpretation of the law before the amendment, local governments were able to secure large tracts of land after determining the occupied property to be a threat to the health, safety, and welfare of the communities.[156]

Parlaying this broad, liberally construed scope of blight, the legislature incorporated the same elements of the Act into the new laws.[157] Therefore, as originally understood within the meaning of Article VII Section 34 of the Michigan Constitution[158] and the statutory grants of eminent domain, current laws permit local governments to broadly construe the meaning of blight within the interest of the

148. *Id.*

149. *Id.*

150. *Id.*

151. *See* MICH. CONST. art. X, § 2. The amendment added language that individualized the property that could be taken, instead of allowing an area-wide sequester. *Id.* For example, the amendment used the language "taking of *a* private property" and "taking of *that* property." *Id.* (emphasis added).

152. *See* CITIZENS RESEARCH COUNCIL OF MICH., *supra* note 99, at 13.

153. *See generally* MICH. COMP. LAWS ANN. § 125.7 (West 2007).

154. MICH. COMP. LAWS ANN. §125.71(2)(a) (West 2007).

155. *Id.*

156. CITIZENS RESEARCH COUNCIL OF MICH., *supra* note 99, at 12-13.

157. *Compare* MICH. COMP. LAWS ANN. § 213.23 (8)(a)-(h) (West 2007), *with id.* § 125.7(2)(b).

158. MICH. CONST. art. III, § 34.

communities.[159] In turn, such broad interpretation enables the government to constitutionally condemn all land within its discretion, and as the court held in *Robert Adell Children's Funded Trust*, this determination of public necessity is within the sole discretion of the government.[160] It is only subject to judicial challenge if the government's determination is based on "fraud, error of law, or abuse of discretion."[161] With a liberal textualist or originalist interpretation, the laws can permit local governments to exercise eminent domain liberally, provided it is in furtherance of the public interest. However, if courts are unwilling to adopt the interpretation of Justice Ryan's third category as within the meaning of the constitution, there is yet another viable understanding, which permits local governments to exercise eminent domain and allow private parties to operate the land.

3. Condemning Land for Use by a Private Entity is Constitutional Provided That the Entity Remains Accountable to the Public in the Use of that Land

As required by the constitution's demand for originalist interpretation,[162] Justice Ryan's second factor of public use taking was ratified in the 2006 amendment.[163] Under this classification, the court recognized "the transfer of condemned property to a private entity is consistent with the constitution's 'public use' requirement when the private entity remains accountable to the public in its use of that property."[164] Instead of weighing the relative benefits the private entity may derive from use of the land, such as economic development or tax benefits, the court will only analyze the facts to see if the public still has ownership and control of the property.[165] Similar to the constitution's ambiguous definition of public use, there is no bright-line definition

159. *See* MICH. COMP. LAWS ANN. § 213.23(8)(a)-(h).

160. *Robert Adell Children's Funded Trust*, 701 N.W.2d at 151-52.

161. *Id.* (internal quotations marks omitted).

162. *See Hathcock*, 684 N.W.2d at 781.

163. *See* MICH. CONST. art. X, § 2. The constitution says "private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment . . ." thereby adopting Justice Ryan's three factor test in *Hathcock*. *Id.*

164. *Hathcock*, 684 N.W. 2d at 782.

165. *Robert Adell Children's Funded Trust*, 701 N.W.2d at 150. *See also* Lakehead Pipe Line Co. v. Dehn, 64 N.W.2d 903, 911 (Mich. 1954) (stating that private benefits, if any, are merely "incidental to the main purpose" as long as the state has control of the property independent of the will of the private entity). *But see* Bd. of Health of v. Van Hoesen, 87 Mich. 533, 538 (Mich. 1891) (holding that a "use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public.").

distinguishing the difference between private and public retention of ownership and control.[166] Rather, courts are left with a balancing test to decide if the condemned property is under the direct management and responsibility of the government.[167]

For purposes of the constitution's proscriptions against eminent domain, this distinction between private and public ownership is crucial in the application of the law.[168] Instead of outright banning a taking for the purposes of economic development or enhancement of tax revenues, the constitution avoids an over-inclusive prohibition.[169] As a matter of statutory construction, there is a modifying clause[170] in the constitution's sentence which limits the scope of the ban against economic development purposes.[171] The constitution does not recognize a taking for economic development as "public use" *if* the property is "transferred" to a private entity.[172] If there is no "transfer" of the private property, then the constitution will allow a taking for public use "as that term is understood on the effective date . . . ."[173]

Although the definition of "transfer" is considered to be broad, courts will generally not include an executory contract, such as a lease, to fall completely within the purview of that definition.[174] Therefore, if a government retains public ownership of the condemned property and leases it to a private party for the purposes of economic redevelopment, there should be no violation of the constitution.[175] The only point of

166. *Robert Adell Children's Funded Trust*, 701 N.W.2d at 150.

167. *Id.* at 150-51.

168. *See* Kirkham, *supra* note 93, at 232-36 (arguing that using *Kelo* as an example of when government ownership of condemned land can be permissible under the *Hathcock* three-prong "public use" test).

169. MICH. CONST. art. VII, § 34.

170. *See* MICH. CONST. art. X, § 2 ("'Public use' does not include the taking of private property for transfer . . . .").

171. By adding the modifier "for transfer," the constitution limits the application of the first sentence's restriction only to the use of eminent domain which takes private property for transfer to private ownership for the purpose of economic development. By including "for transfer," this constitutional clause does not apply to all takings for economic purposes. If the private property is not "transferred" to another private entity, then this first sentence should have no relevance to a taking by the government for government ownership.

172. *See* MICH. CONST. art. X, § 2.

173. *Id.* (referring to the second sentence of the second paragraph).

174. *See* Gerald L. Blanchard, *Transfer Defined*, 1 LENDER LIABILITY: LAW, PRAC. & PREVENTION § 10:6 (2012). *But see* MICH. COMP. LAWS ANN. § 211.27a (West 2007) (stating in subsection (6), a lease for more than thirty-five years will be considered a "transfer" of ownership of property).

175. As long as the government retains legal title to the property, then there will be no transfer of the property within the meaning of the constitution. Thus, the only remaining

contention remaining under this application of the law is whether or not the property is truly subject to public ownership when leased.[176] Unfortunately, the *Hathcock* opinion[177] and constitutional amendment failed to give clear parameters as to what constitutes "public oversight."

Notwithstanding this lack of definitive statutory elements establishing public ownership, the court in *Robert Adell Children's Funded Trust* outlined a framework that local governments can consider when determining if a taking is permitted.[178] The court identified the distinction between private and public use as being largely dependent upon "whether the property condemned is under . . . the direct use and occupation of the public at large, though under the control of private persons or of a corporation."[179] Provided that the property is established by a public authority and managed by a public agency whose duty is to maintain and keep the property in repair, then so long as the general public pays the damages for the condemned land, the constitution authorizes such condemnation.[180] Even if the proportional use of the land by the public is outweighed by a private entity, the constitution still authorizes the condemnation of the land.[181] As long as a public agency "establishes [the property], pays for it out of public funds, and retains control . . . and responsibility for its repair," then any private use and benefit derived from the land—whether primary or merely secondary to the public—is within the constitutional domain of a public taking.[182]

Pursuant to the court's interpretation, a local government can condemn land for the purposes of leasing it out to private entities, provided the private use is subordinate to the public agency's control and interest.[183] The court illustrated such an interpretation in *Hathcock* when

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restriction on the use of eminent domain will be the limitations imposed by *Hathcock*, which held that use of eminent domain must meet one of the three characteristics outlined by Justice Ryan's dissent in *Poletown*. *See supra* text accompanying note 59. As legal scholars have noted, the second prong of *Hathcock* allows a taking of private property and subsequent lease to a private entity as long as there is public oversight. *See* Kirkham, *supra* note 93, at 232-36. However, Kirkham argues later in his article that this allowance of eminent domain should be seen as a loophole and the court should quickly address the issue before it is abused. *See id.* at 235-36.

176. *But see id.* at 228-36. *See* Schultz, *supra* note 93, at 78.

177. *See* Ross, *supra* note 97, at 264.

178. *See generally Robert Adell Children's Funded Trust*, 701 N.W.2d at 150-51.

179. *Id.* (quoting Rogren v. Corwin, 147 N.W. 517, 518-19 (Mich. 1914)).

180. *Id.* at 151.

181. *Id.*

182. *Id.*

183. *See Hathcock*, 684 N.W.2d at 782-83 (explaining that private company can use condemned land for its own benefit as long as a public agency can have the ultimate say in directing the use of the property).

it cited *Lakehead Pipe Line Co. v. Dehn* to exemplify public control within the meaning of Justice Ryan's second category.[184] Although the *Hathcock* opinion was a precursor to the decision in *Robert Adell Children's Funded Trust*, the court's analysis was nearly identical with respect to Justice Ryan's second factor.[185] Relying on the issue presented in *Lakehead Pipe Line Co.*, the court in *Hathcock* interpreted public use to reflect the taking of private land by a corporation in order to construct an oil pipeline.[186] Because the Michigan Public Service Commission retained oversight regarding the use of the pipeline and Lakehead Pipe Line Co. acted pursuant to the directions of the public agency, the court found sufficient public management to constitute a public use.[187] Thus, the court held that as long as a public agency could assert any public obligation over the property used by a private entity, there is sufficient control to justify and permit condemnation of the land.[188]

Considering this use of eminent domain in the context of current societal needs, as cities are facing declining populations[189] and deteriorating urban centers, it is becoming increasingly important for local governments to take action.[190] Unlike before, when the public only required the private use of eminent domain for common carriers,[191] utility providers,[192] and instrumentalities of commerce,[193] today many

184. *Id.*

185. *Compare Hathcock*, 684 N.W.2d at 782-83, *with Robert Adell Children's Funded Trust*, 701 N.W.2d at 150-51.

186. *Hathcock*, 684 N.W.2d at 783 (using the issue in *Lakehead Pipe Line Co.* as an example for what constitutes sufficient public control).

187. *Hathcock*, 684 N.W.2d at 782. *See also Lakehead Pipe Line Co*, 64 N.W.2d at 911.

188. *Hathcock*, 684 N.W.2d at 782.

189. Steven Gray, *Vanishing City: The Story Behind Detroit's Shocking Population Decline*, TIME NEWSFEED (Mar. 24, 2011), http://newsfeed.time.com/2011/03/24/vanishing-city-the-story-behind-detroit%E2%80%99s-shocking-population-decline/ ("Detroit's population dropped 25% to 714,000 in the last decade.").

190. *See* JOHN FEE, EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 125, 131 (Dwight H. Merriam & Mary Massaron Ross ed., 2006).

191. E.g., railroads, highways, and canals. *See Poletown Neighborhood Council*, 304 N.W.2d at 478 (Ryan, J., dissenting), *overruled by Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, Judge Ryan argued, "urban renewal would be stymied and made impossible if eminent domain was not recognized for these essential improvements," *Id.* (quoting Ellis v. City of Grand Rapids, 257 F. Supp. 564, 568-69 (W.D. Mich., 1966)), and that, for example, "[a] railway cannot run around unreasonable landowners," (quoting Ryerson v. Brown, 35 Mich. 333, 340 (1877)). *Id.*

192. E.g., gas lines and power lines. The majority in *Hathcock* adopted Justice Ryan's dissent in *Poletown* by holding that implementing these public necessities would be a "logistical and practical nightmare" without the use of eminent domain. *Hathcock*, 684 N.W.2d at 782.

cities are in desperate need of housing providers,[194] retailers, manufacturers, and schools.[195] In order to serve these public needs, communities usually require the coordination of public agencies to assemble large tracts of land.[196] However, once a government has acquired and established control over a property, the efficiency of private entrepreneurship would best serve the public interest.[197] The private sector can offer creative virtues backed by specialized skills that a general governmental entity could not reasonably achieve.[198] Instead of inundating the operation of the land with the processes and procedures traditionally required by government policy, leasing the property to private corporations will avoid bureaucratic encumbrances by fostering the acute business judgment offered by the private sector.[199] The private sector can aim these business judgments at solving public challenges[200] by relaying and implementing private expertise that traditional governments are unable to enjoy and expend.[201]

For example, private parties such as Lakehead Pipe Line Co.[202] are more sophisticated and better equipped to operate the business of oil transportation over condemned land than the government.[203] These private companies can respond to the changing conditions of the market and locality without the constraints of a rigid public bureaucracy.[204] That is not to say these government procedures will be ineffective to control

193. The court never gave a specific example of this classification, but nonetheless recognized this category as requiring eminent domain when the purpose of the land can "be assembled only by the coordination central government alone is capable of achieving." *Hathcock*, 684 N.W.2d at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

194. The City of Detroit has been facing increasing needs for affordable housing and safe environments since the early 2000s. *See generally* DALE THOMSON & LYKE THOMPSON, WAYNE STATE UNIV. COLL. OF URBAN, LABOR, & METRO, CITY OF DETROIT HOUSING NEEDS ASSESSMENT: DATA FINDINGS AND REVIEW OF POLICY OPTIONS 2001-2002, AFFAIRS (2002), *available at* http://www.cus.wayne.edu/cdbg/documents/FinalReportSubmittedtoCPC--VersionforWeb.pdf.

195. Fee, *supra* note 190, at 131.

196. *Id.*

197. *Id.*

198. Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 372 (1999).

199. *Id.* at 372-74.

200. *See* Fee, *supra* note 190, at 131 (arguing that many cities need retailers, manufacturers, housing, and schools "more then they need newer roads and sewers").

201. *Id.*

202. *See Lakehead Pipe Line Co.*, 64 N.W.2d at 903.

203. *See* Fee, *supra* note 190, at 131.

204. Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL'Y REV. 263, 270 (2006).

the property through oversight, but the public sector will best extract the overall utility of the land when it draws on the diverse perspectives and experiences of the private sector.[205] Admittedly, such private parties may benefit in the operation of the property; however, it will be "merely incidental to the main purpose" of the condemnation.[206] In taking the property, the local government will retain ownership and control of the land and oblige the private parties to abide by the public agency's direction.[207] Thus, the fact that the private party "may receive some benefit from the earnings of the [property] . . . does not vitiate . . . the power to condemn property . . . nor may it be given the effect in any such instance of barring the exercise of such power."[208]

a. Condemned Land Subject to Public Oversight Also Satisfies Statutory Requirements

Not only would a government agency's taking and ownership of property with use rights leased to a private entity satisfy the constitutional requirements of eminent domain, but it would also meet the restrictive standards of the statutory grant of such authority under section 213.23.[209] Concerned a "public use" taking may be "a pretext to confer a private benefit on a" private party, the legislature narrowed the government's grant of authority by specifically excluding such a situation.[210] However, the reference of this provision in the compiled laws adds nothing of relative significance to the statutory prohibition. When reviewing any government taking, whether for a private entity to use the property or for the land to remain solely within the government's disposal, it is always possible to link the taking to a possible pretext of economic development.[211]

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205. *Id.* at 270-71.

206. *Lakehead Pipe Line Co.*, 64 N.W.2d at 911.

207. *See, e.g., id.*

208. *Id.*

209. *See* MICH. COMP. LAWS. ANN. § 213.23(6) (West 2007).

> A taking of private property for public use, as allowed under this section, does not include a taking for a public use that is a pretext to confer a private benefit on a known or unknown private entity. For the purposes of this subsection, the taking of private property for the purpose of a drain project by a drainage district as allowed under the drain code . . . does not constitute a pretext to confer a private benefit on a private entity.

Id.

210. *Id.*

211. CITIZENS RESEARCH COUNCIL OF MICH., STATEWIDE ISSUES ON THE NOVEMBER GENERAL ELECTION BALLOT PROPOSAL 2006-04: EMINENT DOMAIN 9 (2006).

For example, as the Citizens Research Council of Michigan identified, the construction of roads can be linked to facilitating commerce for private parties; building of airports and rail lines can be associated with providing private benefits to the carriers; and providing safety protections in the communities will benefit businesses and private citizens.[212] Reading the amendment narrowly to exclude any private use of land taken by the government would thereby result in a steadfast prohibition precluding nearly all uses of eminent domain.[213] To avoid a blanket prohibition, it is appropriate for this provision to be read in accordance with the court's interpretation in *Robert Adell Children's Funded Trust*, meaning as long as ownership, control, and maintenance remains vested in the public body, any use or benefit by a private party is incidental and therefore constitutionally and statutorily acceptable.[214]

b. Use of Special Districts to Acquire and Subsequently Lease Property Will Satisfy the Constitutional and Statutory Requirements of Eminent Domain

By adopting a use of eminent domain pursuant to Justice Ryan's second category, local governments would operate within the proscriptions of the constitution and statutes.[215] As "public use" is understood by those "sophisticated in the law at the time of the 1963 constitution's ratification," the courts will support a subsequent transfer of condemned land to a private party when the public retains a measure of control.[216] Despite the recognized constitutionality of such an approach, there remains a concern that continuous government oversight might burden local governments with land management and result in an inefficient utilization of the property.[217] To alleviate such qualms and hesitations, local governments can avoid the potential pitfalls of over-extending their budgets and resources by creating public agencies such as special districts.[218] These agencies, while accountable to the public, can

212. *Id.*

213. *Id.*

214. *Robert Adell Children's Funded Trust*, 701 N.W.2d at 151.

215. As seen in the *Hathcock* opinion, (which was incorporated and adopted into the 2006 amendment of the MICH. CONST. art. X, § 2) a condemnation of property by the government is permissible, provided that the ownership and control of the property is subject to public oversight. *Hathcock*, 684 N.W.2d at 782. As long as the government owns the property, such ownership satisfies the meaning of "public control." *See id.*

216. *Hathcock*, 684 N.W.2d at 783.

217. *See* Fee, *supra* note 190, at 131. *See also* Davidson, *supra* note 204, at 270.

218. Special Districts are a form of public government which serve special purposes or provide a particular service within a specific region. BARKER & GILLETTE, *supra* note 130. Unlike general-purpose governments, such as local public city corporations, special

independently manage and control land, yet provide parties use rights of property and any associated benefits derived therefrom.[219]

Unlike traditional governments, whose control of land may be inefficient[220] and cost prohibitive, special districts "can realize economies of scale in the provision of services."[221] The districts and agencies are "operationally and financially independent" from the local governments, in addition to being extra-territorial in relationship to traditional government jurisdictional boundaries.[222] If such a district is formed and permitted to exercise eminent domain powers, it could manage a variety of properties over a multitude of jurisdictions without the limitations of territorial disputes and requirements.[223] Developing a special district for the limited purpose of maintaining ownership and control of property will circumvent the hazards of political dichotomies[224] while effectively managing land use. Under a special district, an entire government agency is specially devoted to a narrowly tailored purpose and can direct its entire focus to the function of managing the property, instead of sparingly addressing the issue.[225]

For example, if the Metro-Detroit area established a special public agency charged with the duty of controlling and leasing condemned land, that agency's sole purpose would be to exercise public oversight respecting any acquired land from eminent domain.[226] Because the agency would be distinct from a general government, it would have the ability to levy taxes on the city, county, or even statewide private parties benefiting from the land.[227] This eliminates the financial imposition on

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districts have jurisdictions which transcend traditional local government. boundaries, enabling them to provide needed services at a more efficient and less expensive basis. *Id.* These types of governments can be classified into five broad categories such as school, fire, local public authorities, other special purpose entities, and town special districts. *See Special Purpose Districts*, LGEC, http://www.nyslocalgovorg/pdf/special_purpose_govts.pdf (last visited Mar. 3, 2012). *See also* BARKER & GILLETTE, *supra* note 130.

219. *See generally* Briffault, *supra* note 198.

220. *See* Fee, *supra* note 190, at 131.

221. BARKER & GILLETTE, *supra* note 130, at 196. *See also* Briffault, *supra* note 198, at 372 (arguing special districts like Business Improvement Districts are free from the problems and delays associated with bureaucracies, entrenched interests and ideologies, and electoral calculations).

222. BARKER & GILLETTE, *supra* note 130, at 195-96.

223. *See id.*

224. Referring to the political friction between varying ideologies and partisanship and how such political disagreement can impede the progression of city improvement and land development.

225. *See* BARKER & GILETTE, *supra* note 130, at 195-96.

226. *Id.* at 194-95.

227. *See id.*

city governments by avoiding the depletion of cities' debt capacity to fund the special districts.[228] As financially self-sufficient and legally independent entities, such special districts could. manage the land immune from the challenges associated with various political cleavages and financially distressed treasuries.[229] Instead of having to negotiate strategies and control among several city councils and boards, the special district's trans-jurisdictional nature would allow it to execute its power and management uniformly across boundary lines.[230] Such districts will constructively act as surrogate landlords of the property and direct the private use of the land according to the public's need and wishes within that district.[231] Not only does this approach satisfy the criterion of Justice Ryan's second category,[232] but it also establishes a public framework that exploits the benefits offered by the privatization of services without costs to the local governments.[233]

As cities like Detroit perennially spiral downward with dying neighborhoods[234] and inadequate urban planning,[235] the communities and surrounding areas require a uniform approach to manage the land.[236] Thus far, the traditional local governments have failed to carry this burden.[237] Not only are the cities facing devastating financial woes,[238] but

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228. *See id.*

229. *See generally* KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 12-15 (1997).

230. BARKER & GILLETTE, *supra* note 130, at 195-96. *See also* Briffault, *supra* note 198, at 418.

231. *See generally* Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008) (outlining the success of creating special land assembly districts that coordinate a more efficient use of land through eminent domain, but are still subject to public oversight).

232. Special purpose districts meet the "public control" requirement adopted in *Hathcock* because they are subject to public oversight and election. *See* Briffault, *supra* note 198, at 378.

233. BARKER & GILLETTE, *supra* note 130, at 194-96. (explaining that "special purpose governments are operationally and financially independent, [thus] their debts are not included in those of the local governments whose constituency they serve . . . . [A] local government may create special districts to finance community needs without consuming any of its current debt capacity.").

234. *See* Stephen Henderson, *City Needs to Watch and Learn From Marathon Expansion Plan*, DETROIT FREE PRESS, Nov. 2, 2011, http://www.freep.com/article/20111102/COL33/111102040/Stephen-Henderson-City-needs-watch-learn-from-Marathon-expansion-plan.

235. Pete Saunders, *The Reasons Behind Detroit's Decline*, URBANOPHILE (Feb. 21, 2012), http://www.urbanophile.com/2012/02/21/the-reasons-behind-detroits-decline-by-pete-saunders/.

236. *Id.*

237. *See Michigan: Decline in Detroit*, TIME MAGAZINE, Oct. 27, 1961, at 27, *available at* http://www.time.com/time/magazine/article/0,9171,873465,00.html.

they also lack the community leadership that will efficiently manage the public concern associated with the land.[239] To remedy this rampant urban endemic, the formation of special districts can carefully redesign property rights to enhance the welfare of the public by establishing an accountable managing body.[240] The district can reorganize fragmented land use and restore the utility of the condemned property as required by the communities whose interests the district is serving.[241] Once established, the districts could then lease out the land to private parties to provide "higher quality services at lower cost[s]" than the government could provide.[242] Thus, these special purpose public agencies can retain ownership, control, and maintenance of the condemned property and lease it out to private parties to provide needed services of markets, retailers, manufacturers, and housing.[243] As a result, the community will derive a public benefit from the services rendered by the private entities, while the land will always remain subject to public ownership as required by the eminent domain laws.

IV. CONCLUSION

Despite the belief that the Michigan Constitution constructively nullifies the use of eminent domain for purposes of economic development and community revitalization through conveyance to a private party, the apophasis definition of "public use" in the constitution leads to a contrary conclusion. As this Note has shown, the ambiguities in the text establish viable and constitutionally permissible avenues for the use of eminent domain to effectuate necessary changes in starved cities. By adopting the holding in *Hathcock*, the Michigan Constitution conscribes local governments' authority by limiting the use of eminent domain to three possible categories.[244] While any attempted transfer of condemned land to a private party beyond the scope of these categories is strictly prohibited, the constitution can be interpreted to give local

238. *See* John E. Mogk, *Detroit Faces Worse Fate Than an EM*, DETROIT NEWS, Feb. 10, 2012, at A17.

239. *See* Wisely, *supra* note 2. *See also* Baldas & Elrick, *supra* note 2.

240. *See* Briffault, *supra* note 198, at 373.

241. *Id.* at 369-70.

242. Davidson, *supra* note 204, at 270. *But see* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 34-36 (2006) (arguing that property acquired through eminent domain and then subsequently transferred to private parties will create an incentive for the public to abuse the power of eminent domain in order to obtain secretly promised benefits from the private sector).

243. *See* Davidson, *supra* note 204, at 270.

244. MICH. CONST. art. X, § 2.

governments discretion when using eminent domain in furtherance of the three categories.

Focusing only on two of these possibilities, this Note detailed how a textualist or originalist interpretation of the "independent public significance" classification will enable local governments to take land and later dispose of it to a private party. As consistently recognized throughout state history, Michigan encourages its local communities to enforce their police power to ensure the health, safety, and general welfare of its citizens.[245] To effectively carry out this duty, local governments have been given broad discretion in determining what the public generally needs. As such, local governments should determine the "facts of independent public significance" when initiating a taking pursuant to eminent domain.

Alternatively, if this previous analysis proves unworkable, local governments can take land for economic development provided that the land remains subject to the will and ownership of the government. The constitution only prohibits a taking for purpose of economic development if the land is "transferred" to a private entity.[246] However, as the definition of "transfer" is understood according to Michigan law, a lease[247] does not effectuate a "transfer." As long as a government entity, such as a special district, retains ownership of the land and leases it to a private party, it has the authority under the constitution to take the property as consistent with the term "public use."[248]

Therefore, as destitution increasingly consumes communities throughout the state, there is a need for local governments to react. As of yet, no effective tool has been utilized to combat urban deterioration, as municipalities passively observe the regression of the area's general welfare. Instead of waiting until the demise of the cities is a foregone conclusion, the time is now for local governments to implore new strategies to reinvigorate these communities. Not only will the implementation of eminent domain for redevelopment be the needed game changer, but it will stand under state and federal constitutional scrutiny.

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245. *See supra* notes 113-15 and accompanying text.

246. MICH. CONST. art. X, § 2.

247. A lease duration lasting less then thirty-five years will not be a transfer. *See* MICH. COMP. LAWS ANN. § 211.27a (West 2007).

248. *See supra* Part III.A.3.