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Eminent Domain and the "Public Use": Michigan Supreme Court Legislates an Unprecedented Overruling of *Poletown* in *County of Wayne v. Hathcock*

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EMINENT DOMAIN AND THE "PUBLIC USE": MICHIGAN SUPREME COURT LEGISLATES AN UNPRECEDENTED OVERRULING OF *POLETOWN* IN *COUNTY OF WAYNE v. HATHCOCK*

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Table of Contents

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I. INTRODUCTION

The Michigan Supreme Court's ruling in *County of Wayne v. Hathcock*[1] that article X, section 2 of the Michigan Constitution of 1963[2] prohibits any exercise of the power of eminent domain to transfer property from one private owner to another for the "public use" of "alleviating unemployment and revitalizing the economic base of the community"[3] is unprecedented in Michigan takings jurisprudence. The *Hathcock* decision rewrote the state's constitution and removed the power of the legislature to meet the economic necessities of the people of Michigan. Departing from solidly reasoned Michigan eminent domain law based upon public necessity and public benefit, the *Hathcock* court wrongfully overturned *Poletown Neighborhood Council v. Detroit*,[4] which permitted the use of eminent domain to alleviate unemployment as a public necessity. The Michigan Supreme Court's holding in *Hathcock* goes beyond a misunderstanding of Michigan law or a misreading of *Poletown* to imposing an economic ideology on the state legislature and the people of Michigan.

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1. 684 N.W.2d 765 (Mich. 2004).

2. MICH. CONST. of 1963, art. X, § 2.

3. *Hathcock*, 684 N.W.2d at 787.

4. 304 N.W.2d 455 (Mich. 1981). The overruling of *Poletown* will potentially have a crippling effect on the city of Detroit's ability to rebuild. The city is one of the most distressed in the nation, with the highest poverty rate of any major municipality. Patricia Montemurri et al., *Detroit Tops Nation in Poverty Census*, DET. FREE PRESS, *available at* http://www.freep.com (last visited Jan. 23, 2006). Detroit has used its condemnation power to facilitate construction of the General Motors Poletown and Chrysler auto assembly plants, Brush Park and Jefferson Village neighborhoods, Comerica Park and Ford Field stadiums, integral parts of Detroit's theater district, and sections of the Detroit Medical Center. The city's future in the twenty-first-century hinges upon creating greater economic opportunity for more than a half million residents who have moderate to low family incomes or who are trapped in poverty. Without adequate income, residents cannot maintain their homes, meet daily needs, support local shops, or provide taxes to fund city services. Developers view the prospect of having to assemble vast tracts of distressed, obsolete land into major project sites without using the power of eminent domain as sheer folly. Separate negotiations of the thousands of property interests involved in any one project would be unduly expensive, time consuming and would face the possibility of being blocked by one owner's refusal to sell. The use of eminent domain to facilitate economic development was recently upheld as a "public use" under the Fifth Amendment to the U.S. Constitution by the U.S. Supreme Court in *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), under circumstances similar to those in *Poletown*.

A number of factors suggest that the *Hathcock* decision is a classical case of judicial legislation, not the least of which is that the Hathcock property owners could have been protected against eminent domain by a clarification of the *Poletown* holding. In electing to overrule *Poletown*, the Michigan Supreme Court (1) recast *Poletown* as a case involving maximizing profits for a private company, rather than alleviating unemployment in the community;[5] (2) excluded an entire category of use, alleviation of unemployment, from takings jurisprudence;[6] (3) limited the types of persons or corporations that could receive property through eminent domain to "instrumentalities of commerce" unless "facts of independent public significance" exist;[7] (4) held that the meaning of the term "public use" is frozen on the date of adoption of the 1963 Constitution;[8] and (5) ruled that the term "public use" is not to be based upon the common understanding of the voters that ratified the Constitution, but rather upon the understanding of "persons sophisticated in the law."[9]

Since the enactment of the Northwest Ordinance in 1787[10] all Michigan cases holding the exercise of the power of eminent domain to be unconstitutional have done so on the basis that the taking (a) was not for a "public necessity"[11] or (b) did not primarily benefit the public.[12] The holding that a taking for a specific category of use is unconstitutional when a court finds that a "public necessity" exists and the public is the primary beneficiary, as was found in *Poletown*, is unsupported by Michigan takings jurisprudence.[13] While *Poletown* was controversial, the case was properly

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5. *Hathcock*, 684 N.W.2d at 786.

6. *Id.* at 787.

7. *Id.* at 782-83.

8. *Id.* at 787.

9. *Id.* at 780.

10. 1787 Gov't of Northwest Territory art. II.

11. Peterman v. DNR, 521 N.W.2d 499 (Mich. 1994); McDonald v. Marquette Circuit Judge, 123 N.W. 1112 (Mich. 1909); Pere Marquette R.R. Co. v. Gypsum Co., 117 N.W. 733 (Mich. 1908); Ryerson v. Brown, 35 Mich. 333 (1877); McClary v. Hartwell, 25 Mich. 139 (1872); People *ex rel.* Trombley v. Auditor-General, 23 Mich. 471 (1871).

12. Toldsdorf v. Griffith, 626 N.W.2d 163 (Mich. 2001); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638 (Mich. 1993); Shizas v. City of Detroit, 52 N.W.2d 589 (Mich. 1952); Berrien Springs Water-Power Co. v. Berrien Circuit Judge, 94 N.W. 379 (Mich. 1903); Board of Health of Portage Twp. v. Van Hoesen, 49 N.W.894 (Mich. 1891); *Ryerson*, 35 Mich. 333. *See* Mansfield, Coldwater & Lake Mich. R.R. Co. v. Clark, 23 Mich. 519 (1871).

13. *Ryerson* is the principal case relied upon by Justice Ryan in his *Poletown* dissent and the *Hathcock* court for the proposition that when a private corporation is involved the necessity must be one "of the extreme sort." *Poletown*, 304 N.W.2d at 645-83. *See also Hathcock*, 684 N.W.2d 765. However, in *Ryerson*, Justice Cooley found that the legislation did not assure a primary benefit to the public, nor was there any "public necessity" for the

decided and has no basis for being overturned.

The *Hathcock* court has complicated eminent domain law in Michigan by introducing a new approach to interpreting the term "public use," known as "originalism."[14] This approach is not supported by any previous Michigan courts or scholars writing on Michigan takings jurisprudence. Its adoption prohibits the exercise of eminent domain to address changing needs and conditions of society after the ratification of the 1963 Constitution.[15]

Justice Young writing for the *Hathcock* majority and Justice Weaver in her concurring opinion rely heavily upon the writings of Justice Thomas M. Cooley, referred to by the court as "our patron saint."[16] There is little

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taking. *Ryerson*, 35 Mich. at 334-35. In Justice Cooley's words:

> [T]here is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obligated in any manner to carry it on for the benefit of the locality or of the state at large. He is not bound to consider the interest of the locality or of the state; and nothing but the requirement that his devoting the power to purposes which public opinion would not sanction. The statute appears to have been drawn with studious care to avoid any requirement that the person availing himself of its provisions shall consult any interest except his own.

Id. at 338.

14. In the context of U.S. Constitutional interpretation, originalism is a family of theories which share the starting point that a constitution or statute does not evolve in meaning, but rather, has a fixed and knowable meaning, which should be adhered to by Judges. *See* Doug Linder, *Exploring Constitutional Law*, *available at* http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/interp.html (last visited Jan. 23, 2006). The key to originalism is that interpretive decisions made by Judges should be based on facts about the document when it was originally written or ratified, with minimal adjustments for the time of context in which it is interpreted. *Id.*

15. The application of originalism to the case formed the ultimate basis for the *Hathcock* court to reject the principles of *Poletown* in its decision:

> Because *Poletown's* conception of a public use—that of 'alleviating unemployment and revitalizing the economic base of the community'—has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of 'public use' in art. X, § 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification.

Hathcock, 684 N.W.2d at 787.

16. *Id.* at 779 n.48. Justice Thomas M. Cooley (1824-1898) is one of the most highly respected jurists and scholars in Michigan legal history. *See* Thomas McIntyre Cooley, *available at* www.cooley.edu/overview/tmctheman.htm (last visited Nov. 28, 2005). He first gained recognition when, pursuant to an 1857 act of the legislature, he was appointed to compile the statutes of the state into "The Compiled Laws of the State of Michigan." *Id.* Thereafter, he was appointed the official reporter of the Michigan Supreme Court. *Id.* In 1859, Cooley became one of the first faculty members of the University of Michigan Law School. *Id.* He was appointed to the Michigan Supreme Court in 1864, and served on the

argument that the founding principles of Michigan takings jurisprudence are based upon the 19th-century works of Justice Cooley. These works, however, do not support the *Hatchcock* holding. The court's interpretation of Cooley's writings are wholly misguided and, in some instances, his teachings are taken out of context or totally disregarded.

II. *POLETOWN* AND *HATHCOCK*

Hathcock was decided amidst concern throughout the country that local governments were abusing the power of eminent domain to further private economic interests.[17] The concern centered on the need to overturn Poletown, widely regarded as the seminal state case holding that the state legislature could authorize use of the power of eminent domain to further economic development purposes.[18]

At issue in both *Poletown* and *Hathcock* was the meaning of article X, section 2 of the Michigan Constitution of 1963: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."[19] This provision finds its roots in the Northwest Ordinance of 1787[20] governing the territory of Michigan, and similar provisions have been included in each of the state's constitutions, beginning with the state's first in 1835.[21]

The words of Michigan's 1963 Constitution are nearly identical to the language contained in the Fifth Amendment to the U.S. Constitution ratified in 1789: "nor shall private property be taken for public use, without just compensation."[22] The Supreme Court has construed the Fifth Amendment

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court until his retirement in 1885, authoring a number of landmark opinions. *Id.* Justice Cooley wrote countless articles on legal subjects and wrote full-length works on Constitutional Limitations, Blackstone's Commentaries, Story's Commentaries, and Torts. *Id.*

17. *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003).

18. *See* Timothy Sandefur, *A Gleeful Obituary for* Poletown Neighborhood Council v. Detroit, 28 HARV. J.L. & PUB. POL'Y 651, 664 (2005). *See also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 179-80 (1985); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 489-90 (1983).

19. MICH. CONST. of 1963 art. X, § 2.

20. 1787 Gov't of Northwest Territory, art. II.

21. The Constitution was ratified by the people of the territory in 1835 and Michigan was granted statehood in 1837. *See* The Official State of Michigan Website, *available at* http://www.michigan.gov/hal/0,1607,7-160-15481_20826_20829-56001--,00.html (last visited Jan. 23, 2006).

22. U.S. CONST. amend. V. Courts and scholars have described the Fifth Amendment of the U.S. Constitution as the "Just Compensation Clause." There is little affirmative

as applicable to the states under the Fourteenth Amendment to the U.S. Constitution adopted in 1868.[23] Accordingly, landowners in Michigan, such as those plaintiffs in *Hathcock* and the residents of the Poletown neighborhood, are protected against unlawful takings by state agencies and local governments under provisions of both the Michigan and U.S. Constitutions.

III. THE *POLETOWN* CASE

The *Poletown* case arose in the late 1970s, at a time when the severity of economic decline facing Detroit was beginning to cause widespread alarm within the city and the state. While the majority opinion in *Poletown* provides little detail, Justice Ryan in his dissent describes the conditions in stark terms:

> It is difficult to overstate the magnitude of the crisis. Unemployment in the state of Michigan is at 14.2%. In the City of Detroit it is at 18%, and among black citizens, it is almost 30%. . . . To meet [foreign] competition, domestic manufacturers are finding it necessary to construct new manufacturing facilities in order to build redesigned, lighter and more economical cars.[24]

Outdated World War I vintage multi-story plants needed to be replaced by more efficient, expansive single-story manufacturing complexes pioneered during World War II.[25] Reducing production space to a single-story required

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evidence that the Framers understood the words "for public use" in the Just Compensation Clause to incorporate any kind of substantive limitation on the ends to which the power of eminent domain may be devoted. These words may have been intended merely to describe the type of taking for which just compensation must be given — a taking of specific private property by public authority as opposed to some other type of taking, such as a taking by tort or taxation. *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS, 8-25 (2002); Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002). Nevertheless, "for public use" has been read throughout U.S. history as imposing an implied limitation on the exercise of eminent domain—that it can be used only for public and not private uses—and the U.S. Supreme Court has accepted this interpretation. *See* Brown v. Legal Found. of Washington, 538 U.S. 216, 231-32 (2003); Thompson v. Consol. Gas Util. Corp., 300 U.S. 55, 80 (1937).

23. The U.S. Supreme Court began applying the Fifth Amendment to the states at the end of the 19th-century. *See Kelo*, 125 S.Ct. at 2655 n.9.

24. *Poletown*, 304 N.W.2d at 465-66 (Ryan, J., dissenting).

25. New automobile assembly plants were required to be single-story, a design characteristic that increases the energy efficiency of the entire operation as opposed to moving auto bodies vertically through the existing multi-level assembly plants. *Id.* at 466 (Ryan, J., dissenting).

the use of much larger land areas to locate new automobile plants within the city.

In 1973, Detroit elected its first African-American mayor, Coleman A. Young.[26] In that year the mayor and corporate leaders of Detroit formed Detroit Renaissance, a CEO council, to jointly address the economic crisis facing the city.[27] No manufacturing plants of the big three domestic automobile companies, General Motors, Ford, and Chrysler, had yet been closed, however, it was generally anticipated that the retirement of aging plants was inevitable.

Mayor Young asked the heads of all three companies for the opportunity to locate new or replacement plants in Detroit when a decision was made to build them. In response to this request, General Motors informed Mayor Young of the closing of the Fisher Body and Cadillac Plants in Southwest Detroit and the relocation of the 6,000 positions at the plants to a new combined facility. GM executives provided the mayor with a time schedule and site specifications for a large modern manufacturing complex which the company was prepared to build outside of the city and, perhaps, outside of the Detroit metropolitan region on a 465 acre "green field" site.[28]

Although the City investigated nine separate sites, each of which required major land assembly within existing residential neighborhoods, only one site, anchored by the recently closed Dodge Main Plant, was found suitable for the project.[29] The obsolete multi-story manufacturing plant straddled the Detroit and Hamtramck border and required demolition.[30] It was built at an earlier time when neither city had a master plan, zoning

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26. Coleman Alexander Young (1918-1997) was the first African-American elected Mayor of the City of Detroit. *See* Coleman A. Young, President Emeritus of the Coleman A. Young Foundation: *A Life of Struggle Becomes...a Rich Legacy*, *available at* http://www.cayf.org/bio-cay.htm (last visited Nov. 28, 2005). He was elected in 1973, and served five terms through 1993, receiving wide margins in four succeeding elections. *Id.* Young was faced with major declines in the city's population, job base, and housing stock during his twenty years of administration. *Id.* He attempted to forge close alliances with the corporate leaders of the city to spur industrial and commercial revitalization in the face of widespread disinvestment. *Id.*

27. Detroit Renaissance was founded in 1970 by business leaders to transform the city's disinvestment and decline into a promising economic future. *See* Detroit Renaissance Profile, *available at* http://www.detroitrenaissance.com (last visited Nov. 28, 2005). The major thrust of the organization's programs in the 1970s was to stimulate building activity in Detroit. *Id.* Its board was comprised of chief executive officers of member organizations and only they could attend the group's board meetings. *Id.* The Mayor of the city was a member of the Detroit Renaissance board. *Id.*

28. *Poletown*, 304 N.W.2d at 460 (Fitzgerald, J., dissenting).

29. *Id.*

30. *Id.* at 460 n.2.

ordinance, or building code.[31] As a result, blocks of houses, built to varying standards, were tucked up next to the factory gates.[32] Automobile transportation was not widely available to most families at the time the Dodge Main Plant was built and most workers walked or rode public transportation to work.[33] Any major expansion of the site required intrusion into the surrounding neighborhood, as was the case of all other sites under investigation.[34]

The neighborhood was first occupied by immigrants of Polish decent prior to World War I, hence the name Poletown.[35] Its population had declined by 1980 and over half of its residents were non-white at the time of the case.[36] A Detroit News article described the neighborhood's conditions as follows, "The old workingmen's houses, once solid, were losing mortar or siding. Blight was already driving residents north in the city to Warren and Sterling Heights."[37]

Mayor Young proposed the Poletown site and GM agreed to build its combined plant on the site, if the property could be assembled for construction within eighteen months.[38] "Many homeowners agreed at the outset to sell their homes to the city and leave their crumbling neighborhood."[39] However, some owners did not sell. "Buyout prices for the homes started at $6,000 and averaged $13,000. Residents received an

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31. *See generally*, CITY OF DETROIT DEPT. REPORT AND INFO. COMM., DETROIT: THE NEW CITY, SUMMARY REPORT DETROIT CMTY. RENEWAL PROGRAM (1966).

32. *Id.*

33. *Id.*

34. *Id.*

35. JEANIE WYLIE, POLETOWN COMMUNITY BETRAYED, 65 (1989).

36. Mayor Young testified that the character of Poletown had changed dramatically in recent times as the area became integrated, and that the area should more properly be designated as "Afro-Poletown." Brief of Appellees in Response to Application for Leave to Appeal Prior to a Decision by the Court of Appeals at Tr-IV-46-47; App. 94-95, Poletown Neighborhood Council v. Detroit, No. 66294 (Mich. S. Ct. Dec. 31, 1980) (on file with author). Over half of the residents of the area were non-white. *Id.* at Ex. 5 at IV-24; App. 157. *See generally Poletown*, 304 N.W.2d 455. Speculation arose within the community at the time and the belief persists today among some white critics that Mayor Young, an African-American, cooperated with GM in the Poletown project to wipe out a European ethnic community in retaliation for the white leadership of Detroit clearing African-American neighborhoods in the early days of Detroit's urban renewal and interstate highway construction programs. *See State Supreme Court Must Reverse* Poletown *Decision*, OAKLAND PRESS, *available at* http://theoaklandpress.com/stories/050204/opi_20040502006.html (last visited Jan. 23, 2006).

37. Jenny Nolan, *Auto Plant v. Neighborhood: The Poletown Battle*, DET. NEWS, *available at* http://info.detnews.com/history/story/index.cfm?id=18&category=business.html (last visited Nov. 28, 2005).

38. *Poletown*, 304 N.W.2d at 460 (Fitzgerald, J., dissenting), 467 (Ryan, J., dissenting).

39. *See generally* Nolan, *supra* note 37.

additional grant of up to $15,000 to buy replacement homes, and another grant of $3,500 was available for moving costs."[40] Detroit used its eminent domain authority under the state's Economic Development Corporation Act to take the property of landowners who refused to sell.[41] The Act declares that

> [t]here exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and that it is accordingly necessary to assist and retain local industrial and commercial enterprises . . . to strengthen and revitalize the economy of this state and its municipalities. . . . Therefore, the powers granted in this act constitute the performance of essential public purposes and functions for this state and its municipalities.[42]

The Michigan Supreme Court, by deciding *Poletown* in 1981, became the first court in the nation to address the legitimacy of using of the power of eminent domain "to alleviate and prevent conditions of unemployment."[43] Although the opposing landowners conceded that the project furthered the public purpose of retaining local industries, they argued that the transfer of their property to GM did not constitute a "public use" of the power, as required by article X, section 2 of the Michigan Constitution of 1963. In addressing the landowners' argument, the court concluded that the terms "public use" and "public purpose" had been used interchangeably in Michigan eminent domain cases "in an effort to describe the protean concept of public benefit."[44] It recognized that the United States Supreme Court's holding in *Berman v. Parker*,[45] decided twenty-seven years earlier, defined the meaning of "public use" under the Fifth Amendment to the U.S. Constitution as synonymous with public purpose.[46] Like *Berman*, the *Poletown* court accorded deference to the legislature by holding that when the legislature has determined that governmental action of the type contemplated meets a public need and serves an essential public

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40. *Id. See* Uniform Relocation Assistance and Real Property Acquisition Act of 1970, 42 U.S.C.S. § 4601 (2005).

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

42. Economic Development Corporations Act, MICH. COMP. LAWS ANN. § 125.1602 (West 2005).

43. *See generally supra* note 18.

44. *Poletown*, 304 N.W.2d at 458. *See In re* City of Center Line, 196 N.W.2d 144 (Mich. 1972); Gregory Marina, Inc. v. City of Detroit, 144 N.W.2d 503 (Mich. 1966); *In re* Slum Clearance in City of Detroit, 50 N.W.2d 340 (Mich. 1951).

45. 348 U.S. 26 (1954).

46. *Id.* at 31-32.

purpose, the court's role is "limited." Unlike *Berman*, however, the *Poletown* court did not accept the legislature's determination as "conclusive."[47]

Significantly, the limited role described by the *Poletown* court did not signal the court's abandonment of its judicial prerogative. The court specifically found that the benefits to the public were primary and those to a private interest (General Motors) merely incidental.[48] It also determined that a "public necessity" for the taking existed based upon the city's presentation of "substantial evidence of the severe economic conditions facing the residents of the city and state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide, and the lack of other adequate available sites to implement the project."[49] Accordingly, the "public use" components of primary benefit to the public and "public necessity" were present in *Poletown* and, while the case was controversial and not easy, the

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47. *Poletown*, 304 N.W.2d at 458. The majority in *Poletown* quoted the language of the U.S. Supreme Court in *Berman*, 348 U.S. at 32, with respect to interpreting "public use" in the Fifth Amendment to the U.S. Constitution that "when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.'" *Id.* at 459. The *Poletown* court did not say, however, as did the *Berman* court, that it viewed the legislature's determination of "public use" as conclusive. *Id.* Nor did it reject the principle that whether a taking is for public or private use in Michigan is a question for the court. If the *Poletown* court viewed the legislature's determination as conclusive, its opinion need not have included findings by the court that the private benefits to GM were incidental and a public necessity existed for the taking. *Id.* Moreover, the court would not have stated that, "[w]here, as here, the condemnation power 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." *Id.* at 459-60. While the *Poletown* majority grants deference to the policy of the legislature, expressed in the Economic Development Corporation Act, that projects under the Act "shall be considered necessary for public purposes and for the benefit of the public," the court clearly does not state that it is bound by them. *Id.* at 461. Justice Fitzgerald in his dissent concedes, "It is undeniable that such legislative pronouncements are entitled to great deference." *Id.* at 461 (Fitzgerald, J., dissenting). Justice Ryan, on the other hand, engages in a misguided reading of Michigan law in his dissent when he concludes that "it has always been the case that this Court has accorded little or no weight to legislative determination of 'public use.'" *Id.* at 474 (Ryan, J., dissenting). Justice Ryan's position has no support in Michigan takings jurisprudence or the writings of Justice Cooley, who stated "the question of what is a public use is always one of law. Deference will be paid to the legislative judgment, as expressed in enactments providing for an appropriation of property, but will not be conclusive." THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS, 666 (5th ed. 1998)(1883). The *Hathcock* court, in rendering its opinion, adopted the flawed reasoning of Justice Ryan in his *Poletown* dissent, providing a simplistic approach to overruling *Poletown*, which it appears the court was seeking from the outset.

48. *Poletown*, 304 N.W.2d at 459.

49. *Id.*

condemnation was consistent with Michigan takings jurisprudence and in no way an abuse of the eminent domain power under Michigan law.

The justices in *Poletown* were sharply divided on the issue to be addressed in the case. Chief Justice Coleman together with Justices Moody, Levin, Kavanagh, and Williams comprised the majority, while Justices Fitzgerald and Ryan dissented. Justice Fitzgerald dissented on the basis that "[t]he condemnation contemplated in the present action goes beyond the scope of the power of eminent domain in that it takes private property for private use."[50] Similarly, Justice Ryan found that "the central jurisprudential issue is the right of government to expropriate property from those who do not wish to sell for the use and benefit of a strictly private corporation."[51] In contrast, the majority's focus was upon the benefits to the public:

> Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?[52]

IV. THE *HATHCOCK* CASE

Unlike *Poletown*, where the private market for large economic development projects was virtually nonexistent and local unemployment was at record levels, *Hathcock* arose in an area of burgeoning growth surrounding the recently expanded Detroit Metropolitan Airport, one of the busiest airports in the nation.[53] The expansion of the airport raised concerns that the noise from increased air traffic would plague neighboring landowners.[54] In an effort to obviate the problem, Wayne County used a partial grant from the Federal Aviation Administration (FAA) to begin a program of purchasing neighboring properties through negotiated sales.[55] A checkerboard pattern of lots, with an area totaling five hundred acres, was acquired in close proximity to the airport.[56] The county's agreement with the FAA required that property purchased through the noise abatement

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50. *Id.* at 464 (Fitzgerald, J., dissenting).

51. *Id.* at 471 (Ryan, J., dissenting).

52. *Id.* at 457.

53. *See* Detroit Metropolitan Wayne County Airport, *available at* http://www.clearchannelairports.com/markets/detroit.htm (last visited Jan. 23, 2006).

54. *Hathcock*, 684 N.W.2d at 770-71.

55. *Id.*

56. *Id.*

program be put to economically productive use.[57] In order to comply with the mandate, the county proposed to develop a multi-purpose technology park, comprised of business and research space, a conference center, hotel accommodations and a recreational facility on 1,300 acres.[58]

Using its own funds, the county purchased an additional five hundred acres, leaving it three hundred acres short of the amount of land it needed to begin the project.[59] The county then commenced condemnation proceedings to acquire the remaining forty-six parcels needed to fully assemble the planned site.[60] The properties were appraised and written offers made to the remaining landowners, in accordance with the requirements of Michigan's Uniform Condemnation Procedures Act.[61] Twenty-seven more property owners accepted the county's offers, leaving nineteen properties subject to a taking through eminent domain.[62] These remaining landowners argued that the taking was not for a "public use" and requested that the court overturn the *Poletown* decision.[63]

The county maintained that the taking served a "public purpose" and based upon the principles of *Poletown* constituted a "public use" of the county's power of eminent domain under article X, section 2 of the Michigan Constitution.[64] According to the county, the project would create

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Hathcock*, 684 N.W.2d at 771.

61. MICH. COMP. LAWS ANN. § 213.51 (West 1980).

62. *Hathcock*, 684 N.W.2d at 771.

63. The *Hathcock* property owners apparently had little interest in using the *Poletown* holding to protect their property rights. The prevailing economic conditions in the two cases were markedly different and, accordingly, the *Poletown* principles may well have inured to their benefit. In *Poletown*, the unemployment levels in Detroit were near those of the Great Depression in the 1930s, while in *Hathcock*, the purpose of the taking was to accelerate growth in an economically prosperous local area. *Hathcock,* 684 N.W.2d at 770. Unlike *Poletown*, *Hathcock* did not involve an attempt to alleviate impacted local unemployment or to reverse a precipitous economic decline within the community. In reaching its holding, the *Poletown* court stated, "If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project." 304 N.W.2d at 459. The author maintains that "public use" in an eminent domain proceeding in Michigan requires (1) providing for a "public necessity" and (2) primarily benefitting the public with no more than incidental benefits to a private entity. Clearly, if the property were not needed in *Hathcock* to complete the project, as later conceded by the county, no public necessity would exist. *See* Joel Kurth, *County Vows to Move on Tech Park*, DET. NEWS, *available at* http://www.detroitnews.com (last visited Jan. 23, 2006). Conceivably, the court could find also that the use of eminent domain to promote economic growth under the circumstances of *Hathcock*, rather than to reverse an economic decline as in *Poletown*, would not meet the "public necessity" requirement, even if the property were needed to complete the project.

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

thousands of jobs, broaden the county's tax base from industrial to a mixture of industrial, technology, and service uses, creating tens of millions of dollars in tax revenue. The *Hathcock* court found that the taking was necessary for public purposes.[65]

Notwithstanding findings by the *Hathcock* court that the county's takings were (1) necessary for public purposes,[66] (2) within the scope of the county's powers,[67] and (3) for the use or benefit of the public under the Economic Development Corporation Act,[68] the court held that the takings were unconstitutional, overruling *Poletown.* The court stated, "In this case, Wayne County intends to transfer the condemned properties to private parties in a manner wholly inconsistent with the common understanding of 'public use' at the time our Constitution was ratified."[69] In explaining its position the court reasoned:

> Because Poletown's conception of a public use—that of 'alleviating unemployment and revitalizing the economic base of the community'—has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of 'public use' in article X, section 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the Poletown analysis provides no legitimate support for the condemnation proposed in this case and, for the reasons stated above, is overruled.[70]

Having erroneously concluded that Michigan takings jurisprudence prohibits the use of eminent domain for economic development purposes under any circumstance, the court in *Hathcock* did not assess the extent of the "necessity" present or the degree of the public benefit to be derived.

Immediately after the *Hathcock* court's decision, Wayne County announced that it was proceeding with the project without the nineteen parcels that were the subject of the condemnation.[71] Eminent domain was being used by the county for public convenience and not "public necessity,"

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65. *Id.* at 775-79.
66. *Id.* at 777.
67. *Id.* at 776.
68. *Id.* at 776.
69. *Id.* at 770.
70. *Hathcock*, 684 N.W.2d at 787.
71. *See* Kurth, *supra* note 63. By contrast, accomplishing the project in Poletown without using eminent domain would have been impossible, and no neighborhood property had been acquired prior to commencement of condemnation.

as that term has been interpreted by the court.

V. HISTORICAL PERSPECTIVE

A. Introduction

The *Hathcock* court has described Justice Cooley as "our patron saint," but neither Cooley's opinions nor his treatise support the *Hathcock* holding overruling *Poletown*.[72] Cooley is widely recognized as one of the leading scholars and jurists of the 19th-century and served on the Michigan Supreme Court from 1864 to 1885.[73] His work entitled "A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union" was first published in 1868 and soon became universally recognized as an authoritative source for interpreting state constitutional law within the federal system of the United States.[74] Cooley's

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72. *Hathcock*, 684 N.W.2d at 779.

73. *See* Thomas McIntyre Cooley, *available at* www.cooley.edu/overview/tmctheman.htm (last visited Nov. 28, 2005).

74. Cooley's work entitled "A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the State of the American Union" was published in eight editions, with the first appearing in 1868. William J. Fleener, Jr., *Michigan Lawyers In History—Thomas McIntyre Cooley: Michigan's Most Influential Lawyer*, *available at* http://www.michbar.org/journal/article.cfm?articleID=53&volumeID=3 (last visited Jan. 23, 2006). The eighth edition was published in 1927, twenty nine years after his death in 1898. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927). Justice Cooley himself exercised editorial and content control over only the first five editions. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1890)(1883). Accordingly, all references to the words of Cooley himself in this article are referenced to the fifth edition. *See* COOLEY, *supra* note 47. Thereafter, the cases, content, and volume of the work were expanded significantly by others without his oversight. In the preface to the sixth edition (1890), Cooley writes:

> The period that has elapsed since the last preceding edition of this work was published, has been prolific in Constitutional questions, and a new edition seems therefore important. The official duties of the author putting it out of his power to perform in person the necessary labor, the services of Mr. Alexis C. Angell of the Detroit bar were secured for the purpose, and by him the edition now offered to the public has been prepared. Mr. Angell has examined all the new cases, making use of them so far as seemed important, and adding to the references till the whole number now reaches over ten thousand. Where it seemed necessary, the text has been changed and added to.

THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed. 1890). Copyrights for the work were issued to Justice Cooley through 1896, two years before his death. Thereafter they were issued to one of his two sons, either Thomas B. Cooley (in 1903, 1906, and 1910) or Charles H. Cooley (in 1917, 1919, and 1927). Thomas B. Cooley was not a lawyer, but a pediatrician, and Charles H. Cooley a professor of sociology at the University of Michigan. *See* Thomas Benton Cooley, *available at* http://www.whonamedit.com/doctor.cfm/1931.html (last visited Jan. 23, 2006); Charles Horton Cooley, *available at*

treatise provides a comprehensive analysis of state constitutional law among the states in the latter half of the 19th-century and does not exclusively address Michigan constitutional law. The great majority of cases analyzed and discussed by Cooley in his treatise are from other states.[75]

However, as a member of the Michigan Supreme Court during the same period, Justice Cooley authored opinions in landmark Michigan constitutional law cases, including four important to Michigan takings jurisprudence: *The Detroit and Howell Railroad Co. v. The Township Board of Salem*,[76] *People ex rel Trombly v. Auditor-General*,[77] *Andrew McClary v. Benjamin Hartwell*,[78] and *Martin Ryerson v. Harrison J. Brown*.[79]

Justice Cooley has described the power of eminent domain as:

> [T]he rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand. The authority springs from no contract or arrangement between the government and the citizen whose property may be appropriated, but it has its foundation in the imperative law of necessity . . . The right being thus found to rest upon necessity, the power to appropriate in any case must be justified and limited by the necessity.[80]

Accordingly, the principle is well accepted that the legislature may authorize the use of eminent domain to provide for a "public necessity,"

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http://socsci.colorado.edu/SOC/SI/si-cooley-bio.htm (last visited Jan. 23, 2006). The eighth and final edition of the Treatise (1927) was compiled by Walter Carrington, a member of the Maryland Bar. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS, 33 (8th ed. 1927). By then, it had grown to be a two volume work and was no longer limited to the analysis and words of Justice Cooley by any standard. In citing Cooley's treatise, the *Hathcock* court freely and arbitrarily shifts from the 8th edition of the work to the 5th edition and back again to the 8th edition. *Hathcock*, 684 N.W.2d at 779, 789-92, 797-99.

75. For example, with respect to the statement, "The right of eminent domain, it has been said, 'does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer.'" COOLEY, *supra* note 47, at 657 n.2. None of the eighteen cases cited by Justice Cooley to support this principle are from Michigan. *Id.*

76. People *ex rel.* Detroit & H.R. Co. v. Salem Twp. Bd., 20 Mich. 452 (1870).

77. People *ex rel.* Trombley v. Humphrey, 23 Mich. 471 (1871).

78. McClary v. Hartwell, 25 Mich. 139 (1872).

79. *Ryerson*, 35 Mich. 333.

80. *Salem Twp. Bd.*, 20 Mich. at 474.

subject to limitations contained in the state constitution.[81]

Provisions covering the use of eminent domain in Michigan are contained in the Northwest Ordinance of 1787[82] and the Michigan Constitutions of 1835,[83] 1850,[84] 1908,[85] and 1963.[86] Michigan courts have consistently interpreted all five charters as limiting the exercise of the power to a "public use."[87] The language in the documents themselves creating the "public use" limitation, however, has varied from "public exigencies make it necessary, for the common preservation" (Northwest Ordinance), to "public use" (Constitutions of 1835 and 1963) and "use or benefit of the public" (Constitutions of 1850 and 1908). Notwithstanding these distinct wording differences, Michigan courts have not drawn any distinction in the interpretation of these separate expressions, indicating that the term "public use" broadly encompasses eminent domain actions generating a "public benefit." Moreover, Michigan eminent domain cases draw virtually no distinction between the terms "public use" and "public necessity." These decisions are consistent with the conclusion of Justice Cooley with respect to the meaning of "public use": "[I]t must be conceded that the term 'public use,' as employed in the law of eminent domain, has a meaning much more controlled by the necessity, and somewhat different from that which it bears generally."[88]

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81. COOLEY, *supra* note 47, at 55.

82. 1787 Gov't of Northwest Territory art. II.

83. MICH. CONST. of 1835, art. I, § 19.

84. MICH. CONST. of 1850, art. XV, § 9 and art. XVIII, § 14.

85. MICH. CONST. of 1908, art. XIII, §§ 1,5.

86. MICH. CONST. of 1963, art. X, § 2.

87. *Poletown*, 304 N.W.2d 455; *Shizas*, 52 N.W.2d 589; *In re* Slum Clearance, 50 N.W.2d 340 (Mich. 1951); *Ryerson*, 35 Mich. 333; Swan v. Williams, 2 Mich. 427 (1852).

88. COOLEY, *supra* note 47, at 665. Historically, three different interpretations of "public use" can be discerned from early case law among the states: (1) the government must hold title to the property after condemnation, (2) the condemned property is accessible to the public as a matter of right and (3) the condemnation results in a public benefit or advantage. *See generally* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204-25 (1978); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 4-41 (1980); Philip Nichols, Jr., *The Meaning of Public Use in Law of Eminent Domain*, 20 B.U. L. REV. 615 (1940). The widespread willingness of states to support federally funded slum clearance and low income housing beginning in the 1930s under the National Industrial Recovery Act, followed by the Housing Acts of 1937 and 1949, largely eliminated categories one and two. *Id.* Michigan case law places the state's interpretation of "public use" in the third category, consistent with the Michigan Constitutions of 1850 and 1908 describing the limitation as including "public use or benefit." *Id.*

B. Northwest Ordinance

The U.S. Congress adopted the Northwest Ordinance[89] in 1787. The Ordinance contained the clause that:

> [N]o man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land, and that should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular service, full compensation should be made for the same.[90]

The Michigan Supreme Court in the early 19th-century case of *Swan v. Williams* interpreted the phrase "public exigencies make it necessary, for the common preservation" as describing the Michigan territorial government's "right to take private property for public use, whenever the public necessities or convenience demand it."[91] *Swan* involved the constitutionality of an act that authorized a private railroad company to appropriate private property for the purpose of constructing and maintaining a rail line.[92]

C. Constitution of 1835

Michigan achieved statehood in 1837 and, thereafter, for more than a decade was governed by the Constitution of 1835.[93] Article I, section 19 of the constitution provided: "The property of no person shall be taken for public use, without just compensation therefor." With respect to this language, the Michigan Supreme Court has stated: "This is substantially the language of the like provision of the Fifth Amendment of the U.S. Constitution, and of the Constitutions of nearly all of the states."[94] It is substantially the language also of article X, section 2 of the Constitution of 1963.[95]

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89. 1787 Gov't of Northwest Territory art. II.
90. *Id.*
91. *Swan*, 2 Mich. at 427.
92. *Id.*
93. MICH. CONST. of 1835, art. I, §19.
94. Hendershott v. Rogers, 211 N.W. 905, 906 (Mich. 1927).
95. MICH. CONST. of 1963, art. X, § 2.

D. Constitution of 1850

The takings provisions were contained in article XVIII, sections 2 and 14 of the Constitution of 1850.[96] Section 2 refers for the first time to "*use or benefit*," while section 14 references only "use"; section 2 states:

> When private property is taken for the *use or benefit* of the public, the necessity for using such property and the just compensation to be made therefore, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law: Provided, the foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duty as highway commissioners.[97]

Section 14 states:

> The property of no person shall be taken for public use without just compensation therefore. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of freeholders; and such amount, together with the expenses of proceedings, shall be paid by the person or persons to be benefitted.[98]

E. Constitution of 1908

The Constitution of 1908 contained the provisions in article XIII, sections 1 and 2.[99] Reversing the order of the provisions contained in the Constitution of 1950, section 2 refers also to a taking for the "*use or benefit*" of the public.

Section 1 of the Constitution of 1908 states:

> Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefore being first determined and just compensation therefore being first made

96. MICH. CONST. of 1850, art. XVIII, §§ 2, 14.
97. MICH. CONST. of 1850, art. XVIII, § 2 (emphasis added).
98. MICH. CONST. of 1850, art. XVIII, § 14.
99. MICH. CONST. of 1908, art. XIII, §§ 1, 2.

or secured in such manner as shall be prescribed by law.[100]

Section 2 states:

> When private property is taken for the *use or benefit* of the public, the necessity for using such property and the just compensation to be made therefore, except when to be made by the state, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, that the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.[101]

F. Constitution of 1963

As described earlier, article X, section 2 of the Constitution of 1963, which governs *Hathcock* and *Poletown*, contains the provision: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."[102] The simplified language harkens back to the language of article 1, section 19 of the Constitution of 1835[103] and to the language of the Fifth Amendment of the United States Constitution.[104]

While the Constitution of 1835 referred to "public use," the Constitutions of 1850 and 1908 replaced the words "public use" with "*use or benefit* of the public" and, in addition, included the requirement that a jury of twelve freeholders or three commissioners appointed by the court determine the necessity for the taking.[105] The appointment of a jury or commissioners to determine necessity was incorporated into the constitution to prevent private property from being taken from one person for the private benefit of another.[106]

Necessity has always been a constitutional requirement in Michigan for the exercise of the power of eminent domain. Under the Constitution of 1835, determination of necessity was a legislative prerogative. However,

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100. MICH. CONST. of 1908, art. XIII, § 1.
101. MICH. CONST. of 1908, art. XIII, § 2 (emphasis added).
102. MICH. CONST. of 1963, art. X, § 2.
103. MICH. CONST. of 1835, art. I, § 19.
104. U.S. CONST. amend V.
105. Hendershott v. Rogers, 211 N.W. 905, 906-07 (Mich. 1927).
106. Paul v. City of Detroit, 32 Mich. 108, 113 (1875).

drafters of the Constitution of 1850 found that the system was being abused by legislatures and persons or corporations whom they authorized to use the power of eminent domain to oppress individuals by "corruption and bargaining."[107] As a result, the Constitution of 1850, followed later by the Constitution of 1908, shifted the determination of necessity from a legislative responsibility to a judicial one. Only a few other states followed this approach.[108]

During the period from 1850 until 1963 the terms "necessity" and "use" became cohesive in Michigan takings case law. Without exception, the court upheld eminent domain when it was satisfied that a public necessity existed and a taking primarily benefitted the public with no more than incidental private benefits.[109] Although Justice Cooley employed the terms "use" and "necessity" separately on occasion, he drew no distinction between the two when he found the public benefit requirement to be satisfied.[110]

The Constitution of 1963 deletes any reference to a court appointed jury or commission being responsible for determining necessity for a taking.[111] Minutes of the Eminent Domain Committee of the Constitutional Convention indicate that late in its session, members elected to simplify the language of the "public use" limitation in the constitution to parallel once again the wording of the Fifth Amendment of the U.S. Constitution.[112] The requirement to convene a judicial tribunal to determine necessity was eliminated.[113] The effect is to return the eminent domain provision to wording nearly identical to the "public use" provision of the Constitution of 1835, which the court in *Paul v. City of Detroit* described as opening the

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107. *Id.* at 114.

108. "The constitutions of some of the States require the question of the necessity of any specific appropriation to be submitted to a jury; and this requirement cannot be dispensed with." COOLEY, *supra* note 47, at 668 n.3.

109. *See generally supra* notes 11-12 and accompanying cases.

110. Cooley stated:

> The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is a, like proper, useful, and needful for the government to provide.

COOLEY, *supra* note 47, at 668 n.3.

111. MICH. CONST. of 1963, art. X, § 2.

112. Constitutional Convention Record, at 2846-48.

113. *Id.*

door to private exploitation of the power of eminent domain.[114] It is understandable, then, that the court would continue to maintain some prerogative over potential abuses of eminent domain by the legislature and local municipalities after the Constitution of 1963 was ratified. The vehicle for maintaining judicial oversight and holding abuses of the eminent domain in check is the "public use" limitation.

VI. "PUBLIC USE"

Two distinct words comprise the term "public use" which defines the constitutional limitation on the power of the legislature to authorize the use of eminent domain: "public" and "use."[115] The legislature has the sovereign power to use eminent domain for a public purpose. Article X, section 2 of the Constitution of 1963 requires that the public purpose constitute a "public use."[116] A line of Michigan cases dating back more than a century subscribe to the principle that a "public use" exists when the taking (1) primarily benefits the public with merely incidental private benefits and (2) provides for a public necessity.[117]

A. Public

Michigan cases have uniformly held that the use is "public" when it primarily benefits the public and private benefits are merely incidental.[118] The power of eminent domain has never been limited to acquiring property solely for the state or one of its governmental units.[119] From the earliest use of eminent domain in Michigan, private individuals and corporations have been eligible to receive condemned property to provide for a public necessity when they can best accomplish the public good.[120]

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114. *Paul*, 32 Mich. 108.

115. MICH. CONST. of 1963, art. X, § 2.

116. *Id.*

117. *See* Toldsdorf v. Griffith, 626 N.W.2d 163 (Mich. 2001); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638 (Mich. 1993); Shizas v. City of Detroit, 52 N.W.2d 589 (Mich. 1952); Berrien Springs Water-Power Co. v. Berrien Circuit Judge, 94 N.W.2d 379 (Mich. 1903); Bd. of Health of Portage Township v. Van Hoesen, 49 N.W. 894 (Mich. 1891); Ryerson v. Brown, 35 Mich. 333 (1877). *See also* Mansfield, Coldwater & Lake Mich. R.R. Co. v. Clark, 23 Mich 33 (1871).

118. *See generally id.*

119. *Swan*, 2 Mich. 427.

120. Justice Cooley did not even rule out the exercise of eminent domain when the benefits to the public were not primary, if the power were used for a public necessity: "We are not disposed to say that incidental benefits to the public could not under any circumstances justify an exercise of the right of eminent domain." *Ryerson*, 35 Mich. at 339.

In the seminal case of *Swan v. Williams,* decided in 1852, the Michigan Supreme Court held that a "public use" existed when the legislature authorized a railroad corporation to take private property to construct its rail lines.[121] Justice Cooley in his treatise explained the rationale for such a holding as based upon the sovereign's need to provide for a public necessity:

> And while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolument, so that *to them* the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, if the legislature, reflecting the public sentiment, decide [sic] that the general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest. Accordingly, on the principle of public benefit, not only the State and its political divisions, but also individuals and corporate bodies, have been authorized to take private property for the construction of works of public utility, and when duly empowered by the legislature so to do, their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished.[122]

The *Hathcock* court artificially and mistakenly limited the type of persons or corporations that may provide for a public necessity to "instrumentalities of commerce."[123] All other persons and corporations are

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However, no examples exist in Michigan takings jurisprudence of the use of eminent domain being upheld when the court found that the public benefit was merely incidental.

121. *Swan*, 2 Mich. 427.

122. COOLEY, *supra* note 47, at 667-68.

123. *Hathcock*, 684 N.W.2d at 781-85. The requirement that when eminent domain is used to acquire property for transfer to a private person or corporation for public necessity, the entity must be an "instrumentalit[y] of commerce," was first described in Michigan case law as a formal limitation by Justice Ryan in his dissenting opinion in *Poletown*. 304 N.W.2d at 475-76 (Ryan, J., dissenting). Justice Ryan's proposition is contrary to the teachings and holdings of Justice Cooley, which do not limit the eligibility to receive condemned property to a closed class of private persons or corporations when a public necessity exists. As stated by Cooley:

excluded. With the exception of Justice Ryan in his *Poletown* dissent, no other justice or scholar had previously drawn such a bright line distinction in providing for a public necessity, including Justice Cooley in his

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> We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use. It has been said by a learned jurist that, "if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose. It is upon this principle that the legislatures of several of the States have authorized the condemnation of the lands of individuals for mill sites, where from the nature of the country such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprises." It would not be entirely safe, however, to apply with much liberality the language above quoted, that, "where the public interest can be in any way promoted by the taking of private property," the taking can be considered for a public use . . . The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; . . . .

COOLEY, *supra* note 47, at 659-60. Justice Cooley's rejection of the use of eminent domain to acquire property for mill dams in *Ryerson v. Brown* was based upon his conclusion that no public necessity existed for the use of the power and mill dams frequently constituted public nuisances in 19th century America, not that they failed to constitute an "instrumentality of commerce." *Ryerson*, 35 Mich. at 337-40. With regard to the lack of a showing of local necessity and the need that the private entity be an "instrumentality of commerce," Cooley explained, "[i]f the act were limited in its scope to manufactures which are of local necessity, as grist-mills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now." *Id.*

> It is natural to assume that any new manufacturing establishment will be advantageous in the community; and in a general sense, if there were no drawbacks, this would be true; but the drawbacks are often so serious that it becomes a public nuisance. It would be a singular, but by no means impossible, result of the condemnation of lands for a mill-dam, to find the dam itself condemned and ordered removed as a nuisance. That mill-dams often are nuisances, is not only well known, but the prosecutions for such nuisances make the fact a familiar one in our jurisprudence. Where the country is level, as is the case with a considerable part of this state, the danger that they will become nuisances is particularly great.

Id. at 341.

nineteenth-century landmark decision of *Ryerson v. Brown*.[124] To paraphrase Justice Cooley in the context of the *Poletown* case, if it were found in *Poletown* that "alleviating unemployment" were a public necessity, "it would clearly be pressing a constitutional maxim to an absurd extreme" to hold that the state should use its political subdivisions to add workers to alleviate employment, if a major manufacturing corporation is better able to provide increased employment for the public good.[125] With respect to the presence of the public necessity to alleviate unemployment in *Poletown*, Justice Ryan in his *Poletown* dissent described economic and unemployment conditions in the City of Detroit as grave: "While unemployment is high throughout the nation, it is of calamitous proportions throughout the state of Michigan, and particularly in the City of Detroit, whose economic lifeblood is the now foundering automobile industry. It is difficult to overstate the magnitude of the crisis."[126]

Justice Ryan's "instrumentality of commerce" distinction is based upon an unwarranted extrapolation from the narrow focus of eminent domain cases decided during the nineteenth century. Like most states at the time, the Michigan legislature authorized the use of eminent domain almost exclusively to build and operate railroads, turnpikes, plank roads, bridges, ferries, and canals.[127] These uses were widely accepted as public necessities and shaped the early principles governing eminent domain law. The principal exception among the states and in Michigan during this period involved legislation authorizing private property to be taken to construct mill dams, referred to in nineteenth-century America as manufactories.[128]

Two principal mill dam cases came before the Michigan Supreme Court during this early period: *McClary v. Hartwell* (1872)[129] and *Ryerson v. Brown* (1877).[130] Justice Cooley authored the opinions in both, which were

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124. Justice Weaver's concurrence in the *Hathcock* opinion is highly critical of the majority's categorization of Michigan eminent domain case law. She finds the approach unsupportable by the State's taking jurisprudence and in conflict with the teachings of Justice Cooley. *Hathcock*, 684 N.W.2d at 795-96 (Weaver, J., concurring).

125. COOLEY, *supra* note 47, at 667-68.

126. *Poletown*, 304 N.W.2d at 465 (Ryan, J., dissenting)

127. The study entitled "The Michigan Constitution and Eminent Domain," by Solomon Bienenfeld, was prepared for the Constitutional Convention Preparatory Committee, State of Michigan and determined that necessity to support eminent domain was found in Michigan cases involving highways, schools, parks, airports, parking facilities, slum clearance, low-cost housing, railroads, utilities, courts, administrative offices, jails, and hospitals. SOLOMON BIENENFELD, THE MICHIGAN CONSTITUTION AND EMINENT DOMAIN (1961).

128. COOLEY, *supra* note 47, at 662-66. *See Ryerson*, 35 Mich. 333.

129. 25 Mich. 139 (1872).

130. 35 Mich. 333 (1877).

decided under the Constitution of 1850, requiring that when private property is taken "for the use or benefit of the public," the necessity for such taking shall be ascertained, by "a jury of twelve freeholders appointed by a court of record."[131] Each case involved taking property under "An Act to encourage the erection and support of waterpower manufactories" approved March 21, 1865, as amended.[132] It is perfectly clear from the reasoning of the cases that Justice Cooley did not believe that a mill dam had to be an "instrumentality of commerce" for its owner to use eminent domain to assemble land for its construction. If that were his belief, Cooley would have dismissed the mill dam cases out of hand. Instead, Cooley focused upon whether the "public necessity" requirement was met in both cases.[133]

In *McClary v. Hartwell*, the commissioners found that the taking was for a "public use," but made no specific finding with respect to "public necessity."[134] Cooley deemed this fatal.[135] He ruled: "The finding of the necessity can not in any instance be dispensed with, nor can anything be accepted as a substitute for it."[136] His opinion does not indicate that the mill dam owner would be ineligible to receive condemned property, if a public necessity were found.

Justice Cooley went further five years later in *Ryerson v. Brown* and held that there was no public necessity within the state to support the act itself.[137] He based his conclusion on two principal factors. First, he reviewed the legislative history of legislative support for mill dams in Michigan.[138] Prior to Michigan achieving statehood in 1837, the Territorial Legislature adopted an act in 1824 to authorize the use of eminent domain to appropriate property to erect private dams for building mills for the grinding of grain.[139] The act was repealed four years later, as steam power was introduced into the Michigan economy to support mill and other manufacturing operations.[140] Cooley noted:

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131. MICH. CONST. of 1850, art. XVIII, § 2.

132. 1864 Mich. Pub. Acts 651 (as amended at 1867 Mich. Pub. Acts 193).

133. *McClary*, 25 Mich. at 140; *Ryerson*, 33 Mich. at 333-39.

134. *McClary*, 25 Mich. at 139-40.

135. *Id.*

136. *Id.* at 140. Justice Cooley held further that: "This petitioner's machinery might be taken and operated through State agents, but it would not be easy to suggest any reason of necessity or policy for doing so." *Id.*

137. *Ryerson*, 35 Mich. at 338.

138. *Id.* at 334.

139. *Id.*

140. *Id.*

> The repeal of the act of 1824 and the neglect for more than forty years to pass any other act of like character, afford weighty evidence that whatever necessity might have been supposed to exist for such legislation in very early days, had wholly passed away in a very brief period. Nothing has occurred recently to create any necessity which has not existed at every moment since the act of 1824 was repealed.[141]

Justice Campbell concurred by saying:

> There is no public necessity for accomplishing unnecessary results. The increase of settlements and the improvements in machinery are constantly diminishing the old difficulties instead of increasing them. The choice between steam and water power is now one purely of private economy. The public can be supplied adequately at all events, and the occasional refusal of individuals to sell the right of flowage cannot drive any community into distress.[142]

Second, Justice Cooley assessed the low level of demand for power in the state at the time of the case and the potential for mill dams becoming a public nuisance. According to Justice Cooley:

> Numerous fine mill-sites in the populous counties of the state still remain unimproved, not because of any difficulty in obtaining the necessary permission to flow, but because the power is not in demand. If the power were needed, the land would generally be obtained on reasonable terms, except, perhaps, where there was ground to believe a dam would become a nuisance; and in such cases no permission to take lands, and no condemnation for mill purposes, could protect the parties maintaining a dam against prosecution for the public grievance.[143]

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141. *Id.*

142. *Id.* at 345-46 (Campbell, J., concurring).

143. *Ryerson*, 33 Mich. at 337-38. Predictably and ironically, Justice Cooley's holding in *Ryerson* actually promoted economic development in Detroit and Michigan, which had become a major steam engine center of the country. *See* The History of the Economy of Detroit, *available at* http://www2.sisu.edu/faculty/watkins/detroit.htm (last visited Jan. 23, 2006). Steam engine technology and production rapidly expanded in Detroit during the three decades following Michigan's statehood in 1837. *Id.* By 1840, Detroit had become a major ship building center, where its shipyards built ocean-going cargo ships and were among the first in the world to build steamships. *Id.* By the 1860's marine steam engines were a major export from Detroit, and inventors were attracted to its steam power industry, notably Elijah

Justice Ryan was mistakenly influenced, as well, by the court's description in *Swan v. Williams* that private railroad corporations for which eminent domain was exercised were essentially impressed with a "public trust" responsibility.[144] The *Swan* court was concerned that once the legislature granted the power of eminent domain, the railroad would exercise it for its own private benefit and not for the benefit of the public.[145] Since the legislature did not expressly impose a public trust obligation upon the railroad, the court inferred one:

> All this class of incorporations have been enacted upon the hypothesis that the lands taken for these purposes were taken for public use, and not for the private endowment, and it legitimately follows that the tenure of the corporation is in the nature of a trust for the public use, subject to the supervision of the government, while its franchises are but consideration paid for the faithful execution of this trust.[146]

Justice Cooley found the *Swan* court's reasoning to be spurious. He concluded that there was no distinction between railroads and other private businesses of the nineteenth century.[147] In *People v. Salem*, he wrote:

> No principle was older, and none seemed better understood or more inflexible, than that one man's property could not be taken under the power of the government and transferred to another against the will of the owner; but the State nevertheless is allowed to do so in the case of railroads, under the guise of a convenient fiction, which treats a corporation managing its own property for its own profit, as merely a public convenience and agency. Nothing but an overriding public necessity could ever have led the courts to this judgment, for when the relations between the proprietors of a railroad and the public are examined, we perceive at once that the idea of agency in a legal sense is inadmissible. They are public agents in the same sense that the proprietors of many other kinds of

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McCoy, the African-American son of former slaves. *Id.* In 1872 McCoy perfected in Detroit a unique lubricating system for steam powered locomotives and manufacturing equipment. *Id.* His invention reportedly led to the expression "the real McCoy" as describing his technology. Justice Cooley's decision actually advanced this technology and the local steam engine industry rather than disregarding it. *Id.*

144. *Swan*, 2 Mich. at 436.

145. *Id.* at 439-40.

146. *Id.*

147. *Salem*, 20 Mich. at 480.

private business are, and not in any other or different sense."[148]

In Cooley's mind, public necessity was the determining factor in whether a corporation could receive property acquired through eminent domain and not the nature of the agent.

B. Use

In every Michigan case in which a "public necessity" has been found to exist, the court has held that the "public use" requirement has been met, so long as public benefits are primary and private benefits merely incidental. Michigan decisions are consistent with the nineteenth-century interpretation of "public use" by Justice Cooley: "[I]t must be conceded that the term 'public use,' as employed in the law of eminent domain, has a meaning much controlled by the necessity, and somewhat different from that which it bears generally."[149]

The courts in *Poletown* and *Hathcock* have entertained a needless debate with respect to whether "public use" and "public purpose" have the same or different meanings in Michigan takings jurisprudence. This focus on the use of terms, rather than on the settled reasoning of a long line of Michigan eminent domain cases, obscures the fundamental importance of the elements of "public necessity" and "public benefit" in the use of eminent domain. Michigan courts have consistently sustained the exercise of the power when they determine that the public necessity and public benefit standards ingrained within the "public use" of requirement the state constitution are satisfied.

The debate played significantly into the *Poletown* and *Hathcock* decisions. The *Poletown* court drew no distinction between the terms "use" and "purpose" in interpreting article X, section 2 of the Michigan Constitution. On the other hand, the *Hathcock* decision overruling *Poletown* turns on distinguishing the two terms. There is ample precedent in Michigan case law for the *Poletown* court's position. The court stated: "We are persuaded the terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit. The term 'public use' has not received a narrow or inelastic definition by this Court in prior cases."[150] The court's reasoning is reflective of the U.S.

148. *Id.*

149. COOLEY, *supra* note 47, at 664-65.

150. *Poletown*, 304 N.W.2d at 457. "The historic distinction notwithstanding, it is clear that the terms 'public use' and 'public purpose' have, indeed, been used interchangeably in the inexact language of both eminent domain and taxation cases written by this Court." *Id.*

Supreme Court's interpretation of the term "public use" contained in the Fifth Amendment to the U.S. Constitution as described in *Berman v. Parker*,[151] *Hawaii v. Midkiff*[152] and, more recently, *Kelo v. City of New London*.[153] Moreover, eminent domain provisions of both the Michigan Constitutions of 1850 and 1908 employ the language *"public use or benefit"* supporting a broader interpretation of the "public use" limitation.[154] Neither the *Hathcock* nor *Poletown* courts adequately focused upon the importance of "public necessity," although it was found to exist by the *Poletown* court in arriving at its holding.[155]

Ironically, the *Hathcock* court could have ruled in favor of the landowners based upon a clarification of the *Poletown* holding. The county announced publicly immediately following the *Hathcock* decision that it

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at 475 (Ryan, J., dissenting) (citing *In re* Slum Clearance, 50 N.W.2d 340, 343 (Mich. 1951); *See also* Hays v. City of Kalamazoo, 25 N.W.2d 787, 790 (Mich. 1947)).

151. Berman v. Parker, 348 U.S. 26 (1954).

152. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

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

154. *Poletown*, 304 N.W.2d at 465 (emphasis added). "The test of public use is not based upon the function or capacity in which or by which the use is furnished. The right of the public to receive and enjoy the benefit of the use determines whether the use is public or private." *Hays*, 316 Mich. at 791.

> More accurately, [eminent domain] is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand.

COOLEY, *supra* note 47, at 649. Notably, eminent domain has been upheld by the court in Michigan to acquire property to benefit low income housing tenants. As the court has previously stated:

> Through its several municipalities authorized to exercise it, the power of eminent domain may be employed for the acquisition of property for the erection of poorhouses for the care of those who are indigent or unable to care for themselves. The legislation in question does not undertake to authorize the exercise of the power of eminent domain for these purposes, but it does undertake to authorize the exercise of the power of eminent domain for the purpose of acquiring lands, not only for the purposes of slum-clearance, but for the construction of so-called low-cost housing,—that is, for the purpose of erecting upon the lands so acquired buildings which may be leased to persons with low incomes. Though we may not agree with the economic reasoning lying back of the legislation, we are not prepared to say that it violates any constitutional limitation of the State, is class legislation, or denies to anyone the equal protection of the law.

In re Brewster Street Housing Site in City of Detroit, 289 N.W. 493, 502 (Mich. 1939). *See also In re* Edward J. Jeffries Homes Housing Project, City of Detroit, 11 N.W.2d 272 (Mich. 1943).

155. *Poletown*, 304 N.W.2d at 459.

would proceed with the project without the land sought to be condemned.[156] This leads to the conclusion that "public necessity" was lacking to support a taking in *Hathcock*.[157] As stated by Justice Campbell in *Ryerson v. Brown*, which prohibited the use of eminent domain to capture water power after steam power was available in Michigan, "There is no public necessity for accomplishing unnecessary results."[158] However, it does not appear that the *Hathcock* court gave any consideration to using the principles of *Poletown* to protect the property owners whose land was being taken by the county. All indications are that the court was determined to overrule *Poletown* in furtherance of its own economic ideology.

The court's first step in overruling *Poletown* was to recast the case as one designed to maximize the profits of General Motors. According to *Hathcock*:

> [T]he *Poletown* majority concluded, for the first time in the history of our eminent domain jurisprudence, that a generalized economic benefit was sufficient under art. 10, § 2 to justify the transfer of condemned property to a private entity. Before *Poletown*, we had never held that a private entity's pursuit of profit was a "public use" for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy.[159]

There is nothing in the record of *Poletown* that the profits of General Motors would be maximized by building at the Poletown site rather than at a greenfield site outside of the city or the state.[160] The *Hathcock* court

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156. *See* Kurth, *supra* note 63.

157. *Ryerson*, 35 Mich. at 346 (Campbell, J., concurring).

158. *Id.*

159. *Hathcock*, 684 N.W.2d at 786. Contrary to the *Hathcock* court's statement that the *Poletown* court held profit maximization by General Motors constituted a public use, the *Poletown* court focused upon the public necessity and benefit: "The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental." *Poletown*, 304 N.W.2d at 459.

160. Justice Ryan himself was not convinced that profit maximization was the motivation behind GM's willingness to undertake the project. In his dissent he stated:

> What is reported here is not meant to denigrate either the role or the good faith of General Motors Corporation. It is a private, profit-making enterprise. Its managers are answerable to a demanding board of directors who, in turn, have a fiduciary obligation to the corporation's shareholders. It is struggling to compete worldwide in a depressed economy. It is a corporation having a history, especially in recent years, of a responsible, even admirable "social conscience." In fact, this project

appears to have been swayed in shaping its reasoning by superficial arguments of *Poletown* critics, unproven facts and claims about originalism, none of which apply to the case.[161] If *Poletown* were about maximizing General Motors' profits, the *Poletown* court itself could not have upheld the taking, based upon the principles proffered by the majority in the case.[162]

Justice Young, writing for the *Hatchcock* court, distinguished between the terms "purpose" and "use" and adopted the "public use" interpretation of Justice Ryan contained in his *Poletown* dissent.[163] Ryan limits the transfer of property acquired through eminent domain to private persons or corporations falling within three artificial categories of cases decided before the adoption of the 1963 Constitution: (1) where a public necessity of the extreme sort exists,[164] (2) when the private entity remains accountable to the

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> may well entail compromises of sound business dictates and concomitant financial sacrifices to avoid the worsening unemployment and economic depression which would result if General Motors were to move from the state of Michigan as other major employers have.

Id. at 470 n.9 (Ryan, J., dissenting).

161. *See* Linder, *supra* note 14; *See also Hathcock*, 684 N.W.2d 765. The underpinning of eminent domain and the "public use" limitation is public necessity. Michigan case law leaves no doubt that public necessity is a term defined by the changing needs of society. Originalism is not relevant in determining the meaning of a term that is controlled by the circumstances and time at which a taking occurs other than to validate that the term was intended by the people ratifying the constitution to be flexible in providing for community needs.

162. The use of eminent domain to maximize profits for General Motors would not have met the *Poletown's* "heightened scrutiny" requirement that the public benefit be more than speculative or marginal but must be clear and significant if it is to be within the legitimate purpose for eminent domain as provided by the legislature. *Poletown*, 304 N.W.2d at 459-60.

163. *Hathcock*, 684 N.W.2d at 782-83; *Poletown*, 304 N.W.2d at 464. The *Hathcock* court, with the exception of Justice Weaver in concurrence, adopts without modification Justice Ryan's position with respect to the meaning of "public use" based upon categorizing Michigan eminent domain cases decided prior to the adoption of the 1963 Michigan Constitution. *Hathcock*, 684 N.W.2d at 781. The court also concludes, again with the exception of Justice Weaver, that the term "public use" is to be interpreted based upon the "common understanding of that phrase among those sophisticated in the law at ratification," freezing the meaning as of 1963. *Id.* at 780-81. It appears that Justice Ryan is the only "sophisticated person" to whom the court looks for guidance in discerning the meaning of "public use." *Id.* at 780-88. Justice Ryan has a highly respected record on both the Michigan and federal court benches. Nevertheless, he did not become a trial judge until 1967 (3rd Circuit of Michigan), four years after the 1963 Michigan Constitution was adopted, making it curious and injudicious that his views alone were adopted, without any mention or serious consideration of the views also expressed at the time or later by other jurists, property lawyers or scholars "sophisticated in the law," if such a standard were appropriate to apply. (For the author's rejection of the *Hathcock* standard and the principles of originalism for interpreting "public use" see *infra* text accompanying notes 169-76).

164. The *Hathcock* court has modified the labeling of Justice Ryan's first category from

public,[165] and (3) when the property is selected on facts of independent public significance.[166] Ryan's approach is entirely arbitrary. It limits

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"Public Necessity of the Extreme Sort Otherwise Impracticable" to "Public Necessity of the Extreme Sort," suggesting a more rigid standard for necessity. *Hathcock*, 471 Mich. at 473. However, there are no Michigan cases striking down the use of eminent domain on the basis that they lacked "public necessity of the extreme sort" when the court found that the public was primarily to benefit and private benefits were merely incidental. No "public necessity of an extreme sort" has been needed to support eminent domain as that term is commonly understood. The term public necessity of the extreme sort was used by Justice Cooley to describe the necessity that exists when a private railroad selects a route for its track and a landowner refuses to transfer the land needed to construct the line. *Ryerson*, 35 Mich. at 340. "A railroad cannot go around the farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare could never have existed if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him." *Salem*, 20 Mich. at 482. In fact, as noted by Justice Ryan in his *Poletown* dissent, the court has referred to lesser necessity standards in terms of "overriding public necessity" and "necessity . . . otherwise impracticable" *Poletown*, 304 N.W.2d at 478 nn. 19-20 (Ryan, J., dissenting).

165. The *Hathcock* court has also modified the labeling of Justice Ryan's second category. Whereas Ryan categorizes the cases as those involving "continuing accountability to the public," the *Hathcock* court uses the description "where the property remains subject to public oversight after transfer to a private entity." *Hathcock*, 684 N.W.2d at 783. Neither description captures the essence of the principle contained in the cases, which is that the private entity will continue to use the condemned property for the public necessity unless it terminates all use. Many railroads have gone out of business and no longer benefit the public or have terminated lines of service which they acquired by eminent domain. In *Poletown*, the development agreement required that General Motors build a 2,000,000 square foot modern manufacturing plant on property condemned by the City of Detroit to address the need to alleviate staggering local unemployment. The only practical use of one of the world's major manufacturing complexes would be large scale manufacturing operations requiring the continuous employment of thousands of local workers directly and many more in supplier industries located near the complex, whether the plant is owned and operated by General Motors or a successor corporation. The *Poletown* plant has operated continuously since its completion in the early 1980s, employing thousands of workers daily. Concern has been expressed that General Motors might decide to shut down the plant at some time in the future. If it did, General Motors' actions would be no different than a railroad corporation discontinuing a line of service to the public, as many have done.

166. This third category attempts to explain eminent domain decisions that do not fall within the other two groupings. Both the *Hathcock* court and Justice Ryan agree on the description: "when the property is selected on facts of independent public significance." *Hathcock*, 684 N.W. 2d at 783; *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting). This category draws especially sharp criticism from Justice Weaver in her concurring opinion. She reasoned that:

> If, instead of the common understanding of "public use," future courts rely on "facts of independent public significance" to determine whether a condemnation is for a "public use," then it is easy to imagine how the people's limit on the exercise of eminent domain might be eroded. For example, a municipality could declare the lack of a two-car garage to be evidence of blight, as has been

eminent domain to those situations where (1) the legislature has previously authorized the use of the power and (2) eminent domain disputes have come before the court. It does not include historical circumstances of public necessity where eminent domain was not authorized by the legislature or circumstances arising out of changing conditions of society. No other cases or scholars have independently concluded that the use of eminent domain in Michigan is limited to the three categories defined by Justice Ryan.

Significantly, Justice Cooley's writings do not support the categorical approach of Justice Ryan and the *Hathcock* court to interpreting the term "public use." Cooley focused upon the need to address "public necessity" in exercising eminent domain. In this connection, Cooley stated in *People ex rel. Detroit & Howell R.R. Co. v. Township Board of Salem*: "If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the

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attempted in Lakewood, Ohio or justify condemning a small brake repair business so that the property can be use for a hardware store, as has been attempted in Mesa, Arizona.

Hathcock, 684 N.W.2d at 797 (Weaver, J., concurring). The principal Michigan case placed in this category is *In re Slum Clearance*. 50 N.W.2d 340 (Mich. 1951). Like in *Berman v. Parker*, 348 U.S. 26 (1954), eminent domain was used to take property in an area where slum conditions existed and presented a threat to the public health, safety, morals and welfare of the community. *In re* Slum Clearance, 50 N.W.2d at 341. The "public purpose" and "public necessity" were the elimination of slums, according to the court. *Id.* at 342-43. The property was planned to be resold to private entities for redevelopment after acquisition and slum clearance. *Id.* In each case, however, the property owners objecting to the taking did not own "slum" property. *Id.* In *Berman* they owned a department store and *In re Slum Clearance* a pipe and supply business. *Id.* Their property did not involve "facts of independent significance" pertaining to slum conditions. Facilitating economic development by assembling a marketable site for resale was an integral part of "public use" in taking their property in these two cases. If it were not, there would be no necessity for using eminent domain to forcibly take the owners' standard commercial property. *See In re* Brewster Street Housing Site, 289 N.W. 493, 502 (Mich. 1939); *In re* Jefferies Homes Housing Project, 11 N.W.2d 272 (Mich. 1943) (sanctioning the taking of property to build low cost housing). *See also In re* Advisory Opinion on Constitutionality of Act No. 346 of Public Acts of 1966, 158 N.W.2d 416 (Mich. 1968) (approving the use of eminent domain to develop low-cost housing). Nonetheless, in *Hathcock*, the court held that "alleviating unemployment and revitalizing the economic base of the community" cannot be found to be a "public use" under any circumstances. 684 N.W.2d at 787. The *Hathcock* court draws an arbitrary and irrational distinction between alleviating unemployment, reducing poverty, and eliminating slum conditions with respect to the "public use" of property for a public necessity to serve the public good. The cause of slum conditions is unemployment and entrenched poverty that results in residents being incapable of supporting decent, safe and sanitary shelter, adversely affecting the health and welfare of the community.

need."[167]

As importantly, Cooley concludes that "public use" is to be interpreted as a dynamic term addressing the changing needs of society and not frozen in time. In his treatise he advises:

> The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty–perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide.[168]

Notwithstanding the reverence which the *Hathcock* court extends to Justice Cooley, these two examples and others in the *Hathcock* opinion stand the work of the court's patron saint on its head.

VII. ORIGINALISM[169]

Hathcock's most radical departure from Michigan takings jurisprudence was the adoption of "originalism" principles to interpret the term "public use." Under this approach, the meaning of the term is frozen at the time of

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167. *Salem,* 20 Mich. at 480-81.

168. COOLEY, *supra* note 47, at 660. *See also Swan*, 2 Mich. 427; *Hays*, 25 N.W.2d at 787. In *Hays,* the court stated:

> A public use changes with changing conditions of society, new appliances in the sciences, and other changes brought about by an increase in population and by new modes of transportation and communication. The courts as a rule have attempted no judicial definition of a public as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances... The test of public use is not based upon the function or capacity in which or by which the use is furnished. The right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.

Id. at 790-91. In the words of Justice Cooley: "More accurately [eminent domain] is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand." COOLEY, *supra* note 47, at 649.

169. *See generally* Linder, *supra* note 14. "We can uncover the common understanding of art 10, § 2 only by delving into [Michigan eminent domain] case law, and thereby determining the 'common understanding' among those sophisticated in the law at the time of the Constitution's ratification." *Hathcock*, 684 N.W.2d at 780-81.

the adoption of the constitution.[170] Whatever application "originalism" may have to other sections of the Constitution, it has none to interpreting the term "public use," which is well understood in Michigan eminent domain law to be dependent upon the evolving necessities of the community.[171] Whether the *Hathcock* court chose to rely upon the common understanding of the people of Michigan with respect to the meaning of "public use" or the understanding of "persons sophisticated in the law," as discussed below, the clarity of previous decisions of the court makes it beyond reason to conclude that the use of eminent domain is limited to those types of public necessities for which eminent domain was used prior to 1963. Nonetheless that is precisely what the *Hathcock* court held. In the words of the court:

> Because Poletown's conception of a public use—that of 'alleviating unemployment and revitalizing the economic base of the community'—has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of 'public use' in art 10, sec 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification.[172]

Hathcock's own groupings of eminent domain cases are undermined by an originalism approach to interpreting "public use." The third category—when the property is selected upon facts of independent public significance—would be meaningless under originalism. The very definition of the category makes sense only when the significance of the facts are evaluated on the date they occur, not an earlier date when the constitution was adopted. Ryan's third category is based primarily on the court's holding in the case *In re Slum Clearance in City of Detroit*, decided in 1951,[173] with respect to the meaning of the term "public use" contained in the Constitution of 1908.[174] Precedent for taking private slum property for clearance and transfer to private persons for the elimination of slums and redevelopment prior to 1908 was nonexistent. *Hathcock's* originalism theory applied to the slum clearance case would lead to the following reasoning: because *In re Slum Clearance*'s conception of a public use–that of eliminating housing conditions detrimental to the public peace, health,

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170. *Hathcock*, 684 N.W.2d at 780-81.

171. Silver Creek Drain Dist. v. Extrusions Div., Inc., 663 N.W.2d 436 (Mich. 2003); Peterman v. Dep't of Natural Res., 521 N.W.2d 499 (Mich. 1994).

172. *Hathcock*, 684 N.W.2d at 787.

173. 50 N.W.2d 340 (Mich. 1951).

174. MICH. CONST. of 1908, art. XIII, §§ 1, 5.

safety, morals, and welfare, and to aid in re-planning and reconstruction of the area involved–has no support in the court's eminent domain jurisprudence before the ratification of the Constitution of 1908, its interpretation of "public use" cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Similarly, with respect to the holding in *Swan v. Williams*, support for the taking of private property in Michigan by a private railroad to further its operations did not exist at the time of the adoption of the Northwest Ordinance in 1787[175] or prior to the Michigan Constitution of 1835.[176]

VIII. PERSONS SOPHISTICATED IN THE LAW[177]

At this point, the reader should be asking why the *Hathcock* court relies upon the common understanding among those "sophisticated in the law at ratification" in its interpretation of the term "public use," rather than the understanding of the people who ratified the constitution. Justice Weaver was highly critical of the approach in her concurring opinion.[178] The court's reasoning is flawed and based upon a misinterpretation of the principle expounded by Justice Cooley that "technical terms" are to be interpreted on the basis of the understanding of those sophisticated in the law. The example of a technical term which Cooley uses in his treatise are the Latin words "ex post facto."[179] He concluded that technical terms had acquired a

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175. 1787 Gov't of Northwest Territory, art II.

176. MICH. CONST. of 1908, art. XIII, §§ 1, 5.

177. *Hathcock*, 684 N.W.2d at 788-94 (Weaver, J., concurring).

178. *Id.* There are three fundamental rules of constitutional construction contained in Michigan case law. The first and primary rule is the rule of common understanding. The interpretation that should be given to a constitutional provision is that which reasonable minds would give it. The second rule is that to clarify the meaning of a constitutional provision, the circumstances surrounding its adoption and the purpose sought to be accomplished by the provision may be considered. Third, whenever possible, a construction that does not create constitutional invalidity is preferred to one that does, and no constitutional provision should be construed to nullify or impair another. Council No. 11, Am. Federation of State, County and Mun. Emp. (AFSCME), AFL-CIO v. Michigan Civil Serv, Comm'n, 292 N.W.2d 442 (Mich. 1980); Council of Org. and Others for Educ. About Parochiaid, Inc. v. Governor, 566 N.W.2d 208, 215 (1977); *In re* Proposal C., 185 N.W.2d 914 (Mich. 1971).

179.

> But it must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of

well understood meaning in legal history, which the people must be assumed to have meant in adopting them. Irrationally seizing upon this principle, the *Hathcock* court declared that "public use" was a technical term, confounding Cooley's work once again. Justice Cooley's widely known view, as referenced in the *Hathcock* opinion itself, was that the term "public use" was not well understood either by those sophisticated in the law or the public. His frequently quoted words are: "We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use."[180] Moreover, Justice Cooley never described "public use" as a technical term in his landmark opinions or treatise, nor did he ever hold that the term was to be understood as frozen in meaning on the date of the 1850 Constitution upon which his eminent domain decisions rested. The great irony in the *Hathcock* court's specious reasoning is that while attempting to introduce "originalism" into Michigan takings jurisprudence, the court adopts the commonly understood meaning today of the words "technical term" to mistakenly interpret Cooley's original use of the term in the 19th Century.

The meaning to be arrived at in constitutional construction is the intent of the people of the state who ratified the Constitution and they are deemed to have intended the meaning most obvious to the common understanding. Cooley cautioned against the sophisticated approach used by the *Hathcock* court when he said: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.[181]

IX. CONCLUSION

The *Hathcock* court has no basis under article X, section 2 of the Michigan Constitution of 1963 for overruling *Poletown*. The holding in *Hathcock* is neither consistent with the writings of Justice Thomas Cooley,

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art, we must suppose these words to be employed in their technical sense. When the Constitution speaks of an ex post facto law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to imply language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.

COOLEY, *supra* note 47, at 72-73.

180. COOLEY, *supra* note 47, at 659.

181. *Id.* at 72-73.

Michigan case law, or the will of the people of Michigan who ratified the Constitution. While it was a difficult and controversial case, *Poletown* properly upheld the use of the power of eminent domain to "alleviat[e] unemployment and revitaliz[e] the economic base of community" when the court found that a public necessity existed, the benefits to the public were primary and to a private corporation merely incidental.

The concern of the *Hathcock* court that local governments in Michigan were unchecked in abusing the power of eminent domain to further the economic interests of favored private businesses could and should have been addressed by the court by clarifying the principles of *Poletown*, rather than by discarding the holding. Under the *Poletown* principles, takings were required to benefit private persons or corporations only incidentally and to provide for a public necessity, consistent with over 100 years of Michigan eminent domain jurisprudence. It is clear that courts in Michigan have the prerogative to determine when the public benefit from a taking is primary and the public necessity requirement is met. With the elimination of the judicial tribunal in the constitution of 1963, clarification is required with respect to the degree of deference to be extended to the legislature's determination of public necessity, which is where the *Hathcock* court's attention should have been focused.

Clarification and judicious enforcement of the *Poletown* principles within the bounds of Michigan takings jurisprudence would have provided the proper balance between the rights of property owners whose land is being taken and the good of the community in which the property is located. Instead, the *Hathcock* court legislated a new and unwise ideological solution to controlling the potential abusive use of the power of eminent domain by state and local governments. Members of the state legislature who support the *Hathcock* court's holding worry that a future Michigan Supreme Court may set aside the *Hathcock* decision and return to the principles of *Poletown*.[182] Accordingly, they are proposing to amend the Constitution to modify the "public use" language.[183] They have reason to worry. Michigan takings jurisprudence does not support the *Hathcock* holding.

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182. *See* Clear Language Is Needed To Protect Property Rights, *available at* http://www.detnews.com/2005/editorial/0510/22/E07-357029.htm (last visited Nov. 28, 2005).

183. *See* State Constitutional Amendment on Eminent Domain to be on 2006 Ballot; Would Strengthen Private Property Rights, *available at* www.crainsdetroit.com/cgi-bin/search.pl (last visited Jan. 23, 2006).