

October 2005

Quieting the Clang: Hathcock as a Model of the State-Based Protection of Property Which Kelo Demands

Joshua E. Baker

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Property Law and Real Estate Commons](#)

Repository Citation

Joshua E. Baker, *Quieting the Clang: Hathcock as a Model of the State-Based Protection of Property Which Kelo Demands*, 14 Wm. & Mary Bill Rts. J. 351 (2005), <https://scholarship.law.wm.edu/wmborj/vol14/iss1/10>

Copyright c 2005 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

**QUIETING THE CLANG: *HATHCOCK* AS A MODEL OF
THE STATE-BASED PROTECTION OF PROPERTY
WHICH *KELO* DEMANDS**

Joshua E. Baker*

INTRODUCTION	352
I. THE AMERICAN FOUNDING AND PRIVATE PROPERTY	355
A. The Right to Property is a Natural Right	355
B. Government Should Protect Private Property	356
II. THE FOUNDERS REQUIRED A TAKING TO BE FOR A “PUBLIC USE”	361
A. The Presence of a “Public Use” Requirement	361
B. Determining What Constitutes a “Public Use”	364
III. THE ROAD TO <i>POLETOWN</i>	368
A. A National Progression	368
B. Michigan’s Path	370
IV. <i>POLETOWN</i> CONTRADICTED BOTH THE MICHIGAN FOUNDERS’ AND THE NATIONAL FOUNDERS’ VIEW OF “PUBLIC USE”	371
V. <i>HATHCOCK</i> RESTORES MEANING TO THE “PUBLIC USE” REQUIREMENT ..	375
A. Interpreting “Public Use” in Michigan	376
B. A General Economic Benefit is not a “Public Use”	377
C. Three Acceptable Cases for Making a Public Use Condemnation	378
D. <i>Hathcock</i> Accords with the Original, Restrictive Meaning of “Public Use”	379
VI. THE JUDICIAL LANDSCAPE — LOOKING FORWARD	380
A. Successes in the States	381
B. Problems in the States	382
C. A National Misstep	383
D. Returning to the Path	384
CONCLUSION	385

* B.A., Political Science, Hillsdale College, 2001; J.D., College of William & Mary, 2006. The author wishes to thank the staff of the *William & Mary Bill of Rights Journal* for their assistance and hard work on his behalf. He would like to express his thanks to those professors who taught him the importance of the American Founding and its significance to the Nation’s life today. He would like to thank specifically Dr. Mickey Craig, Justice Stephen Markman, and Dr. Larry Arn for their invaluable instruction throughout the years. The author also wishes to thank those who were kind enough to lend a critical eye and helpful word during the drafting of this Note, specifically Timothy Sandefur and David Bobb. He wishes to thank especially his family for their enduring love and support.

INTRODUCTION

“I thought as long as you got the title your home belongs to you for life.”¹ For most of American history and in most instances, Ann Giannini would have been correct. But unfortunately for Mrs. Giannini, her home was no longer protected by a rigid “public use” requirement. Because the City of Detroit believed it could find a more economically beneficial use for the land her house occupied, the City seized and demolished her home.

The Founders, when drafting the United States Constitution, protected private property from confiscation by the federal government through the Fifth Amendment requirement that no “private property be taken for public use, without just compensation.”² The constitutions of forty-seven states, including Michigan, have similarly encapsulated this protection by using the same “public use” language.³ But during the course of the twentieth century, American courts and the Michigan Supreme Court, specifically in its *Poletown* decision, expanded the definition of “public use” in new and broadening ways — ways which made Mrs. Giannini incorrect.

In 1981, the Michigan Supreme Court found a new “public use” when it decided *Poletown Neighborhood Council v. City of Detroit*.⁴ *Poletown* employed a new theory of “public use” — one that rested on the general economic benefit that may result to the community from the taking.⁵ The *Poletown* court ruled that the Michigan Constitution at article 10, section 2⁶ permitted as a “public use” the transfer of private property to a different private owner “to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state.”⁷

In reaching its decision, the Michigan Supreme Court found that “[t]he term ‘public use’ has not received a narrow or inelastic definition by this Court in prior cases.”⁸ The economic benefit rationale used in *Poletown* had been growing in prominence across the nation. Through its prominence, *Poletown* pushed forward

¹ William Serrin, *Detroiters Confronting a Choice: New Jobs or Old Neighborhoods*, N.Y. TIMES, Sept. 15, 1980, at A1 (quoting *Poletown* resident Ann Giannini, after her home was taken to provide space for a new General Motors assembly plant).

² U.S. CONST. amend. V.

³ Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 595–97 n.129 (2003) [hereinafter Sandefur, *A Natural Rights Perspective*].

⁴ 304 N.W.2d 455 (Mich. 1981).

⁵ *Id.* at 459–60.

⁶ MICH. CONST. art. X, § 2 (amended 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.”).

⁷ *Poletown*, 304 N.W.2d at 457.

⁸ *Id.*

the nationwide acceptance of the economic benefit rationale. *Poletown*, though heavily criticized at the time it was decided, began to be taught in law school texts as an acceptable justification for public takings.⁹ Local governments quickly learned this lesson and used it to expand their eminent domain power to new limits.¹⁰

But, as Mrs. Giannini believed, it was not always this way; neither would it remain so in Michigan. In July 2004, the Michigan Supreme Court returned Michigan's eminent domain law to its pre-*Poletown* status. In *County of Wayne v. Hathcock*,¹¹ the Michigan Supreme Court faced a set of facts similar to those presented in *Poletown*.¹² This time the court overruled its prior decision and found that its earlier holding did not apply in *Hathcock*:

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, § 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification.¹³

The Michigan Supreme Court recognized its error and overturned “*Poletown*'s ‘economic benefit’ rationale,”¹⁴ thereby restoring Michigan's original “public use” requirement for legitimate government takings and quieting the clang that Justice Ryan had predicted in his *Poletown* dissent.¹⁵ *Hathcock* sounded a clear bell that

⁹ See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1108–12 (5th ed. 2002).

¹⁰ Dana Berliner, *Home, Safe Home*, 13 LIBERTY & LAW (Oct. 2004), available at http://www.ij.org/publications/liberty/2004/13_5_04_a.html.

¹¹ 684 N.W.2d 765 (Mich. 2004).

¹² *Poletown* was the result of Detroit's attempt to use its eminent domain power to condemn an entire neighborhood and allow General Motors to build an assembly plant on the newly condemned land. *Poletown*, 304 N.W.2d at 457. The Supreme Court of Michigan ruled that, under the Michigan constitution's “public use language, the city's goal of increasing employment and expanding the tax base to provide a general economic benefit to the larger community were proper grounds for allowing the condemnation and transfer to a private entity to occur. *Id.* at 459–60.

¹³ *Hathcock*, 684 N.W.2d at 787 (citation omitted).

¹⁴ *Id.* at 786.

¹⁵ Justice Ryan warned:

The reverberating clang of [*Poletown*'s] economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership.

“a private entity’s pursuit of profit”¹⁶ is not a public use and that the government should not be in the business of redistributing land among private owners.

Not more than a year after *Hathcock* was decided in Michigan, the United States Supreme Court reached the same conclusion that a mistaken Michigan Supreme Court had reached in 1981’s *Poletown* decision.¹⁷ By ignoring the text of the Constitution and relying on Connecticut’s good intentions, the United States Supreme Court read the “public use” requirement in the most permissive terms possible¹⁸ and validated the taking of private land for an economic benefit.¹⁹

To better understand why the Michigan Supreme Court was correct and the United States Supreme Court was in error, this Note examines the Founders’ understanding of individual property rights in order to understand the “public use” requirement for infringing upon property rights, as used in the Fifth Amendment to the United States Constitution and as included in the constitutions of the several states, specifically Michigan’s. Part I examines the influence that John Locke had upon the Founders’ understanding of property rights and how they installed their understanding of natural rights in their new government. This Part pays particular attention to the new government’s chief end of protecting the right to property. Part II considers more explicitly the original meaning of “public use” as a literal requirement, which acted as a bar on the power of eminent domain. Parts III and IV of this Note examine the slippery slope away from the Founders’ original understanding of “public use” and its confusion with a “public benefit rationale” that occurred most notably during the twentieth century, concentrating on the *Poletown* case in Michigan. Part V concludes that the 2004 *Hathcock* decision, which overturned *Poletown*, was a correct interpretation of the original understanding of “public use” in Michigan, which understanding stemmed from the original understanding of the term in the Fifth Amendment. Part VI surveys the national landscape of “public use” jurisprudence and pays considerable attention to the recently decided *Kelo* case. This Note concludes that *Kelo* makes *Hathcock* all the more important because it provides other states with a model to follow in

Poletown, 304 N.W.2d at 464–65 (Ryan, J., dissenting).

¹⁶ *Hathcock*, 684 N.W.2d at 786.

¹⁷ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

¹⁸ *See id.* at 2678 (Thomas, J., dissenting) (“Today’s decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.”). As Justice O’Connor explained,

[t]o reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property — and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.

Id. at 2671 (O’Connor, J., dissenting).

¹⁹ *Id.* at 2668 (majority opinion).

interpreting their own constitutions, which the *Kelo* majority invited state courts to do.

I. THE AMERICAN FOUNDING AND PRIVATE PROPERTY

A. *The Right to Property Is a Natural Right*

Property, and specifically land, is one of the most intimate holdings human beings possess. Taking an owner's property against his will incites passions to a degree reached by few other events.²⁰ Ann Giannini understood this principle before her house was destroyed. Ann's belief that the government should protect her property, and not take it capriciously, was a belief rooted in the foundation of the United States.

The Founders' high regard for property rights was informed by the natural rights philosophers and political theorists they studied. Most prominently the Founders were familiar with John Locke, who observed an intimate connection between a man's life, liberty, and property.²¹ Locke believed that governments were formed to protect the natural rights of man and that among man's natural rights was a right to property.²² Locke reasoned that property could be acquired only through the use of a man's life and liberty, in the form of his labor, and for this reason he perceived the three as blending together.²³

Locke believed that man has ownership of himself and therefore ownership of his labor and the fruit of his labor — his property.²⁴

[E]very man has a *property* in his own *person*: this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that

²⁰ Machiavelli bluntly recognized this principle:

The prince should nonetheless make himself feared in such a mode that if he does not acquire love, he escapes hatred, because being feared and not being hated can go together very well. This he will always do if he abstains from the property of his citizens and his subjects But above all, he must abstain from the property of others, because men forget the death of a father more quickly than the loss of a patrimony.

NICCOLÒ MACHIAVELLI, *THE PRINCE* 67 (Harvey C. Mansfield, Jr. trans., Univ. of Chi. Press 1985) (1532).

²¹ See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 19, at 15 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) [hereinafter LOCKE].

²² *Id.* §§ 26–30, at 18–20.

²³ *Id.*

²⁴ See *id.*

is his own, and thereby makes it his *property*. . . . [I]t hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to²⁵

Locke's philosophy was the most influential of the many natural rights theories the Founders studied.²⁶ "By the late eighteenth century, 'Lockean' ideas of government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."²⁷ It is this Lockean, natural rights understanding of property and just government that is the key to unlocking a proper understanding of how and why the Founders intended to secure private property rights.

Because obtaining property requires the mixing of an individual's labor with the property to make it wholly his own, it becomes a part of his life — life having been exchanged to make it so. Therefore, if an individual is free to labor, and the product of his labor naturally becomes his property, then it is clear that his life, liberty, and property are bound together and are, at one level, indistinguishable. The taking of his property is, then, the taking of his life and his liberty.²⁸

The Founders regarded liberty and property to be inseparable.²⁹ Thomas Jefferson wrote of their unity, "The God who gave us *life* gave us *liberty* at the same time; the hand of force may destroy, but cannot disjoin them."³⁰

B. Government Should Protect Private Property

From their understanding of Locke, the Framers understood that government's first purpose was to protect the natural rights of its citizens: their life, liberty, and property.³¹ Following Locke, the Framers believed that government must secure its

²⁵ *Id.* § 27, at 19 (emphasis in original).

²⁶ See Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 576.

²⁷ Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 *GEO. J.L. & PUB. POL'Y* 77, 82 (2002) [hereinafter Eagle, *The Development of Property Rights*] (quoting PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 87 (1997)).

²⁸ This is why the American public knew instantaneously in their bones that *Kelo* was an affront to their rights and to what they rightly believed to be a large part of the essence of the United States — protection of private property.

²⁹ THOMAS G. WEST, *VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA* 37 (1997).

³⁰ *Id.* (quoting THOMAS JEFFERSON, *A Summary View of the Rights of British America*, in *WRITINGS* 122 (Merrill D. Peterson ed., Library of America 1984) (1774) (first emphasis added)).

³¹ See, e.g., *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

citizens in the free exercise of their rights to property and to protect the property they acquired.³² The Framers believed that government, by securing citizens in their natural rights and formalizing their duties to one another, would permit the citizenry to pursue the “higher goods in life.”³³

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness — That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed

Id. See James Madison, *Property* (1792), reprinted in 1 THE FOUNDERS’ CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Madison, *Property*] (“Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”) (emphasis in original); see also *infra* notes 45, 46, 48 and accompanying text.

³² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³³ Eric R. Claeys, *Property, Morality, and Society In Founding Era Legal Treatises* 27, Address Before the American Political Science Association Annual Meeting (Aug. 30, 2002). Notably Claeys here establishes “property” as the basis of securing a happy and good life, or to use a more famous phrase “to pursue happiness.” The quote here cited continues with a longer explanation of the role of property rights in encouraging individuals to morality and good, happy lives:

This right to property was certainly “absolute” in the sense that it was inalienable. But it was not “absolute” in the sense that every person was entitled to use his own regardless of the consequences to himself or his neighbors, or in the sense that comfortable enjoyment of property was the *summum bonum* of Founding Era morality.

To the contrary, in the treatise writers’ thought, reason and the conscience can discern a series of principled limitations on the scope of property rights. These limitations lay the basis for moral duties on the use of property. Each of the duties follows from an analysis of how property contributes to human happiness in comparison with other sources of human happiness. Property is qualified from beneath in relation to goods that are lower but more necessary. Because health and safety problems threaten self-preservation more urgently than the lack of property, each person’s property rights must be subordinated to respect his neighbor’s personal rights to health and safety. Property is also qualified by the equal property rights of neighbors. Because each individuals’ rights to provide for her self-preservation and prosperity are equal in principle with every neighbor’s, every person owes a duty to use her own property in ways that leave neighbors with equal freedom of action to put their own property to constructive uses. Finally, property is qualified from above by the high and refined. Because human life cannot be fulfilling without society or political life, each person’s property rights must be qualified to make sure no one uses his property in a manner that threatens to disturb the moral

From their understanding of Locke, the Framers understood that government justly derives its powers from the consent of the governed, who have entered the social compact to protect their natural rights. Therefore, government action that contravenes the people's natural rights is unjust. Richard Epstein, like Locke, has observed that "[t]he state arises because the rates of error and abuse in pure self-help regimes become intolerable. The strength of a natural law theory [of property rights] is in its insistence that individual rights (and their correlative obligations) exist independent of agreement and prior to the formation of the state."³⁴ Because individuals outside the social compact, that is to say individuals in a state of nature, do not have the right to possess another's property without the other's consent, the government which they form to better protect their right to property cannot justly be given that right.³⁵ It is imperative for a government which receives its just powers from the consent of the governed to protect private property interests. The only instance in which an individual could rightfully take another's property without his or her consent would be in the face of an emergency.³⁶ So too the government must be limited in its use of its eminent domain power to cases in which there is an exigency requiring the taking for a "public use."

One of the first Supreme Court Justices, William Patterson, offered a fine summary of the interconnection of the Lockean view of private property and just government in his charge to the jury in the early Pennsylvania case *Vanhome's Lessee v. Dorrance*.³⁷

[I]t is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would

conditions that make social life and self-government possible.

Id. at 27–28.

³⁴ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 334 (1985). *Cf.* LOCKE, *supra* note 21, §§ 25–51, at 18–30.

³⁵ *See* 1 JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 256 (3d ed. 1909) [hereinafter LEWIS]; Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 584.

³⁶ This is little more than a precursor of the Property doctrine of safe harbor, by which individuals may enter upon another's land in an emergency but are responsible for any property destruction their actions create. Because Lockean theory posits that government has no more power or rights than the individuals who have created it could have in nature, the government's ability to take property may be thought of as a corollary to the safe harbor rule. Thus, a taking may occur in the face of necessity — for a public use — but the government must provide just compensation for the property it takes.

³⁷ 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795).

become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact³⁸

Jefferson iterated this sentiment in his First Inaugural Address when he observed that to protect private property, “a wise and frugal Government . . . shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and *shall not take from the mouth of labor the bread it has earned*. This is the sum of good government”³⁹ The Founders recognized that if the government they were creating was to protect individual liberty, it would necessarily protect the individual’s natural right to property.

James Madison, writing as Publius, famously declared protection of the ability to acquire and maintain property as the first aim of government: “The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government.”⁴⁰

In 1792, Madison lauded the protection of property as one of the new nation’s chief concerns:

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.⁴¹

John Adams captured the sentiment more succinctly: “Property must be secured or liberty cannot exist.”⁴²

The most popular formulation comes to us from Thomas Jefferson’s pen in the Declaration of Independence’s statement that “all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness⁴³ — That to secure these Rights,

³⁸ *Id.*

³⁹ Thomas Jefferson, First Inaugural Address (March 4, 1801) (emphasis added), available at <http://www.yale.edu/lawweb/avalon/president/inaug/jefinaul.htm>.

⁴⁰ THE FEDERALIST NO. 10, at 41 (James Madison) (Terrence Ball ed., 2002).

⁴¹ Madison, *Property*, *supra* note 31, at 599.

⁴² Eagle, *The Development of Property Rights*, *supra* note 27, at 83 (quoting 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1850)).

⁴³ See Claey, *supra* note 33, at 3–4 (explaining Jefferson’s substitution of “pursuit of happiness” for “property”).

Governments are instituted among Men, deriving their just Powers from the Consent of the Governed”⁴⁴

With such strong beliefs as to liberty’s protection being so closely connected with the protection of property, it is no surprise that the Founders encoded the protection of property in their state and federal constitutions. George Mason wrote in Virginia’s Bill of Rights, approved June 12, 1776:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, *with the means of acquiring and possessing property*, and pursuing and obtaining happiness and safety.⁴⁵

John Adams, Samuel Adams, and James Bowdoin used very similar language in drafting Massachusetts’ Constitution:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of *acquiring, possessing, and protecting property*; in fine, that of seeking and obtaining their safety and happiness.⁴⁶

And again at Article X: “Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.”⁴⁷ These two most prominent state constitutions reflect protections included by several other early states.⁴⁸

When the Founders claimed that every American enjoyed an inalienable right to pursue happiness, they did not mean by “happiness” self-gratification or egoism. The pursuit of happiness meant the pursuit of all of the sources of a good life — self-regarding, social, political, and intellectual — each in proportion to how much it contributes to the completely happy life as discerned by reason.

As has been discussed above, the “pursuit of happiness” cannot occur if one is concerned each day with the preservation of his property.

⁴⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴⁵ VA. CONST. of 1776, § 1 (emphasis added).

⁴⁶ MASS. CONST. art. I, *repealed by* MASS. CONST. amend. art. CVI (emphasis added).

⁴⁷ *Id.* at art. X.

⁴⁸ See, e.g., PA. CONST. of 1776, § I (“[A]ll men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); MD. CONST. of 1776, § XXI (“That no freeman ought to

The Founders encoded their Lockean understanding of property rights in the new nation's laws and made protecting property chief among their government's purposes because they understood such protection to be their inheritance as a natural right, which government should protect.⁴⁹

II. THE FOUNDERS REQUIRED A TAKING TO BE FOR A "PUBLIC USE"

A. The Presence of a "Public Use" Requirement

Though the Founders believed the protection of private property to be the chief end of government,⁵⁰ they recognized that government should have the power to take private property when it was necessary for it to act for a "public use."⁵¹

be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."); N.C. CONST. of 1776, § XII ("That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land."); S.C. CONST. of 1778, § XLI ("That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land."); VT. CONST. of 1777, ch. 1, § I ("THAT all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."); *id.* at ch. 1, § II ("That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."); *id.* at ch. 1, § IX ("[N]o part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives . . ."). The Pennsylvania Constitution, more explicitly than others, recognized the reciprocal rights and duties of individuals within its commonwealth:

[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent, nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.

PA. CONST. of 1776, § VIII.

⁴⁹ See *supra* notes 31–32, 35, 38–41, 44–48 and accompanying text.

⁵⁰ See *supra* Part I–B.

⁵¹ See Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 574, 586. See generally

Though distrustful of a powerful government, the Founders placed only the “public use” and “just compensation” restrictions on the power of eminent domain in the Fifth Amendment’s Takings Clause.⁵² This apparent paradox can only be resolved if the Founders intended these restrictions to provide significant restraints on the government’s power, which they did.

The “public use” restriction on eminent domain was present early in the colonies.⁵³ The Founders were not introducing new, undefined restrictions in the Takings Clause. These were mechanisms they were familiar with from Locke and English law and which they understood to be high bars to government action.⁵⁴ The 1641 version of the Massachusetts Body of Liberties at Section 8 demonstrates the colonists’ early understanding of the “public use” requirement: “No man’s cattle or goods of what kind soever shall be pressed or taken for any public use or service, unless it be by warrant grounded upon some act of the General Court.”⁵⁵ This early formulation of the requirement clearly required an actual physical use of the “cattle or goods” for a “public use.”

Though the Founders “rejected the British monarchy and formed new structures of government,”⁵⁶ they were committed to maintaining the English common law protection of property rights:

The new Constitution, which established the scope of legitimate political power and its exercise, was bound by two significant limitations. The first was respect for contract, both private and public. The second was tradition, largely embodied in the common law, which served to identify and enforce personal rights. “[T]ogether these placed life, liberty, and property morally beyond the caprice of kings, lords, or popular majorities.”⁵⁷

Protection from government takings appeared elsewhere before the Constitution in another of the organic laws of the United States — The Northwest Ordinance.⁵⁸

Eagle, *The Development of Property Rights*, *supra* note 27.

⁵² U.S. CONST. amend. V.

⁵³ Just compensation was also historically required, but is outside the focus of this Note.

⁵⁴ See *supra* Part I–B; see also Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 574; Eagle, *The Development of Property Rights*, *supra* note 27, at 83.

⁵⁵ Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 574.

⁵⁶ Eagle, *The Development of Property Rights*, *supra* note 27, at 83.

⁵⁷ *Id.* (quoting FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776–1790*, at 310 (1979)).

⁵⁸ Northwest Ordinance of 1787 art. II (1787), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTING ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 392 (Richard L. Perry & John C. Cooper eds., 1978).

The Northwest Ordinance explicitly protected private property rights from government takings unless there was a *necessary* public use:

[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 should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, *bona fide* and without fraud previously formed.⁵⁹

Just as the states had given specific emphasis to *preserving* private property rights they gave specific requirements for the government's *infringement* upon those rights, the most restrictive being the "public use" requirement.⁶⁰

The "public use" requirement in Virginia's 1776 Bill of Rights protected those who could vote from "be[ing] taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected."⁶¹

John Adams wrote the protection into the constitution of the Commonwealth of Massachusetts:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: *but no part of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.* In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to *public uses*, he shall receive a reasonable compensation therefor.⁶²

⁵⁹ *Id.* at 395.

⁶⁰ *See, e.g., supra* note 54 and accompanying text.

⁶¹ VA. CONST. art. I, § 6 (amended 1971).

⁶² MASS. CONST. art. X, *amended by* MASS. CONST. amend. art. XXXIX (emphasis added). Here the connection of the taking power to matters involving "public exigencies"

While the Founders conceived a government dedicated to the protection of property rights, they admitted there were proper instances in which government could interfere with the private right to property. However, they limited the interference to matters involving a necessary “public use,” which seemed natural to the Founders from their understanding of Locke and English common law.

B. Determining What Constitutes a “Public Use”

The Fifth Amendment sets forth the conditions under which the government may take private property. The taking must be for a “public use,” and the owner must receive “just compensation” for his taken land.⁶³ To understand just how far astray “public use” jurisprudence has been carried by cases such as *Poletown* and *Kelo*, one must understand the strictness with which the term was originally applied. The appropriate place to start the investigation, then, is with an examination of what the words “public use” meant when the Fifth Amendment was written.

Timothy Sandefur has traced the history of a formally required “public use” to the coining of the term “eminent domain,” by Hugo Grotius.⁶⁴ Grotius characterized eminent domain as allowing “a king . . . [to] take away [property] from his subjects”⁶⁵ But Grotius restricted the king’s power by attaching a qualifier that “in order to [take private property] by the power of eminent domain, first, *the public welfare must require it*, and, second, compensation must be made to the loser, if possible, from the public funds.”⁶⁶ Not surprisingly, the “public use” requirement came to the United States from Grotius through the English legal system and its common law.

English common law focused heavily upon Grotius’ particular phrase “the public welfare must require it”⁶⁷ The common law’s respect for property was “so great . . . that it [would] not authorize the least violation [of private property rights] . . . no, not even for the general good of the whole community.”⁶⁸ Blackstone’s strict statement “seems to require an actual public use, such as a public road.”⁶⁹

further qualifies the conditions under which a public use taking is proper.

⁶³ U.S. CONST. amend. V.

⁶⁴ See Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 571.

⁶⁵ *Id.* (quoting HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, bk. 2, ch. XIV, § 7 (L. Loomis, trans., Walter J. Black 1949)).

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.*

⁶⁸ *Id.* at 573 (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *139) (alterations added).

⁶⁹ *Id.*

The people's representatives must take property only when they have determined that a genuine public need exists.⁷⁰ When property is taken capriciously for purposes that are not specific public uses, the Constitution is contravened.⁷¹

It is . . . difficult to form a case, in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen. It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles, and renders it an holy thing.⁷²

Justice Patterson's statement, shortly after the ratification of the Fifth Amendment, clearly demonstrates the original understanding of the Fifth Amendment to be that government could take private lands only for public uses and could not redistribute one owner's private lands to another private owner for a private use.

Three years later, the Court reinforced Patterson's understanding and stated that "a law that takes *property* from A. and gives it to B." would be "contrary to the *great first principles of the social compact*" and could not "be considered a *rightful exercise of legislative authority*."⁷³ The words "public use" still served as a meaningful restriction on the government power of eminent domain in 1909 when John Lewis, the esteemed author of "A Treatise on the Law of Eminent Domain in the United States," wrote:

The power of eminent domain . . . is the power of a sovereign State to appropriate private property to particular uses for the purpose of promoting the general welfare. This power was originally in the people, in their sovereign capacity, and was by them delegated to the legislature in the general grant of legislative power. In the absence of any restrictions, the legislature could take private property for any purpose calculated to promote the general good. By the provision in question [the words "public use"], the people said to the legislature, in effect,

⁷⁰ See *supra* Part I–B (stating that a Lockean understanding of the derivation of government's just powers leads to this requirement).

⁷¹ Eagle, *The Development of Property Rights*, *supra* note 27, at 94 (summarizing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (1st ed. 1827)).

⁷² *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795).

⁷³ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis in original). This quote comes from Justice Chase's opinion for the court, but Justice Patterson concurred in the finding.

You shall not exercise this power except for public use. To give these words any effect, they must be construed as limiting the power to which they relate, that is, as limiting the purposes for which private property may be appropriated. As the power is by its nature limited to such purposes as promote the general welfare, it is evident that the words public use, if they are to be construed as a limitation, cannot be equivalent to the general welfare or public good. They must receive a more restricted definition.⁷⁴

Lewis's writings reflect a Lockean understanding of government's power, an understanding that the Founders, such as Madison and Adams, also held.⁷⁵

The Founders would not have allowed takings for amorphous public uses. To do so would have been at odds with their understanding of a government receiving its just powers from the consent of the governed.⁷⁶ Accordingly, the government can be given only the power that the people once had held.⁷⁷ Sandefur recognizes the same public choice problem Lewis identified when the "public use" requirement is read broadly:⁷⁸

⁷⁴ LEWIS, *supra* note 35, § 256, at 503–04 (citation omitted).

⁷⁵ See *supra* notes 31–32, 35, 38–41, 44–48, 52 and accompanying text.

⁷⁶ See *supra* notes 44–46 and accompanying text.

⁷⁷ Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 584 ("Since people have no right to steal from each other in the State of Nature, they cannot give government that right, or justify theft by compact.").

⁷⁸ See generally Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL'Y 651 (2005) [hereinafter Sandefur, *A Gleeeful Obituary for Poletown*]; Timothy Sandefur, *Freedom and the Burden of Proof: Randy E. Barnett's New Book on the Constitution*, 10 INDEP. REV. 139 (2005). In both articles, Sandefur argues that the root of this "broad reading" problem is contained in Blackstone's conception of just government and his reliance entirely upon the will of the majority to establish what is just and to set for itself the parameters of proper government action. Blackstone's view clashes mightily with Locke's natural rights theory of just government. As discussed previously in Parts II and III–B, according to Locke, government governs justly only when it governs to the limits of the rights its citizens naturally possess. Once government crosses this line, it governs unjustly. Therefore, government is restricted by what is naturally in the rights of its citizens to do. Sandefur points out that *The Federalist* argues strongly for the Lockean conception of government, when in *No. 51* it explains that majoritarian factions must be mindful of the rights of the minority and are restricted by natural law from trampling on them. Sandefur traces the ideological tension between Locke and Blackstone through America's history and argues that Blackstone's interpretation has ultimately, but incorrectly won out, as evidenced by the ever expanding reach of government power and the apparent lack of concern with any demarcated boundaries for government's further growth, other than the will of the majority.

So, too, if the legislature may take property whenever it serves a “public interest,” and if the legislature itself determines what constitutes a public interest, then eminent domain becomes a blank check, rendering the public use clause surplusage. It is a basic rule of construction that the Constitution should be read to give effect to all its provisions; however, only this Madisonian understanding — that the public use clause requires something more than public convenience — does so.⁷⁹

The Founders did not draft the Fifth Amendment so as to make permissible a taking for an amorphous general benefit to the community.⁸⁰ Neither did they record a positive, concrete formula for determining what constitutes a “public use.” Explaining the meaning of the words “public use” in the Fifth Amendment would have been superfluous to the Founders because the only reading of “public use” that gives the words a separate meaning is their plain reading: as a limit on the legislature’s power.⁸¹

Lewis’s treatise summarizes and argues for this narrow, plain reading definition of “public use”:

The public use of anything is the employment or application of the thing by the public. Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, That it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.

If the constitution means that private property can be taken only for use *by* the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retain certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights

⁷⁹ Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 588–89.

⁸⁰ See *supra* notes 51, 68–69, 74, 76 and accompanying text.

⁸¹ See *supra* notes 75, 78 and accompanying text.

are secured to the public, then the property is not taken for public use and the act of appropriation is void.⁸²

Coexistent at the Founding, as has been demonstrated, was a great respect for private property and an equally great distrust of the degree to which a powerful government could intrude upon one's property.⁸³ It would therefore be at odds with the Founders' understanding to allow property to be taken for any tangential "public use." Had they believed that the legislature could name a "public use" for any parametric reason,⁸⁴ the Founders would have more liberally delineated the conditions under which the legislature could order a taking. But they did not. They were comfortable with the severe limitations they placed upon the legislature's eminent domain power by means of the "public use" and "just compensation" restraints.

Reconciling the Founders' high regard for private property rights with their empowerment of the legislature to determine when a "public use" existed demands that the "public use" requirement be seen as a high, burdensome, and specific protection to be invoked on those rare occasions when private lands are necessary for a physical public use.⁸⁵ If the requirement is not seen as an actual limitation on the legislature's power and "the constitution means that private property may be taken for any purpose of public benefit and utility, [then] what limit is there to the power of the legislature?"⁸⁶

III. THE ROAD TO POLETOWN

A. A National Progression

Though the decisions in several late nineteenth century cases loosened the "public use" limitation on the legislature's power,⁸⁷ the unraveling accelerated during the twentieth century. "[C]ourts had long permitted some leeway in applying

⁸² LEWIS, *supra* note 35, § 258, at 506–08 (emphasis in original) (citations omitted).

⁸³ See *supra* Part I and Part II–B.

⁸⁴ See *supra* note 78 and accompanying text.

⁸⁵ See, e.g., LEWIS, *supra* note 35, § 258.

⁸⁶ *Id.* § 258, at 508.

⁸⁷ The rise of the railroads during the nineteenth century drove the legislatures of the several states to sanction taking private property for the construction of "public ways." See Sandefur, *A Gleeeful Obituary for Poletown*, *supra* note 78, at 657–58 (discussing the influence of railroad development on the public use debate in greater depth and quoting Thomas M. Cooley, who explained that the railroad takings were justified because, "[e]very government makes provision for the public ways; and for this purpose it may seize and appropriate lands . . . [and railroads] are equally public highways with others, when open for use to the public impartially.").

the public use requirement, [but] the concept of public use steadily lost meaning after the 1930s.”⁸⁸ John Lewis’s narrow definition of public use “was rowing against the tide. In short order the Supreme Court explicitly declined to confine the concept of public use to situations in which the public could make actual use of the property taken. Most state courts took a similar path.”⁸⁹ In the early twentieth century, federal and state cases continually expanded the legislature’s power to claim a “public use” in their act of taking.⁹⁰

What evolved was a change in language. Federal and state courts came to conflate “public use” with “public benefit.”⁹¹ The change to this much more permissive language was accompanied by a dynamic shift in rationale, which courts employed to easily approve legislative takings for a wide range of “public benefit” projects.⁹²

Under the “public benefit” rationale, it is nearly impossible to think of a taking for which it cannot be claimed a “public benefit” exists. Such an expansion of power clearly runs against the definition and restraint the Founders had designed the “public use” requirement to embody.⁹³ Abandoning the heightened protection of “public use” for the lower “public benefit” threshold allowed for takings of property that the Founders never would have allowed. This subtle change in language inverted the purpose of the “public use” clause. What had previously been a trusty protection for property owners was changed into an effective and blunt tool wielded in government takings.

“This trend climaxed in the virtual elimination of the public use requirement in the 1954 case *Berman v. Parker*, the 1981 Poletown [sic] case in Michigan, and the 1984 case *Hawaii Housing v. Midkiff*.”⁹⁴ These cases allowed a legitimate “public benefit” taking if there was “some connection, however tenuous, to some at least minimally plausible conception of the public interest.”⁹⁵ Consequently, “[t]o allow this form of indirect public *benefit* to satisfy the requirement for a public use is to make the requirement wholly empty.”⁹⁶ The rationale validated by these cases had

⁸⁸ James W. Ely, Jr., *Can the “Despotic Power” Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, PROB. & PROP., Nov.–Dec. 2003, at 34 [hereinafter Ely].

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See Sandefur, A Natural Rights Perspective, supra* note 3, at 594 (observing that with “the derogation of the natural rights foundation of the public use clause, and growing political hostility toward powerful corporations and wealthy interests, government redistribution of property came to be justified in terms of the ‘public benefit’”).

⁹² *Id.*

⁹³ *See supra* discussion Part II.

⁹⁴ *See Sandefur, A Natural Rights Perspective, supra* note 3, at 595 (citations omitted).

⁹⁵ *Id.* (quoting *Gamble v. Eau Claire County*, 5 F.3d 285, 287 (7th Cir. 1993)).

⁹⁶ EPSTEIN, *supra* note 34, at 170.

the effect, for all practical purposes, of removing the restraints that the “public use” requirement had imposed.⁹⁷

By substituting “public benefit” for “public use,” several state courts and legislative bodies improperly widened the range of “public uses” for which private property could be taken. In doing so they routinely contravened the original understanding of the “public use” requirement in two ways. First, they incorrectly declared a community’s ostensive general economic benefit, rather than an actual or tangible one,⁹⁸ to be a “public use.” Second, they took land from one private owner and gave it to another private owner for a private use.⁹⁹

B. Michigan’s Path

As one of the Northwest Territories, Michigan was governed under the Northwest Ordinance for the first thirty years of its recognized existence.¹⁰⁰ Upon the grant of statehood, Michigan approved the first of its four constitutions. The first Michigan Constitution, ratified in 1835, explicitly included a “public use” requirement for takings in its Bill of Rights: “The property of no person shall be taken for public use, without just compensation therefor.”¹⁰¹ This prohibition was nearly identical to the Fifth Amendment’s¹⁰² and demonstrates that the Michigan founders intended to protect private property in a manner similar to the nation’s Founders, such as Madison, Jefferson, and Adams.¹⁰³

The language of the “public use” requirement was maintained throughout each of the three successive Michigan constitutions. In 1850, the exact language was kept, with the addition of two provisions. The first new provision restricted corporations from taking land for public use by making such a taking subject to just compensation and to further prescriptions of law.¹⁰⁴ The second “public use” provision addressed the opening of roads and made an allowance for takings that were necessary for the completion of a road, the necessity of which was to be determined by a jury of other landholders.¹⁰⁵

⁹⁷ The recent *Kelo* decision has merely done nationally what *Poletown* did in Michigan and has simply extended the Supreme Court’s “public use” jurisprudence to the next logical step.

⁹⁸ See *supra* notes 69–71 and accompanying text.

⁹⁹ See *supra* notes 72–73 and accompanying text.

¹⁰⁰ See *supra* notes 58–59 and accompanying text (highlighting the high protection that the Northwest Ordinance provided for property rights).

¹⁰¹ MICH. CONST. art. I, § 19 (1835).

¹⁰² U.S. CONST. amend. V.

¹⁰³ See *supra* notes 44, 46–47, 49, 51, 59–60 and accompanying text.

¹⁰⁴ MICH. CONST. art. XV, § 9 (amended 1909, 1963).

¹⁰⁵ *Id.* art. XVIII, § 14.

In the Constitution of 1908, the drafters again included a “public use” requirement to protect private property.¹⁰⁶ The language of that constitution restricted both corporations and the public from taking private property for “public use, without the necessity therefor being first determined”¹⁰⁷ The current Michigan Constitution also carries the “public use” restriction and echoes the Fifth Amendment by plainly stating, “Private property shall not be taken for public use without just compensation”¹⁰⁸

Including the “public use” language in each of Michigan’s successive constitutions demonstrates a connection backward to the original Michigan Constitution, which reflected both the Northwest Ordinance and the original intention of the state’s founders. The language in each of Michigan’s constitutions, being nearly identical to that of the Fifth Amendment and springing from the Northwest Ordinance, is evidence of the common root of the protection provided by the “public use” requirement.

IV. *POLETOWN* CONTRADICTED BOTH THE MICHIGAN FOUNDERS’ AND THE NATIONAL FOUNDERS’ VIEW OF “PUBLIC USE”

One of the most notorious cases of the government using the “public benefit” rationale to defeat the “public use” requirement, established by the Founders and adopted by the states,¹⁰⁹ was *Poletown Neighborhood Council v. City of Detroit*.¹¹⁰ Using the modern “public benefit” rationale, the city of Detroit used its eminent domain power to condemn a neighborhood and gave the land to General Motors to build an assembly plant on the site. The Michigan Supreme Court found that the public benefitted by transferring the land “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[.]”¹¹¹

The *Poletown* court refused to find a difference between the phrases “public purpose” and “public use.”¹¹² “The majority mistakenly concluded that the terms ‘public use’ and ‘public purpose’ have ‘been used interchangeably.’”¹¹³ It should be noted here that the *Poletown* court employed the rationale behind the “public benefit” but used the words “public purpose,” which further muddied the already

¹⁰⁶ Coincidentally 1909 was the same year in which Lewis’s treatise was last revised.

¹⁰⁷ MICH. CONST. art. XIII, § 1 (amended 1963).

¹⁰⁸ *Id.* at art. X, § 2.

¹⁰⁹ See *supra* Part II–A.

¹¹⁰ 304 N.W.2d 455 (Mich. 1981).

¹¹¹ *Id.* at 457.

¹¹² *Id.* at 458.

¹¹³ Brief of Non-Party Inst. for Justice and Mackinac Ctr. for Pub. Pol’y as Amicus Curiae at 9, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070–124078) [hereinafter *Amicus Brief for Inst. for Justice*] (quoting *Poletown*, 304 N.W.2d at 457).

murky waters because each of these phrases has its own genesis and applies to different areas of the law. In an attempt to clear up the confusion in the *Poletown* opinion, the Institute for Justice and Mackinac Center *amicus* brief in *Hathcock* noted that

[t]he pre-*Poletown* precedents utilizing the *public purpose* test relate to taxation or other similar issues. In fact, the principal precedent relied on by the *Poletown* majority to define the concept of *public purpose* was a decision upholding the use of tax revenue for the construction of a marina . . . [which] did not in any way hold that the same standards applied to eminent domain cases.¹¹⁴

The *amicus* brief emphasized that the government's power to interfere "with the individual in the case of taxation is wholly different from the case of eminent domain."¹¹⁵ The eminent Michigan jurist Thomas Cooley had previously delineated between eminent domain and the taxing/spending power:

The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles would suffer it to be resorted to; but each of these powers has its own peculiar and appropriate sphere, and the object which is public for the demands of one is not necessarily of a character to permit the exercise of another.¹¹⁶

Poletown received instant scrutiny, and was condemned by many as the "poster child for excessive condemnation. In reverse Robin Hood style, it appeared that eminent domain was being used to displace modest homeowners in favor of a powerful corporation."¹¹⁷ Although *Poletown* was criticized by observers of all political stripes, the decision did not surprise everyone. Indeed, "*Poletown* was just the logical result of a line of decisions that put virtually no limit on the taking of private property."¹¹⁸

Justice Ryan, in his dissenting opinion, predicted that *Poletown* would have disastrous results in Michigan's future eminent domain cases:

¹¹⁴ *Id.* at 9–10 (citations omitted) (emphasis added).

¹¹⁵ *Id.* at 11 (quoting *Poletown*, 304 N.W.2d at 474 (Ryan, J., dissenting)).

¹¹⁶ Amicus Brief for Institute for Justice, *supra* note 113, at 10 (quoting *People ex rel. Detroit & Howell R.R. Co. v. Salem Twp. Bd.*, 20 Mich. 452, 477–78 (1870)).

¹¹⁷ Ely, *supra* note 88, at 35.

¹¹⁸ *Id.*

The reverberating clang of [*Poletown*'s] economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership.¹¹⁹

Reading the “public use” requirement out of the Constitution heightens the likelihood of the abuse of power by our elected officials, who are encouraged by the prevailing majority or whichever interests most effectively reach them, to ever more blatant acts of constitutional recklessness. The quest for control of political power can become the quest for a redistribution of land.¹²⁰

When government can take property to give it to private parties, interest groups will try to commandeer that power to enrich themselves Groups which hope to profit from forced redistributions of property will attempt to influence the government to use eminent domain in their favor. But, properly applied, the public use limitation prevents this by making it impossible for interest groups to profit.¹²¹

The danger of an unrestricted understanding of the Takings Clause is clear. “[W]hen the public use limitation is eviscerated, the power to take private property tends to fall into the hands of those who are already wealthy or popular to be used against those who are not,”¹²² which is precisely the type of disregard for the minority about which *The Federalist No. 10* warns.¹²³

The natural inclination toward governmental abuse of power, recognized by our Founders¹²⁴ was unleashed by the “public benefit” reasoning in cases such as *Poletown* because “[a]ccording to this view . . . whatever the lawmakers decide to do satisfies the public use test.”¹²⁵ A Mississippi bureaucrat, speaking about a recent case,¹²⁶ in which the state of Mississippi sought to condemn twenty-three

¹¹⁹ *Poletown*, 304 N.W.2d at 464–65 (Ryan, J., dissenting).

¹²⁰ *Cf.* Ely, *supra* note 88, at 31.

¹²¹ Brief Amicus Curiae of Pac. Legal Found. and ACLU Fund of Mich. in Support of Defendants-Appellants at 11, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (Nos. 124070–124078) [hereinafter *Amicus Brief for Pac. Legal Found.*].

¹²² *Id.* at 12.

¹²³ *See* THE FEDERALIST NO. 10 (James Madison).

¹²⁴ *See* THE FEDERALIST NO. 51 (James Madison).

¹²⁵ Ely, *supra* note 88, at 31.

¹²⁶ *Miss. Major Econ. Impact Auth. v. Archie*, No. CO-2001-0082, slip op. 601 (Miss. Special Ct. of Eminent Domain, filed July 26, 2001). *See also* John Kramer, Court Issues

acres of private land to add to the 1300 acres it was transferring to Nissan in order to sweeten the deal, captured the alarming degree to which it has become second nature for politicians to take private property without conceiving of a limit to their ability to do so:¹²⁷

State Development Authority Executive Director James Burns, Jr. admitted in the *New York Times* that the property was not actually a part of the project: "It's not that Nissan is going to leave if we don't get that land. What's important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through."¹²⁸

Burns's comment illustrates the pervasiveness of a government mentality that recognizes no limit on its power of eminent domain, save what it might deem to be outside of the public's benefit, if indeed anything can be. Burns's preference for keeping his "promise to a company like Nissan"¹²⁹ over the constitutional exercise of the eminent domain power shows the danger of reading the "public use" requirement broadly or without meaning. When "local officials insist that property taken under eminent domain for economic development serves a public purpose" and "point to the desirability of economic growth" to justify "the taking of private property," the limit to their ambition falls from view.¹³⁰ Burns's comment anticipates that the government will continue overreaching on behalf of "other companies." He hardly paints this taking as one of special necessity or of extraordinary circumstance.

Poletown left Michigan's eminent domain jurisprudence in a condition that Madison, Adams, and the drafters of Michigan's constitution would not recognize. By removing the high threshold installed by the Founders, the Michigan Supreme Court left private property owners, such as Ann Giannini, without an easily defined protection for their property and properly fearful of a government's limitless power.

Once the broad public benefit rationale, spelled out in *Poletown*, has been adopted, the government's taking power appears unlimited. But a limit must be reinstated if the government is to act within the intended scope of the "public use" requirement. The solution is to return modern jurisprudence to the Founders' view of eminent domain and reinstall the restraints that *Poletown* and its brethren

Mixed Ruling in Mississippi Eminent Domain Case, Inst. for Justice (July 27, 2001), at http://www.ij.org/private_property/mississippi/7-27_01pr.html.

¹²⁷ See Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 598.

¹²⁸ David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20.

¹²⁹ Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 598 (citation omitted).

¹³⁰ Ely, *supra* note 88, at 31.

removed. This revolution of restraint must occur in the courts, which have been largely reluctant.

While many scholars have noted the injustice caused by the broad reading of “public use,” courts have only rarely put real teeth in the review by enforcing the public use clause as a substantive limit on government power. So long as the law permits private redistributions of wealth on the grounds of allegedly public gains, these injustices will continue.¹³¹

V. *HATHCOCK* RESTORES MEANING TO THE “PUBLIC USE” REQUIREMENT

Thankfully not all courts are oblivious to the original meaning of “public use.” The Michigan Supreme Court’s 2004 *Hathcock* decision overruled *Poletown* and stopped the dilution of the public use requirement by restoring its restrictive nature. *Hathcock* replaced the broad public benefit rationale of *Poletown* with a narrow definition of “public use” that resembles the Founders’ definition.¹³²

The facts of the *Hathcock* case were similar to *Poletown*.¹³³ But unlike in *Poletown*, the *Hathcock* court held that the county had to abide by state constitutional limits on its eminent domain power as the limits were understood during the ratification of the current Michigan Constitution. Those limits, which the *Hathcock* taking did not satisfy,¹³⁴ are set forth in the Michigan Constitution at article 10, section 2, which establishes that “[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner

¹³¹ Sandefur, *A Natural Rights Perspective*, *supra* note 3, at 599 (citations omitted). *See also id.* at 571 (noting that limitless eminent domain power most hurts the poor, whose land is often taken for a large corporate purpose).

¹³² *See County of Wayne v. Hathcock*, 684 N.W.2d 765, 786–87 (Mich. 2004).

¹³³ Wayne County, Michigan, moved to condemn nineteen parcels of land south of Metropolitan Airport, just outside Detroit, in order to develop a technology park. *Hathcock* was one of the owners of these parcels. The parcels were taken by eminent domain to make contiguous the county’s previous purchases of land, on which it intended to develop the technology park. The county contended that the business park would create as many as 30,000 jobs and add \$350 million to the tax base. The case rose to the Michigan Supreme Court after the circuit court and the court of appeals both ruled that the exercise of eminent domain fit the definition of “public use” established in *Poletown* and that there was nothing wrong with the present taking. The Michigan Supreme Court then granted *certiorari*. *See id.* at 770–72 (setting forth the facts more fully).

¹³⁴ *Id.* at 778 (“If the authority to condemn private property conferred by the Legislature lacked any constitutional limits, this Court would be compelled to affirm the decisions of the circuit court and the Court of Appeals. But our state Constitution does, in fact, limit the state’s power of eminent domain.”).

prescribed by law.”¹³⁵ As has been discussed previously,¹³⁶ Michigan’s constitutional language is similar to the Fifth Amendment’s language.¹³⁷

Hathcock’s strength is in the manner in which the opinion was developed and written. The court did not find that the county lacked the power to condemn private property in all instances but observed that the government is forbidden from condemning the private property of one owner for the purpose of giving it to another private owner if the condemnation was not “‘necessary’ to the [new] end[]”¹³⁸ or if it is not “for the use or benefit of the public,”¹³⁹ as required by Michigan law. Ultimately, the court found that the taking did not satisfy the state’s public use requirement.¹⁴⁰

A. Interpreting “Public Use” in Michigan

The county’s condemnation in *Hathcock* failed the court’s public use test.¹⁴¹ In determining what constituted a “public use,” the court used a “common understanding”¹⁴² interpretive methodology, also employing a “term of art” corollary.¹⁴³ As the court reasoned, “The primary objective in interpreting a constitutional provision is to determine the text’s original meaning to the ratifiers, the people, at the time of ratification But if the constitution employs technical or legal terms of art, ‘we are to construe those words in their technical, legal sense.’”¹⁴⁴

The court found “that no one sophisticated in the law at the 1963 Constitution’s ratification would have understood ‘public use’ to permit the condemnation of defendants’ properties for the construction of a business and technology park owned by private entities.”¹⁴⁵ Justice Young observed that the term “public use” has reappeared in each of the state’s successive constitutions as a legal term of art and a restriction on the state’s eminent domain power.¹⁴⁶ Looking further into the history of “public use” as a term of art the court found that:

¹³⁵ MICH. CONST. art. I, § 2 (amended 2003).

¹³⁶ See *supra* notes 100–08 and accompanying text.

¹³⁷ U.S. CONST. amend. V (stating, “nor shall private property be taken for public use, without just compensation”); see also discussion *supra* Part IV–B.

¹³⁸ *Hathcock*, 684 N.W.2d at 776.

¹³⁹ *Id.* at 788 (quoting Mich. Comp. Laws Ann. § 213.23 (West 1998)).

¹⁴⁰ *Hathcock*, 684 N.W.2d at 788.

¹⁴¹ *Id.* at 781.

¹⁴² *Id.* at 780.

¹⁴³ *Id.* at 779.

¹⁴⁴ *Id.* (quoting *Silver Creek Drain Dist. v. Extrusions Div., Inc.*, 663 N.W.2d 436, 440 (Mich. 2003)).

¹⁴⁵ *Id.* at 784.

¹⁴⁶ See *Hathcock*, 684 N.W.2d at 780; see also *supra* notes 102–05 and accompanying text.

When our Constitution was ratified in 1963, it was well-established in this Court's eminent domain jurisprudence that the constitutional "public use" requirement was not an absolute bar against the transfer of condemned property to private entities. It was equally clear, however, that the constitutional "public use" requirement worked to prohibit the state from transferring condemned property to private entities for a *private* use.¹⁴⁷

The court concluded that "public use" is a term of art with a deep and well-defined history in Michigan, established by the fact that "this Court has weighed in repeatedly on the meaning of this legal term of art."¹⁴⁸ The full meaning of "public use," as used in the Michigan constitution, can be uncovered "only by delving into this body of case law, and thereby determining the 'common understanding' among those sophisticated in the law at the time of the Constitution's ratification."¹⁴⁹ Examining the history further, the court found that the "requirement worked to prohibit the state from transferring condemned property to private entities for a *private* use."¹⁵⁰ By prohibiting a transfer for a private use, but not a public one, *Hathcock* follows the Founders' understanding of the restrictive nature of the Fifth Amendment's "public use" requirement.¹⁵¹

B. A General Economic Benefit Is Not a "Public Use"

Hathcock's rejection of *Poletown's* economic rationale in claiming a "public use" makes unconstitutional the government's transfer of private land between private owners with the intention of increasing economic output.¹⁵² "Before *Poletown*, [the Michigan Supreme Court] 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."¹⁵³ In fact, the court makes a point to say that use of the eminent domain power to transfer land between private parties for a private use was antithetical to the state constitution's "public use" requirement.¹⁵⁴ By refusing to allow a transfer of private property to another private interest with a proposed more efficient economic use, Michigan has made

¹⁴⁷ *Hathcock*, 684 N.W.2d at 781 (emphasis in original) (citations omitted).

¹⁴⁸ *Id.* at 780.

¹⁴⁹ *Id.* at 780–81.

¹⁵⁰ *Id.* at 781 (emphasis in original) (citations omitted).

¹⁵¹ See *supra* Parts I and II.

¹⁵² *Hathcock*, 684 N.W.2d at 786.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 781.

sure that no longer can “a private entity’s pursuit of profit . . . [be considered] a ‘public use.’”¹⁵⁵

Hathcock firmly rejected and overruled *Poletown*’s economic rationale as having “no support in the Court’s eminent domain jurisprudence before the Constitution’s ratification,”¹⁵⁶ and found further that “its interpretation of ‘public use’ in art. 10, § 2 [could not] reflect the common understanding of that phrase among those sophisticated in the law at ratification.”¹⁵⁷

C. Three Acceptable Cases for Making a Public Use Condemnation

Justice Young’s majority opinion in *Hathcock* looked back to Justice Ryan’s dissent in *Poletown* and observed that “public use” transfers for private use are justified only when they pass one of three tests: to be constitutional, the transfer of property between private entities must fit the necessity requirement, maintain the public accountability of the acquiring entity, or be based upon a public concern.¹⁵⁸ “[A]n individual sophisticated in the law at the time of ratification of [the] 1963 Constitution, [] would” have found only these three reasons acceptable for transfer to another private entity.¹⁵⁹

The necessity requirement, as defined by Ryan’s dissent in *Poletown* and Young’s majority in *Hathcock*, is a question of extreme necessity.¹⁶⁰ It requires the “very existence” of the new public use to “depend[] on the use of land that can be assembled only by the coordination central government alone is capable of achieving.”¹⁶¹ Justice Young went on to explain that the situation envisioned is one “in which collective action is needed to acquire land for vital instrumentalities of commerce,” such as “railroads, gas lines, highways” and other actual uses which can occur only on the land in question.¹⁶² *Hathcock*’s formulation of the “necessity” requirement is in keeping with the narrow scope the Founders intended.¹⁶³

The second acceptable condition for transferring property to another private entity is “when the public retain[s] a measure of control over the property.”¹⁶⁴ Justice Young again quoted Justice Ryan’s *Poletown* dissent, explaining “[l]and cannot be taken, under the exercise of the power of eminent domain, unless, after

¹⁵⁵ *Id.* at 786.

¹⁵⁶ *Id.* at 787.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 781–83.

¹⁵⁹ *Id.* at 783.

¹⁶⁰ *Id.* at 781.

¹⁶¹ *Id.* (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

¹⁶² *Id.* at 782.

¹⁶³ See *supra* notes 51, 59, 62, 66–67, 69, 76 and accompanying text.

¹⁶⁴ *Hathcock*, 684 N.W.2d at 782.

it is taken, it will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*"¹⁶⁵ In such a scenario the public's use is preserved by its continued involvement with the private entity.

The final ground for an acceptable transfer of property to a private entity requires that the impetus, and not the result, of the transfer be a public use. "[T]he property must be selected on the basis of 'facts of independent public significance,' meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement."¹⁶⁶ The case the court discussed in connection with this test is a blight removal case in which "[t]he city's *controlling purpose* in condemning the properties was to remove unfit housing and thereby advance public health and safety."¹⁶⁷

These three tests demonstrate an understanding of the Founders' intention of the public use requirement serving a high threshold for abridging the people's right to property. While not denying the government its eminent domain power, these requirements ensure that such power is carefully and more rarely employed.

D. Hathcock Accords with the Original, Restrictive Meaning of "Public Use"

Hathcock accords with Madison's and Adams's understanding of the Fifth Amendment's "public use" requirement by creating a high threshold for permitting a government taking.¹⁶⁸ The *Hathcock* decision, like the Founders' understanding of the Fifth Amendment, relied on a narrow, meaningful definition and interpretation of the "public use" requirement¹⁶⁹ which must be met to justify the taking of private property. *Hathcock* leaves intact the government's power of eminent domain to be used when a truly public use requires it,¹⁷⁰ but extinguishes justification on an economic benefit rationale, a rationale that the Founders would not have recognized or accepted as legitimate for the transfer of land between private owners.¹⁷¹

¹⁶⁵ *Id.* (quoting *Poletown*, 304 N.W.2d at 479 (Ryan, J., dissenting) (emphasis in original) (citing *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 94 N.W. 379 (Mich. 1903))).

¹⁶⁶ *Id.* at 783 (quoting *Poletown*, 304 N.W.2d at 480) (Ryan, J., dissenting)).

¹⁶⁷ *Id.* (referring to *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951), cited in *Poletown*, 304 N.W.2d at 455 (Ryan, J., dissenting)). See also *Kelo v. New London*, 125 S. Ct. 2655, 2685 (2005) (Thomas, J., dissenting) (discussing nuisance law in the common law as being distinct from eminent domain).

¹⁶⁸ See *supra* Part II.

¹⁶⁹ See *supra* note 147 and accompanying text.

¹⁷⁰ See *supra* Part V-C.

¹⁷¹ See *supra* note 72 and accompanying text.

Hathcock stands in line with the understanding of “public use” which is justified only in the presence of a public “exigency” or “necessity.”¹⁷² It restores the protections of private property that the Founders understood to exist from Locke and the common law. Accordingly, *Hathcock* is in line with the early Supreme Court’s strong condemnation of “a law that takes *property* from A. and gives it to B.”¹⁷³ for private purposes and its warning that “[t]he Legislature . . . cannot . . . violate . . . the *right of private property*.”¹⁷⁴

By restoring the restrictive nature of the “public use” requirement, *Hathcock* has revitalized the plain meaning that John Lewis and the drafters of the 1909 Michigan Constitution understood the phrase to have as late as 1909.¹⁷⁵ The Supreme Court of Michigan has acted to further liberty¹⁷⁶ by protecting private property from capricious government takings and quieting the “clang” begun by *Poletown*.¹⁷⁷

VI. THE JUDICIAL LANDSCAPE — LOOKING FORWARD

America is in the midst of a national reawakening of “public use” jurisprudence. “Where the public use clause was once thought to have been virtually rendered dead letter, it has received increasing attention recently from legal scholars who have pointed out that equating ‘public benefit’ with ‘public use’ gives the government almost limitless power to redistribute property.”¹⁷⁸ The already infamous *Kelo*¹⁷⁹ case has accelerated the national awareness that government’s abuse of the “public use” requirement poses a serious threat to the quiet enjoyment of one’s property. *Kelo* has increased the attention focused on the judiciary’s broadening “public use” jurisprudence. Despite the disappointing *Kelo* decision, a heightened awareness of the abuse of the eminent domain power is good news for current and future property owners because the citizenry will more vigilantly watch for and more harshly object to such abuses.¹⁸⁰

¹⁷² See *supra* notes 51, 59, 62, 66, 68, 76 and accompanying text.

¹⁷³ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

¹⁷⁴ *Id.* at 388.

¹⁷⁵ See *supra* notes 75, 83 and accompanying text; see also *supra* notes 103–07 and accompanying text (showing that Michigan adopted a new version of its constitution in 1909, which maintained the “public use” language).

¹⁷⁶ Cf. Eagle, *The Development of Property Rights*, *supra* note 27, at 83.

¹⁷⁷ See *supra* note 119 and accompanying text.

¹⁷⁸ Sandefur, *A Natural Rights Perspective*, *supra* note 3 at 593 (citations omitted). See also discussion *supra* Part IV.

¹⁷⁹ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

¹⁸⁰ See, e.g., Donald Lambro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A01 (reporting that 16 states have now introduced legislation to ban eminent domain from being used to assist private developers).

A. Successes in the States

Before *Kelo* was decided, cases around the country restricting the government's eminent domain power had been making their way through the courts.¹⁸¹ *Hathcock* stands as one of these several cases in the last few years to take seriously the limits that exist on governmental taking power. *Hathcock's* significance after *Kelo* only grows as it provides a proper blueprint for other states examining the "public use" requirement in their own constitutions.

Before the Supreme Court got it wrong in *Kelo*, state courts had been moving in the right direction, narrowing the "public use" requirement by distinguishing it from the term "public purpose." Wisconsin,¹⁸² Illinois,¹⁸³ and South Carolina¹⁸⁴ all took the view that "public purpose" is a requirement that attaches to the "just compensation" requirement for takings. They found that "public purpose" simply requires the government's expenditure to be for a public purpose, while the "public use" is the limit on condemnation itself.¹⁸⁵

These states have correctly taken seriously and reattached the restrictive meaning originally intended in the "public use" requirement. In so doing many of these states have expressly rejected the public benefit rationale. In a passage representative of others, the South Carolina Supreme Court did exactly that:

The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it . . . and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.¹⁸⁶

In 2002 the Illinois Supreme Court flatly rejected *Poletown's* rationale as unpersuasive.¹⁸⁷ Because "every lawful business" "contribut[es] to positive economic

¹⁸¹ See generally Steven J. Eagle, *Dramatic State Cases Largely Support Property Rights*, 5 ENGAGE 49 (Oct. 2004) [hereinafter Eagle, *State Cases*] (reporting on *Hathcock* and many other state cases). See also *Amicus* Brief for Inst. for Justice, *supra* note 113, at 4–7.

¹⁸² See Eagle, *State Cases*, *supra* note 181, at 52 (discussing *Town of Beloit v. County of Rock*, 657 N.W.2d 344 (Wis. 2003)).

¹⁸³ See *id.* (discussing *Friends of Parks v. Chicago Park Dist.*, 786 N.E.2d 161 (Ill. 2003)).

¹⁸⁴ See *id.* at 52–53 (discussing *Georgia Dep't of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003)).

¹⁸⁵ *Id.*

¹⁸⁶ *Georgia Dep't of Transp.*, 586 S.E.2d at 856–57 (quoting *Edens v. City of Columbia*, 91 S.E.2d 280, 283 (S.C. 1956)).

¹⁸⁷ See *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.C.C.*, 768 N.E.2d 1 (Ill. 2002).

growth[.]” the public use requirement was not met by “the economic by-products of a private capitalist’s ability to develop land.”¹⁸⁸ The Illinois opinion went on to distinguish the differences between “public purpose” and “public use” as being more than “purely semantic [. . .] [Although] the line between the two terms has blurred somewhat in recent years, a distinction still exists . . . [The] flexibility [in terminology] does not equate to unfettered ability to exercise takings beyond constitutional boundaries.”¹⁸⁹ Thankfully a significant number of state supreme courts have avoided the confusion of “public use” with “public benefit” or “public purpose” and offer hope that they and other state courts, when interpreting “public use” in their own constitutions, will reject *Kelo*’s faulty interpretation in favor of the original restrictive meaning of the requirement.

B. Problems in the States

While many state “public use” cases are being decided in favor of the original understanding discussed in this Note, not all are. Recently the Supreme Court of Nevada found a “public purpose” in condemning private lands for transfer to casino owners to build a parking lot.¹⁹⁰ Here the court employed both the flawed “public purpose” and general economic benefit rationales to justify the taking.¹⁹¹

But perhaps even before the United States Supreme Court affirmed it, the most notorious of the recent state cases to use *Poletown*’s economic rationale was *Kelo v. City of New London*.¹⁹² In a fact pattern very similar to *Poletown*, the Supreme Court of Connecticut and the United States Supreme Court upheld the “public purpose” of economic development and expansion of the tax base as a legitimate “public taking” when private homes were taken to transfer the land to a private developer.¹⁹³

¹⁸⁸ *Id.* at 9–10.

¹⁸⁹ *Id.*

¹⁹⁰ *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1 (Nev. 2003) (en banc).

¹⁹¹ *Id.* at 5.

¹⁹² 843 A.2d 500 (Conn. 2004), *aff’d*, 125 S. Ct. 2655 (2005).

¹⁹³ As the state court stated,

“Public use” may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use. Such, it is believed, is the construction which has uniformly been put upon the language by courts, legislatures and legal authorities.

Kelo, 843 A.2d at 522 (emphasis in original) (citation omitted).

C. A National Misstep

The Supreme Court of Connecticut cited *Poletown* as persuasive authority.¹⁹⁴ While *Poletown* was persuasive authority for the Connecticut court's justification, the court was disappointed to find the *Poletown* "majority . . . limited the impact of its holding."¹⁹⁵ Almost as if to make up for the restraint it believed the Michigan court to have improperly shown in 1981, the Connecticut court, in 2004, saw no reason to question the legislature's definition of "public use" — ever.¹⁹⁶ The United States Supreme Court found no reason to exercise a heightened review of the Connecticut legislature¹⁹⁷ and was joined by Justice Kennedy's enthusiastic concurrence, which eagerly adopted the Court's rational basis review, rejecting a more skeptical judicial review.¹⁹⁸

The majority readily admitted that "many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use"¹⁹⁹ but then observed that this reading of the words eroded over time.²⁰⁰ In recognizing this fact, the Court confessed its disinterest in using the true, original meaning of the words "public use" and displayed its fixation with continuing the erroneous precedent it has developed and with upholding *stare decisis*. Justice Thomas rightly took the Court to task for its disregard of the intent of those who put the words "public use" in the Constitution.²⁰¹ As if to prove Justice Thomas's point, the Court's opinion continually substituted the words "public purpose" for "public use."²⁰²

¹⁹⁴ *Id.* at 528–31 & n.39.

¹⁹⁵ *Id.* at 529 n.39.

¹⁹⁶ *Id.* (stating "that the application of a 'heightened scrutiny' standard is inconsistent with our well established approach of deference to legislative determinations of public use") (citation omitted).

¹⁹⁷ See *Kelo*, 125 S. Ct. at 2668 ("The disadvantages of a heightened form of review are especially pronounced in this type of case.").

¹⁹⁸ *Id.* at 2670 (Kennedy, J., concurring) ("This case . . . survives the meaningful rational basis review that in my view is required under the Public Use Clause.").

¹⁹⁹ *Id.* at 2662.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 2677–87 (Thomas, J., dissenting).

Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

Id. at 2678.

²⁰² See *id.* at 2655–68 (majority opinion).

D. Returning to the Path

In *Kelo*'s wake, taking seriously the Founders' beliefs about the "public use" requirement is more important than ever. As Justice Thomas's dissent powerfully argued, understanding the Founders' purposeful use of the words in the Constitution should be the starting place for understanding that document. Thankfully, other judges agree with Justice Thomas, most notably those on the Michigan Supreme Court who soberly considered the actual words of that state's constitution in deciding a case similar to *Kelo*. *Kelo*'s method of interpreting the Constitution so as to read out of the text the actual meaning of its words²⁰³ is a dangerous jurisprudence to employ. Justice Young's and Justice Thomas's consideration of the actual words of our governing documents is encouraging. Justice Thomas's opinion succinctly framed the Court's error in refusing to read the words as they were originally intended and understood: "If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power — for public or private uses — then it would be surplusage."²⁰⁴ Because the Michigan court carefully examined the historical meaning of the words "public use," it reached a result that holds true to the plain and original meaning of those words; the minority in *Kelo* would have nationalized this result if only they could have persuaded another Justice to take seriously the Constitution's original meaning. But as has been pointed out,²⁰⁵ the majority felt that the passage of time and reliance upon earlier, erroneous precedent was sufficient reason to disregard whatever meaning the words had when they were first used in the Fifth Amendment.

In light of the Supreme Court's choice to ignore the original meaning of "public use" and to make coequal the modern definition of "public purpose," *Hathcock*'s strong rejection of the broad "public benefit/public purpose" or general economic benefit rationale becomes even more significant. *Hathcock* must now become a guide to other state courts along the path of return to an original understanding of the "public use" requirement. Ironically, the United States Supreme Court cited *Hathcock* as an example of the stricter state interpretation that remains permissible after *Kelo*.²⁰⁶ If the original restrictions the Founders

²⁰³ *Id.* at 2678 (Thomas, J., dissenting).

²⁰⁴ *Id.*

²⁰⁵ See *supra* note 200 and accompanying text.

²⁰⁶ *Kelo*, 125 S. Ct. at 2668.

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law . . .

Id. (citing *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)).

intended for the eminent domain power are to be restored by the courts, other states will have to follow the path that *Hathcock* has marked.

CONCLUSION

The Founders placed a premium on the ownership of private property.²⁰⁷ In fact, they believed government's chief purpose was to protect it.²⁰⁸ Because the government was responsible for protecting the citizens in the enjoyment of their property, the Founders restricted its power of eminent domain by applying two straightforward restraints.²⁰⁹ Chief among them was the "public use" requirement.²¹⁰

Only a plain reading gives "public use" a restrictive meaning that accords with the Founders' expectation that government would secure the citizens in their property. It therefore must be understood that the Founders required an actual public use for a taking to be legitimate.²¹¹ An unfettered power to take land would give the legislature a power beyond what the citizens had possessed themselves in a state of nature and would be inconsistent with the Founders' understanding of just government.²¹² If the Founders had not intended to restrain the eminent domain power, property could be taken at any time, for any reason,²¹³ which would be antithetical to their belief that individuals can give the government no more power than they possess in the state of nature and would contravene their intention to protect individual's natural rights.²¹⁴ Instead, the Founders relied upon the "public use" requirement to restrict the eminent domain power and force takings to be justified on the grounds that the taking was compelled for an actual, necessary public use.

The *Poletown* and *Kelo* decisions brushed aside the Founders' restraint on the Legislature and allowed a "public use" to be declared for the general public welfare based on the economic benefit rationale.²¹⁵ The cities involved postulated that the mere possibility of an economic benefit for the general community was sound reasoning upon which private homes and businesses should be taken. *Poletown* helped to continue a nationwide wave in which state and federal takings were justified through a broad economic public benefit rationale rather than through

²⁰⁷ See *supra* Part I–A.

²⁰⁸ See *supra* Part I–B.

²⁰⁹ See U.S. CONST. amend. V.

²¹⁰ See *supra* Part II–A.

²¹¹ See *supra* Part II–B.

²¹² See *supra* note 35 and accompanying text.

²¹³ See *supra* notes 74, 79, 96 and accompanying text.

²¹⁴ See *supra* Part I–B.

²¹⁵ *Kelo v. City of New London*, 125 S. Ct. 2655, 2667–69 (2005); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981).

the traditional, restrictive “public use” rationale; *Kelo* is merely the federal culmination of this rationale.

As a result of the rationale used in *Poletown*, private land owners saw their property taken and given to other private land owners who, the courts said, were better qualified to own it because they would better serve the public welfare by undertaking a more productive economic use.²¹⁶ Under the economic benefit rationale families — such as Ann Giannini’s — have been displaced, businesses closed, and properties bulldozed to make way for uses deemed to be more economically desirable. The Supreme Court’s holding in *Kelo* has made the general public acutely aware of the danger posed to their own property by a government using this rationale.

The public’s bewildered and frustrated reaction to *Kelo* indicates a growing interest in property rights, and specifically the “public use” requirement.²¹⁷ Already democratic initiatives to protect private property are making their way through the states, and legislators on both sides of the aisle have reacted to the outrage and fear of their constituents by introducing palliative legislation.²¹⁸ These are laudable reactions to *Kelo*, but they are unnecessary. Justice Thomas’s *Kelo* dissent and Justice Young’s *Hathcock* opinion show that the safeguards against government overstepping its eminent domain power already exist in the “public use” requirement and that no more government action is needed than to interpret this requirement as it was originally intended.²¹⁹ These newly signed laws will soon go the way of the Fifth Amendment’s “public use” clause if our courts insist on ignoring the plain meaning of the words that restrict the eminent domain power.

In Michigan, *Hathcock* has stopped the unconstitutional expansion of the “public use” requirement. By relying on a proper, narrow definition of “public use” to reject Wayne County’s attempt to prefer one private owner’s use over that of another, *Hathcock* recreates Michigan’s original, restrictive and constitutional “public use” jurisprudence. If other states are serious about protecting private property under their own constitutions, they will do well to follow Michigan’s lead and interpret their own Public Use Clauses as the strict requirements they were originally intended to be. Unfortunately for Ann Giannini, Michigan’s return to originalism came twenty-four years too late.

²¹⁶ See, e.g., Ely, *supra* note 88, at 34–35.

²¹⁷ See, e.g., Mary Deibel, *Ruling Doesn’t End Property Rights Clash*, DET. NEWS, Aug. 1, 2005, available at: <http://www.detnews.com/2005/nation/0508/01/A06-265208.htm> (last visited Aug. 29, 2005).

²¹⁸ See *supra* note 181 and accompanying text.

²¹⁹ *Kelo*, 125 S. Ct. at 2677–87 (Thomas, J., dissenting); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 765 (Mich. 2004).