Policy Brief

MACKINAC CENTER FOR PUBLIC POLICY

Oct. 5, 2006

No. S2006-09 • ISBN: 1-890624-53-5

Proposal 4: A Legal Review and Analysis

by Patrick J. Wright

Executive Summary

Proposal 4 of 2006, which will appear on the November ballot, is a proposed state constitutional amendment that would alter state law regarding eminent domain, the legal theory that permits the government to take private property for public use if the government pays just compensation. Specifically, the proposed amendment would do the following:

- require that a property owner receive at least 125 percent of the market value of his or her principal residence whenever that residence is taken through eminent domain;
- explicitly prohibit in the state constitution the use of eminent domain for either economic development or the increase of government tax revenue;
- codify a recent Supreme Court decision, incorporate in the state constitution three narrow categories of takings whereby the government can use eminent domain to acquire property and convey that property to another private owner (such takings are primarily related to transportation and communications infrastructure);
- shift to the government the burden of proof that a taking is for a public use, raising the standard to a "preponderance of the evidence" in most cases and to "clear and convincing evidence" in takings intended to address "blight";
- require that each property being taken to address blight be blighted, thereby preventing the taking of unblighted properties that happen to be located near a blighted property; and
- maintain current statutory rights that property owners possess in eminent domain proceedings.

At the nation's founding, it was difficult to imagine any permissible use of eminent domain that would transfer property from one private owner to another. Since then, some private-party eminent domain transfers, particularly those related to point-to-point infrastructure, have become accepted.

A controversy has emerged, however, over the amount of deference the courts should afford to public officials' determinations that a taking that transfers property between two or more private owners is for a public use. One strain of federal and state cases, characterized by the U.S. Supreme Court's 2005 Kelo v. New London ruling,* accords almost total deference to this legislative determination. An opposing strain, characterized by the Michigan Supreme Court's 2004 Wayne County v. Hathcock decision, requires a meaningful judicial review of the need for the taking to determine if the taking is constitutional.

The Hathcock strain is the more reasonable view, especially since it recognizes that the taking entity is often a self-interested party that might neglect the individual rights of those who are less powerful politically. There is some evidence that those who are not as influential can be victimized by government takings that transfer ownership of property between private parties.

Proposal 4 would directly enshrine the Hathcock decision in Michigan's Constitution. The proposal would also offer additional protections consistent with the

About the Author

Patrick J. Wright is senior legal analyst at the Mackinac Center for Public Policy, where he directs the Legal Studies Project. Wright is a former Michigan Supreme Court commissioner and a former assistant attorney general for the State of Michigan.

* Sources for the findings cited in the executive summary are provided in endnotes to the main text of this Policy Brief.

Hathcock strain of jurisprudence, including clarifying the burdens of proof in a taking and placing them on the government, requiring compensation of at least 125 percent of market value in any taking of an owner's home and prohibiting future reductions in an owner's statutory rights in an eminent domain proceeding. Perhaps most importantly, the proposal would set reasonable limits on blight takings, a potential source of abuse of the government's eminent domain power.

The Provisions of Proposal 4

On Nov. 7, 2006, Michigan voters will be asked to consider Proposal 4, a state constitutional amendment that would alter the law regarding eminent domain, which is the legal theory by which the government can take private property for certain public uses if the government pays just compensation. The proposed amendment was drafted by the Michigan Legislature in the wake of the U.S. Supreme Court's widely criticized ruling in the 2005 case Kelo v. New London. The measure was placed on the ballot by a vote of 106-0 in the Michigan House and 31-6 in the Michigan Senate. Proposal 4 would amend the constitution if a majority of electors vote for it, and it would become effective 45 days after the 2006 general election.[1]

There are provisions about eminent domain in both the federal and Michigan constitutions. The federal provision appears in the Fifth Amendment, which states, "(N)or shall private property be taken for public use, without just compensation."† As will be discussed under the heading "Kelo v. New London" on Page 6, the Kelo ruling held there were few limits on the use of eminent domain under the Fifth Amendment, meaning that any further limits would have to be developed under state law.

The state provision on eminent domain appears in Article 10, Section 2, of the Michigan Constitution:

> "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."[2]

Proposal 4 would change Article 10, Section 2, to read:

> "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.
>
> "'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> "In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.
>
> "Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph."

If enacted, Proposal 4 would narrow the scope of permissible government takings. A 2004 Michigan Supreme Court case, Wayne County v. Hathcock,[3] altered Michigan takings law by prohibiting the use of eminent domain in the pursuit of economic development. Proposal 4 not only incorporates that decision, but would put additional limits on government takings.

The features of Proposal 4 are addressed below in the order in which they appear in the proposal.

125 Percent Compensation for Principal Residences

Proposal 4 would provide a homeowner with at least 125 percent of the fair market value of their property whenever that property serves as their "principal residence." Most Michigan citizens will be familiar with the concept

† The Fifth Amendment did not originally affect the use of eminent domain by state governments. Eventually, after the passage of the 14th Amendment, the Fifth Amendment's limitations on takings were held to apply against state takings as well. This evolution is discussed below.

of a "principal residence," since they receive a tax break for their principal residence on the state property taxes, but essentially the term refers to the home a resident lives in for the majority of the year.[4] As in the current law of eminent domain, a jury would determine the fair market value the government would need to pay to a property owner for a taking.‡

Prohibiting Takings for Economic Development or Revenue Enhancement

Proposal 4 would place an explicit prohibition in the Michigan Constitution on any government takings for the purpose of economic development or the enhancement of tax revenue. Economic development and enhancement of tax revenue are two of the justifications cited by the city of New London, Conn., in the Kelo taking. Those rationales were also cited by the Michigan Supreme Court in the 1981 Poletown Neighborhood Council v. Detroit decision,[5] which allowed an entire community to be taken and converted into an auto plant. The legal rationale behind the Poletown ruling has since has been overturned.

Incorporating Current Categories of Acceptable Public Uses

Proposal 4 states, "Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph." In effect, this language accepts the three currently recognized categories of public use that allow Michigan government to transfer property from one private party to another. These categories were identified in the Michigan Supreme Court's 2004 Wayne County v. Hathcock decision.

The court called the first of these categories "public necessity of the extreme sort otherwise impracticable."[6] These "public necessities" involve infrastructure like railroads, canals and other point-to-point transportation. The court held that the second category involved takings "when the private entity remains accountable to the public in its use of that property," such as petroleum pipelines, which may be privately owned but remain heavily regulated by the government.[7] The third category, which the court labeled "property … selected on the basis of 'facts of independent public significance,'" basically involves takings to eradicate blight.[8]

Under Proposal 4, these three "public-use" categories would become the only ones through which Michigan governments could constitutionally use eminent domain to convey property from one private party to another.

‡ "Regulatory takings," in which property owners lose part or all of their property's value because of a new government regulation, could still be decided without a jury.

Shifting and Raising the Burden of Proof

The fourth feature is a shift in which party has the burden of proof. Under current statutory law, the owner has the burden to show that the use of eminent domain is improper. When challenging whether the taking is for a public use, the owner can prevail only if he or she can show that there was fraud, an error of law or an abuse of discretion in the government's decision.[9]

Proposal 4 would change this procedure by placing the burden on the government to show that a taking is appropriate. In most cases, Proposal 4 would require that the existence of a public use be demonstrated by a "preponderance of evidence," meaning slightly more than 50 percent of the evidence. Where the purported public use is the eradication of blight, however, the proposal would require the government to prove the existence of blight by "clear and convincing evidence," which is more than a preponderance of evidence, but less than the evidence required for proof "beyond a reasonable doubt," the standard for criminal convictions.

Judging Blight Property by Property

Proposal 4's fifth feature requires that blight be determined on a property-by-property basis. Under federal law, when government officials claim that they are eradicating blight, they may take an entire neighborhood, even if numerous properties within that area are not themselves blighted. Typically, the entire area is then turned over to a developer, who tears down any existing structures and builds something new.

Proposal 4 would limit the properties that the government can take to only those that are in and of themselves blighted. Proposal 4 would thus prevent a government from easily obtaining an entire area with the intent to hand it over to a developer.

Maintaining Current Statutory Rights

The last feature of Proposal 4 would prevent the diminution or removal of any statutory protections that existed for owners as of November 1, 2005 (a date near the final ratification of the amendment within the Michigan Legislature).

The Law of Eminent Domain

Court rulings on permissible uses of eminent domain have changed over time. The evolution of this change at the federal level and within the Michigan courts is outlined below.

The American Founding

Even prior to the drafting of the U.S. Constitution, property rights were considered sacrosanct by the Founding Fathers. For example, James Madison, who has been called "the father of the U.S. Constitution," set forth government's duty concerning property as follows:

> "Government is instituted to protect property of every sort. … This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." (Emphasis appears in the original.)[10§]

Many of the Framers were heavily influenced by the writings of John Locke and considered property rights to be "natural rights," which are rights that are possessed by every individual and not dependent on the existence of government. But even at the time of the founding, the government could take private property if it was going to be used for the common good. Aware of the obvious tension between this government power and the individual's right to possess, use and sell property, the framers of the U.S. Constitution put two limitations in the Fifth Amendment: first, that just compensation be paid for the property; and second, that the property be taken only for a "public use."

The federal Constitution took effect on March 4, 1789, and the Bill of Rights was added in 1791. Initially, the Bill of Rights, including the Fifth Amendment, limited only improper federal government actions, not those of state governments. Nevertheless, some federal court decisions from the period suggest a general belief that it was inappropriate for property to be taken by the government and given to another private party, and that this prohibition applied to both state and federal governments. For example, in Calder v. Bull (1798), Supreme Court Justice Samuel Chase wrote:

> "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. … A few instances will suffice to explain what I mean. A law that … takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them." (Emphasis appears in the original.)[11]

A similar conclusion was drawn in the 1795 federal court case Vanhorne's Lessee v. Dorrance. The case concerned a land dispute between citizens of Connecticut and Pennsylvania and the constitutionality of Pennsylvania's Quieting and Conforming Act, under which property was taken from one private party and given to another. U.S. Supreme Court Justice William Paterson, a signer of the U.S. Constitution who oversaw the case while "riding circuit,"[¶] wrote:

> "(T)he 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 become a member of a community, in which he could not enjoy the fruits of his honest labour and industry.
>
> …
>
> "The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it. … It is, however, 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."[12]

§ Madison and many of the other Framers had an expansive view of the term "property," using it to include not only an individual's physical property, but other individual rights, such as free speech, as well. Thus, when the Framers discussed the importance of protecting property, they were concerned with more than physical property, though they did consider that property extremely important.

¶ During most of the U.S. Supreme Court's first century, justices were basically required to travel independently to various states and work as judges in the lower federal courts.

Post-Civil War America

After the Civil War, America was expanding and industrializing. Many takings that assisted the development of the country's infrastructure were permitted by state courts, and these takings often benefited private parties, such as privately owned railroads, utilities and mines. The takings were rationalized on the theory that "they afforded some general larger benefit to the public."[13]

As noted above, the Fifth Amendment of the Constitution (and the remainder of the Bill of Rights) did not originally apply to the states.[14] It was not until the passage in 1868 of the 14th Amendment that the courts were legally empowered to "borrow" (or "incorporate," in legal language) the Bill of Rights and apply those rights against the state governments as well.

But it took several decades for the courts to formally recognize that state takings were limited by the federal Constitution. One recognition came in 1896 when the U.S. Supreme Court used the federal Constitution in Missouri Pacific Railway Co. v. Nebraska to prohibit a state use of eminent domain.[15] In that case, Nebraska had required a railway company to allow another private party to construct a grain elevator on the railway's property. The U.S. Supreme Court ruled that Nebraska's requirement was improper, stating, "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation … of the constitution of the United States."**

Thus, it was not until a little over a century after the federal Constitution became effective that the U.S Supreme Court began in earnest to discuss takings. Up until that point, most takings were made by state governments and were matters of state law. Once the federal courts began deciding eminent domain cases, they eventually allowed some takings for the development of infrastructure.

In Clark v. Nash (1905), the U.S. Supreme Court upheld a taking of one neighbor's land for another neighbor's ditch, thereby making it possible for the second neighbor to irrigate his land.[16] In Strickley v. Highland Boy Gold Mining Co. (1906), the U.S. Supreme Court upheld a taking that allowed a mining company to pass an aerial line for ore transport over an individual's property to a railway station.[17] The Supreme Court in Strickley held that in determining what constitutes a public use, the courts should not focus exclusively on whether the taken property was open to use by the general public. Generally, the courts viewed "public use" as being dependent on the specific facts of the case, rather than an easily defined general principle. This viewpoint led judges in succeeding years to defer to local officials, who typically had more knowledge of local conditions.

20th Century America

As the public-use requirement was being relaxed, many governments became concerned with the living conditions in urban areas. To remedy these ills, statutes were passed that gave municipalities broad powers to condemn neighborhoods to cure "blight." Often, blight was not clearly defined. Michigan's blight removal statute, which is set out under "Property-by-Property Blight Assessment" on Page 16, is a typical example.

Traditionally, eminent domain had been used as a means of creating something, be it a school, railroad, utility or ditch. But with blight, the power of eminent domain was being used to destroy a perceived social ill. The question thus arose whether property that was not in and of itself blighted could be destroyed in order to cure property that was.

In Berman v. Parker (1954), the U.S. Supreme Court reviewed a case wherein Washington, D.C., which is legislatively controlled by Congress, wanted to redevelop a neighborhood that contained some blighted properties.[18] The owner of an unblighted department store in the area objected that his property was going to be taken and turned over to another private owner.

The Supreme Court unanimously held that unblighted property could be taken along with blighted property. The decision serves as the foundation for the Kelo ruling, and the ruling demonstrates how easily governments, even if prohibited from engaging in economic development takings, can achieve the same result merely by labeling such takings an effort to eradicate blight.

The Supreme Court initially held that it was permissible for the government to allow private developers to benefit from a taking for the eradication of blight:

> "It is within the power of the legislature to determine that the community should be

** The court discussed the due process clause of the 14th Amendment, not the Fifth Amendment's takings clause. In Kelo, the United States Supreme Court cited the 1897 Chicago B&Q Railway Company v. Chicago ruling (166 U.S. 226) for the proposition that the Fifth Amendment was incorporated against the states. A careful reading of the B&Q Railway Company decision casts doubt on the certainty implied by the Kelo court. Nevertheless, subsequent case law has clearly held that the Fifth Amendment is incorporated against the states. This view is now universally accepted and beyond argument.

> beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.
>
> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[19]

Thus, in Berman, the U.S. Supreme Court deferred to local officials and held that blight takings could be made broadly, rather than on a particular property-by-property basis.

In the 1984 decision Hawaii Housing Authority v. Midkiff, the U.S. Supreme Court unanimously upheld a state law that redistributed private property from a small group and gave it to numerous other individuals.[20] Hawaii lawmakers were concerned that much of the state was owned by the federal government and a small number of private landowners, believing "that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."[21]

The Hawaii Legislature therefore enacted a statute which allowed certain tenants to petition for condemnation of the land they were renting and gain ownership of that same land after the government took possession. This was clearly taking land from one private citizen and giving it to another. Relying on Berman v. Parker, the Supreme Court unanimously upheld the statute. It held that courts should almost always defer to a legislative assertion that a taking is for a public use; in Midkiff, this legislatively determined public use was to cure the perceived societal ills of concentrated land ownership.

Kelo v. New London

The Fifth Amendment's public-use clause was again at issue in the U.S. Supreme Court's 5-4 Kelo v. New London (2005) case.[22] In Kelo, the city of New London, Conn., was seeking to take a neighborhood not because it was blighted, but because if the neighborhood were redeveloped, the city would likely receive increased tax revenue. The city had received input from a developer and sought to condemn the property necessary to carry out the redevelopment plan.

Among the properties to be condemned were the home of Susette Kelo and the home of Wilhelmina Dery, who was born in her house in 1918 and had lived there her entire life. The court's majority upheld the takings. While the majority admitted that an indiscriminate taking that transfers property from one private party to another would be improper, it held that takings that reassign property to another private party do not violate the public-use clause when they occur pursuant to a redevelopment plan, rather than in isolation. The majority relied heavily on Midkiff, the Hawaii land redistribution case, and Berman, the Washington, D.C., blight case, and the majority held that economic development takings constitute a public use.

The Kelo majority held that there was not a principled way to distinguish economic development takings from blight takings:

> "It is a misreading of Berman to suggest that the only public use upheld in that case was the initial removal of blight. … The public use described in Berman extended beyond that to encompass the purpose of developing that area to create conditions that would prevent a reversion to blight in the future. ('It was not enough, [the experts] believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums. … The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented'). Had the public use in Berman been defined more narrowly, it would have been difficult to

> justify the taking of the plaintiff's nonblighted department store."[23]

Therefore, the U.S. Supreme Court held that under the federal Constitution, economic development takings and blight takings were largely interchangeable. In both situations, the Supreme Court held that federal courts must rule that development plans sanctioned by legislative bodies constitute a public use.

Justice Anthony Kennedy, while signing the majority opinion in the case, filed a concurring opinion. He suggested that a higher standard of review may be appropriate if there are strong indications that a taking does not further a public use, but rather confers a private benefit.

In her dissent, Justice Sandra Day O'Connor forewarned, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[24] She continued:

> "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result."[25]

Justice Clarence Thomas also filed a dissent, in which he echoed some of Justice O'Connor's concerns. He also discussed in more detail the problems that takings similar to Kelo had caused for those less powerful in society.

The majority opinion acknowledged "that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[26] The Kelo majority cited the Michigan Supreme Court's Wayne County v. Hathcock ruling as an example of a state court decision that makes it more difficult for state and local government to use eminent domain.[27]

Michigan Court Rulings: Poletown and Hathcock

Any discussion of takings under Michigan law must begin not with Hathcock, but instead with Poletown Neighborhood Council v. Detroit.[28] In 1980, General Motors Corp. informed Detroit that it would be closing an automobile factory that was located in the city of Detroit. GM offered to build a new plant in Detroit if a suitable location was found. The only area that met the criteria that GM provided was the Poletown neighborhood that straddled the cities of Detroit and Hamtramck. According to The Detroit News, this neighborhood contained approximately 4,200 residents, 1,300 homes, 140 businesses, six churches and a hospital.[29] Not surprisingly, not all of the inhabitants of that neighborhood were willing to sell, and the use of eminent domain was necessary if GM were to acquire all of the land it wanted for its proposed factory.

In a 5-2 decision that came only months after the case was originally filed, the Michigan Supreme Court held that the taking was proper. At the time, unemployment rates had reached 14 percent in Michigan, 18 percent in Detroit and 30 percent among Michigan blacks.[30] The majority cited the economic benefits that the city claimed would come from the factory.

> "[T]he city presented substantial evidence of the severe economic conditions facing the residents of the city and state, the need for new industrial development to revitalize local industries, the economic boost the proposed project would provide, and the lack of other adequate available sites to implement the project.
>
> . . .
>
> "In the instant case the benefit to be received by the municipality invoking the power of eminent domain is a clear and significant one and is sufficient to satisfy this Court that such a project was an intended and a legitimate object of the Legislature when it allowed municipalities to exercise condemnation powers even though a private party will also, ultimately, receive a benefit as an incident thereto. The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental."[31]

Michigan Supreme Court Justice John W. Fitzgerald dissented in Poletown, and he noted that the majority's ruling would leave virtually no limit on the government's ability to take property:

> "The decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another

> private party sufficiently 'public' to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses. Any business enterprise produces benefits to society at large. Now that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use."[32]

Justice Ryan also dissented. He set forth what he believed were the three categories of permissible "public uses" that justify invoking eminent domain to transfer property from one private entity to another, and he noted that the Poletown taking did not meet any of these criteria. As will be discussed below, those three categories of uses eventually formed the intellectual foundation of the opinion in Wayne County v. Hathcock, a decision that overturned the Poletown precedent.

Poletown served as a national model for other courts that sought to justify economic development takings. The Poletown ruling remained the law in Michigan until Wayne County v. Hathcock was decided in 2004, one year before the Kelo decision.

In Hathcock, the Michigan Supreme Court considered the constitutionality of Wayne County's attempt to, in the county's words, "reinvigorate the struggling economy of southeastern Michigan by attracting businesses, particularly those involved in developing new technologies."[33] Wayne County wanted, pursuant to Poletown, to condemn property so that it could construct a 1,300 acre business and technology park. Nineteen landowners refused to sell their property to the county.

The court unanimously held that "economic development" did not constitute a public use under the Michigan Constitution's Article 10, Section 2. Writing for the majority, Justice Robert Young stated:

> "Every business, every productive unit in society, does . . . contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. Poletown's 'economic benefit' rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."[34]

In rendering its ruling, the court relied on the public-use doctrine as explained in Justice Ryan's dissenting opinion in the Poletown case. The Hathcock court thus held that there have been three types of recognized public uses in Michigan that allow the transfer of condemned property to a private entity: (1) "public necessity of the extreme sort otherwise impracticable," which includes things like "highways, railroads, canals, and other instrumentalities of commerce";[35] (2) "when the private entity remains accountable to the public in its use of that property," which includes things like a petroleum pipeline that would be governed by the Michigan Public Service Commission;[36] and (3) "property selected on the basis of 'facts of independent public significance,'" which looks at the rationale for the taking; for example, blight removal is meant to "remove unfit housing and thereby advance public health and safety."[37††]

In contrast to the federal courts, which chose to defer to government officials in determining appropriate uses of eminent domain, the Hathcock court rejected the argument that Michigan courts should grant deference to a governmental claim of public use. The Hathcock court did not, however, set forth what burden of proof must be met in order to show that a taking is for a genuine public use.

Analysis of the Law of Eminent Domain

In the sections below, the federal and Michigan court decisions on eminent domain are categorized into two contrasting sets of underlying principles. The relative merits of the two strains are weighed, including a brief overview of the necessity of economic development takings.

†† A number of federal eminent domain cases have been cited in this Policy Brief, but to date, the U.S. Supreme Court has not made an analogous attempt to categorize, as Justice Ryan did, all of the permissible public uses. As discussed below, these three uses would be incorporated (with modifications) in the Michigan Constitution if Proposal 4 were approved.

The Two Competing Visions of Eminent Domain

As the discussion above suggests, there are two strains of takings jurisprudence in federal and Michigan law. One is characterized by Kelo v. New London, Hawaii Housing Authority v. Midkiff, Berman v. Parker and Poletown Neighborhood Council v. Detroit; it will be referred to in this Policy Brief as the "Kelo" strain. In the Kelo strain, the courts have allowed more types of takings that allow private property to be transferred to another private entity. Included within these takings are economic development takings.

The second strain is characterized by Wayne County v. Hathcock, Calder v. Bull and Vanhorne's Lessee v. Dorrance; it will be referred to here as the "Hathcock" strain.‡‡ Under the Hathcock strain, the courts permit fewer takings that allow private property to be transferred to another private entity. For instance, economic development takings are not allowed.

The Kelo Strain

In the Kelo strain, private property can be taken and transferred to another private entity when a government engages in some form of planning or legislative deliberation to justify the action. In such cases, the court holds that it must defer to the determination of the taking entity.

The planning and legislative determinations are deemed by the courts to be crucial. For instance, in Berman v. Parker, the U.S. Supreme Court highlighted the fact that the city of Washington, D.C., had a "comprehensive or general plan for the district," including a "redevelopment plan" that covered the entire area that was declared "blighted" and at issue in the case. In the court's view, this plan made the taking of unblighted property constitutional:

> "In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners. The particular uses to be made of the land in the project were determined with regard to the needs of the particular community. The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums — the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented."[38]

Absent the plan described above, the U.S. Supreme Court would not have had a legislative proclamation to defer to, and the court would have retained some role in determining whether the taking constituted a public use. But the court's role was diminished by that legislative proclamation, and the court summarized, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[39]

In Hawaii Housing Authority v. Midkiff, the Supreme Court expressed a similar deference to legislative decisions, noting:

> "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'
>
> …
>
> "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings — no less than debates over the wisdom of other kinds of socioeconomic legislation — are not to be carried out in the federal courts. Redistribution of fees simple to

‡‡ A fourth case, Norwood v. Horney, decided in 2006 by the Ohio Supreme Court, fits the Hathcock mold. It is discussed under "Property-by-Property Blight Assessment" below.

> correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause."[40]

Thus, the Hawaii Legislature's determination that the concentration of land ownership affected market conditions became grounds for according deference to the state of Hawaii's decision to redistribute the ownership of land using eminent domain.

In Kelo, the U.S. Supreme Court cited the city of New London's redevelopment plan for the area in question as grounds for ruling that the taking was constitutional:

> "[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a 'carefully considered' development plan.
>
> …
>
> "The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[41]

Justice Anthony Kennedy, the fifth vote in the majority opinion, wrote a concurring opinion and likewise stated that the city has created "a comprehensive development plan" and therefore that the court should not "presume an impermissible private purpose."[42] He did indicate, "[T]here may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible," that a heightened standard of judicial review would be appropriate.[43] He added, however, "This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard. …"[44]

In Poletown, the five Michigan Supreme Court justices signing the majority opinion also referred to "planning" and talked about deference:

> "This case arises out of a plan by the Detroit Economic Development Corporation to acquire, by condemnation if necessary, a large tract of land to be conveyed to General Motors Corporation as a site for construction of an assembly plant.
>
> …
>
> "The Legislature has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose. The Court's role after such a determination is made is limited. 'The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect.' The United States Supreme Court has held that when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.' [Berman, 348 U.S. at 32]."[45]

In all four cases in the Kelo strain, the courts deferred to the taking entity's assertions that the property taken furthered a public use. They did so on grounds that the taking followed some deliberative process empowered by the legislature, whether this process was a specific legislative act, as in Midkiff, or a delegated planning process undertaken by a commission, as in Berman, Kelo and Poletown.

The Hathcock Strain

Calder v. Bull and Vanhorne's Lessee v. Dorrance are both illustrative of a judicial unwillingness to defer to legislative determinations that would allow property to be taken for the benefit of another private owner. In Calder, Justice Chase indicated that he would not bestow the title of "law" on "An ACT of the Legislature ... that ... takes property from A. and gives it to B. ..." (Emphasis appears in the original.)[46] He called such an act "against all reason and justice" and refused to presume that the "people [would] entrust a Legislature with SUCH powers." (Emphasis appears in the original.)[47]

A clearer rejection of deference to a legislature is hard to imagine, but Justice Paterson might have done so a few years earlier. In Vanhorne's Lessee, he reflected on the idea of using eminent domain to transfer property from one private owner to another and opined:

> "If this be the Legislation of a Republican Government, in which the preservation of property is made sacred by the Constitution,

> I ask, wherein it differs from the mandate of an Asiatic Prince? Omnipotence in Legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of Laws, of Courts, of Constitutions, and call ourselves free! In short, gentlemen, the confirming act is void; it never had Constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made."[48]

It is an understatement to note that Justice Paterson's opinion is not particularly deferential to a legislative determination that would permit transfers of property from one private party to another.

Justice Young, author of the majority opinion in the Hathcock case, noted that the Poletown majority cited Berman for the proposition that the courts should readily defer to legislative determinations that a taking is for a public use.[§§] That citation was characterized as "particularly disingenuous"[49] since it was a "radical and unabashed departure from the entirety of [Michigan]'s pre-1963 eminent domain jurisprudence."[50] Justice Young summarized, "Questions of public purpose aside, whether the proposed condemnations were consistent with the Constitution's 'public use' requirement was a constitutional question squarely within the Court's authority."[51]

Justice Young also questioned the idea that Wayne County's determination that the public purpose of economic development would be served by the taking (or Detroit's similar determination with the GM Poletown plant) could render the taking constitutional:

> "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s 'economic benefit' rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity." (Emphasis appears in the original.)[52]

Thus, the Hathcock court not only rejected the idea of judicial deference, but in modern terms echoed Justice Paterson's concern that deference to the legislature could lead to all property owners becoming "tenants at will" of the government. The Hathcock court even echoed the emphasis on rights expressed by Justices Chase and Paterson: "[W]e must overrule Poletown in order to vindicate our Constitution [and] protect the people's property rights. …"[53]

The Hathcock court is not the only recent court to endorse a traditional legal analysis in which the courts interpret constitutional text involving individual rights. In 2006, the Ohio Supreme Court rendered a decision firmly in the Hathcock strain in Norwood v. Horney. In this case, the city of Norwood, which is entirely surrounded by Cincinnati, Ohio, sought to redevelop a "deteriorating" neighborhood.[54] Norwood officials believed that this redevelopment would lead to an increase in the city's tax revenue. When some landowners refused to sell, the city attempted to take their property.

The Ohio Supreme Court rejected the city's argument that the takings constituted a public use. It began its constitutional analysis by observing: "The rights related to property, i.e., to acquire, use, enjoy, and dispose of property, are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty."[55]

The court went on to reject the Kelo-style deference to legislative determinations of public use, stating, "Inherent in many decisions affirming pronouncements that economic development alone is sufficient to satisfy the public-use clause is an artificial judicial deference to the state's determination that there was sufficient public use."[56] The Norwood court continued, "[O]ur precedent does not demand rote deference to legislative findings in eminent-domain proceedings, but rather, it preserves the courts' traditional role as guardian of constitutional rights and limits."[57]

That said, the Norwood and Hathcock courts have accepted transfers of private property for such uses as railroads and pipelines — actions that might well have been anathema to Justices Paterson and Chase. Thus, the Hathcock opinion is in some ways a middle ground between the pure individual rights standpoint, which would probably reject any private entity receiving taken

§§ There were three concurring opinions in Hathcock. Justice Weaver disagreed with the majority's method of constitutional interpretation, but not the result. Justices Cavanagh and Kelly separately also agreed with the result, but they would not have applied the decision retroactively. They would therefore have allowed the takings at issue, but prevented all future takings for economic development. None of these three opinions expressed any disagreement with the majority regarding the important role of the courts in public-use determinations.

land, and the Kelo strain, which would permit nearly any transfer from one private party to another. Nevertheless, what Hathcock, Norwood, Vanhorne's Lessee and Calder all share in common is a belief that some meaningful judicial check is necessary upon the use of eminent domain to transfer property from one private party to another. The Kelo strain of cases, in contrast, provides no discernible judicial check at all.

Evaluating the Two Strains of Eminent Domain Jurisprudence

There are major weaknesses in the Kelo strain of thought. First, it is an undemanding intellectual exercise to generate some sort of rationale for a legislative deliberation or a "plan," especially since the courts have failed to delineate what level of deliberation or planning is necessary to trigger the "well-nigh conclusive" deference of the courts. As Justice O'Connor noted in her dissent in Kelo, "[I]f predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power."[58]

Thus, meeting the planning or legislative requirement is so simple as to constitute a meaningless standard. Justice O'Connor observed that even in the example of Justice Kennedy's "as-yet-undisclosed test" for cases where a suspicious taking that benefits a private party has occurred, "[I]t is difficult to envision anyone but the 'stupid staff[er]' failing it."[59]

Even when the projections are more specific, as when General Motors promised 6,000 jobs would result at the Poletown factory, the courts do not inquire into whether the projections are sound. Further, there is no mechanism for "undoing" a taking after a projection has proven to be inaccurate. For instance, GM's Poletown plant never employed more than 3,600.[60]

Second, and even more fundamentally, as the U.S. Supreme Court ruled long ago in the landmark case Marbury v. Madison, "It is emphatically the province and the duty of the judicial department to say what the law is."[61] In referring to "the law," the Marbury court meant that while the legislature's job is to enact statutes and decide public policy, the courts' job is to determine whether those statutes and policies are permissible under the federal and state constitutions. This doctrine means the courts must inevitably interpret the Fifth Amendment, which is part of the U.S. Constitution. Yet in Berman, the U.S. Supreme Court stated: "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[62]

Such a judicial abdication makes little sense. As Justice Thomas noted in his Kelo dissent, "We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable."[63]

Indeed, local sheriffs are elected officials and are aware of local conditions, including what areas under their jurisdiction are plagued by high crime rates. Yet the courts would not defer to the local sheriff's determination that a search would be reasonable, even if the sheriff were able to articulate the societal benefits that would result from a lower crime rate or announced a countywide crime protection plan.

Third, the concept of deference does not account for the important fact that the legislature or planning commissions are interested parties in the very case in which a court is deferring to them. This is particularly true when an economic development or revenue enhancement taking is at issue. If the taking is successful, the taking entity expects to receive higher tax revenues and therefore has a financial interest in seeing the taking occur. Moreover, government officials may receive a political benefit from the taking to the extent that the increased revenue allows them to provide more services to constituents whose properties were not taken. And as Justice Kennedy, who joined the Kelo majority, admitted, "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[64]

A legislative body's potential conflict of interest was discussed at length by James Madison in the seminal "Federalist Paper No. 10":

> "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?"[65]

Thus, a legislature could serve the purposes of one class of people, rather than society as a whole. Madison referred to this dynamic as a type of "factionalism":

> "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community."[66]

Madison concluded, "The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS" (Emphasis appears in the original.)[67] Thus, controlling the effects of a powerful faction was the appropriate end of a just government:

> "When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."[68]

Madison himself eventually helped address this problem by drafting and championing a Bill of Rights, including what became the Fifth Amendment.[69] In contrast to Madison's vision, the federal courts' deferential treatment leaves the taking entity, an interested party, as the de facto interpreter of the Fifth Amendment.

Madison's concerns about factionalism appear relevant in light of the concerns raised in the many criticisms of the Kelo strain. For example, Justice Clarence Thomas, in his Kelo dissent, observed:

> "The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called 'urban renewal' programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse."[70]

Justice Thomas then set forth examples of factions "actuated by some common impulse of passion" imposing their will on less powerful groups without regard to their rights.

> "[T]he legacy of this Court's 'public purpose' test [has been] an unhappy one. In the 1950's, no doubt emboldened in part by the expansive understanding of 'public use' this Court adopted in Berman, cities 'rushed to draw plans' for downtown development. 'Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them.' Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981, urban planners in Detroit, Michigan, uprooted the largely 'lower-income and elderly' Poletown neighborhood for the benefit of the General Motors Corporation. Urban renewal projects have long been associated with the displacement of blacks; '[i]n cities across the country, urban renewal came to be known as "Negro removal."'"[71]

Jane Jacobs, world-renowned urban scholar and author of the 1961 book "The Death and Life of Great American Cities," likewise noted in her amicus curiae brief in the Kelo case that urban renewal takings have disproportionately affected blacks. She observed that in Berman v. Parker, 97.5 percent of the 5,000 residents in the neighborhood were black, and that within a few years of the taking, the neighborhood had become predominately white.[72]

As noted above, Justice O'Connor recognized that while a disproportionate share of the takings would be borne by the poor and disadvantaged, in reality no property was safe, since "any Motel 6" could be replaced with "a Ritz-Carlton."[73] Michigan Supreme Court Justice Young made a similar observation a year earlier, when he noted, "After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."[74]

Economic Considerations in Eminent Domain

The significant practical drawbacks of the Kelo strain of jurisprudence make it an undesirable basis for judging future takings. Nevertheless, some may question whether the Hathcock strain of decisions fails to acknowledge the practical difficulties attending private economic development and the need for government intervention in the form of eminent domain.

This concern should be tempered on several grounds. First, the Hathcock strain is hardly absolutist, since it allows takings for railroads and other private infrastructure.

Second, while beyond the scope of this paper, it's clear that substantial economic development occurs without eminent domain, and it's not clear that eminent domain is necessary even for some of the more difficult forms of private development. Some developers contend that eminent domain is necessary to facilitate development of large-scale projects where numerous lots owned by multiple owners must be assembled. Developers contend that without eminent domain, "holdouts" could either block a project or extract an exorbitant price for it.

Jane Jacobs, in her Kelo amicus brief, disagreed. She notes that developers have a number or strategies to prevent holdouts. For instance, the developers can negotiate in secret or use agents so as not to alert potential holdouts. Also, the developers may use a "most-favored-nation" clause, which promises everyone in the neighborhood the same terms. This has the practical effect of discouraging holdouts by tying the developer's hands in advance, since the holdouts know that the developer cannot afford to pay the last seller more money because it means he will have to pay everyone that "inflated" price.

Thus, while the lack of eminent domain may hamper some projects, developers do have methods to achieve their ends. As Jacobs summarized, "Large-scale development projects can and do succeed without recourse to the coercive power of eminent domain."[75]

In addition, even if there were a small number of projects that could not be built without eminent domain, there is no principled distinction that would restrict the use of eminent domain only to these instances. The use of eminent domain to prevent holdouts would weaken individual rights merely to make certain projects easier for developers.

Third, it is not clear that eminent domain has worked well in many of the cases in which it has been used. Looking at Poletown, for example, in a dissenting opinion in that case, Michigan Supreme Court Justice Ryan observed that the public cost of the Poletown project, which included buying the land, demolishing the structures and building roads and rail, was more than $200 million.[76] Justice Ryan also noted that GM paid "little more than $8 million" for the property. In Kelo amicus brief, Jacobs noted that the 600 businesses supplanted in the Poletown takings probably employed more workers "than the 2,500 jobs created at the GM plant by 1988."[77] The plant later employed as many as 3,600 workers,[78] but this figure was only 60 percent of the approximately 6,000 jobs promised at the factory by GM's chairman immediately preceding the Poletown trial.[79] Jacobs concluded, "Overall, even if we consider it in purely economic terms, it is likely that the Poletown condemnation caused more harm to the people of Detroit than good."[80]

Analysis of the Provisions of Proposal 4

The analysis of eminent domain law appearing above provides guidelines for takings that are more respectful of meaningful legal and societal considerations. In that light, the discussion below reviews the various elements of Proposal 4 and relates them to the general principles set forth above.

Compensation for Principal Residences

The first of Proposal 4's provisions would provide compensation of at least 125 percent in any case in which eminent domain is used to take someone's principal residence. This appears to be an attempt to compensate homeowners for the subjective value they place on their homes. This multiplier would apply only to the owner's principal residence, presumably because a principal residence is the one most likely to be valued by people for subjective reasons.

Under current law, when a principal residence is taken, the owner receives the "fair market value," which is an effort to arrive at an objective measurement of value based on appraisals and on comparative properties. Not surprisingly, many owners treasure their home for per-

sonal reasons; for instance, the owners may have raised their children there. Obviously, it is difficult to arrive at an objective value for such subjective factors.

Setting a price is therefore difficult. A true price requires an agreement between a willing buyer and a willing seller. However, by definition, a takings case involves no willing seller. Thus, arriving at a "price" for a property in an eminent domain case is at least in part a supposition.

The choice of a minimum of 125 percent of fair market value does not authoritatively solve the problem of setting a price where there is an unwilling seller. At the same time, there is in fact no universal solution to the problem of balancing the cost of a taking to taxpayers and the subjective value homeowners place on their homes.

If this provision of Proposal 4 were to be placed in one of the two strains of eminent domain law discussed above, it would tend toward the Hathcock strain, which is more concerned with individual rights. The current methodology, by focusing on a "market price" (which, after all, does not exist in a forced transfer), is closer to the point of view of the government, since it does not attempt to include the subjective value placed on the home. Proposal 4 shifts the balance towards a concern for the individual by requiring that a multiplier of 125 percent or more be applied to account in part (or perhaps entirely) for the subjective value the owner places on the home.

Prohibiting Kelo-Style Takings

In Michigan, takings for the purpose of economic development or an increase in tax revenue are currently prohibited due to the Michigan Supreme Court's 2004 ruling in Wayne County v. Hathcock, which construed the current version of Article 10, Section 2, of the Michigan Constitution. Proposal 4 would explicitly write this prohibition in the Michigan Constitution.

The current language of Article 10, Section 2, does not expressly discuss whether economic development takings are proper. Remember, in 1981, that same constitutional language was the foundation for the Poletown decision, which had held (before being overruled in Hathcock) that economic development takings were proper.

Since the general language of the current version of Article 10, Section 2, had led to diametrically opposed court rulings (Poletown and Hathcock), the Hathcock result would be made explicit by Proposal 4. This would prevent future courts from overruling Hathcock and holding that economic development takings were permissible.

Quite obviously, this provision is more in line with the Hathcock strain, since it in essence adopts the central holding of Hathcock. Specifically, Proposal 4 would significantly reduce the number of instances in which the government could use eminent domain to transfer property from one private owner to another. This shows a greater respect for individual rights by removing economic development as a public-use claim, since the foundation for such a claim is easy for legislators and planning commissions to produce.

Categories of Acceptable Public Uses

As discussed above under "The Provisions of Proposal 4," the proposal would incorporate in the Michigan Constitution the state courts' current understanding of the permissible categories that allow land seized in a taking to be transferred to another private party. This understanding was set forth in the Hathcock ruling, which enumerated three acceptable categories of such takings.

The first of these categories, "public necessity of the extreme sort otherwise impracticable," involves such things as railroads, canals and other point-to-point transportation and infrastructure. In such instances, both the practical difficulties of gaining ownership of long, contiguous parcels of land or water and the societal benefits of the infrastructure are held to be sufficient grounds for allowing a modification of the original understanding that takings should be primarily for a public, not private, use. By incorporating such instances in the Michigan Constitution, Proposal 4 would continue to allow government takings for such infrastructure.

The second of the categories involves takings "when the private entity remains accountable to the public in its use of that property," such as railroads or petroleum pipelines that are owned privately but subject to heavy government regulation. Proposal 4 would permit takings of this kind, also.

Some have questioned the need for eminent domain even in these more traditional instances.[81] Proposal 4 would have little practical effect on their argument. Both categories will remain acceptable under the law whether or not the voters approve Proposal 4, since longstanding precedent supports both categories, and since both Hathcock (the current controlling interpretation of the present version of Article 10, Section 2) and the proposal itself (which would amend Article 10, Section 2) accept these two categories.

The third category, "property selected on the basis of 'facts of independent public significance,'" essentially concerns only takings to eradicate blight. This topic is discussed in several sections below, because Proposal 4 contains several provisions dealing specifically with

blight takings. Proposal 4 retains the category of blight takings, but would modify the manner in which they are conducted.

With this provision, Proposal 4 is again incorporating the Hathcock strain into the constitution. It would explicitly accept the pre-Poletown categories of permissible takings that existed in 1963, when the Michigan Constitution was ratified.

Burden of Proof

Proposal 4 would require that the existence of a public use be demonstrated by a "preponderance of evidence," meaning slightly more than 50 percent of the evidence. Where the purported public use is the eradication of blight, however, the proposal would require the government to prove the existence of blight by "clear and convincing evidence," which is more than a preponderance of evidence, but less than the evidence required for proof "beyond a reasonable doubt" (the standard for criminal convictions). It would change the current procedure by making the government prove that a taking is proper (the current law is that an owner must show that a taking is improper).

As will be discussed in the next section, blight takings can become an alternative method for achieving economic development ends. Thus, Proposal 4's heightened standard for the eradication of blight would help prevent potential future abuse.

As discussed earlier, the Kelo strain of decisions almost always defer to a government's assertion that a taking is for a public use, while under the Hathcock strain, the courts have a more significant role. In Hathcock itself, the Michigan Supreme Court rejected the concept of deference to legislative deliberations and redevelopment plans, but it did not set forth a clear standard of review. This provision of Proposal 4 requires that the courts play a strong role in making a public-use determination. It also provides clear standards to assist the courts in making these determinations. The proposal would therefore make it more difficult for "Ritz-Carltons," "megastores" and "factions" to achieve their ends at the expense of less powerful individuals and minorities since any potential taking would now be subject to a meaningful judicial review with clear standards of proof.

Property-by-Property Blight Assessment

Proposal 4 also deals with takings for blight, an area of the law developed in the 20th century in response to perceived difficulties in urban America. When most people think of "blight" they envision such things as dilapidated buildings or rodent-infested properties. However, the many state and local legal definitions of blight are far more broad, vague and easily manipulated.

For example, Michigan's current blight law defines a "blighted area," in pertinent part, as the following:

> "a portion of a municipality, developed or undeveloped, improved or unimproved, with business or residential uses, marked by a demonstrated pattern of deterioration in physical, economic, or social conditions, and characterized by such conditions as functional or economic obsolescence of buildings or the area as a whole, physical deterioration of structures, mixed character and uses of the structures, deterioration in the condition of public facilities or services, or any other similar characteristics which endanger the health, safety, morals, or general welfare of the municipality, and which may include any buildings or improvements not in themselves obsolescent, and any real property, residential or nonresidential, whether improved or unimproved, the acquisition of which is considered necessary for rehabilitation of the area. It is expressly recognized that blight is observable at different stages of severity, and that moderate blight unremedied creates a strong probability that severe blight will follow. Therefore, the conditions that constitute blight are substandard building or facility conditions, improper or inefficient division or arrangement of lots and ownerships and streets and other open spaces, inappropriate to be broadly construed to permit a municipality to make an early identification of problems and to take early remedial action to correct a demonstrated pattern of deterioration and to prevent worsening of blight conditions."[82]

Clearly, such a statute leaves a great deal of latitude to public officials in determining what qualifies as blight. Terms like "economic obsolescence," "mixed character," "morals, or general welfare" and "which may include any buildings or improvements not in themselves obsolescent" are elastic. It is difficult to imagine any property that simply could not fall under this statute.

The Hathcock court held that takings for the eradication of blight were permissible, but did not discuss whether Michigan's current statutory scheme for the removal of blight was in fact constitutional.

The Ohio Supreme Court, however, recently ruled on an Ohio "deteriorating area" statute similar to Michigan's

blight law. In Norwood v. Horney, discussed above on Page 10, the city of Norwood sought to redevelop a "deteriorating" neighborhood.

Relying in large part on Hathcock and Justice O'Connor's Kelo dissent, the Ohio Supreme Court unanimously held that economic development takings were improper. Moreover, the court held that the Ohio statute permitting the use of eminent domain to address a "deteriorating area" was unconstitutionally vague:

> "In essence, 'deteriorating area' is a standardless standard. Rather than affording fair notice to the property owner [that their property might be at risk, it] merely recites a host of subjective factors that invite ad hoc and selective enforcement. … We must be vigilant in ensuring that so great a power as eminent domain, which historically has been used in areas in which the most marginalized groups lived, is not abused."[83]

Therefore, the Ohio Supreme Court prevented municipalities from casually categorizing communities as "deteriorating areas" — a label that legally empowered the government to use eminent domain for de facto economic development. The Norwood case demonstrates that attempts to cure blight or deterioration can achieve the same ends as takings for economic development when the statute defining blight or deterioration is vague.

This is not merely a theoretical concern. In Michigan, the city of East Lansing has declared a 35-acre tract adjacent to Michigan State University as a "blighted area."[84] Public controversy has accompanied the decision, however, since many argue that none of the individual properties appears to be blighted. Moreover, it is possible that city officials could use the "blight" label to facilitate a taking for economic development that would be otherwise impermissible.

Ultimately, governments that are in actuality seeking to engage in economic development takings could proclaim that they are engaged in blight eradication and achieve the same result, because once the blight is eliminated, the taking entity is legally allowed to convey the property to another private owner. Thus a blighted area can serve the same purpose as an area taken for economic development. This problem is exacerbated where blight laws are open-ended and vague, as they are in Michigan.

Proposal 4 would not amend Michigan's "blighted area" statute, but constitutional law trumps any inconsistent state law; therefore, the proposal would prevent nonblighted properties from being taken. It would also prevent blight takings that are in their result indistinguishable from economic development takings. Where blight is genuinely the concern, the government's interest is in removing the blight, not in what replaces it.

The blight provision of Proposal 4 lies within the Hathcock strain. By explicitly limiting blight takings to actually blighted properties, it rejects a central holding of the Berman case. In Berman, the eradication of blight was coupled to the question of what was going to replace it, since a redevelopment plan was the basis for the Supreme Court's holding that the taking was a public use.

Proposal 4 would decouple the questions of whether a taking is necessary and what would be erected on the taken land. This decoupling protects the individual whose property is not blighted from having his or her property transferred to another private party merely due to the purported transgressions of his or her neighbor. The proposal does not give deference to a developer's wants or needs; rather, it penalizes only owners whose property has deteriorated to the point that their property interferes with the rights of others.

Current Statutory Rights

Proposal 4 would prevent the Legislature from modifying the statutory protections that currently benefit landowners. Those statutory rights would operate as a floor, and could not be weakened to the benefit of the taking entity and the detriment of the property owner.

This provision is in line with the Hathcock strain in that it as a minimum preserves the property owner's existing statutory rights. Those rights could only be altered to the property owner's benefit. Rather than deferring to the Michigan Legislature, this provision takes future decisions about the minimal amount or statutory rights that a property owner has out of the Legislature's control.

Conclusion

America's Founders saw property rights as a foundation for a just society. While viewing some takings as proper, they sought to protect an individual's property through the Fifth Amendment. This amendment contained both a just compensation requirement and a public-use requirement.

Through the years, the public-use requirement of the Fifth Amendment became watered down. The federal courts eventually settled on a model whereby judges almost always defer to the government's contention that the taking constitutes a public use, a process that culminated in the U.S. Supreme Court's 2005 Kelo decision.

This deferential standard in essence reads the public-use requirement out of the federal Constitution.

The Kelo decision, however, triggered a backlash, and it contained a silver lining: The U.S. Supreme Court indicated that states were allowed to provide more protections for private property rights. A review of Proposal 4 shows that it essentially rejects the Kelo approach and fortifies and clarifies the Hathcock approach to eminent domain by placing substantial limits on the government's ability to take property.

These limits include placing explicit constitutional prohibitions on any Kelo-style takings for economic development and tax revenue enhancement, restricting takings that benefit primarily private parties to point-to-point infrastructure and making the government shoulder the burden of proof that a taking is for a public use. Additionally, perhaps the most important new limit in Proposal 4 is a provision that would force government officials to show a particular property is indeed blighted by clear and convincing evidence. This new blight provision would prevent government officials from declaring entire areas blighted under vague language and turning them over to a developer, thereby achieving a taking for economic development simply by labeling the taking "an eradication of blight." This is a question that the Hathcock ruling did not address.

Not surprisingly, Hathcock also did not address the difference between the "market price" for a property and the value an unwilling homeowner would place on the property in a forced sale. Proposal 4 would modify current law by allowing some compensation for the value an owner places on his or her home.

This and the other provisions of Proposal 4 would accord a greater respect to the values individuals place upon their property and to the need to ensure that less powerful individuals do not find their lives and property continually subject to the demands of public officials and influential members of society.

Appendix: Ballot Description of Proposal 4[85]

PROPOSAL 06-4

A PROPOSED CONSTITUTIONAL AMENDMENT TO PROHIBIT GOVERNMENT FROM TAKING PRIVATE PROPERTY BY EMINENT DOMAIN FOR CERTAIN PRIVATE PURPOSES

The proposed constitutional amendment would:

- Prohibit government from taking private property for transfer to another private individual or business for purposes of economic development or increasing tax revenue.
- Provide that if an individual's principal residence is taken by government for public use, the individual must be paid at least 125% of property's fair market value.
- Require government that takes a private property to demonstrate that the taking is for a public use; if taken to eliminate blight, require a higher standard of proof to demonstrate that the taking of that property is for a public use.
- Preserve existing rights of property owners.

Should this proposal be adopted?

Yes ☐

No ☐

Endnotes

1 Michigan Const. 1963, Art. XII, § 1.
2 Id. at Art. X, § 2.
3 Wayne County v. Hathcock, 471 Mich. 445 (2004).
4 The definition of a "principal residence" in the Michigan General Property Tax Act can be found at MCL 211.7dd(c).
5 Poletown Neighborhood Council v. Detroit, 410 Mich. 616 (1981).
6 Hathcock, 471 Mich. at 473 (citations omitted).
7 Id. at 474.
8 Id. at 475 (citations omitted).
9 MCL 213.56(2).
10 R. Rutland et al, eds., *For the National Gazette, Property* (1983), 266, reprinted in 14 Papers of James Madison.
11 Calder v. Bull, 3 Dall. 386, 388, 1 L.Ed. 648 (1798).

[12] Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 1 L.Ed. 391 (C.C.D.Pa.1795).
[13] Norwood v. Horney, 583 N.E.2d 1115, 1132 (Ohio 2006).
[14] Barron v. Baltimore, 32 U.S. 243 (1833).
[15] Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896).
[16] Clark v. Nash, 198 U.S. 361 (1905).
[17] Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).
[18] Berman v. Parker, 348 U.S. 26 (1954).
[19] Id. at 33-34 (citations omitted).
[20] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
[21] Midkiff, 467 U.S. at 232.
[22] Kelo v. New London, 545 U.S. 469; 125 S.Ct 2655 (2005).
[23] Id. at 2665 n. 13 (citation omitted).
[24] Id. at 2676 (O'Connor, J., dissenting).
[25] Id. at 2677 (O'Connor, J., dissenting).
[26] Id. at 2668.
[27] Id. at 2668 n. 22.
[28] Poletown Neighborhood Council v. Detroit, 410 Mich. 616 (1981).
[29] Jenny Nolan, "Auto Plant vs. Neighborhood: The Poletown Battle," *The Detroit News Rearview Mirror*, http://info.detnews.com/history/story/index.cfm?id=18&category=business (accessed September 22, 2006).
[30] Poletown, 410 Mich. at 647 (Ryan, J., dissenting).
[31] Id. at 633-34.
[32] Id. at 644-45 (Fitzgerald, J., dissenting).
[33] Hathcock, 471 Mich. at 450.
[34] Id. at 482.
[35] Id. at 473 (citation omitted).
[36] Id. at 474.
[37] Id. at 475 (citation omitted).
[38] Berman, 348 U.S. at 34-35.
[39] Id. at 32.
[40] Midkiff, 467 U.S. at 241-43 (citations omitted).
[41] Kelo, 125 S.Ct. at 2661-63 (citations omitted).
[42] Id. at 2670 (Kennedy, J., concurring).
[43] Id. at 2671 (Kennedy, J., concurring).
[44] Id. at 2670 (Kennedy, J., concurring).
[45] Poletown, 410 Mich. at 628-33 (some citations omitted).
[46] Calder, 3 Dall. at 388.
[47] Id.
[48] Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 1 L.Ed. 391 (C.C.D.Pa.1795).
[49] Hathcock, 471 Mich. at 480 n. 81 (citing Poletown, 410 Mich at 668 (Ryan, J., dissenting)).
[50] Id. at 479.
[51] Id. at 480.
[52] Id. at 482.
[53] Id. at 483.
[54] Horney, 583 N.E.2d at 1123.
[55] Id. at 1128 (citation omitted).
[56] Id. at 1136.
[57] Id. at 1138.
[58] Kelo, 125 S.Ct. at 2675 (O'Connor, J., dissenting).
[59] Id.
[60] Ilya Somin, "Robin Hood in Reverse: The Case Against Economic Development Takings," *Cato Institute Policy Analysis* no. 535 (Washington, DC: Cato Institute, February 22, 2005), 6, http://www.cato.org/pubs/pas/pa535.pdf (accessed September 18, 2006).
[61] Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).
[62] Berman, 348 U.S. at 32.
[63] Kelo, 125 S.Ct. at 2684 (Thomas, J., dissenting).
[64] Id. at 2670 (Kennedy, J., concurring).
[65] James Madison, "The Same Subject Continued: The Union as a Safeguard Against Domestic Faction and Insurrection," *The Federalist Papers* No. 10, (November 23, 1787) http://thomas.loc.gov/home/histdox/fed_10.html (accessed September 26, 2006).
[66] Id.
[67] Id.
[68] Id.
[69] "Primary Documents in American History: The Bill of Rights," The Library of Congress: Collections and Bibliographies, http://www.loc.gov/rr/program/bib/ourdocs/billofrights.html (accessed September 27, 2006).
[70] Kelo, 125 S.Ct. at 2686-87 (Thomas, J., dissenting) (citation omitted).
[71] Id. at 2687 (Thomas, J., dissenting) (citing Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003) (other citations omitted)).
[72] *Brief of Jane Jacobs as Amica Curiae in Support of Petitioners, Kelo v. New London*, at 12, http://www.ij.org/pdf_folder/private_property/kelo/jacobs05.pdf (accessed October 3, 2006) (hereafter cited as *Brief of Jane Jacobs*).
[73] Kelo, 125 S.Ct. at 2676 (O'Connor, J., dissenting).
[74] Hathcock, 471 Mich. at 482.
[75] *Brief of Jane Jacobs* at 13.
[76] Poletown, 410 Mich. at 657 n. 7 (Ryan, J., dissenting).
[77] *Brief of Jane Jacobs* at 8.
[78] Somin, "Robin Hood," 6.
[79] Poletown, 410 Mich. at 653 n. 6 (Ryan, J., dissenting).
[80] *Brief of Jane Jacobs* at 8.
[81] Bruce L. Benson, "The Mythology of Holdout as Justification for Eminent Domain and Public Provision of Roads," *The Independent Review* Volume X, Number 2, (Oakland, CA: The Independent Institute, Fall 2005), 165, http://www.independent.org/pdf/tir/tir_10_2_1_benson.pdf (accessed October 4, 2006).
[82] MCL 125.72(a).
[83] Horney, 853 N.E.2d at 1145.
[84] Shikha Dalmia, "Blight loophole could allow cities to grab homes, land," *The Detroit News*, November 3, 2005, http://www.detnews.com/2005/editorial/0511/03/A19-370418.htm (accessed September 29, 2006); Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in the Post*-Kelo *World,* "Michigan," (Washington, DC: Institute for Justice, Castle Coalition, June 2006), 52-53, http://www.castlecoalition.org/pdf/publications/floodgates-report-low.pdf (accessed October 4, 2006).
[85] Text of Proposal taken from "State Of Michigan Statewide Ballot Proposal Status," (Lansing, MI: Michigan Department of State, September 20, 2006), 4, http://www.michigan.gov/documents/Statewide_Bal_Prop_Status_145801_7.pdf#search=%22east%20lansing%20blight%20designation%22.

MACKINAC CENTER
FOR PUBLIC POLICY

Guarantee of Quality Scholarship

The Mackinac Center for Public Policy is committed to delivering the highest quality and most reliable research on Michigan issues. The Center guarantees that all original factual data are true and correct and that information attributed to other sources is accurately represented.

The Center encourages rigorous critique of its research. If the accuracy of any material fact or reference to an independent source is questioned and brought to the Center's attention with supporting evidence, the Center will respond in writing. If an error exists, it will be noted in an errata sheet that will accompany all subsequent distribution of the publication, which constitutes the complete and final remedy under this guarantee.

140 West Main Street • P.O. Box 568 • Midland, Michigan 48640 • 989-631-0900 • Fax: 989-631-0964
www.mackinac.org • info@mackinac.org

ISBN: 1-890624-53-5
S2006-09