

2006

Not by the Hair of My Chinny Chin Chin: Ohio's Attempt to Combat the Big Bad Wolf of Blight

Justin M. Lugar

Follow this and additional works at: http://digitalcommons.liberty.edu/lu_law_review



Part of the [Law Commons](#)

Recommended Citation

Justin M. Lugar (2006) "Not by the Hair of My Chinny Chin Chin: Ohio's Attempt to Combat the Big Bad Wolf of Blight," *Liberty University Law Review*: Vol. 2: Iss. 1, Article 11.

Available at: http://digitalcommons.liberty.edu/lu_law_review/vol2/iss1/11

This Article is brought to you for free and open access by the Liberty University School of Law at DigitalCommons@Liberty University. It has been accepted for inclusion in Liberty University Law Review by an authorized administrator of DigitalCommons@Liberty University. For more information, please contact scholarlycommunication@liberty.edu.

NOTE

NOT BY THE HAIR OF MY CHINNY CHIN CHIN: OHIO'S ATTEMPT TO COMBAT THE BIG BAD WOLF OF BLIGHT¹

Justin M. Lugar[†]

I. INTRODUCTION

“There’s no place like home,” stated the First Appellate District in the Ohio Court of Appeals, after announcing that the City of Norwood was legally justified in appropriating private property for private development because it was “deteriorating.”² Seemingly falling in line with the recent United States Supreme Court decision in *Kelo v. City of New London*,³ the appellate court in *Norwood* deferred to the findings of the trial court and held that “the current status of the law permits this kind of appropriation.”⁴ Fortunately for the owners, the Supreme Court of Ohio reviewed and reversed the appellate decision, holding that the takings at issue violated the Ohio Constitution.⁵

This Note argues that while the Ohio Supreme Court arrived at the correct holding in *Norwood*, because of its failure to recognize that this case is at the crux of current eminent domain issues, the court lost its opportunity to re-establish the foundation of private property rights in Ohio and the nation at large. In section II, this Note focuses on the background and the procedural history of the *Norwood* decision. Section II also details the Ohio Supreme Court’s critical analysis of *Kelo* and provides an in-depth analysis of public use, blight, and the void-for-vagueness doctrine under Ohio law. In section III, this

1. For those unfamiliar with childhood stories, this is a reference to the story of the Three Little Pigs. See *The Three Little Pigs in TELL-A-TALES* (Ben Williams, illus. 1959). Basically, the story explains that those who plan and create a strong foundation for their homes and for their lives will be rewarded and strengthened against potential disasters. In the present case, this story seems particularly relevant as Ohio has mandated that the property of its citizens should be protected from government appropriation on the basis of economic utility.

† Managing Editor of Publication, *Liberty University Law Review*, Volume 2; J.D. Candidate, 2008, Liberty University School of Law; B.A. Religious Studies, Focus in Tibetan Buddhism/Tibetan Language, 2004, University of Virginia. I am eternally grateful to my wonderful wife, Mrs. Cerid Lugar, who provided endless encouragement and honest critique. I also thank the Liberty University Law Review staff and editorial board for thoughtful comments and suggestions. Finally, I thank my parents and sister for all of their support along the way.

2. *City of Norwood v. Horney (Norwood I)*, 830 N.E.2d 381 (Ohio Ct. App. 2005).

3. *Kelo v. City of New London*, 555 U.S. 469 (2005).

4. *Norwood I*, 830 N.E.2d at 383.

5. *City of Norwood v. Horney (Norwood II)*, 835 N.E.2d 1115, 1123 (Ohio 2006).

Note provides a brief sketch of the foundational sources for private property rights in the Western Legal Tradition.⁶ This Note emphasizes the importance of understanding the development of private property rights by a historical analysis beginning with Ancient Rome and concluding with Ohio's various constitutional amendments. Within this discussion, the reader will find an analysis of Blackstone's and Locke's differing views on the origin of private property rights. Finally, section III concludes with an analysis of the Ohio General Assembly's actions in the wake of *Kelo* and *Norwood*. Based on this analysis, this Note concludes that if Ohio chooses to renew Senator Tim Grendell's version of Senate Bill 167, including a limited definition of "blight," the state will be better equipped to combat the expansion and abuse of eminent domain power.⁷

II. BACKGROUND: THE FOUNDATION OF PRIVATE PROPERTY RIGHTS IN EQUIPOISE WITH THE OHIO TAKINGS CLAUSE

The city of Norwood is quite a unique place. Entirely surrounded by Cincinnati, Norwood has retained its independence from annexation by the larger metropolis.⁸ Once a vibrant and integral part of the greater Cincinnati area, Norwood is now a wounded town that has suffered irreparable harm by the demise of industrial America.⁹ Nevertheless, many people still call Norwood home, hope to raise children and grandchildren there, and express a desire to remain in the town until their last days.¹⁰ Unfortunately for some of these homeowners, they must endure the uncertainty that their property may be stripped away in the name of economic growth and municipal benefit.

Several years ago, homeowners in New London, Connecticut were faced with the same problem.¹¹ Unfortunately for the homeowners in New London,

6. The author is quite aware that even attempting to provide a brief sketch of the history of private property rights in the Western Legal Tradition ("WLT") is a daunting, and essentially impossible task. However, the author firmly believes it is possible to gain some insight into the foundational theories and documents that support the "American" view of private property rights. This better understanding of the WLT as applied to the various versions of the Ohio Constitution and Senate Bill 167 is the purpose of this Note. In accordance with this recognition, the author sincerely hopes that the reader will further investigate the sources supplied in the following footnotes.

7. See *infra*, Part III: Section C.

8. *Norwood I*, 830 N.E.2d at 384.

9. *Id.*

10. *Norwood II*, 835 N.E.2d at 1124 n.3 ("Appellants Carl and Joy Gamble lived in the neighborhood for over 35 years before the appropriation").

11. *Kelo v. City of New London*, 545 U.S. 469 (2005).

on June 23, 2005, the United States Supreme Court issued one of the most controversial property opinions in the history of this nation.¹² By giving deference to the Supreme Court of Connecticut, the plurality expanded the meaning of the public use clause of the Fifth Amendment of the United States Constitution.¹³ The Court stated that because the “[city] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”¹⁴

As a consequence, a municipality can constitutionally appropriate private property not merely for public use, but for any public purpose regardless of whether “the public end may be as well or better served through an agency of private enterprise than through a department of government.”¹⁵ Thus, the Supreme Court altered the language of the takings clause of the Fifth Amendment in two ways. First, the Court expanded the definition of the term “public use” to the much broader “public purpose” terminology and supported such an expansion by stating, “[w]ithout exception, our cases have defined that concept broadly.”¹⁶ Second, the Court explicitly stated that the takings clause allows for the government to appropriate private property and pass such property to a private entity for redevelopment, effectively redistributing private property to those parties the government deems better suited to increase the profitability of the land.¹⁷

Fortunately, because the *Kelo* decision was based on deference to the state supreme court, the plurality in *Kelo* left the door open for each state to narrow or broaden its power of eminent domain.¹⁸ The plurality stated, “We emphasize

12. *Id.* See generally Janet B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 *FORDHAM URB. L.J.* 613 (2007); Michael A. Lang, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 *IND. L. REV.* 449 (2006); Ryan J. Sevcik, *Trouble in Fort Trumbull: Using Eminent Domain for Economic Development in Kelo v. City of New London*, 85 *NEB. L. REV.* 547 (2006). This list merely highlights a few articles characterizing the *Kelo* decision as controversial. Shephardizing the case citation reveals 440 law review citations, 70 statutory citations, and 67 treatise citations. Needless to say, *Kelo* is generally regarded as a controversial opinion.

13. *Id.* Citing the Fifth Amendment, which reads in pertinent part “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” U.S. CONST., amend V (emphasis added). Justice O’Conner, in her dissent states, “the Court today significantly expands the meaning of public use.” *Id.* at 501.

14. *Kelo v. City of New London*, 545 U.S. at 484.

15. *Id.* at 486 (citing *Berman v. Parker*, 348 U.S. 26, 34 (1954)).

16. *Kelo v. City of New London*, 455 U.S. at 480.

17. *Id.* at 488.

18. *Id.* at 489.

that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”¹⁹ As a direct response to this invitation, the Ohio General Assembly enacted Senate Bill 167 as sponsored by Republican Senator Timothy Grendell.²⁰ This legislation sought to ensure that no private property in the State of Ohio could be taken for purely economic gain by a private entity through local government.²¹ Section 8 of Senate Bill 167 states,

This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for the necessity is that the United States Supreme Court decision in *Kelo v. City of New London (2005)*, 125 S. Ct. 2655, could allow the taking of private property that is not within a blighted area, ultimately resulting in ownership of that property being vested in another private person in violation of Sections 1 and 19 of Article I, Ohio Constitution, and, as a result, warrants a moratorium on any takings of this type until further legislative remedies may be considered.²²

In accordance with the intent of Senate Bill 167, the General Assembly formed a “Legislative Task Force to Study Eminent Domain and Its Use and Application in the State” and instructed the task force to report its findings to the General Assembly by August 1, 2006.²³ While the Ohio legislature investigated the role of eminent domain within the state in the wake of *Kelo*, the courts in Ohio had to wrestle with the dilemma presented by the *Norwood* case. Thus, to understand the importance of Senate Bill 167 and the legislative task force, we must examine the facts and circumstances surrounding the Ohio Supreme Court’s decision in *Norwood*.

A. *City of Norwood v. Horney: The Story of a “Deteriorating” Town*

Founded in 1888, the city of Norwood has been a quintessential element of Cincinnati’s development.²⁴ Buttressed by companies such as LeBlond Machine Tool Company and the General Motors Assembly Plant, Norwood

19. *Id.*

20. Am. Sub. S.B. 167, § 4(A), Gen. Assem. (Ohio 2005) (on file with author).

21. *Norwood II*, 853 N.E.2d 1115, 1122 (Ohio 2006).

22. Am. Sub. S.B. 167, § 8.

23. Am. Sub. S.B. 167, § 3(A).

24. City of Norwood, Department of Economic Development Homepage, http://www.norwood-ohio.com/ed_index.html (last visited September 4, 2007).

was once a haven for American industry.²⁵ However, beginning in the late 1960s and the early 1970s with the development of Interstate 71, the *Norwood* homeowners'²⁶ neighborhood slowly transformed from single-family homes into a predominately commercial area.²⁷ As a result of these changes, the city of Norwood observed the homeowners' neighborhood gradually transforming into a hodgepodge of commercial and residential properties.²⁸ In order to alleviate inconsistencies in the city plan, the city of Norwood created the Edwards Road Corridor Urban Renewal Area.²⁹

In 2002, a commercial developer, Rookwood Partners, Ltd. ("Rookwood"), sought to redevelop the homeowners' properties for a private, commercial shopping center called Rookwood Exchange.³⁰ The court of appeals described the development by stating, "The project involved constructing a massive conglomerate of stores and offices in place of the owners' properties."³¹ Furthermore, this newly developed commercial property primarily appeals to those of a substantially more fortunate socio-economic group who wish to shop at high-end boutiques and dine at fine restaurants.³² Because two-thirds of the two million people that call Cincinnati home live within ten miles of Norwood, redevelopment like the Rookwood Exchange has created economic growth and provided a substantial increase in revenue for the city.³³

Despite the obvious benefit to Norwood, the city itself expressed reluctance to invoke the powers of eminent domain.³⁴ Norwood wanted the developers to purchase the land directly from the owners, but the owners refused to sell.³⁵

25. *Norwood I*, 830 N.E.2d 381, 384 (Ohio Ct. App. 2005).

26. The "homeowners" are also referred to as the "appellants" throughout this Note.

27. *Norwood I*, 830 N.E.2d at 384.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Rookwood Commons & Pavilion Homepage, <http://www.shoprookwood.com> (last visited September 4, 2007). It appears that Rookwood has built and developed a shopping center called Rookwood Commons & Pavilion very near, if not actually on the property that this case addresses. It is unclear at this time whether Rookwood Commons & Pavilion is a different shopping center than proposed in 2002, or if it is the same plan with a different name. Regardless, it seems quite clear that Rookwood was primarily in the business of developing high-end shopping centers.

33. *Norwood II*, 853 N.E.2d 1115, 1124 (Ohio 2006) (stating that the "city expects the redeveloped area to result in nearly \$2,000,000 in annual revenue for Norwood").

34. *Id.*

35. *Id.* at 1124-25. The Supreme Court of Ohio noted that, "[the City of Norwood] encouraged Rookwood to purchase the property through voluntary sales of homes and businesses without the city's intervention . . . the appellants, however, refused to sell."

Accordingly, Rookwood appealed to the city of Norwood to exercise the power of eminent domain and even offered to incur the cost of demolition of the appropriated property.³⁶ Norwood finally acquiesced and instituted appropriation proceedings pursuant to the Norwood City Code.³⁷

After the city initiated the power of eminent domain, the first step in appropriating the properties involved conducting “an urban-renewal study.”³⁸ Norwood, with funding from Rookwood, employed a consulting firm, Kinzelman Kline Grossman (“KKG”), to conduct a study of the appellants’ properties.³⁹ KKG reported that “the neighborhood was a ‘deteriorating area’ as that term is defined in the Norwood Code” and concluded that “the neighborhood would continue to deteriorate.”⁴⁰ As a result of the KKG study, numerous public hearings, and several town meetings, the Norwood City Council approved the appropriation plan and authorized the mayor to contract with Rookwood to redevelop the property.⁴¹ The city of Norwood thereafter filed complaints with the trial court to institute the appropriation of the homeowners’ properties.⁴²

During the trial, several employees of KKG offered conflicting testimony regarding the nature and status of the appellants’ properties; this nature and status was a key issue in determining that the property was susceptible to appropriation in the first place.⁴³ The testimony of one KKG employee concluded that the neighborhood “was neither a slum nor blighted or

36. *Id.* at 1125.

37. *Norwood I*, 830 N.E.2d 381, 384-85 (Ohio Ct. App. 2005) (*See also* Norwood Code § 163.05).

38. *Norwood II*, 853 N.E.2d at 1125.

39. *Id.*

40. “Deteriorating area” under the Norwood Code § 163.02(c) is defined as:

an area, whether predominantly built up or open, which is not a slum, blighted or deteriorated area but which, because of incompatible land uses, nonconforming uses, lack of adequate parking facilities, faulty street arrangement, obsolete platting, inadequate community and public utilities, diversity of ownership, tax delinquency, increased density of population without commensurate increases in new residential buildings and community facilities, high turnover in residential or commercial occupancy, lack of maintenance and repair of buildings, or any combination thereof, is detrimental to the public health, safety, morals and general welfare, and which will deteriorate, or is in danger of deteriorating, into a blighted area.

Id. at 1125 n. 5.

41. *Id.* at 1125-26.

42. *Id.*

43. *Id.* at 1126.

deteriorated and was not on its way to becoming blighted.”⁴⁴ Despite this testimony and other glaring errors in the KKG report, the trial court accepted the study as in accord with the Norwood Code.⁴⁵ The court held that although the city of Norwood *had* abused its discretion in finding the appellants’ properties to be a “slum, blighted, or deteriorated area,” the city *had not* abused its discretion in determining that the neighborhood was a “deteriorating area.”⁴⁶ Accordingly, the court upheld the appropriation of the homeowners’ property.⁴⁷

On appeal, the homeowners raised five assignments of error, all of which the court of appeals found unpersuasive under an abuse of discretion standard.⁴⁸ The Supreme Court of Ohio, however, granted review and unanimously reversed the decision.⁴⁹ In an eloquent and engaging opinion, Justice Maureen O’Connor provided a detailed overview of the history of eminent domain in Ohio and its relation to *Kelo*, as well as a brief synopsis of the enactment proceedings of Senate Bill 167.⁵⁰ Additionally, the court held that the Norwood Code’s definition of “deteriorating area” was void-for-vagueness. The court also upheld the constitutionality of Ohio Revised Code § 163.19, granting a stay of the injunction awarded by the trial court, which would have allowed Rookwood to demolish the property in the midst of the proceedings.⁵¹

B. The Supreme Court of Ohio’s Unanimous Decision: Public Use, Blight, and Void-for-Vagueness

Justice O’Connor began the state constitutional analysis by addressing the foundation and history of individual, private property rights.⁵² The majority explained that private property rights are: “believed to be derived fundamentally from a higher authority and natural law, property rights were so sacred that they could not be entrusted lightly to ‘the uncertain virtue of those who govern.’”⁵³ The court’s focus on the nature and foundation of private property rights concluded that “Ohio has always considered the right of

44. *Norwood II*, 853 N.E.2d 1115, 1126 (Ohio 2006). I am hesitant to define blighted at this juncture despite resolution of this issue by the Ohio General Assembly. There are multiple proposed definitions of “blight” that will be entertained in Section C of Part III of this Note.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Norwood I*, 830 N.E.2d 381, 384 (Ohio Ct. App. 2005).

49. *Norwood II*, 853 N.E.2d at 1153.

50. *Id.* at 1127-43.

51. *Id.* at 1142-53.

52. *Id.* at 1128.

53. *Id.* (quoting *Parham v. Justices of the Inferior Court of Decatur County*, 9 Ga. 341, 348 (Ga. 1851)).

property to be a fundamental right.”⁵⁴ Further, the court quoted Chief Justice Bartley’s opinion in *Bank of Toledo*, regarding the right of private property in Ohio:

The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are *derivative* -- mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore *trusts* of civil power, to be exercised for the public benefit . . . Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection -- the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right*, which it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges . . . which are created by law and conferred upon a few . . . The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, were evidently designed to protect the right of private property as one of the primary and original objects of civil society . . .

⁵⁵

Having established a foundation for private property rights in the State of Ohio, Justice O’Connor explained the modern approach to eminent domain in Ohio and the shift in the Court’s view of appropriations.⁵⁶

1. Reinforcing the Definition of Public Use

Despite the compelling clarity of Chief Justice Bartley’s opinion, the interpretation and application of the Ohio Constitution’s takings clause has drastically expanded since the adoption of the Northwest Ordinance in 1787.⁵⁷

54. *Id.* at 1129.

55. *Norwood II*, 853 N.E.2d 1115, 1128-29 (Ohio 2006) (quoting *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622, 632 (Ohio 1853)).

56. *Id.* at 1128-35 (providing a brief history of the development of eminent domain).

57. *Id.* Through the reading of the opinion in *Norwood II*, it is clear that the overall trend of the interpretation of the takings clause has expanded drastically. Once a narrowly defined clause, the takings clause has evolved into a broad understanding of general police powers and public purpose. As will be explained in Section C of Part III, this expansion of the definition is

It is clear that both the Northwest Ordinance and the Ohio Constitution recognized the sovereign's ability to appropriate property; however, both documents limited the government by requiring that the takings must be for public use and the owners must be justly compensated.⁵⁸ As the *Norwood* court highlighted, the issue of just compensation is rarely challenged, but both Ohio courts and federal courts have explored the definition of public use numerous times.⁵⁹ Perhaps the most important limitation on the definition of public use is the presumption that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."⁶⁰

More recently, even the presumption that the sovereign cannot pass property from one private party to another has been nullified, so long as "there was no evidence of an illegitimate purpose [on the part of the developer and local government]."⁶¹ Fortunately, the Supreme Court of Ohio recognized the contradiction in this reasoning and instead adopted the reasoning of Justice Sandra Day O'Connor's dissent in *Kelo*.⁶² The court referenced Justice O'Connor's dissent by stating that "O'Connor correctly discerned in her analysis of the taking in *Kelo*, when the state takes an individual's property and gives it to another based solely on the economic gain afforded by the transfer, the 'private benefit and [the] incidental public benefit are, by definition, merged and mutually reinforcing.'"⁶³

Based on this line of reasoning, the Supreme Court of Ohio held that transferring property from one private party to another private party does not satisfy the public use requirement because such a transfer is merely "an economic or financial benefit."⁶⁴ The court further opined that "eminent domain is a power of last resort for the good of the public; it 'is not simply a vehicle for cash-strapped municipalities to finance community improvements.'"⁶⁵ Founded on an unambiguous rejection of the majority position in *Kelo*, and on an acceptance of Justice O'Connor's dissent, the court found that the appropriation in *Norwood* violated the takings clause of the Ohio Constitution.⁶⁶

unsupported by a much deeper history of eminent domain that traces back to pre-Roman law.

58. *Id.* at 1130-31 (citing, *State ex rel. Bruestle v. Rich*, 110 N.E.2d 778, 785 (Ohio 1953)).

59. *Id.* at n. 9 (citing *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946)).

60. *Id.* at 1131 (citing *Kelo v. United States*, 545 U.S. 469, 476-77 (2005)).

61. *Kelo v. United States*, 125 U.S. 2655, 2661-62 (2005).

62. *Norwood II*, 853 N.E.2d 1115, 1140 (Ohio 2006).

63. *Id.* (citing Justice O'Connor's dissent in *Kelo*, 545 U.S. 469, 494 (2005)).

64. *Id.* at 1143.

65. *Id.* at 1141.

66. *Id.* The Supreme Court of Ohio also explicitly accepts the reasoning of County of

2. Norwood's Definition of Deteriorating Area: Too Vague To Survive

Having concluded that the takings instituted by the city of Norwood violated the Ohio Constitution's public use requirement, the Supreme Court of Ohio shifted to the issue of whether the Norwood Code's definition of deteriorating area was void for vagueness.⁶⁷ In analyzing the issue, the court stated that the test for the void-for-vagueness doctrine is "whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those laws that do not are void for vagueness."⁶⁸

Regarding fair notice, the unanimous court reasoned that even though the Norwood Code provides a plethora of factors that may tend to show that an area is deteriorating, "the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement"⁶⁹ Therefore, the appellants in *Norwood* did not have fair notice of the various factors that could support a finding of "deteriorating area" because the evidence consisted of contradictory and conflicting opinions about the quality and status of the neighborhood.⁷⁰

The court found that sufficient definition and guidance were also absent from Norwood City's eminent domain statute. The court stated, "[t]he statutory definition . . . incorporates not only the existing condition of a neighborhood, but also extends to what that neighborhood might become [and] [s]uch a speculative standard is inappropriate in the context of eminent domain"⁷¹ This definition includes not only the *present* state of the property as deteriorating, but also gives the local government wide discretion to determine that a property may deteriorate in the *future*.⁷² And as the Ohio Supreme Court stated, such a standard is too speculative in appropriating private property under the doctrine of eminent domain.⁷³

Wayne v. Hathcock, 684 N.W.2d 765 (2004).

67. *Norwood II*, 853 N.E.2d at 1142.

68. *Id.* at 1143 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

69. *Id.* at 1145.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Norwood II*, 853 N.E.2d at 1145.

III. ARGUMENT

THE HISTORY OF PRIVATE PROPERTY RIGHTS IN THE WESTERN LEGAL TRADITION: THE ORIGINS OF OHIO SENATE BILL 167 AND ITS PROPER APPLICATION

A. Brief History of the Sources of Public & Private Property Rights: From Justinian to Madison

As the introduction and the argument heading state, the main purpose of this Note is to craft a historical argument in favor of protecting private property rights as natural rights that transcend the will or desire of one particular government. Thus, in order to understand the unique status of private property rights in the United States, and more specifically in Ohio after the decision in *Norwood* and outlined in Senate Bill 167, we must briefly examine the major sources that the Founding Fathers recognized and applied in the formative documents of this nation. When attempting to tackle this daunting analysis, some scholars immediately reference the great John Locke and his theory of labor as the foundation of property rights in America.⁷⁴ Others take the view that private property rights have much older roots, roots that originate at the very beginnings of Western civilization.⁷⁵ Although there are a variety of viewpoints on the development of private property rights, there is a common thread that connects many of these perspectives. This common thread is natural law theory, which holds that the natural law is ingrained in the mind and heart of each and every man, woman, and child.⁷⁶ To track the development of private property rights in the Western Legal Tradition, we must look to the period of codification of laws under the Judeo-Christian worldview, namely Justinian's Rome.

74. See generally Brett D. Liles, *Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights*, 48 ARIZ. L. REV. 369 (2006).

75. See generally 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 (2003).

76. See generally ST. THOMAS AQUINAS, SUMMA THEOLOGICA (1274); ST. AUGUSTINE OF HIPPO, TWO CITIES (410); HUGO GROTIUS, DE JURE BELLI ET PACIS (1625); SAMUEL PUFENDORF, ELEMENTA JURISPRUDENTIAE UNIVERSALIS (1673); and JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690). This is hardly an exhaustive list of works on the natural law, but this list provides a new reader with a good starting point. Though there are differences between each of the authors' views of the natural law, the definition of natural law as the law "written on the heart" of mankind can be regarded as a general definition.

1. Justinian's Institutes and the Roman Divisions of Property

Under the Institutes of Justinian, the division of ownership of property is twofold: those things that may be owned by an individual and those things that cannot.⁷⁷ Those types of property that an individual cannot own are further divided into four subcategories.⁷⁸ The Institutes of Justinian elaborate on these types of property that “consist of things that belong to all men in common (*res communes*); of things that belong to the state (*res publicae*); of things that belong to a corporation (*res universitatis*); and of things that belong to no one (*res nullius*).”⁷⁹

Having acknowledged the various divisions of property, Justinian further stated some examples of public property (*res publicae*) that were owned by the Roman people as a whole.⁸⁰ Justinian's examples clarify that “[p]ublic property is represented by rivers, harbors, and public roads . . . they belong to the Roman people . . . the use being in the public at large.”⁸¹ Accordingly, one may conclude that Roman law gives us an early example of the types of property that could be held publicly. Also, “the use being in the public at large” seems to provide some foundation for the later public use requirement for municipal takings.⁸² Though the connection is not direct, the Institutes of Justinian lay the foundation for later elaborations on public and private property in the Western Legal Tradition.

2. King John's *Magna Carta*: The First Codification of Private Property Rights

Though much time passed between the foundational contribution of Justinian's Institutes and June of 1215, for purposes of this limited Note, the next seminal event in the historical development of public and private property rights came by way of King John's *Magna Carta*.⁸³ The *Magna Carta* states that

77. WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 307 (The Law Book Exchange, Ltd. 2003) (1938). (This division is more commonly understood as the division between private property and public property).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. BOYD C. BARRINGTON, *THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND WITH AN HISTORICAL TREATISE AND COPIOUS EXPLANATORY NOTES* 228-50 (Fred B. Rothman & Co. 1993) (1900).

No free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.⁸⁴

The *Magna Carta* is considered by many to be at the very root of British, and eventually, American common law.⁸⁵ According to Thomas Cooley, the *Magna Carta* was “the first great statute, promulgated at a time when the legislative power was exercised by the king alone”⁸⁶ Thus, the right of a free man to have exclusive rights and possession in his land, free from the will of the sovereign, was statutorily recognized in 1215.⁸⁷ This recognition of private property ownership as paramount to the will of the legislature was a crucial step in the development of public and private categories of ownership.⁸⁸ Accordingly, it is critical to evaluate the impact of the codification of the common law of private property rights over the following centuries. The next seminal figure, Hugo Grotius, expanded and elaborated upon the provisions of the *Magna Carta*, providing an organized codification of, and commentary on, property law in the early period of the Western Legal Tradition.

3. Hugo Grotius: Moving Toward the Modern Framework

Much like the Roman divisions of property, Grotius expounds that “[t]his division, of the *suum*, reveals two parts: ‘some things belong to us by a right common to mankind, others by our individual right.’”⁸⁹ Grotius proclaims that the origin of property lay in the notion of community property which mankind was able to appropriate for his own use.⁹⁰ However, mankind was limited to

84. *Id.* at 239 (specifically Article 39).

85. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 169 (1998). Amar states, “[t]hese English documents [Magna Charta, Petition of Right, the Habeas Corpus Act, the English Bill of rights of 1689] were the fountainhead of the common law and the acknowledged forebears of many particular rights that later appeared in the federal Bill, sometimes in identical language.”

86. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 23 (The Lawbook Exchange, Ltd. 2002) (1868).

87. *Id.*

88. Timothy Sandefur, *Public Use: Returning to the Sources* 2 (Feb. 4, 2005) (unpublished manuscript, on file with author), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=656004 (last visited September 4, 2007).

89. STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 35 (2002) (citing *De Jure Belli ac Pacis*, II. 2. II. 3).

90. *Id.* at 36.

appropriating only as much as one needed for survival.⁹¹ As one scholar explains, “Grotius is thus committed to holding that at least the first purpose of private ownership was to protect the things or actions necessary to preservation—in other words, to satisfy needs.”⁹² However, Grotius does not dismiss the fact that there are many other reasons for owning property, but ownership of private property must at the very least satisfy the element of preservation.⁹³

Although Grotius recognizes a limitation on ownership by means of basic preservation, there is no specific line or moment in time that marks the transition from common ownership to private ownership. Rather, the “undifferentiated use-right in the earth is . . . transformed by agreement or division into the territories of first, nations, and secondly, households.”⁹⁴ Once mankind transforms the use-right in the earth in a formal division of nations, it becomes apparent that a sovereign must promulgate and uphold laws.⁹⁵ Following the framework established by the *Magna Carta*, Grotius left an indelible mark in the world of property law by coining the term “eminent domain.”⁹⁶ In the *De Jure Belli et Pacis*, Grotius stated that, “a king can . . . take away from his subjects [property] . . . by the power of eminent domain.”⁹⁷

Grotius further contends that the state must satisfy two requirements to appropriate property.⁹⁸ First, “the public welfare must require it, and second, compensation must be made to the loser, if possible, from the public funds.”⁹⁹ Here, Grotius provides the terminology that is employed today, coupled with a clear and largely unchanged framework for evaluating the exercise of eminent domain.¹⁰⁰

4. The Great Locke: Labor Theory and the Origin of a Fundamental Right

While Grotius provided a thorough framework and useful terminology, John Locke’s theories shaped much of American property law.¹⁰¹ Much like his

91. *Id.*

92. *Id.* at 37.

93. *Id.*

94. *Id.* at 41.

95. BUCKLE, *supra* note 89, at 41.

96. Sandefur, *supra* note 75, at 571 (citing HUGO GROTIUS, 2 THE LAW OF WAR AND PEACE 7 (L. Loomis, trans., 1949) (1625)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Liles, *supra* note 74.

fellow natural law scholar Grotius, Locke held that God gave to man a common dominion over the land of the earth.¹⁰² However, Locke's major contribution is his theory of labor, which became the archetype for the natural law foundation of private property rights as found in the United States Constitution.¹⁰³ According to Locke's labor theory, "as much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property . . . he by his labour does, as it were, enclose it from the common."¹⁰⁴ This labor, as commanded by the Divine,¹⁰⁵ is the means by which mankind subdued the earth and acquired first possession of property.¹⁰⁶ Because the Divine has commanded mankind to put his labor into the earth, mankind must also take the necessary steps to form a civil government to ensure the protection of private property.¹⁰⁷ As Locke states, "the great and chief end . . . of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."¹⁰⁸ Thus, according to the words of Locke himself, civil government's primary purpose is the protection of private property rights, both real and personal, as obtained by means of one's labor.¹⁰⁹

5. Blackstone: The Common Law View of Private Property Rights

Another oft-cited legal scholar, William Blackstone, is best known for his compilation of the British common law entitled *Commentaries on the Laws of England*.¹¹⁰ In Book II of *Commentaries*, Blackstone devotes 520 pages to the history and development of property rights in England.¹¹¹ As an initial observation, Blackstone's dedication of an entire volume to the rights of

102. JOHN LOCKE, TWO TREATISES OF GOVERNMENT & A LETTER CONCERNING TOLERATION 113 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). For a more thorough understanding of Locke, see also JOHN LOCKE, ESSAYS ON THE LAW OF NATURE AND ASSOCIATED WRITINGS (W. von Leyden, ed., 1954) (2002).

103. Sandefur, *supra* note 75, at 576.

104. LOCKE, *supra* note 102, at 113. See also, BUCKLE, *supra* note 89, at 149-61.

105. This term, "the Divine" will be used interchangeably with the term "God" to convey Locke's and Blackstone's understanding of the Western notions of divinity (i.e., the Western notion of a divine Creator that presides over mankind and is the source of all things).

106. LOCKE, *supra* note 102, at 113.

107. *Id.* at 54-64. This passage includes a theme that is developed through Locke's *Treatise*; namely, that Hobbes' state of nature is a valid presumption, but Locke holds that God is the creator and king of the earth and that the life of man is not necessarily "solitary, poor, nasty, brutish, and short." THOMAS HOBBS, LEVIATHAN 76 (Edwin Curley, ed., 1994) (1668).

108. LOCKE, *supra* note 102, at 124.

109. *Id.*

110. WILLIAM BLACKSTONE, 2 COMMENTARIES.

111. *Id.*

property, at the very least, indicates the value that the common law placed on private property rights. And much like Locke, “[Blackstone] claimed that [private property] had arisen out of necessity, in that as people multiplied upon the earth there was not enough land and things to meet every person’s need.”¹¹² Accordingly, “both [Locke and Blackstone] cited passages from the book of Genesis dealing with conflicts over property.”¹¹³ However, Locke and Blackstone expressed differing views on the common law foundation of exclusive possession.¹¹⁴ Unlike Locke, Blackstone propounded that the so-called “first taker” of property became the owner and possessor of property merely because of his status as the first in time.¹¹⁵ Additionally, Blackstone held that there was “nothing inherently right in the first taker’s claim,” and “he concluded that the common law of property was a matter of societal convention, not a matter of natural right.”¹¹⁶

6. Blackstone v. Locke: Which Position Prevailed?

This divergence of opinion on origins between Locke and Blackstone is at the core of understanding the development of private property rights in the United States. On the one hand, both Blackstone and Locke cite the same foundational sources and both view the development of private property as a historical progression.¹¹⁷ On the other hand, the two come to different conclusions regarding the essence of the right to own property.¹¹⁸ Locke concludes that private property rights are natural rights that are founded in God’s gift of “reason to make use of it [property] to the best advantage of life and convenience.”¹¹⁹ This gift of reason, coupled with mankind’s labor, led Locke to propound that mankind has a natural right to hold private property for his own use at the exclusion of all others.¹²⁰ Blackstone, however, surmised that the ownership of private property was not a natural right; rather, the ability to own property derived from a societal convention, which recognized that in order to protect civility, the sovereign had to protect each person’s private

112. Herbert W. Titus, *God’s Revelation: Foundation for the Common Law*, 4 REGENT U. L. REV. 1, 23 (1994) (citing Locke, *supra* note 102, at 18, 23-24; citing BLACKSTONE, *supra* note 110, at *5-6).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. LOCKE, *supra* note 102, at 18, 23-24; *see also* BLACKSTONE, *supra* note 110, at *5-6.

118. Titus, *supra* note 112.

119. LOCKE, *supra* note 102, at 111.

120. Titus, *supra* note 112, at 24.

property interest from others.¹²¹ The question thus arises as to which perspective is correct, or more directly put for purposes of this Note, which theory is at the foundation of the American view of private property rights.

Perhaps the answer to this inquiry is found in the words of Thomas Jefferson from the year 1826.¹²² In a letter to James Madison, Jefferson stated that “the honied Mansfieldism of Blackstone became the student’s hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue.”¹²³ Unlike Blackstone, Jefferson and Madison recognized that there are certain inalienable and natural rights that supersede the sovereign’s power.¹²⁴

According to Madison, “[g]overnment 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*”¹²⁵ This language echoes Locke’s view that the sovereign’s greatest duty is to protect the natural right to own private property.¹²⁶ This view, however, is not necessarily opposed to Blackstone’s view of the purpose of government even though Blackstone regards the development of private property as a societal convention.¹²⁷ In Book I of *Commentaries*, Blackstone states, “so great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.”¹²⁸ As a result, one may conclude that Blackstone, Locke, Jefferson, and Madison all agree that protection of private property is a fundamental object of government, though the status of private property as a natural right is still debatable.

121. *Id.*

122. Sandefur, *supra* note 75, at 582. The author is quite aware that the year 1826 is much later than the actual composition of the Bill of Rights in which Madison so earnestly participated. Though this letter occurs much later, it does provide insight into the views of Jefferson regarding the negative impact, in his opinion, of Blackstone’s views.

123. *Id.* (quoting Letter to James Madison (Feb. 17, 1826), *reprinted in* Jefferson: Writings, at 1512 (M. Peterson ed., 1984)).

124. Sandefur, *supra* at note 75, at 583.

125. JAMES MADISON, PROPERTY AND LIBERTY (1792), *reprinted in* THE COMPLETE MADISON: HIS BASIC WRITINGS 267-68 (Saul K. Padover, ed., 1953). I am aware that this was not published until 1792, three years after the ratification of the U.S. Constitution. Though this excerpt seemingly breaks the chronological approach of this Note, this quote embodies Madison’s view of private property and the crafting of the 5th Amendment.

126. LOCKE, *supra* note 102, at 155.

127. Titus, *supra* note 112.

128. WILLIAM BLACKSTONE, 1 COMMENTARIES *117, 135.

7. The Northwest Ordinance: Ohio's First Organic Law

Although the nature of private property rights may be unsettled, one may still gain an understanding of the development of private property rights in America by analyzing the Northwest Ordinance of 1787. Eleven years after Jefferson penned the Declaration of Independence and four years after the United States finally achieved her sovereignty under the Treaty of Paris, the Continental Congress of the United States, under the authority of the Articles of Confederation, adopted the Northwest Ordinance.¹²⁹ This Northwest Ordinance effectively established the rule of law for the northwestern territories and is regarded as “one of the organic laws of the United States”¹³⁰ The Article of the Second sets forth the law concerning the writ of habeas corpus, trial by jury, proportional representation, capital offences, and directly addresses the importance of private property.¹³¹ The provision states,

[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 persons [sic] 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.¹³²

In line with Jefferson's focus on inalienable rights, Article of the Second of the Northwest Ordinance gives a preview of the language of the United States Constitution and the Bill of Rights.¹³³ Though much of the provision focuses on the rights of the criminally accused, the second half of the article focuses primarily on private property rights and the limited circumstances in which the government may appropriate private property.¹³⁴ Additionally, the specific reference to “public exigencies” indicates that the authors of the Article of the Second sought to “distinguish between public use and public necessity (or

129. THE NORTHWEST ORDINANCE 1787: A BICENTENNIAL HANDBOOK xv-xviii (Robert M. Taylor, ed. 1987) [hereinafter THE NORTHWEST ORDINANCE].

130. Sandefur, *supra* note 75, at 574.

131. THE NORTHWEST ORDINANCE, *supra* note 129, at 59-60.

132. *Id.*

133. *Id.*

134. *Id.*

convenience) [which was] incorporated into early American law.”¹³⁵ This distinction becomes critical at a later point in the historical development of property law. The most effective means of understanding the problem, however, hinges on a proper appreciation of the Bill of Rights. More specifically, we must shift focus to the Fifth Amendment and its impact on private property rights.

8. Madison’s Fifth Amendment: The Current Language of Eminent Domain

As the sole author of the takings clause to the Fifth Amendment, James Madison understood the gravity of public appropriations of private property and valued the natural right to pursue, purchase, and maintain private property.¹³⁶ Madison, aware of the dangers of an unchecked sovereign, sought to prevent the abuses of powers by the British crown that plagued early Americans.¹³⁷ Though majority rule is a hallmark of democratic government, Madison was especially wary of factions and the unchecked will of a majority.¹³⁸ In Federalist No. 10, he states,

When a majority is included in a faction, the form of popular government . . . 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.¹³⁹

Here, Madison unequivocally warns of the potential abuses of power that have the ability to corrupt and overthrow any democratic government that is formed upon factions.¹⁴⁰ The only means of controlling faction, in the eyes of Madison, was to establish an American republic as opposed to a pure democracy.¹⁴¹ Further, Madison recognized that “the diversity in the faculties

135. Sandefur, *supra* note 75, at 574.

136. HARRY N. SCHEIBER, *The “Takings” Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 234 (Eugene W. Hickok, Jr. ed., 1991).

137. Saul K. Padover, *Introduction* to *THE COMPLETE MADISON: HIS BASIC WRITINGS* 13 (1953).

138. *THE FEDERALIST NO. 10* (James Madison).

139. *Id.*

140. *Id.* (See also Sandefur, *supra* note 75, at 585-93).

141. *Id.*

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.”¹⁴² As a result of these concerns and to counter the evils of faction, Madison was an ardent supporter of the Bill of Rights and exclusively provided the language for the Fifth Amendment to the United States Constitution.¹⁴³ This amendment was modeled largely on the Northwest Ordinance of 1787 and on various state declarations of rights and constitutions.¹⁴⁴

The language of the Fifth Amendment proclaims that “No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁴⁵ Though Madison sought to prevent the state from being able to appropriate private property under the two-fold condition of public use and just compensation, the Fifth Amendment was not officially incorporated in the states until 1896 in *Missouri Pacific Railway Co. v. Nebraska*.¹⁴⁶ As a result, each state determined its own procedures and the scope of eminent domain.¹⁴⁷

142. *Id.*

143. SCHEIBER, *supra* note 136, at 236.

144. *Id.* (See also VA. CONST. Bill of Rights, § 6 (1776), in 7 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3813 (1909) (stating, “all men . . . cannot be . . . deprived of their property for public uses without their own consent . . .”); see also VT. CONST. art. 1, §2 (1777) (stating “[t]hat 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.”).

145. U.S. CONST. amend. V.

146. SCHEIBER, *supra* note 136, at 239. See also *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896). In 1868, Congress adopted the Fourteenth Amendment which initiated the so-called “incorporation doctrine” whereby the federal bill of rights became binding upon state governments. The takings clause of the Fifth Amendment finally became “officially” binding on state governments in *Missouri Pac.*, although most states already had similar language in their individual state constitution. The quote in *Missouri Pac.* stated, “[t]he construction so given to the statute [Nebraska Eminent Domain Statute] by the highest court of the state must be accepted by this court, in judging whether the statute conforms to the constitution of the United States.” *Id.* at 414. Thus, the Supreme Court in *Missouri Pac.* first stated that the statute at issue must adhere to the language of the U.S. Constitution. Later in the opinion, the Court took the line of reasoning to the next level, effectively incorporating the Fifth Amendment to the states by means of the Fourteenth Amendment. The court explicitly stated, “[t]he 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 Fourteenth Article of Amendment of the Constitution of the United States.” *Id.* at 417.

147. SCHEIBER, *supra* note 136, at 239.

Such state conceptions of the power of appropriation included the view that the term “public use” was an affirmative limitation on the government’s ability to take property, and not merely a “tautological phrase.”¹⁴⁸

B. Ohio’s Take on the Takings Clause: The Sources and Presuppositions of Inviolability in the Ohio Constitution

As stated previously, one of the functions of the Northwest Ordinance of 1787 was to provide the Northwest Territories with the formal concepts and procedures necessary to protect private property from certain types of governmental intrusion.¹⁴⁹ In effect, the Northwest Ordinance was “much more stringent than what is found in the takings clause of the Fifth Amendment [to the United States Constitution].”¹⁵⁰ Accordingly, when Ohio solidified statehood in 1803, the framers of the Ohio Constitution were sure to include a rigid takings clause, which embodied the letter and the spirit of the Northwest Ordinance that had served the territory well for the previous sixteen years.¹⁵¹

Following the Enabling Act of 1802, the founding fathers of Ohio completed the first constitution in that same year.¹⁵² This first constitution recognized “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, [and] acquiring, possessing, and protecting property.”¹⁵³ Thus, the Ohio Constitution echoed the language of the Declaration of Independence, United States Constitution, and the Northwest Ordinance of 1787.¹⁵⁴ Additionally, the original Ohio Constitution addressed the issue of eminent domain in Article VIII, section 4.¹⁵⁵ This provision stated, “[p]rivate property ought and shall ever be held inviolate, but always subservient to the public welfare; provided a compensation in money be made to the owner.”¹⁵⁶ Once again, the framers of the Ohio Constitution mirrored the language of the federal constitution and the Northwest Ordinance. Additionally, section 4 of the Schedule provided that all prior laws, including

148. *Id.* at 240.

149. THE NORTHWEST ORDINANCE, *supra* note 129, at 59-60.

150. SCHEIBER, *supra* note 136, at 237.

151. OHIO CONST. art. VIII, § 4; OHIO CONST. art. I, § 19.

152. *See generally* OHIO CONST. (1802).

153. OHIO CONST. art. VIII, § 1 (1802).

154. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. (1789); THE NORTHWEST ORDINANCE, art. II (1787).

155. OHIO CONST. art. VIII, § 4 (1802).

156. *Id.*

the Northwest Ordinance, shall continue to govern so long as the laws do not contradict the letter or spirit of the Ohio Constitution.¹⁵⁷

In 1850, Ohio held a constitutional convention to examine the viability of the 1802 version and decided to propose a new constitution for ratification.¹⁵⁸ Under the new 1851 version of the Constitution, Article I contains the Bill of Rights, which includes the clause on natural and inalienable rights as well as a newly worded takings clause.¹⁵⁹ The eminent domain clause is much more specific than the 1802 version and provides:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war, or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefore shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.¹⁶⁰

Facially, the 1851 version of the inviolability provision is much more thorough and much more specific. This facial alteration of the 1851 inviolability provision is particularly interesting in two ways. First, the drafters of the 1851 version placed the takings clause at the forefront of all constitutional provisions in the Bill of Rights contained within the first article.¹⁶¹ Thus, the takings clause, in the view of the 1851 drafters, was so vital to governance that it was unearthed from deep within the 1801 Constitution (Article VIII). Second, the 1851 version is much more thorough and provides specific language that provides for various exceptions to the general rule of inviolability.¹⁶² This detailed, specific language evinces the fact that the 1851 framers recognized the origins of the takings clause and sought to address the overly general 1801 provision. As a result of the diligence of the 1851 drafters, and despite an attempt to re-write the Ohio Constitution in 1874, the 1851 version reigned

157. OHIO CONST. Schedule, § 2.

158. OHIO CONST. (1802).

159. OHIO CONST. art. I, § 1, 19.

160. *Id.*

161. *Id.*

162. *Id.*

supreme until November 16, 2005 when the Governor signed Senate Bill 167 of the 126th General Assembly into law.¹⁶³

C. Senate Bill 167: Moratorium on Kelo Appropriations

Republican Senator Timothy Grendell sponsored Senate Bill 167, an emergency measure specifically tailored to address the threat of expansion of eminent domain power under *United States v. Kelo*.¹⁶⁴ The synopsis of Senate Bill 167 establishes:

Until December 31, 2006, a moratorium on the use of eminent domain by any entity of the state government or any other political subdivision of the state to take, without the owner's consent, private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person, [and] to create the Legislative Task Force to Study Eminent Domain and Its Use and Application in the State, and to declare an emergency.¹⁶⁵

Not only did Senate Bill 167 establish a moratorium on *Kelo*-type takings, but it also formed a legislative task force to research and report on the history of eminent domain in Ohio.

The goal of the task force was to provide recommendations for the General Assembly in dealing with the issue addressed in *Norwood*.¹⁶⁶ One of the central sub-issues on which the task force focused was the purpose of classifying certain property as blighted.¹⁶⁷ The task force concluded that the *Norwood* court directly addressed this issue and suggested that "Ohio law does need to clearly define 'blight' in order to permit a taking by eminent domain . . . [and] because blight has been and is a subjective term and difficult to define qualitatively, it can be interpreted to include property that some may not perceive to be blighted."¹⁶⁸

As a result of the *Norwood* court's mandate regarding the definition of blight, the legislative task force proposed a majority and minority opinion of the

163. Am. Sub. S.B. 167, Gen. Assem. (Ohio 2005).

164. *Id.* § 8.

165. Am. Sub. S.B. 167, Gen. Assem. (Ohio 2005).

166. LEGIS. TASK FORCE, 126TH GEN. ASSEM., *Study on Eminent Domain, Final Report* (2006) (obtained from the office of Sen. Timothy Grendell) (on file with author).

167. *Id.*

168. *Id.* at 12 (under the heading *Definition of Blight: Majority Task Force Recommendation*).

proper definition of blight.¹⁶⁹ Before addressing each of these proposed definitions, it is imperative to briefly comment on the historical development of the use of blight as a foundation for the exercise of eminent domain. Though the Ohio Constitution of 1802 and of 1851 do not directly refer to the term blight, it is clear that concept of taking blighted property by means of municipal appropriation was an integral part of John Locke's labor theory of property.¹⁷⁰ In Locke's *Second Treatise*, he explains the idea of blight by stating, "if either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering and laying up; this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other."¹⁷¹ Clearly then, Locke's labor theory of property took into account the situation in which a private landowner lays waste to his property, an act that essentially amounted to forfeiture of that section of property.

In recognition of this waste/blight theory as expounded by Locke, courts across the United States, and more specifically in Ohio, sought to counter the trend of urban decay following the mass exodus to the suburbs in the 1950s and 1960s.¹⁷² As a result, "these modern urban-renewal and redevelopment efforts fostered the convergence of the public-health police power and eminent domain."¹⁷³ At this juncture in the development of government takings, it is critical to note that the essential nature of the takings clause of the Ohio Constitution reached its most outward limit of interpretation. As the *Norwood* Court opined, "[r]ather than furthering a public benefit by appropriating property to *create* something needed in a place where it did not exist before, the appropriations power was used to *destroy* a threat to the public's general welfare and well-being: slums and blighted or deteriorated property."¹⁷⁴

The *Norwood* court, however, characterizes this expansion as unsupported by tradition and instead states that, "the concept of public use was altered [from its origins]."¹⁷⁵ Despite this misapplication of the takings clause by destruction of property in the mid-twentieth century, the court in *Norwood* recognized that any taking based on blight falls within the black letter of the public use requirement, and therefore, is constitutional.¹⁷⁶

169. *Id.* at Attachment 2. (Majority recommendation, R-126-3937). *Id.* at Attachment 3. (Minority recommendation, RC 126-3899).

170. LOCKE, *supra* note 102, at 116-17.

171. *Id.* at 116.

172. *Norwood II*, 835 N.E.2d 1115, 1134 (Ohio 2006).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1135.

Accordingly, as both the legislative task force and the *Norwood* court recognized, a proper definition of blight is at the root of ensuring that the power of eminent domain cannot be abused. As Senator Grendell submitted, “Ohio should adopt a statewide definition of blight, defined by objective standards and subject to heightened scrutiny . . . subjective standards (e.g. “deteriorated”) should not be used as such standards can lead to potential abuse of eminent domain powers (e.g. Lakewood, Norwood).”¹⁷⁷ The minority-proposed definition of blight, supported by Senators Pine and Grendell, provides an objective, statewide standard that is in accordance with the history and tradition of private property rights in Ohio.¹⁷⁸

Under the minority definition of blight, private property would be secure against eminent domain abuse in three significant ways. First, the various qualifications confine the definition of “blighted property” to property that essentially offends the public safety, health, and welfare.¹⁷⁹ For example, the proposed definition limits blighted property to “a public nuisance . . . fire hazard or [a condition] otherwise dangerous to the safety of persons or property . . . vacant or unimproved lot . . . property [that] has tax delinquencies that exceed the value of the property . . . property poses a direct threat to public health or safety . . . [and any] abandoned property.”¹⁸⁰

In contrast, the majority definition states that property is blighted if it fits two or more of the following conditions: “age and obsolescence; non-compliance with building, housing or other codes; excessive dwelling unit density; overcrowding of buildings on the land; [and any] faulty lot layout.”¹⁸¹ Based upon this broad definition, the property at issue in *Norwood* would qualify as a blighted area because of a lack of compliance with codes, faulty lot layout, and sheer age of the property. Thus, the majority definition is not only contrary to the ruling in *Norwood*, but also offends the very foundation of private property rights in Ohio.¹⁸²

Second, the minority proposal includes a restrictive definition of “blighted area” to ensure that heterogeneous areas that may have spot blight are not appropriated as a whole community.¹⁸³ The provision states that a blighted area

177. LEGIS. TASK FORCE, *supra* note 166. (Sen. Grendell’s letter to the task force as included in the Final Report).

178. *See id.* at Attachment 3. (Minority recommendation, RC 126-3899).

179. LEGIS. TASK FORCE, *supra* note 166, §1.08(A)(1)-(9).

180. *Id.*

181. LEGIS. TASK FORCE, *supra* note 166, at Attachment 2, §1.08(B)(2)(a)-(q) (Majority recommendation, R-126-3937).

182. *See generally* OHIO CONST. of 1851; OHIO CONST of 1802; NORTHWEST ORDINANCE OF 1787; U.S. CONST. (1789).

183. LEGIS. TASK FORCE, *supra* note 166, at Attachment 3 § 1.08(B).

is “a contiguous area in which over ninety per cent of all properties are blighted properties.”¹⁸⁴ In contrast, the majority proposal provides that a blighted area is “an area in which at least fifty per cent of the parcels are blighted parcels.”¹⁸⁵ In addition to the lax requirements under the majority proposal that define a blighted parcel, there is no real limitation on finding that at least fifty percent of the property in the area is blighted because there is no requirement that the blighted area is contiguous.¹⁸⁶ Therefore, the majority position fails to reign in the definition of blight to prevent abuses of eminent domain power, while the minority position promotes a strict meaning of blight and blighted area that is consistent with the natural rights recognized in the Ohio Constitution and throughout the Western Legal Tradition.

Finally, the minority recommendation provides a section that specifically addresses the issue of taking private property for private purposes. In section 1.63.xx, subsection A, the minority proposal states the following:

(A) No property that a state agency acquires by eminent domain may be used for any private commercial enterprise, economic development, or any other private use unless that property is conveyed or leased to one of the following:

- (1) A private entity that is a public utility or common carrier;
- (2) A private entity that occupies an incidental area within a publicly owned and occupied project;
- (3) A private entity when the condition of the property at the time of the taking poses an existing threat to public health and safety and the entity that is taking the property by eminent domain establishes by clear and convincing evidence that the property is a blighted property as defined in section 1.08 of the Revised Code.¹⁸⁷

Even though the minority position creates exceptions to taking private property for private use, the majority position fails to even mention a limitation of any sort on appropriations for private use.¹⁸⁸ One possible conclusion maintains that the majority position fails to state a limitation on private appropriation as a direct response to the holding in *Norwood*. Though this omission may be in accord with the current status of case law, the failure to explicitly limit such takings in a constitutional amendment leaves the door wide open for takings of

184. *Id.*

185. LEGIS. TASK FORCE, *supra* note 166, at Attachment 2 §1.08(A)(1).

186. *Id.*

187. *Id.* at Attachment 3 §1.63.xx(A)(1)-(3).

188. *Id.* (specifically the Majority Report).

private property for private use, if a future decision abandons the precedent established by *Norwood*.

The unanimous decision in *Norwood* provides the support and constitutional authority for the Ohio General Assembly to narrowly define blight.¹⁸⁹ Unfortunately, the General Assembly failed to adopt the minority position, a decision that may result in *Kelo*-type takings across the state of Ohio in the near future.¹⁹⁰

IV. CONCLUSION

Though most citizens of Ohio are probably unaware of the potential implications of Senate Bill 167 and the current code provision,¹⁹¹ it is clear that Senator Tim Grendell's proposed definition of blight is not only aptly suited to protect the interests of private property owners, but also is in accord with the historical foundations of private property rights in Ohio. The Founders of the United States, in drawing on these historical bases, recognized the right to own property as a fundamental right that should only be tread upon for the *public use*, not for the general welfare, private gain, or even economic gain for the municipal, state, or federal government.

Thus, regardless of whether one adheres to Locke's notion of private property ownership as a natural right, or Blackstone's societal conventions, the American view of private property rights, as based in the Western Legal Tradition, is clear and unambiguous. Madison, Jefferson, and Locke all held private property rights to be among those that are natural and inherent in mankind.¹⁹² Having modeled the Northwest Ordinance of 1787 and the various

189. See discussion *supra*, Part II.

190. OHIO REV. CODE ANN. § 303.26. This definition clearly supports the majority position. The provision states,

"Blighted area" means an area within a county but outside the corporate limits of any municipality, which are by reason of the presence of a substantial number of slum, deteriorated, or deteriorating structures, *predominance* of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, insanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions to title, or the existence of conditions which endanger life or property by fire and other causes, or *any combination of such factors*, substantially impairs or arrests the sound growth of a county, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use. *Id.* (emphasis added).

191. *Id.*

192. See discussion *supra*, Part III, at Section A.

versions of the Ohio Constitution on those principles, it is imperative that Ohioans not abandon the very foundation on which their rights as citizens are based. Unfortunately, the majority proposed definition of blight and section 303.26 of the current code, fail to understand and appreciate the danger of departing too far from the foundation. Therefore, the Ohio General Assembly should re-examine Senator Tim Grendell's proposed minority definition of blight to prevent the further expansion of eminent domain powers by the state.

On a final note, while both the court in *Norwood* and the legislature recognized that *Kelo*-type takings were not supported in the organic laws of Ohio, neither body took the necessary steps to enforce Article 1, §19 of the Ohio Constitution. Thus, it should be no surprise there will be another *Norwood* that will bring this issue back into the public discourse. Perhaps this brief exposition and analysis will inform the courts, legislature, and citizens of Ohio of their own history so that when future debate arises, the necessary individuals will be equipped to act within the laws of nature and in accord with the wisdom of our founders.