FROM NEW LONDON TO NORWOOD: A YEAR IN THE LIFE OF EMINENT DOMAIN

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ABSTRACT

A little more than a year after the U.S. Supreme Court's decision in Kelo v. City of New London *upheld the use of eminent domain for economic development, the Ohio Supreme Court became the first state supreme court to address a factual situation raising the same issues. In* City of Norwood v. Horney, *the Ohio court repudiated the* Kelo *rationale and rejected Norwood's proposed takings. Property rights advocates quickly hailed* Norwood *as a model for other state courts to follow in defending individual land owners from eminent domain abuse. This Note argues that* Norwood*'s holding is incoherent and does nothing to resolve the language-based quagmire that inflames the eminent domain debate. This Note instead contends that the Connecticut Supreme Court's more nuanced* Kelo v. City of New London *opinion is a superior state court model, which better captures the necessary balance between individual property rights and urban revitalization plans involving eminent domain.*

INTRODUCTION

Imagine a city official looking out at a once-thriving municipality. Like that official, the residents have stuck by the city from its heyday through its struggles and still call it home. The population has decreased, jobs are in dwindling supply, and industrial areas lie abandoned as new economies elsewhere replace the old. The city official grapples with the complexity of the situation: the official

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empathizes with the property rights of the residents and the sentimental value they place on their homes, but the desperate need for and practical reality of urban revitalization are forcing the town's leaders to consider taking those homes away. Complicating matters even further, although the United States Supreme Court appeared to permit the use of eminent domain for urban renewal in *Kelo v. City of New London*,[1] the Ohio Supreme Court—the first state supreme court to confront a factual scenario raising the same issues—blatantly declined to follow the *Kelo* rationale.[2] Moreover, it failed to announce a clear alternative to use in the state context.[3] In July 2006, the Ohio Supreme Court decided *City of Norwood v. Horney*,[4] striking down Norwood's proposed condemnation of the appellants' property.

Norwood was decided in the middle of the "firestorm of controversy"[5] that followed *Kelo*. To onlookers, the *Kelo* decision interpreted the Public Use Clause of the Fifth Amendment[6] to permit takings that transferred property to private owners for the purpose of economic development.[7] Citizens from across the political spectrum decried the invasion on individual property rights and the sanctity of the home.[8] Responses ranged from a grassroots effort to condemn Justice David Souter's home in New Hampshire[9] to proposed federal legislation that would have limited the uses of eminent domain.[10]

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

2. *See* City of Norwood v. Horney, 853 N.E.2d 1115, 1142 (Ohio 2006) ("[A]n economic or financial benefit alone is insufficient to satisfy the public-use requirement . . . .").

3. *See infra* Parts I.B, II.

4. City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006).

5. *Restricting Eminent Domain*, CHATTANOOGA TIMES FREE PRESS, May 26, 2006, at B6.

6. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

7. *See, e.g.*, Marie Price, *Eminent Domain Petition is Filed*, TULSA WORLD, Dec. 21, 2005, at A11 ("In [*Kelo*], the [C]ourt said the U.S. Constitution allows the government to condemn property for private development purposes if the result would increase jobs or tax revenue.").

8. *See* Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 ("[T]he result was a firestorm of public resentment that cut across party and ideological lines.").

9. *See id.* (noting that a resident of California filed a petition to condemn Justice Souter's New Hampshire home because Justice Souter had voted with the majority).

10. *See* Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005) (attempting to require that "'public use' . . . not be construed to include economic development"); *see also* Sonya D. Jones, Note and Comment, *That Land Is Your Land, This Land Is My Land . . . Until the Local Government Can Turn It for a Profit: A Critical Analysis of* Kelo v. City of New London, 20 BYU J. PUB. L. 139, 161 (2005) ("Within five days

As the dust began to settle, property rights advocates turned their attention to language in the *Kelo* majority opinion that emphasized that states could still enact harsher restrictions on their own exercise of eminent domain.[11] State legislatures responded.[12] And citizens themselves exerted their political influence: during the 2006 midterm elections, various state ballots included measures to restrict eminent domain, ten of which passed.[13]

Perhaps due to the visibility of the legislative responses to citizens' concerns, property rights advocates have closely monitored the activity of state legislatures in the wake of *Kelo*.[14] Beyond this

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of the announcement of the *Kelo* decision, Sen. John Cornyn (R-TX) proposed the Protection of Homes, Small Businesses, and Other Private Property Rights Act of 2005, which would withhold federal funds from states that use eminent domain power for economic development.").

11. *E.g.*, Patricia H. Lee, *In the Aftermath of* Kelo v. New London*, a Resurrection in* Norwood*: One Public Interest Attorney's View*, 29 W. NEW ENG. L. REV. 121, 139–40 (2006) (praising *Norwood* and calling for states to "resurrect . . . the constitutional protections tossed out by the [U.S.] Supreme Court"). *Kelo* invites this argument:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005).

12. *See, e.g.*, T.R. Reid, *Missouri Condemnation No Longer So Imminent; Supreme Court Ruling Ignites Political Backlash*, WASH. POST, Sept. 6, 2005, at A2 (reporting that within three months of the *Kelo* decision, three states passed new laws restricting eminent domain and "hundreds of local governments around the country" began considering similarly restrictive ordinances); *see also* Nat'l Conference of State Legislatures, Eminent Domain 2006 State Legislation, http://www.ncsl.org/programs/natres/emindomainleg06.htm (last visited Mar. 7, 2008) (reporting that all of the forty-four state legislatures in session in 2006 at least considered legislation to restrict eminent domain and that twenty-eight of those states actually passed bills to that effect). The Castle Coalition, a project of the Institute of Justice, includes a section discussing how to advocate for legislative reform as a regular citizen in its "Eminent Domain Abuse Survival Guide." CASTLE COALITION, EMINENT DOMAIN ABUSE SURVIVAL GUIDE: GRASSROOTS STRATEGIES FOR WINNING THE FIGHT AGAINST EMINENT DOMAIN ABUSE 23–24 (n.d.), *available at* http://www.castlecoalition.org/pdf/publications/survival-guide.pdf.

13. *An American's Home Is Still Her Castle; Lexington*, ECONOMIST, Nov. 25, 2006, at 36. For example, in New Hampshire, more than 85 percent of voters voted in favor of an amendment to the state constitution prohibiting the transfer of taken property, "directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property." CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 33 (2007) (quoting Constitutional Amendment Con. Res. 30, 159th Gen. Court, Reg. Sess. (N.H. 2006)), *available at* http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

14. *See* Castle Coalition, Legislative Center, http://www.castlecoalition.org/legislation/index.html (last visited Mar. 7, 2008) (cataloging state and federal legislative activity in detail).

flurry of legislative action, the spotlight has also expanded to include the state courts, which interpret the existing and newly enacted eminent domain statutes.[15] It is unclear whether the judiciary will offer solace to property rights advocates as legislatures did given that, after all, it was a court, albeit the U.S. Supreme Court, that construed "public use" so broadly.[16] After *Norwood*, the question of what role the state courts should play in the takings debate demands even more attention. Property rights advocates have argued that future state courts considering economic development issues should use *Norwood* as a model for deciding those cases.[17]

This Note evaluates *Norwood* as such a potential model. Part I provides the factual background and legal findings of *Kelo v. City of New London* and *City of Norwood v. Horney*. Part II examines more closely the Ohio Supreme Court's holding in *Norwood* and clarifies that decision. Part III goes on to explain how the transmutation of language in the eminent domain debate has muddied the usefulness of *Norwood* as a model decision. Part IV proposes that revisiting a different state court opinion—the Connecticut Supreme Court's opinion in *Kelo v. City of New London*[18]—offers a better framework than *Norwood* does for state courts deciding the legality of takings in economic development proposals. This Note warns that despite its first-in-time position among *Kelo*'s progeny, the Ohio Supreme Court's *Norwood* decision should not be used as a model and that the Connecticut Supreme Court in *Kelo* suggested a superior approach.

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15. Justice Stevens anticipated that state courts would play a key role in the future of eminent domain when he referred to both state constitutional law and state statutes. *See Kelo*, 125 S. Ct. at 2668 (noting that states' public use restrictions "have been established as a matter of state constitutional law" and by limiting language within state statutes).

16. "Public use" is typically judged to have two competing definitions. The "broad" definition of "public use" equates it with "public advantage." Kelo v. City of New London, 843 A.2d 500, 531 n.41 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005). The "narrow" definition means that "the property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the property taken." *Id.* (quoting 2A P. NICHOLS, EMINENT DOMAIN § 7.02[2]–[7] (J. Sackman ed., rev. 3d ed. 2003)).

17. *See, e.g.*, Lee, *supra* note 11, at 139–40 (praising *Norwood* and calling for states to "resurrect . . . the constitutional protections tossed out by the [U.S.] Supreme Court").

18. Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

I. *KELO V. CITY OF NEW LONDON* AND *CITY OF NORWOOD V. HORNEY*

It is impossible to proceed in any eminent domain discussion without mentioning *Kelo*. To that end, this Part first highlights the necessary facts from *Kelo* and briefly summarizes the U.S. Supreme Court's legal analysis. It then goes on to describe *Norwood*. It explains how the Ohio Supreme Court invoked three major court opinions to address the status of takings law in Ohio, but ultimately disposed of the case at hand using the void-for-vagueness doctrine.

A. Kelo v. City of New London

New London is a city on the eastern coast of Connecticut where the Thames River empties into the Long Island Sound.[19] The Fort Trumbull area of New London is a peninsula that juts out eastward into the Thames.[20] In 1990, a state agency designated New London as a "distressed municipality."[21] Employment rates were declining, and specifically, in 1996, the United States Naval Undersea Warfare Center on Fort Trumbull closed, leading to "more than 1000 positions" being transferred sixty miles east to Newport, Rhode Island.[22] In 1998, the unemployment rate of New London "was nearly double that of [Connecticut], and its population of just under 24,000 residents was at its lowest since 1920."[23]

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19. *Kelo*, 125 S. Ct. at 2658.

20. *Id.* at 2659.

21. *Id.* at 2658. "Distressed municipality" is defined in the Connecticut Statutes. CONN. GEN. STAT. ANN. § 32-9p (West 2003). There are several ways that a city can be designated a "distressed municipality," but generally, the city must meet certain "thresholds of distress" in areas such as "high unemployment and poverty, aging housing stock and low or declining rates of growth in job creation, population and per capita income." *Id.* Those thresholds may be set at either the state or federal level. *Id.* For example, if a city met the criteria to be eligible for an Urban Development Action Grant, it could be designated a "distressed municipality." *Id.* The United States Department of Housing and Urban Development issues regulations that lay out those criteria. The grant was part of a federal program intended to encourage municipalities to leverage private funds into redevelopment projects. *See* H.R. REP NO. 95-634, at 45 (1977) (Conf. Rep.), *as reprinted in* 1977 U.S.C.C.A.N. 2965, 2965 (clarifying that the program aimed to "stimulat[e] . . . private investment and community revitalization" in areas of outmigration and stagnation). Although the statute authorizing the program remains active, Congress has not appropriated funds for the program since 1988. Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101, 130 n.166 (1995).

22. *Kelo*, 843 A.2d at 510. The court noted that "approximately 1900 government sector positions" had been lost during the years leading up to the case. *Id.*

23. *Kelo*, 125 S. Ct. at 2658.

In January 1998, the Connecticut state bond commission authorized bonds to support planning activities, property acquisition, and the ultimate creation of a state park in the Fort Trumbull area.[24] Thanks to these bonds, New London was able to begin the process of redevelopment. For New London, the bonds were a long-awaited turn to secure economic stability; for years, the city had watched fellow municipalities finance revival projects with state bonds.[25] A month later, Pfizer Inc. announced that it was developing a global research facility adjacent to Fort Trumbull.[26] Within another couple of months, the city council authorized the New London Development Corporation (NLDC), a private nonprofit corporation established to assist the city in planning economic development, to prepare a development plan for the area.[27] With the assistance of RKG Associates, a private real estate development consulting firm,[28] the NLDC's final plan was a "composite of the most beneficial features" of no fewer than six alternative plans.[29] To realize the plan, the NLDC managed to purchase most of the real estate in the ninety-acre Fort Trumbull area, but its negotiations with Susette Kelo and eight other owners failed.[30] The NLDC voted to use the power of eminent domain—pursuant to chapter 132 of the Connecticut General Statutes[31]—to acquire the properties whose owners had not been

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24. *Kelo*, 843 A.2d at 508. The state "authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park." *Kelo*, 125 S. Ct. at 2659.

25. DVD: Distinctive Aspects of American Law, *Kelo v. City of New London*, 545 U.S. 469 (2005) (Duke University School of Law 2006) (on file with the *Duke Law Journal*).

26. *Kelo*, 843 A.2d at 508. The research facility cost approximately $300 million to construct. *Kelo*, 125 S. Ct. at 2659. In June 2001, the Pfizer facility opened and began operations. *Kelo*, 843 A.2d at 509.

27. *Kelo*, 843 A.2d at 508.

28. *Id.* at 553.

29. *Id.* at 510. Those alternate plans included the following:

> (1) no action, with the assumption that some development activities would proceed under the direction of other entities, such as the United States Navy, without action by the development corporation; (2) recreational and cultural facilities to complement the adjacent state park; (3) residential construction with minor amounts of retail and office space; (4) a business campus supported by the hotel and conference center; and (5) two mixed use alternates combining residences, recreational, commercial, hotel and retail uses in differing arrangements.

Id. at 510 n.6. The development plan was projected to generate between "(1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also [were] expected to generate between $680,544 and $1,249,843 in property tax revenues for the city." *Id.* at 510.

30. *Kelo*, 125 S. Ct. at 2660.

31. CONN. GEN. STAT. ANN. § 8-193 (West 2003).

willing to sell.[32] In November 2000, the NLDC filed the condemnation proceedings.[33]

The development plan concerned seven out of about 115 land parcels in the complete Fort Trumbull area.[34] Susette Kelo and the other eight owners possessed property on two of those seven parcels, "parcel 3" and "parcel 4A."[35] Some of the properties were owner-occupied, and the rest were held as investments.[36] Susette Kelo had lived in her Fort Trumbull home since 1997 and especially liked it "for its water view."[37] Under the development plan, parcel 3 was "projected to have at least 90,000 square feet of high technology research and development office space and parking."[38] Parcel 4A was "designated for 'park support'; it [would] provide parking or retail services for the adjacent state park."[39] In December 2000, Susette Kelo and the other eight owners filed suit to enjoin the takings.[40] The New London Superior Court granted a permanent restraining order prohibiting the taking of the parcel 4A properties, but it allowed the parcel 3 takings.[41] Both sides appealed, and the Connecticut Supreme Court reversed as to parcel 4A.[42] In other words, all of New London's proposed takings were permissible, according to Connecticut's highest court. Susette Kelo and the other property owners took their case to the Supreme Court of the United States.

In a 5–4 decision, the Supreme Court narrowly affirmed the Connecticut Supreme Court's decision to uphold the takings.[43] Writing for the majority, Justice John Paul Stevens presented the issue as follows: "The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the

32. *Kelo*, 843 A.2d at 510–11.

33. *Id.* at 511.

34. *Id.* at 509. The plans for each of these areas ranged from a waterfront hotel and conference center on parcel 1 to office, parking, and retail space on parcel 5. *Id.*

35. *Kelo*, 125 S. Ct. at 2660. Parcel 4 was "subdivided into two smaller parcels, 4A and 4B." *Kelo*, 843 A.2d at 509.

36. *Kelo*, 125 S. Ct. at 2660.

37. *Id.*

38. *Kelo*, 843 A.2d at 509.

39. *Id.* The proposed Fort Trumbull State Park was planned for parcel 2. *Id.*

40. *Id.* at 511.

41. *Kelo*, 125 S. Ct. at 2660.

42. *Id.*

43. *Id.* at 2669.

Constitution."[44] On one end of a spectrum, he recognized that the taking of private property for the sole purpose of transferring it to another private owner was necessarily unconstitutional, regardless of any compensation.[45] On the other end, he recognized that if the taking were for public use, then with just compensation, the taking was constitutional.[46] The situation in *Kelo*, as with many such cases, fit somewhere in the middle.

The Court relied on its holdings in *Berman v. Parker*[47] and *Hawaii Housing Authority v. Midkiff*[48] in laying out the broad, deferential stance its takings precedent had followed.[49] In *Berman*, the Court upheld the taking of a nonblighted structure within a development area that was as a whole blighted for eventual transfer to private parties.[50] In *Midkiff*, the Court upheld the transfer of taken land to private parties to break up an oligopoly of land ownership.[51] Based largely on these two cases, the Court held that the transfer of property to private ownership did not automatically invalidate the takings.[52] Instead, it affirmed the Connecticut Supreme Court's decision that the takings were constitutional.[53]

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44. *Id.* at 2658. Justice Stevens's choice of the neutral phrase "proposed disposition of this property" is not insignificant. At the heart of the eminent domain debate is whether the "proposed disposition" was "urban redevelopment" or whether it was "economic development." *See infra* Part III.B. Of course, this semantic difference might just be a red herring.

45. *Kelo*, 125 S. Ct. at 2661 ("On the one hand, 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.").

46. *Id.* ("On the other hand, it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking . . . .").

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

48. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

49. *Kelo*, 125 S. Ct. at 2663–64.

50. *Berman*, 348 U.S. at 35; *accord Kelo*, 125 S. Ct. at 2663. In Justice Stevens's view, the key to *Berman* was not the *taking* itself, but rather the Court's holding that the area in question must be looked at *as a whole*, which therefore justifies the public use. *Kelo*, 125 S. Ct. at 2665 n.13. Justice Stevens relied on the effect, not the actual taking itself.

51. *Midkiff*, 467 U.S. at 242; *accord Kelo*, 125 S. Ct. at 2663–64.

52. *Kelo*, 125 S. Ct. at 2660. Justice Stevens also cites to *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986 (1984), as a further argument against seeking a bright-line rule in takings jurisprudence. *Kelo*, 125 S. Ct. at 2663 n.10. *Ruckelhaus* provided an example of a transfer of property from private owners to other private owners, but which had a direct benefit to the public. Perhaps due to the fact that the property involved was not land, *Ruckelhaus* is typically not discussed when legal scholars refer to the precedents leading up to *Kelo*. *See, e.g.*, Alan T. Ackerman, Kelo v. City of New London*: The Answer to the Public Use Question or Just a Source of More Questions?*, *in* CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION,

The decision was an ostensible blow to property rights advocates, but Justice Stevens stressed that the holding was a mere baseline for takings law. He wrote that states, through their statutes and their constitutions, could afford greater protection for their citizens from eminent domain actions:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.[54]

This limitation in *Kelo* amounted to a virtual permission slip for state courts to circumvent the decision.[55] Whether this was Justice Stevens's intention or not, Justice Sandra Day O'Connor bluntly criticized this portion of the majority's opinion as "an abdication of [the Supreme Court's] responsibility."[56] Unsurprisingly, *Kelo*'s critics have seized upon this language from Justice Stevens's opinion and turned the Supreme Court's permission into a political mandate.

B. City of Norwood v. Horney

City of Norwood v. Horney was the first major state supreme court case to provide an opportunity to apply the *Kelo* ruling directly to a set of analogous facts.[57] The Ohio court made a point of

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AND BENEFITS 293, 299–301 (Alan T. Ackerman & Darius W. Dynkowski eds., 2d ed. 2006) (discussing only *Berman* and *Midkiff* together).

53. *Kelo*, 125 S. Ct. at 2669.

54. *Id.* at 2668. The majority cited Michigan's *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), as an example of state constitutional law acting as a more stringent limit on eminent domain than the federal constitution. *Kelo*, 125 S. Ct. at 2668 n.22.

55. *Cf. id.* at 2677 (O'Connor, J., dissenting) ("Today nearly all real property is susceptible to condemnation on the Court's theory.").

56. *Id.* Justice O'Connor also pointed out the irony of asking states to "compensat[e] for [the Supreme Court's] refusal to enforce properly . . . a provision meant to curtail state action." *Id.*

57. Between the *Kelo* decision in June 2005 and the *Norwood* decision in July 2006, the highest courts of seven states cited the Supreme Court's *Kelo* decision but did not directly address its legal holding. *See* Kellogg v. Dearborn Info. Servs., 119 P.3d 20, 24 (Mont. 2005) (Rice, J., dissenting) (employing a quote by James Madison from Justice O'Connor's dissent stating that a "just government" should secure to each citizen "whatever is his own"); Nevadans for the Prot. of Prop. Rights, Inc. v. Heller, 141 P.3d 1235, 1243–44 (Nev. 2006) (noting that a voter initiative seeking to restrict eminent domain was responding to the *Kelo* decision); *id.* at

recognizing that its decision fit within a much broader debate,[58] and referenced the section of the holding in *Kelo* stating that state courts and legislatures could restrict takings pursuant to state law and constitutions.[59]

The appellants in *Norwood* were two couples, Carl and Joy Gamble and Joseph P. Horney and his wife, Carol Gooch.[60] The Gambles had lived in their neighborhood in the city of Norwood for more than thirty-five years.[61] Horney and his wife had previously lived in Norwood, and the couple owned and operated rental properties in the area at the time of the takings.[62]

Norwood itself is surrounded by the city of Cincinnati.[63] It once was "home to several manufacturing plants and businesses that provided a substantial tax base."[64] Since the late 1960's, however, it had economically and physically declined.[65] Prior to the suit,

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1251–52 (Maupin, J. dissenting) (the same); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1126 (Nev. 2006) (citing *Kelo* in support of a holding that states may interpret their own constitutions as restricting their taking powers more than the federal constitution does); *In re* Initiative Petition No. 382, 142 P.3d 400, 408 (Okla. 2006) (noting that *Kelo* "has prompted a national discussion on the proper limitations on the power of eminent domain"); Conti v. R.I. Econ. Dev. Corp., 900 A.2d 1221, 1231 (R.I. 2006) (citing *Kelo* in support of the proposition that the Just Compensation Clause of the federal constitution applies to the states via the Fourteenth Amendment); R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 104 (R.I. 2006) (citing *Kelo* for the proposition that a condemnation must be done in good faith and that a comprehensive plan is indicative of the public use of the takings); Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006) (holding that despite the federal constitution's allowance of takings that get conveyed to private owners, *Kelo* allows states to construe their own constitutions more narrowly, which South Dakota does); Hoffman Family, L.L.C. v. City of Alexandria, 634 S.E.2d 722, 731 (Va. 2006) (noting the inapplicability of *Kelo* to a condemnation for a public utility to be run by the city and that *Kelo*'s holding only applies to the federal constitution); Norfolk Redevelopment & Hous. Auth. v. C & C Real Estate, Inc., 630 S.E.2d 505, 509 (Va. 2006) (citing *Kelo* as paralleling the takings clause of the Virginia Constitution); HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 121 P.3d 1166, 1168 (Wash. 2005) (distinguishing *Kelo* because the condemnation was for a monorail—a clear public use); *id.* at 639 (Johnson, J., dissenting) (citing *Kelo* because states are permitted to restrict the takings power); *see also* Bd. of County Comm'rs v. Lowery, 136 P.3d 639, 650 (Okla. 2006) (explaining a holding that was inconsistent with *Kelo* based on Justice Stevens's permitting states to interpret state laws more strictly).

58. *See* City of Norwood v. Horney, 853 N.E.2d 1115, 1122 (Ohio 2006) ("Our consideration does not take place in a vacuum.").

59. *Id.*

60. *Id.* at 1124 n.3.

61. *Id.*

62. *Id.*

63. *Id.* at 1123.

64. *Id.*

65. *See id.* at 1124 (describing the construction of Interstate 71 and the concomitant and subsequent replacement of residences with businesses).

Rookwood Partners Ltd., a private company, began discussions with Norwood about redeveloping the appellants' neighborhood.[66] The plans envisioned "more than 200 apartments or condominiums and over 500,000 square feet of office and retail space . . . as well as two large public-parking facilities . . . with spaces for more than 2,000 vehicles."[67] The expected increase in city revenue from the proposed project was approximately $2 million annually.[68] The City of Norwood was especially interested in the proposed project because it was operating with a deficit and therefore unable to finance redevelopment on its own.[69] Rookwood initially asked that Norwood use its power of eminent domain to prepare the properties, but Norwood insisted that Rookwood first attempt to negotiate the purchase of the property directly with the current owners.[70] Rookwood successfully acquired most of the needed properties via voluntary purchase but not those owned by the appellants.[71]

To use its power of eminent domain, Norwood was obligated to commission an urban renewal study of the prospective development area.[72] The Kinzelman Kline Grossman consulting firm (KKG) prepared the study and concluded that "the neighborhood was a 'deteriorating area' as that term is defined in the [City of Norwood Codified Ordinances (Norwood Code)]."[73] The city council adopted

66. *Id.* Significantly, in *Norwood* the private developer approached the municipality whereas in *Kelo* the state bond provided the impetus for the municipality to approach the private developer. *See supra* text accompanying notes 24–26.

67. *Norwood*, 853 N.E.2d at 1124. The residential and retail spaces would have been owned by Rookwood, and the parking facilities would have been owned by Norwood. *Id.*

68. *Id.*

69. *Compare id.* (suggesting that the financial impetus for the redevelopment in Norwood was a private company), *with* Kelo v. City of New London, 843 A.2d 500, 508 (Conn. 2004) (noting that the financial impetus for the redevelopment in New London was a state bond), *aff'd*, 125 S. Ct. 2655 (2005).

70. *Norwood*, 853 N.E.2d at 1124.

71. *Id.* at 1125. Many of the residents in the neighborhood were happy to sell and ended up enjoying lucrative compensation. *See generally* Steven Kemme & Gregory Korte, Editorial, *Untold Story*, CIN. ENQUIRER, Apr. 30, 2006, at 1E (providing details on how "most of the . . . property owners were handsomely compensated" and describing the legal battles of the six holdouts).

72. *Norwood*, 853 N.E.2d at 1125 n.4 (citing NORWOOD, OHIO, CODIFIED ORDINANCES §§ 163.03 to 163.09, which required a "study of an area in order to determine whether redevelopment [was] needed").

73. *Id.* at 1125. The Norwood Code distinguished between a "deteriorated area" and a "deteriorating area." *Id.* at n.5. According to CODIFIED ORDINANCES § 163.02(b), a "deteriorated area" was the equivalent of a slum or blighted area. *Id.* In contrast, according to CODIFIED ORDINANCES § 163.02(c), a "deteriorating area" was

the development plan and proceeded to file complaints to appropriate the appellants' properties.[74] After a trial that lasted several days, the trial court unearthed inconsistencies in KKG's study, including the firm's conflation of the Norwood Code sections that defined a "deteriorating area" and a "deteriorated area."[75] Nevertheless, the court addressed both standards and concluded that Norwood had abused its discretion in concluding that the neighborhood was a "*deteriorated* area."[76] The court, however, found no such abuse of discretion in Norwood's characterizing the neighborhood as a "*deteriorating* area" and allowed the condemnations to proceed.[77] The property owners lost their appeal and took their cases to the Ohio Supreme Court.[78]

The supreme court began its discussion of the relevant constitutional considerations by addressing legal scholarship espousing the special place private property rights enjoyed within "our theory of democracy and notions of liberty."[79] The court declared that "Ohio has always considered the right of property to be a fundamental right."[80] Then the court turned its attention and recognized the "political necessity" of the power of eminent domain.[81] It noted that like the federal constitution, Ohio's constitution balanced these interests by conditioning eminent domain on the equitable condition of public use.[82] In setting up the historical development of the public use doctrine in Ohio—and possibly

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> an area, whether predominantly built up or open, which is not a slum, blighted or deteriorated area but which . . . 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. (citing CODIFIED ORDINANCES § 163.02(c)).

74. *Id.* at 1125–26.

75. *Id.* at 1126.

76. *Id.* (emphasis added).

77. *Id.* at 1126–27 (emphasis added).

78. *Id.* at 1127.

79. *Id.* at 1128 (citing as an example ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 10 (1999)).

80. *Id.* at 1129; *see also* OHIO CONST. art. I, § 1 ("All men . . . have certain inalienable rights, among which are those of . . . acquiring, possessing, and protecting property."); OHIO CONST. art. I, § 19 ("Private property shall ever be held inviolate, but subservient to the public welfare . . . .").

81. *Norwood*, 853 N.E.2d at 1129.

82. *Id.* at 1130; *see also* OHIO CONST. art. I, § 19 ("[I]n all other cases, where private property shall be taken for public use, a compensation therefor shall first be made . . . .").

foreshadowing its ultimate holding—the court noted the difficulty of answering whether the public use condition was satisfied and referred to Justice O'Connor's *Kelo* dissent for the simple proposition that this was a "difficult question."[83] It then carefully traced the legal authorities that had dealt with the public use doctrine since the founding of the United States.[84] The discussion eventually converged on the same federal cases that appear regularly in the public use debate and on which *Kelo* heavily relied: *Berman* and *Midkiff*.[85] From that nexus, the Ohio court framed the issue as follows: "In some jurisdictions, a belief has taken hold that general economic development is a public use. . . . *Kelo* confirmed this view for purposes of federal constitutional analysis despite the fact that many legal commentators have expressed alarm at the potential abuse of the eminent-domain power in such circumstances."[86] The court unsurprisingly held:

> In addressing the meaning of the public-use clause in Ohio's Constitution, we are not bound to follow the United States Supreme Court's determinations of the scope of the Public-Use Clause in the federal Constitution, and we decline to hold that the Takings Clause in Ohio's Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause in *Midkiff* . . . .[87]

The Ohio Supreme Court then looked at the role of the judiciary in the inquiry. It held that although some deference is due to legislative determinations of public use, the separation of powers doctrine would necessarily be violated if the judiciary always acquiesced to the legislature's purported invocation of the police power.[88] The court reiterated at least four times in its opinion the "limited" though "critical" role the judiciary must play by interposing itself as a check on the legislature.[89] The court's self-admonition was

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83. *Norwood*, 853 N.E.2d at 1130.

84. *Id.* at 1131–35.

85. *Id.* at 1135.

86. *Id.* at 1135–36 (citations omitted).

87. *Id.* at 1136 (citations omitted).

88. *See id.* at 1137 (asserting the danger in allowing the state to use police power as a means to "virtually immunize all takings from judicial review"). The police power was one of the key rationales given in *Berman* and *Midkiff* for deferring to the legislature's determination of public use. *Id. But see infra* note 138.

89. *See, e.g.*, *Norwood*, 853 N.E.2d at 1138 ("The scrutiny by the courts in appropriation cases is limited in scope, but it clearly remains a critical constitutional component.").

grounded in a fear of powerful private interest groups exerting their influence on susceptible public agencies with eminent domain authority.[90] This fear was articulated by both Justice O'Connor in her dissent[91] and Justice Peter T. Zarella in his Connecticut Supreme Court *Kelo* dissent.[92]

With these principles in mind, the Ohio court turned its attention to the public use at issue in the proposed Norwood development plan. In a definitive yet paradoxically noncommittal statement, the court chose not to distinguish the facts from *Kelo* but rather to reject the *Kelo* opinion altogether:

> [W]e find that the analysis by the Supreme Court of Michigan in [*County of Wayne v.*] *Hathcock* and those presented by the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution.[93]

On this legal basis, the Ohio court ultimately held that "[a]lthough economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit."[94]

What looked like the beginning of an announcement of a test for public use in economic development contexts, however, went no further. The court instead chose to use the void-for-vagueness doctrine and notions of due process to attack the Norwood Code that authorized the takings of deteriorating areas.[95] It was therefore able to sidestep further definition of the public use concept.[96]

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90. *Id.* at 1140. The Connecticut Supreme Court was not immune to this fear either. In siding with New London, it thoroughly considered Pfizer's involvement in the creation of the development plan. Kelo v. City of New London, 843 A.2d 500, 542 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005). Although Pfizer had certain "requirements" it hoped that New London would implement, the executive vice president of RKG Associates, which had assisted the NLDC in developing the development plan, was "never told that Pfizer would not come to the city if the hotel [which was needed] was not built." *Id.* at 538. The court was ultimately satisfied that the takings were done in good faith. *Id.* at 542.

91. *Norwood*, 853 N.E.2d at 1138 (quoting Kelo v. City of New London, 125 S. Ct. 2655, 2676–77 (2005) (O'Connor, J., dissenting)); *see also infra* note 167.

92. *Norwood*, 853 N.E.2d at 1140 (quoting *Kelo*, 843 A.2d at 579 (Zarella, J., dissenting)); *see also infra* notes 108, 116 and accompanying text.

93. *Norwood*, 853 N.E.2d at 1140.

94. *Id.* at 1141 (citations omitted).

95. *See id.* at 1142–43 (analyzing the case under the void-for-vagueness doctrine). At least one commentator sharply criticized the Ohio Supreme Court's application of the void-for-

II. WHAT IS *NORWOOD*'S HOLDING?

This Part attempts to do what the Ohio Supreme Court did not and articulate a cohesive holding so that the *Norwood* decision's utility as a potential model for other state courts can be assessed. To interpret the public use clause of the Ohio Constitution, *Norwood* invoked three decisions: the Supreme Court *Kelo* dissent, the state *Kelo* dissent, and *County of Wayne v. Hathcock*.[97] Other than stating that an economic benefit can be a factor for determining public use, but not the only one,[98] the Ohio Supreme Court did not explicate how these decisions should be synthesized, let alone applied to the facts at hand. By citing the three opinions, including the *Kelo* dissent, *Norwood* did not merely use Justice Stevens's *Kelo* majority opinion as a "baseline" from which to construe the Norwood city statutes; instead, it rejected the entirety of the *Kelo* analysis.[99] Of course, the Ohio Supreme Court could not overrule the U.S. Supreme Court, but what it actually meant by its invocation of three distinct court opinions from a legal holding standpoint was not clear.[100] This Part briefly describes those three opinions and then suggests a way to synthesize them into a consistent legal principle.

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vagueness doctrine to eminent domain statutes, finding the doctrine's purposes inapposite to the property context. *See generally* Sarah Sparks, Comment and Casenote, *Deteriorated vs. Deteriorating: The Void-For-Vagueness Doctrine and Blight Takings*, Norwood v. Horney, 75 U. CIN. L. REV. 1769 (2007) (arguing against the void-for-vagueness doctrine in the eminent domain context and warning that such application might problematically lead to the doctrine's application to the "public use" clauses in statutes).

96. *See Norwood*, 853 N.E.2d at 1146 (holding that because the void-for-vagueness doctrine applied, there was no "adequate showing that the takings were for a public use"). The case was decided unanimously. *See id.* at 1153 (listing the justices concurring in the judgment).

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

98. *See Norwood*, 853 N.E.2d at 1141 ("Although economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit."); *see also infra* Part III.B (discussing the language of "economic benefit").

99. *See Norwood*, 853 N.E.2d at 1141 (stating explicitly that the approach of the *Kelo* dissent is the preferred way to interpret Section 19, Article I of the Ohio Constitution).

100. There is some indication that Ohio residents themselves are not sure which side of the debate can best use the *Norwood* decision. *See* Gregory Korte, *Owners, City Refer to Same Land Case*, CIN. ENQUIRER, Dec. 8, 2006, at 2B ("Both sides in a Clifton Heights[, Ohio,] eminent domain dispute argued their case before a state appeals court Thursday, and both cited the same Norwood case as precedent.").

A. Justice Zarella's State Kelo *Dissent*

Writing to dissent from the Connecticut Supreme Court's *Kelo* decision, Justice Zarella advocated using a heightened scrutiny test to evaluate proposed takings[101] and concluded that all of New London's proposed takings were unconstitutional.[102] Justice Zarella wanted to limit the deference the court would afford to legislative determinations of public use. Although he conceded that "[i]t is well established that judicial deference to determinations of public use by state legislatures is appropriate,"[103] he asserted that "judicial deference to legislative declarations of public use does not require complete abdication of judicial responsibility."[104]

Justice Zarella distinguished the takings pursuant to chapter 132 of the Connecticut General Statutes[105] from previously accepted definitions of public use in two ways: that proper takings "almost always are followed by an immediate or reasonably foreseeable public benefit"[106] and that "the public benefit derived from a conventional taking typically flows from the actions of the taking party."[107] Of particular concern was the fact that chapter 132 contained a provision whereby

> a development plan may be abandoned within three years of its approval, and that any properties acquired thereunder may be conveyed free of the plan's restrictions if they cannot be conveyed to a private party at fair market value pursuant to the plan. . . . Accordingly, under chapter 132 . . . the possibility that a project may be abandoned after properties have been taken by eminent domain . . . raises concerns regarding the limits of the takings power that cannot be ignored.[108]

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101. Kelo v. City of New London, 843 A.2d 500, 587 (Conn. 2004) (Zarella, J., dissenting), *aff'd*, 125 S. Ct. 2655 (2005).

102. *Id.* at 600–01.

103. *Id.* at 581.

104. *Id.* at 582.

105. CONN. GEN. STAT. ANN. § 8-200(b) (West 2003).

106. *Kelo*, 848 A.2d at 578 (Zarella, J., dissenting).

107. *Id.* at 579. The dissent further distinguished chapter 132 by comparing it directly to other Connecticut General Statutes in which the "disposition of property," that is, the transfer of taken property to private ownership, was "'incidental to' the elimination of blight" (i.e., the public use). *Id.*

108. *Id.* at 580 (describing CONN. GEN. STAT. ANN. § 8-200(b)).

The dissent pressed for a four-step heightened scrutiny test "to ensure that the constitutional rights of private property owners are protected adequately when property is taken for private economic development under chapter 132 of the General Statutes."[109] The dissent's proposed test amounted to shifting burdens of proof.[110] The linchpin to this test is the third step, where the burden shifts to the party seeking the taking. That party must show by "clear and convincing evidence" that the questioned development plan will in fact result in a public benefit.[111] Although the dissent found that the situation satisfied step one[112] and step two[113] of its test, it was not so convinced in applying step three. It found a lack of clear and convincing evidence that the plan would "actually" benefit the public.[114] The dissent summarized its problem with the development plan by likening it to a "'Field of Dreams' test":

> [I]f the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough. . . . [T]he test is premised on the concept that "if you build it, [they] will come," and fails to protect adequately the rights of the private property owners.[115]

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109. *Id.* at 587. In step one, the court should examine the facial constitutionality of the statutory scheme, and the party opposing the taking should bear the initial burden of proving that the proposed public use of private economic development is unconstitutional. *Id.* If the opposing party succeeds, the inquiry ends and the taking is invalid. *Id.* at 587–88. If not, then step two asks that the party opposing the taking prove that the primary intent of the plan is to benefit private, rather than public, interests. *Id.* at 588. Again, if the opposing party succeeds, the inquiry ends and the taking is invalid. *Id.* If not, then the test moves on to step three, where the burden shifts for the first time to the taking party to show that the proposed economic development will in fact benefit the public. *Id.* Finally, if the taking party succeeds in meeting that test, the inquiry moves to step four, in which the burden shifts back to the opposing party, who must prove that "the specific condemnation at issue is not reasonably necessary to implement the plan." *Id.* at 591. The taking only passes constitutional muster if the opposing party cannot disprove the reasonable necessity of the condemnation at this stage. *Id.*

110. *Id.* at 587.

111. *Id.* at 588. The dissent likens the level of proof required to that required in a claim of adverse possession in a civil suit. *Id.* at 589.

112. *Id.* at 593–94.

113. *Id.* at 595–96.

114. Among other pieces of evidence, the dissent noted that no development agreement had been signed at the time of the taking. *Id.* at 596.

115. *Id.* at 602.

The main point of disagreement between the dissent and the majority had to do with "whether the *actual* use to be implemented will serve the public purpose described in the development plan."[116]

B. County of Wayne v. Hathcock

The Michigan Supreme Court decided *Hathcock* on July 30, 2004, between the time that the Connecticut Supreme Court handed down its *Kelo* decision and the time that the Supreme Court heard oral arguments in *Kelo*. In *Hathcock*, the Michigan Supreme Court explicitly overturned its *Poletown Neighborhood Council v. Detroit*[117] decision from 1981, which had come to stand for what *Kelo* later came to represent—that pure economic development in which private property is transferred to other private owners is a valid public use.[118]

Detroit is located in Wayne County, Michigan.[119] As part of a $2 billion renovation to the Detroit Metropolitan Airport, the county expected problems with noise pollution for neighboring landowners.[120] It used a $21 million grant from the Federal Aviation Administration to purchase through voluntary sales the neighboring properties south of the airport where it anticipated those issues.[121] As a condition of receiving the federal grant, Wayne County was obligated to put the properties it acquired to "economically productive use."[122] To that end, it developed a construction project—called the "Pinnacle Project"—that would have resulted in a "large business and technology park with a conference center, hotel accommodations, and a recreational facility."[123] It was predicted that the Pinnacle Project would yield thirty thousand jobs and $350 million in tax revenue for

116. *Id.* at 582; *see also id.* at 584 n.13 ("[T]he question is not whether the development plan and the statutes reasonably ensure adherence to the development plan, but, rather, whether 'private sector participants' are available and willing to develop the property and whether the terms by which they agree to develop the property will result in a public benefit such that the private benefit will be incidental thereto.").

117. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

118. This Note argues, however, that this rule is an unfortunate misconstruction of what the state *Kelo* holding actually was. *See infra* Part III.

119. Wayne County, Michigan, About WC, http://www.waynecounty.com/about (last visited Mar. 7, 2008).

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

121. *Id.*

122. *Id.*

123. *Id.*

the county.[124] Wayne County's voluntary purchase efforts came up short of the ambitious plan's thirteen hundred acres, so it turned to eminent domain to acquire the remaining land owned by individual property owners.[125] Those proceedings ultimately led to the Michigan Supreme Court.

The Michigan Supreme Court only addressed the specific situation in which condemned property is transferred to private entities.[126] It identified three distinct categories of such takings that would satisfy the public use clause:[127] "(1) where 'public necessity of the extreme sort' requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of 'facts of independent public significance.'"[128]

C. Justice O'Connor's Dissent

Justice O'Connor wrote the primary dissent in *Kelo* for the Supreme Court.[129] Like the Connecticut state court's *Kelo* dissent, she also advocated limited deference to legislative determinations of what

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124. *Id.* at 771.

125. *Id.*

126. *Id.* at 781.

127. *Id.* at 783; *cf.* Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting) (identifying "three categories of takings that comply with the public use requirement").

128. *Hathcock*, 684 N.W.2d at 783 (Mich. 2004). As examples, the first category included "highways, railroads, canals, and other instrumentalities of commerce." *Id.* at 781. The second category included a petroleum pipeline over which the state retained some control. *Id.* at 782 (citing Lakehead Pipe Line Co. v. Dehn, 64 N.W.2d 903 (Mich. 1954)). And the third category included the removal of blight. *Id.* at 783 (citing *In re* Slum Clearance, 50 N.W.2d 340 (Mich. 1951)).

129. *Kelo*, 125 S. Ct. at 2671. Justice Rehnquist, Justice Scalia, and Justice Thomas joined. *Id.* Justice Thomas wrote an additional dissenting opinion arguing that an originalist approach to the text was best, and that such an analysis would yield the same conclusions Justice O'Connor reached. *Id.* at 2677 (Thomas, J., dissenting). In particular, he wrote that the holdings in *Berman* and *Midkiff* were misguided to construe the respective takings in each case as being "coterminous" with the police power. *Id.* at 2685 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984)). Justice Thomas's unique observation, however, dealt with the practical reality of whom such a taking power would likely displace in society. He wrote that the losses of personal property "will fall disproportionately on poor communities." *Id.* at 2686–87. Furthermore, "[U]rban 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.'" *Id.* at 2687 (quoting Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003)) (internal quotation marks omitted).

benefits the public.[130] She outlined three general categories that the Court's precedents have identified as complying with public use. First, if the private property taken is transferred to public ownership, the taking is permitted.[131] Second, if the private property taken is transferred to a private owner who makes the property available for the public's use, the taking is permitted.[132] Third, when the taking itself "meet[s] certain exigencies" and "serve[s] a public purpose," the taking is permitted regardless of the status of the recipient.[133]

According to Justice O'Connor, if the NLDC development plan were to fit at all in a category, it would be within this third box.[134] She posed the issue as one of first impression: "Are economic development takings constitutional?"[135] She emphatically contended that they are not.[136] Whereas both *Berman* and *Midkiff* fit within this category because the taking in each "*directly* achieved a public benefit,"[137] no such *immediate* benefit would come from the taking in the NLDC project.[138] In other words, the "exigencies" that Justice O'Connor had in mind were situations in which the "extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society."[139] Neither her reading of the record nor New

130. *Id.* at 2673 (O'Connor, J., dissenting) ("We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. . . . An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.").

131. *Id.* Justice O'Connor listed "a road, a hospital, or a military base" as examples. *Id.*

132. *Id.* Justice O'Connor listed "a railroad, a public utility, or a stadium" as examples. *Id.*

133. *Id.* The takings in *Berman* and *Midkiff* were cited for this category. *Id.*

134. *See id.* ("This case returns us . . . to the hard question of when a purportedly 'public purpose' taking meets the public use requirement.").

135. *Id.*

136. *Id.*

137. *Id.* at 2674. *But see supra* note 50.

138. Some commentators have noted that language in the dissent suggests that Justice O'Connor had become dissatisfied with what *Berman* and particularly *Midkiff*, an opinion written by Justice O'Connor, had come to stand for in the development of the public use doctrine. *See, e.g.*, Steven J. Eagle, Kelo v. City of New London*: A Tale of Pragmatism Betrayed*," *in* EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 195, 202 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) ("Some of Justice O'Connor's . . . language resembled nothing more than a mea culpa."). Both opinions liken the eminent domain power to the legislature's police power, thereby suggesting near limitless deference to legislative determinations of public use takings. *Id.* ("If *Berman* and *Midkiff* focused on elimination of harm, Justice O'Connor saw the Court's new jurisprudence as unrestrained.").

139. *Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting).

London's argument suggested to her that Susette Kelo's property caused such harm.[140]

D. Common Ground?

For two of the three opinions that *Norwood* incorporates into its holding, harmonization is relatively straightforward. *Hathcock* and Justice O'Connor's *Kelo* dissent significantly overlap in their three-part structures for defining public use. Both opinions recognize public use when the public retains actual physical usage regardless of ownership after transfer, and both opinions recognize public use when the property is taken under exceptional circumstances. The opinions are not identical, however. Although *Hathcock* is slightly more vague in defining exceptional circumstances by only offering examples that have met this category's requirements, Justice O'Connor would have specifically required that the act of the taking itself have some immediately desirable public use.[141] Also, Justice O'Connor's dissent is slightly broader in scope, as one of her categories explicitly covers public ownership.[142] In contrast, *Hathcock* limits its analysis of public use to scenarios in which condemned property is transferred to a private owner, but, like Justice O'Connor's dissent, *Hathcock* accepts public oversight as a proxy for public ownership.[143] Despite differences, the essence of *Hathcock* and Justice O'Connor's dissent are easily compatible.

Justice Zarella's dissent is not as concerned with cabining the definition of public use as are the O'Connor dissent and the *Hathcock* decision. Instead, the Zarella dissent focuses on the appropriate role that courts should play in eminent domain cases by advocating the application of heightened scrutiny to condemnations.[144] Although Justice Zarella sought to limit the deference due to legislative

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140. *Id.* at 2675.

141. *Compare id.* at 2673 ("[W]e have allowed that . . . takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use."), *with* County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004) (noting that the main example "turned on the fact that the act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, was a public use").

142. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

143. *See Hathcock*, 684 N.W.2d at 782 ("[T]he transfer of condemned property to a private entity is consistent with the constitution's 'public use' requirement when the private entity remains accountable to the public in its use of that property.").

144. Kelo v. City of New London, 843 A.2d 500, 587–92 (Conn. 2004) (Zarella, J., dissenting), *aff'd*, 125 S. Ct. 2655 (2005).

determinations of public use, he specifically advocated that courts not defer to municipal determinations of "whether the actual use to be implemented will serve a public purpose."[145] He was less focused on *defining* public use, leaving that duty up to the state legislature.[146] If adopted, Justice Zarella's dissent would have ultimately increased judicial oversight of the actual development projects themselves when eminent domain was involved.

But from a slightly broader viewpoint, *Hathcock*, Justice O'Connor, and Justice Zarella were all fundamentally concerned with the inherently speculative nature of economic development plans. In other words, all three opinions were concerned with ensuring that the public would *actually* benefit from a taking. They only differed on what guiding principle courts could, or should, use toward that end. Justice O'Connor's dissent would limit uses of eminent domain to situations in which the taking itself provided an objective public benefit, until a better limiting principle could be articulated.[147] The other opinions did articulate more or less coherent limiting principles, although Justice O'Connor referred to neither of them: *Hathcock* required "facts of independent public significance,"[148] and Justice Zarella would require "clear and convincing evidence."[149]

Because the Ohio Supreme Court itself did not synthesize the three opinions it invoked, it frustratingly failed to suggest a limiting principle that is any clearer than the others already offered. *Norwood* did hold that "[a]lthough economic benefit can be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, it cannot serve as the sole basis for finding such benefit."[150] But that adds nothing new to eminent domain jurisprudence.

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145. *Id.* at 583.

146. *Id.* at 582.

147. To Justice O'Connor, the Supreme Court majority was satisfied with the fact that "[t]he NLDC's plan is the product of a relatively careful deliberative process"; meanwhile, Justice O'Connor was concerned with finding a limiting principle that could ferret out "property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one." *Kelo*, 125 S. Ct. at 2676–77 (O'Connor, J., dissenting).

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

149. *Kelo*, 843 A.2d at 588.

150. City of Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006).

Even more maddening is the fact that the Ohio Supreme Court employed an entirely separate legal doctrine to resolve Norwood's dispute; it invoked the void-for-vagueness doctrine to strike down the Norwood city code that defined a "deteriorating" area.[151] It found the definition too speculative and therefore an unconstitutionally impermissible basis for eminent domain.[152] In a sense, then, *Norwood* also impeded the state legislature's own attempt at working out a limiting principle: *part* of what the Ohio state legislature had already employed as a limiting principle was constitutionally invalid—for being too vague and *not* necessarily because there would be insufficient public use for the city development project.[153] At best, therefore, *Norwood*'s holding can be read as requiring some guarantee that an economic development project will benefit the public. How that principle could be articulated—and whether it is ultimately for the judiciary or the legislature to do so—went unsaid.

III. A LANGUAGE-BASED LIMITING PRINCIPLE

The *Norwood* holding demonstrates the difficulty in finding a limiting principle to determine what types of economic development constitute "public use." This Part proposes that much of the problem with drawing a line to protect individual property owners has to do with extreme shifts in the language of eminent domain law since its inception in the U.S. Constitution. Although the battle over language in law is not unique to any one field and may not always rise above a mere semantic debate, it is particularly acute in the realm of eminent domain. This Part traces the various ways that issues in eminent domain jurisprudence have been characterized and shows how courts and parties have gone beyond merely interpreting words to actually *changing* the words themselves. Such linguistic transmutation helps explain why opinions like *Norwood* struggle to provide useful guidance in the face of controversial takings.

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151. *See supra* notes 73–75 and accompanying text (distinguishing the Norwood Code's definition of a "deteriorating" area and a "deteriorated" area).

152. *Norwood*, 853 N.E.2d at 1146.

153. *See id.* ("We therefore hold that the use of 'deteriorating area' as a standard . . . is void for vagueness . . . . Further, we hold that the term 'deteriorating area' cannot be used as a standard for a taking, because it inherently incorporates speculation as to the future condition of the property . . . .").

A. "Public Use" v. "Public Purpose"

The first major issue of interpretation in eminent domain law has to do with the source of authority itself: the Fifth Amendment of the U.S. Constitution. Since *Midkiff* and *Berman*, it has been generally accepted that the "public use" clause in the Fifth Amendment is not limited to literal use by the public.[154] Instead, the definition of "public use" has expanded to mean more broadly "public purpose."[155] The Supreme Court in *Kelo* highlighted this interpretation, and the dissent acknowledged that this is accepted precedent.[156] The Court had "long ago rejected any literal requirement that condemned property be put into use for the general public."[157] The Court therefore described the case as "turn[ing] on the question [of] whether [New London]'s development plan serves a 'public purpose.'"[158]

Similarly, the Connecticut Supreme Court effected the same language transmutation. The court started by reaching as far back as 1866 to its own case of *Olmstead v. Camp*[159] and noted that it had "long . . . taken a flexible approach" to construing the public use clause of its state constitution.[160] It "rejected a strict construction that 'the term "public use" mean[t] possession, occupation, [or] direct enjoyment, by the public'"[161] in favor of a broader "purposive formulation."[162] Unlike the U.S. Supreme Court, the Connecticut Supreme Court did not explicitly define public use in terms of public purpose, but it came close when it described its other past cases: "[T]he court in *Barnes* expressly used the terms 'public use' and 'public purpose' in an interchangeable manner, a definition we later adopted in *Katz v. Brandon*, a redevelopment taking case."[163] Highlighting the language in *Katz*, the Connecticut Supreme Court in *Kelo* fully endorsed the fungibility of the two phrases: "[P]ublic use

154. Kelo v. City of New London, 125 S. Ct. 2655, 2662 (2005).

155. *Id.*

156. *Id.* at 2673 (O'Connor, J., dissenting).

157. *Id.* at 2662 (majority opinion) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).

158. *Id.* at 2663.

159. Olmstead v. Camp, 33 Conn. 532 (1866).

160. Kelo v. City of New London, 843 A.2d 500, 522 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

161. *Id.*

162. *Id.* at 523.

163. *Kelo*, 843 A.2d at 523 n.32 (citation omitted) (citing Katz v. Brandon, 245 A.2d 579, 586 (Conn. 1968); Barnes v. City of New Haven, 98 A.2d 523 (Conn. 1953)).

defies absolute definition . . . . Courts as a rule, instead of attempting judicially to define a public as distinguished from a private purpose, have left each case to be determined on its own peculiar circumstances."[164]

B. "Urban Revitalization" v. "Economic Development"

Against the backdrop of fluid and expansive interpretation of the origin of eminent domain law, the language debate most pertinent to post-*Kelo* law is whether situations like New London's and Norwood's are best described as "urban revitalization" or "economic development." This Note argues that "urban revitalization" is a public use whereas "economic development" is not necessarily so.[165] The debate is one that the *Kelo* briefs presented front and center, even if they did not explicitly designate it as a point of contention.[166] One might argue that the distinction is merely semantic and that characterizing the issue favorably is a matter of brief writing. Nevertheless, the choice of terminology does identify distinguishing features of a case like *Kelo* versus a case that truly warrants the fear of unrestricted eminent domain that Justice O'Connor expressed.[167] The Michigan Supreme Court's decision in *Hathcock* expresses how, when viewed as pursuing economic benefit, takings can appear limitless in scope:

> Every business, every productive unit in society . . . contribute[s] in some way to the commonwealth. To justify the exercise of eminent

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164. *Id.* at 524–25 (quoting *Katz*, 245 A.2d at 586) (emphasis omitted). This point is particularly relevant because it suggests that deference to the legislature regarding the public use doctrine is not a blind surrender to legislative determinations, as the United States *Kelo* opinion often is viewed.

165. "Urban revitalization" may be more applicable to New London's situation, and "economic development" may be more applicable to Norwood's case.

166. *Compare* Brief of Respondent at 1, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108) ("QUESTION PRESENTED: Does the Takings Clause of the Fifth Amendment forbid an economically distressed city from employing its eminent domain power to condemn, and pay just compensation for, private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, and to realize immediate structural and environmental benefits for the city and its residents?"), *with* Brief of Petitioners at 1, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108) ("QUESTION PRESENTED: What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of 'economic development' that will perhaps increase tax revenues and improve the local economy?").

167. *See Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting) ("Any property may now be taken for the benefit of another private party . . . .").

> 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.[168]

Indeed, the state court *Kelo* dissent consistently chose to refer to the public use in question as "economic development."[169]

In contrast, the state court *Kelo* majority referred to the public use in question as "urban revitalization."[170] The semantic difference is not insignificant. "Development" suggests growth or progression.[171] "Revitalization," on the other hand, suggests imparting new life or vigor to something.[172] The latter connotes that a loss of some sort must first occur before revitalization can take place whereas the former could occur in almost *any* situation. This distinction was potentially so important that the Connecticut court chose to repeat the question presented in *Kelo* in full detail no fewer than four times. For example, the Connecticut Supreme Court first characterized the issue as follows:

> The principal issue in this appeal is whether the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.[173]

Each time it reiterated the issue at stake, it used similarly detailed language and pointedly asserted that New London's project was not

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168. County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004).

169. *See, e.g.*, *Kelo*, 843 A.2d at 587 (Zarella, J., dissenting) ("[S]o, too, should a heightened standard of judicial review be required to ensure that the constitutional rights of private property owners are protected adequately when property is taken for private economic development . . . .").

170. *See, e.g.*, *id.* at 520 (majority opinion) ("We conclude that economic development projects . . . contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.").

171. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 543 (1996).

172. *Id.* at 1648.

173. *Kelo*, 843 A.2d at 507.

just about making more money.[174] In fact, it was the Connecticut Supreme Court—more than any other court—that recognized the full complexity of the situation and the competing interests of the city and the residents at stake in the taking. Unfortunately, at some point in the aftermath of the *Kelo* decision, the actual status and struggles of the city of New London took a backseat to the simpler and less descriptive public image of "economic development."[175] Despite affirming the Connecticut Supreme Court, Justice Stevens's choice of simpler terminology in the Supreme Court opinion was to some extent his greatest disservice to advocates who support using eminent domain for economic development purposes—not his permissive baseline statement—because he eschewed using either "urban revitalization" or "economic development" to frame the debate, and thereby did not choose a side in this particular debate at all.[176]

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174. The second time the issue was stated was at the conclusion of the Connecticut Supreme Court's analysis of eminent domain legal precedent:

> [W]e conclude that economic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution.

Id. at 531. The third time, the court was applying the law to the facts of one of the parcels owned by the petitioners:

> [W]e concluded that economic development projects created and implemented pursuant to chapter 132 of the General Statutes that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, namely, the development plan in the present case, satisfy the public use clauses of the federal and state constitutions.

Id. at 555–56. The fourth and final description of the issue occurred when the court was again applying the law to the facts of the case:

> In part II of this opinion, we concluded that economic development projects created and implemented pursuant to chapter 132 of the General Statutes that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, namely, the development plan in the present case, satisfy the public use clauses of the federal and state constitutions.

Id. at 569.

175. One commentator argues that the City of New London has itself to blame for this. Although New London's statutorily defined status as a "distressed municipality" prompted the development plan, in its brief to the Supreme Court, the city chose to focus on the benefits of economic development isolated from the initial disposition of the city. *See* Ackerman, *supra* note 52, at 306 ("Rather than focus on the established, legitimate exercise of the police power for blight removal, the Respondent sought a confirmation that economic development alone was also a legitimate exercise of the police power as long as the legislature had declared it to be so.").

176. *Compare* Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005) ("The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution."), *with*

C. "Blight" v. "Distressed Area"

Before New London ever thought to condemn Susette Kelo's property, the State of Connecticut had designated the city a "distressed municipality."[177] The state legislature defines that label according to certain measurable economic parameters.[178] Blight, similarly, is statutorily defined in all fifty states,[179] although it is often mistaken for a merely descriptive term. Blight statutes purport to offer objective standards to measure economic decay within a community. A municipality suffering from blight necessarily fits within the exigencies of the third category of public use that *Hathcock* and Justice O'Connor described. By analogy, it seems reasonable that a "distressed municipality" could likewise fit within that category. Given that *Hathcock* and Justice O'Connor agreed that a taking is permissible when it eliminates blight, it appears that they should likewise agree that a taking is permissible when it eliminates the source of distress in a "distressed municipality."

And yet, New London's use of eminent domain was never justified as a *Berman*-type taking, in which the taking itself was necessary to combat blight, despite another similarity between *Berman* and New London's situation. In *Kelo*, both the U.S. Supreme Court's and the Connecticut Supreme Court's assessments of the facts viewed the city's development plan as addressing employment and tax revenue problems in the area as a whole, rather than a specific distressed area.[180] *Berman*, too, at least in Justice Stevens's view, required that city development efforts be viewed as a whole instead of piecemeal.[181] Because *Berman* permitted taking a nonblighted property due to its location within a larger area that was as a whole

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Kelo, 843 A.2d at 520 ("We conclude that economic development projects created and implemented pursuant to chapter 132 that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.").

177. *See supra* note 21 and accompanying text.

178. *Id.*

179. Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 394 (2000).

180. *Compare Kelo*, 125 S. Ct. at 2658 ("[I]t is appropriate for us . . . to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan."), *with Kelo* 843 A.2d at 537 n.50 ("[A]n appropriate public use analysis necessarily requires evaluation of the development plan as a whole—the end result of the sum of all of its parts.").

181. *See Kelo*, 125 S. Ct. at 2665 n.13 ("It was important to redesign the whole area . . . . The entire area needed redesigning . . . ." (quoting Berman v. Parker, 75 S. Ct. 98, 103 (1954))).

blighted, New London could have made an analogous argument with respect to Kelo's property being in an area that was as a whole "distressed." It did not. Instead, the difference, whatever it may be, between a "blighted area" and a "distressed municipality"—though both are objectively and statutorily defined by the Connecticut state legislature—was enough to center the issue in *Kelo* on the disposition of the petitioners' property after the taking rather than on whether the taking itself would remedy the municipal distress.

The logical fallacy in the distinction between "blight" and "distressed area," or any other statutory definition of land condition, is that it is one of degree rather than clear-cut categorization. Court opinions like Justice O'Connor's dissent advocate the use of a limiting principle like a blight standard because they are concerned with the degree of speculation inherent in city planning.[182] "Blight," however, is neither as objectively discernible as the Court assumes, nor is it any more immune from the manipulation of the legislature than is a problematic phrase like "distressed area."[183]

D. From Kelo *to* Norwood

The only plain holding in *Norwood* was that a taking cannot be primarily for "economic benefit," regardless if other motivations are present or not.[184] This holding shows how dramatically the debate changed in the year between *Kelo* and *Norwood*. The Ohio Supreme Court interpreted *Kelo* to stand for a proposition that it was never meant to: that takings that bestow some economic benefit are constitutionally valid.[185] After just one year and with the quagmire of eminent domain language that the U.S. Supreme Court has done little to resolve, *Kelo* revealed itself as a Pyrrhic victory for urban

182. *See, e.g.*, *id.* at 2676 (O'Connor, J., dissenting) ("[T]he judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer.").

183. For a proposal on a model definition of blight that is more immune to the potential manipulation of legislatures, see generally Will Lovell, Note, *The* Kelo *Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Minority Property Owners*, 68 OHIO ST. L.J. 609 (2007).

184. *See* City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006) ("We hold that although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution.").

185. *Cf. id.* at 1142 (holding that "an economic or financial benefit alone" is not a public use).

redevelopment advocates. The speed with which the debate shifted necessarily begs the question whether *Norwood* is an appropriate model for other state courts addressing similar problems.

IV. A BETTER STATE COURT MODEL

Although it does not appear that the Connecticut Supreme Court majority consciously intended to do so, it has offered the strongest framework for assessing takings in an economic development context. That opinion is as much in favor of property rights advocates as any other. It is crucial that in searching for a model opinion for the future, both sides of the debate look to the methodology and not the result of a case. Although *Norwood* was ostensibly a victory for individual property owners, the state *Kelo* decision may hold better protections of their rights because of the guidance it offers state courts. This Part extracts the key factors from the Connecticut Supreme Court's opinion and proposes that these be used as a starting point on which eminent domain jurisprudence in the context of economic development is refined.

A. Prerequisites

The Connecticut court presumed at least two conditions must be satisfied for constitutionally permissible takings. First, there must be some statutorily defined thresholds that municipalities must meet. The most common type of statute—and one that has been unequivocally endorsed as applicable by the U.S. Supreme Court[186]—is a blight statute. In *Kelo*, the applicable statute defined a "distressed municipality."[187] And although it was struck down on other grounds, in *Norwood* the applicable statute defined a "deteriorating area."[188] No matter what actual term is used, the key is for a legislative body to independently describe the municipal conditions that it deems unacceptable before it gets involved with an economic development plan. By doing so, a legislature ensures that a proposed condemnation occurs in an "urban revitalization" context and not just in an "economic development" context.

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186. *See Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting) (accepting takings to eliminate blight as a constitutional example of "public use").

187. *See supra* note 21 and accompanying text.

188. *See supra* note 73–75 and accompanying text.

Second, the initiative for the development plan must originate with the state or municipality. It should not originate with a private developer. This distinction has not been emphasized despite the fact that almost all courts have expressed a desire to ensure that the primary beneficiary not be a private party.[189] Based on just this simple consideration, at least as far as the Ohio Supreme Court portrayed the situation,[190] *Norwood* would have failed meeting this prerequisite. In contrast, in *Kelo*, the City of New London initiated the project, trying to take advantage of a state bond to turn itself around.[191]

B. The Development Plan

The linchpin to the usefulness of the Connecticut Supreme Court model is the development plan.[192] What makes the development plan so important in this context is the guidance it gives in establishing the boundary between the legislature and the judiciary so that each branch's expertise is best used. The development plan is in essence a contract[193] that is created by the legislative body and enforced by the courts.

First, the process by which a development plan is created has objectively ascertainable factors that a court can look at on a case-by-case basis. Given the variety of issues that municipalities across the country face, there is no checklist of requirements for a development plan. For example, in *Kelo*, the development plan went through at least six permutations before it was finally accepted.[194]

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189. The Connecticut Supreme Court, for example, recognized this concern. Kelo v. City of New London, 843 A.2d 500, 543, *aff'd*, 125 S. Ct. 2655 (2005) ("[A]n exercise of the eminent domain power is unreasonable . . . if the facts and circumstances of the particular case reveal that the taking specifically is intended to benefit a private party.").

190. *See Norwood*, 853 N.E.2d at 1124 ("A private, limited-liability company, Rookwood Partners, Ltd. . . . entered discussions with Norwood about redeveloping the appellants' neighborhood."); *see also* Sparks, *supra* note 95, at 1779 ("In 2002, a development group approached the City Council of Norwood, Ohio with a redevelopment project proposal, and asked the council to exercise its power of eminent domain to aid in the project.").

191. *See supra* notes 24–26 and accompanying text.

192. *See Kelo*, 843 A.2d at 536 (distinguishing the case at hand from problematic takings for economic development on the basis of the "carefully considered development plan" at issue).

193. *See, e.g.*, *id.* at 544 (analogizing the standard of review of the development plan to that which would be applied to "contractual" restraints).

194. *See supra* note 29 and accompanying text.

Second, when viewed as a contract, a development plan can assure a level of state control over the economic development.[195] Both Justice O'Connor in her *Kelo* dissent and the *Hathcock* majority expressed a willingness to allow condemnation transfers to private properties so long as the public maintained some oversight.[196] As the Connecticut Supreme Court explained, New London's development plan could not be changed without legislative approval because of various statutory requirements.[197] Furthermore, New London wrote in various covenants to ensure that future parties to the development plan would have to adhere to these requirements.[198] These covenants not only addressed the issue of control, but they also spoke to the question of time with which Justice O'Connor was concerned.[199] By specifying when certain benchmarks had to be met during project construction, the development plan blunted the speculative nature of the proposed city project.[200] In these situations, a court's role is more tenable: it can bring the tools of contract law to bear on economic development to ensure that a "public use" is in fact satisfied.[201]

Third, the Connecticut Supreme Court managed to find a balance between deference to the legislature, which *Norwood* hesitated to accept,[202] and heightened scrutiny, which Justice Zarella's dissent strongly advocated. The Connecticut court accepted the practical reality that economic development plans require assessment as a whole.[203] Indeed, the U.S. Supreme Court recognized this need too in *Berman*, in which Justice O'Connor wrote for the majority and understood that one nonblighted property should not stand in the way of revitalizing a larger surrounding area which was otherwise blighted.[204] At the same time, the Connecticut Supreme Court still engaged in a piecemeal analysis of the condemned plots by

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195. *See Kelo*, 843 A.2d at 545 ("We . . . conclude that the trial court properly determined that the significant state involvement in this project . . . functions to provide a level of governmental oversight beyond that provided by the development corporation.").

196. *See supra* text accompanying notes 127–128, 143.

197. *Kelo*, 843 A.2d at 544 n.63.

198. *Id.* at 545 n.64.

199. *See supra* text accompanying note 138.

200. *Kelo*, 843 A.2d at 545 ("[T]here are sufficient assurances that the public use of the development plan will be carried out.").

201. *See id.* at 536 ("[R]esponsible judicial oversight over the ultimate public use question does much to quell the opportunity for abuse of the eminent domain power.").

202. *See supra* notes 88–89 and accompanying text.

203. *See supra* note 180 and accompanying text.

204. *See supra* note 181 and accompanying text.

questioning the *reasonable necessity* of each parcel to the plan as a whole.[205] The court made clear that it was not engaging in heightened scrutiny,[206] and by only requiring reasonableness, it largely deferred to the city's determinations. The court, however, still made a point of looking at the specific condemnations.[207]

Despite New London's considered development plan and the state court's deliberative review, Justice O'Connor nonetheless expressed anxiety that development plans are not a magic bright line to protect individual property owners.[208] In this respect, Justice O'Connor is correct. But, as this Note has shown, no bright-line test exists in eminent domain law.[209] If urban revitalization is to be a real option for cities to combat economic decline, requiring a bright-line rule is impractical. What is practical is establishing how the respective expertise of the legislative and judicial branches of government can be best used to revitalize urban areas, while still affording individual property owners their constitutionally protected rights.

CONCLUSION

At first glance, the purpose behind New London's and Norwood's attempts to take away the property of their residents appears to be little more than economic benefit. But delving deeper, both cities were suffering from statutorily defined plights. Their attempts to remedy economic downturns through urban redevelopment were not based on whimsical decisions but rather on deliberative planning.[210] The two state supreme courts in these cases were on opposite sides of the U.S. Supreme Court decision that would galvanize property rights advocates and flood the media. Those courts and others have not been blind to the fact that this situation requires the heavy involvement of legislative bodies, and they have

205. *See Kelo*, 843 A.2d at 558–62 (analyzing the market for a class A office building).

206. *Id.* at 528 n.39; *see also* Kelo v. City of New London, 125 S. Ct. 2655, 2667–68 (2005) ("The disadvantages of a heightened form of review are especially pronounced in this type of case.").

207. Interestingly, it is unclear what precedent the court was relying on to engage in this parcel-specific analysis.

208. *See supra* note 147.

209. *See supra* Part III.

210. New London culled through no fewer than six city development plans to create its final plan. *See supra* note 29.

struggled with the issue of how much deference to give when an individual right as precious as property is involved.[211]

The Ohio Supreme Court's *Norwood* opinion has been suggested by some commentators as a model for states to use to protect individual property rights against eminent domain abuse, mostly because of its result and its first-in-time position post-*Kelo*.[212] The Ohio Supreme Court, however, paradoxically rejected the very authority—Justice Stevens's opinion—that permitted it to further safeguard the rights of property owners from unchecked city and state legislatures. Its *Norwood* decision was more of a rallying cry than a template in that it lacked clear reasoning for rebuking the U.S. Supreme Court. Instead, this Note proposes that the Connecticut Supreme Court's original opinion in *Kelo* is the better model for state courts to use. Justice Stevens could have been contemplating that opinion when he wrote that "state constitutional law" and "state eminent domain statutes" may provide better protection to individuals. Although the state *Kelo* decision sided with New London, it offered olive branches to both sides of the eminent domain debate.

From an even broader perspective, this Note encourages state courts in the post-*Kelo* world to resist any oversimplification of the issues. The city official facing the decision whether to condemn fellow citizens' homes has too much at stake to take that choice lightly and succumb to such simplified political sound bites. The official is accountable to voters.[213] The official also knows that the economic

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211. Several courts have explicitly held that property ownership is a fundamental right, *e.g.*, City of Norwood v. Horney, 853 N.E.2d 1115, 1129 (Ohio 2006), which typically demands heightened scrutiny review, Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997). In property law, however, this conclusion does not necessarily follow. *See* ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1318–19 (N.D. Okla. 2007) (explaining that the U.S. Supreme Court does not protect all aspects of property rights, though fundamental, under substantive due process).

212. *See, e.g.*, Lee, *supra* note 11, at 139–40 (referring to *Norwood* and noting "the judiciary may yet be the branch that restores new life to the principle that constitutional limits do exist with respect to eminent domain"); Elisabeth Sperow, *The* Kelo *Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 MCGEORGE L. REV. 405, 424–25 (2007) ("*Norwood* exemplifies that additional legislation is not needed for state court judges to adopt and follow their own standards of review."); *see also* Sparks, *supra* note 95, at 1793–94 (warning future state supreme courts away from adopting *Norwood*'s void-for-vagueness rationale).

213. *See, e.g.*, Sperow, *supra* note 212, at 426–27 (advocating that political accountability is a superior check on eminent domain abuse than are state courts); *see also* Recent Case, City of Norwood v. Horney, *853 N.E.2d 1115 (Ohio 2006)*, 120 HARV. L. REV. 643, 648–49 (2006) (challenging the Ohio Supreme Court's assumption in *Norwood* that contractors will inevitably exert more influence on the political process than would the collective voice of individual property owners).

development may not have the desired results.[214] And as a homeowner, that official understands the intangible value of property. Still, sometimes, a city official has actually done the necessary homework, and that official's vote in favor of a taking for economic development is both necessary and constitutionally sound.

214. Some have argued that Justice O'Connor's concerns over economic development project benefits actually adhering to the public have already been realized because many urban renewal projects have failed. *See, e.g.*, Lovell, *supra* note 183, at 627–28 ("Not only is [urban renewal] generally thought to be ineffective, it is also considered to cause more harm than good.").