EMINENT DOMAIN — PUBLIC USE — OHIO SUPREME COURT HOLDS THAT ECONOMIC DEVELOPMENT CANNOT BY ITSELF SATISFY THE PUBLIC USE LIMITATION OF THE OHIO CONSTITUTION. — *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006).

The proper interpretation of the public use limitation on the power of eminent domain is the subject of substantial disagreement.[1] The government clearly violates that limitation, however, when it takes property from a private individual or entity for the sole purpose of giving it to another private individual or entity.[2] Although a taking for economic development may at first blush appear to clearly violate the public use limitation because the government takes private property to give to a developer, the potentially large public benefit of economic revitalization calls that judgment into question.[3] In 2005, in *Kelo v. City of New London*,[4] the U.S. Supreme Court held that economic development satisfied the public use limitation in the Federal Constitution[5] but noted that state courts may reach different conclusions when interpreting the eminent domain provisions in their own states' constitutions.[6] Recently, in *City of Norwood v. Horney*,[7] the Ohio Supreme Court held that economic development does not by itself satisfy the public use requirement that the Ohio Constitution imposes on takings.[8] Although the Ohio Supreme Court's rule achieves a commendable balance between individual property rights and the State's eminent domain power, an unfortunate byproduct of that balance is the increased role of the judiciary at the expense of the legislative branch. This incursion on the legislative role highlights the need for a more clearly defined rule that will balance the legislative and judicial roles.

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[1] *See, e.g.*, Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 9, 13–14 (1993) (arguing that U.S. Supreme Court precedent has confused the true meaning of the public use limitation).

[2] *See* Kelo v. City of New London, 125 S. Ct. 2655, 2661 (2005); City of Norwood v. Horney, 853 N.E.2d 1115, 1137 (Ohio 2006); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 194 (2002).

[3] *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 494 (2006).

[4] 125 S. Ct. 2655.

[5] *Id.* at 2668. The *Kelo* Court was careful to point out, however, that economic development cannot be used as a pretext for "tak[ing] the property of *A* for the sole purpose of transferring it to another private party *B*." *Id.* at 2661.

[6] *Id.* at 2668. The *Kelo* Court also noted that state legislatures may take up the issue of economic development in eminent domain statutes. *Id.*

[7] 853 N.E.2d 1115.

[8] *Id.* at 1142. After *Kelo*, Ohio's General Assembly also took action and imposed a "moratorium on any [economic development] takings . . . by any public body until further legislative remedies may be considered." *Id.* at 1122–23 (quoting 2005 Ohio Legis. Serv. Ann. 44 (West) (codified at OHIO REV. CODE ANN. § 163.01 (West 2006))) (internal quotation mark omitted).

The City of Norwood is a municipality wholly encircled by Cincinnati, Ohio.[9] In the 1960s, the construction of Interstate 71 through Norwood changed the city's makeup from predominantly residential to a mixture of residential and commercial.[10] Traffic, road safety problems, noise, and light pollution all increased.[11] Norwood's transformation prompted the Norwood City Council to enter into a contract in 2003 with a development company, Rookwood Partners, Ltd. (Rookwood), to redevelop a portion of the municipality.[12] Rookwood's redevelopment plan proposed the construction of 200 apartments or condominiums, over 500,000 square feet of office and retail space, and two parking facilities.[13]

Norwood's decision to enter into a contract with Rookwood was not made hastily. The city council, the development committee, and the Norwood Planning Commission conducted several public meetings, and the project was also discussed at a series of town meetings.[14] At Norwood's insistence, Rookwood acquired most of the parcels in the redevelopment area via private transaction.[15] Norwood initiated eminent domain proceedings against properties whose owners refused to sell, including parcels belonging to appellants Carl and Joy Gamble and Joseph P. Horney and his wife, Carol Gooch.[16] According to the Norwood City Code, Norwood could use its eminent domain power as a means to accomplish urban renewal only if the redevelopment area was found to be a "slum, blighted, or deteriorated"[17] area or a "deterio-

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[9] City of Norwood v. Horney, 830 N.E.2d 381, 384 (Ohio Ct. App. 2005).

[10] *Id.*

[11] *Norwood*, 853 N.E.2d at 1124.

[12] *Norwood*, 830 N.E.2d at 386.

[13] *Norwood*, 853 N.E.2d at 1124.

[14] *Norwood*, 830 N.E.2d at 384.

[15] *Id.* at 385.

[16] *Norwood*, 853 N.E.2d at 1125. The court explained:

> Appellants Carl and Joy Gamble had lived in the neighborhood for over 35 years before the appropriation. They raised their children there and planned to live the rest of their lives there. Appellants Joseph P. Horney and his wife, Carol Gooch, once lived in the neighborhood and, though now residing elsewhere, owned and operated rental properties in the neighborhood before the appropriation.

Id. at 1124 n.3.

[17] The Norwood City Code defined a "slum, blighted, or deteriorated area" as:

> [A]n area . . . in which there are a majority of structures or other improvements, which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsafe and unsanitary conditions or the existence of conditions which endanger life or property by fire or other hazards and causes, or any combination of such factors, and an area with overcrowding or improper location of structures on the land, excessive dwelling unit density, detrimental land uses or conditions, unsafe, congested, poorly designated streets or inadequate public facilities or utilities, all of which substantially impairs the sound growth and planning of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals and general welfare.

rating"[18] area.[19] In compliance with the Code, the city council hired a consulting firm, which found the redevelopment area to be a "deteriorating area."[20] After receiving the consulting firm's report, Norwood authorized the mayor to appropriate the appellants' property and filed complaints against the appellants to effectuate the appropriation.[21]

The trial court held that Norwood's use of eminent domain to acquire appellants' properties was justified under the Norwood City Code[22] and was constitutional.[23] The trial court found that Norwood abused its discretion by finding that the redevelopment area was a "slum, blighted, or deteriorated area" because that determination was not supported by the consulting firm's report.[24] Nevertheless, since Norwood had not abused its discretion in finding that the area was "deteriorating," the takings were proper under the Code.[25] The trial court then held that under Ohio and U.S. Supreme Court precedent, the use of eminent domain for urban renewal constituted a valid public use and was constitutional.[26]

A three-judge panel of the Ohio Court of Appeals affirmed. First, noting that deference was due to the city council's findings, the court of appeals held that the evidence of unsafe conditions, faulty street and lot layout, and "high diversity of ownership of small parcels" indicated that Norwood's finding that the redevelopment area was "deteriorating" was not an abuse of discretion.[27] The court then held that appropriating "deteriorating land for an urban renewal project . . . is condu-

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Id. at 1125 n.5 (omission in original) (quoting NORWOOD, OHIO, CODE § 163.02(b) (2005)) (internal quotation marks omitted).

[18] The Norwood City Code defined a "deteriorating area" as:

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

Id. (quoting NORWOOD, OHIO, CODE § 163.02(c) (2005)) (internal quotation marks omitted).

[19] *Norwood*, 830 N.E.2d at 385 (citing NORWOOD, OHIO, CODE § 163.02(b)–(c) (2005)).

[20] *Norwood*, 853 N.E.2d at 1125–26.

[21] *Id.* at 1126.

[22] *Id.* at 1127.

[23] *Norwood*, 830 N.E.2d at 391.

[24] *Norwood*, 853 N.E.2d at 1126.

[25] *Id.*

[26] *Norwood*, 830 N.E.2d at 391. The trial court also found that the redevelopment plan complied with the Norwood City Code, that the purpose of the redevelopment plan was not pretextual because it was intended to eliminate slums and blight, and that Norwood did not improperly delegate its takings power to Rookwood. *Id.* at 386, 392.

[27] *Id.* at 388, 390.

cive to the public welfare"; therefore, Norwood's redevelopment plan constituted a valid public use under the Ohio Constitution.[28]

The Supreme Court of Ohio unanimously reversed. The court first highlighted the "inherent tension" between individual property rights and the State's power of eminent domain,[29] and noted that both the Northwest Ordinance and the Ohio Constitution conditioned the State's power to appropriate property on "equitable considerations of just compensation and public use."[30] The court explained that an increasingly broad conception of public use had led the U.S. Supreme Court and several state courts to hold that "general economic development is a public use."[31] The court posited that these holdings came about partially as a result of courts erroneously giving "artificial judicial deference" to legislative determinations of what constitutes a public use.[32] Citing *County of Wayne v. Hathcock*,[33] a Michigan Supreme Court case, as persuasive authority, the court warned that allowing Ohio's conception of public use to encompass takings based solely on economic benefit risked nullifying the Ohio Constitution's public use limitation.[34] As a result, the court held that economic development by itself does not satisfy the public use requirement of article I, section 19 of the Ohio Constitution.[35]

The court then considered whether Norwood's takings could be justified by the Norwood City Council's finding that the redevelopment area was "deteriorating." First, the court held that the term "deteriorating area" as defined in the Norwood City Code was void for vagueness because its enumerated conditions failed to provide property owners or officials with a clear understanding of what constituted a deteriorating area.[36] The court then held that regardless of whether

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[28] *Id.* at 391 (quoting City of Dayton v. Kuntz, No. 10513, 1988 WL 28104 (Ohio Ct. App. Mar. 3, 1988)). The court of appeals also affirmed all of the trial court's holdings summarized in note 26, *supra*. *Id.* at 387, 392–94.

[29] *Norwood*, 853 N.E.2d at 1129.

[30] *Id.* at 1130 (citing State *ex rel.* Bruestle v. Rich, 110 N.E.2d 778 (Ohio 1953); Joseph J. Lazzorotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 54 (1999)). The Ohio Constitution provides:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall . . . be made . . . .

OHIO CONST. art. I, § 19.

[31] *Norwood*, 853 N.E.2d at 1135.

[32] *Id.* at 1136.

[33] 684 N.W.2d 765 (Mich. 2004).

[34] *Norwood*, 853 N.E.2d at 1138, 1141.

[35] *Id.* at 1142.

[36] *Id.* at 1145.

the term "deteriorating area" was impermissibly vague, the standard could not be used as the basis of a taking because according to the Norwood City Code, an area could be deemed deteriorating not only if it "[*was*] deteriorating or [*would*] deteriorate,"[37] but also if it "[was] *in danger of* deteriorating."[38] The court explained that Ohio Supreme Court precedent barred the State from exercising its power of eminent domain based on a prediction that the property it sought to take *might* pose a future threat.[39]

In holding that economic development cannot by itself satisfy the public use requirement of the Ohio Constitution's takings clause, the Ohio Supreme Court sought to balance individual property rights with the State's eminent domain power. In doing so, however, the court formulated a rule that carves out a large role for the judiciary at the expense of the legislative branch. The court would have been better advised to adopt a rule that balances not only individual property rights and the State's eminent domain power, but also the legislative and judicial roles.

The court's holding that economic development cannot by itself satisfy the public use requirement occupies a middle ground between two extremes. At one extreme is a rule that economic development alone may satisfy the public use requirement, which would strongly support the government's exercise of its eminent domain power. At the other extreme is a rule that economic development can never be probative in determining whether an appropriation satisfies the public use requirement, which would robustly protect individual property rights. The *Norwood* court embraced neither extreme. Instead, it held that economic benefit may be considered as one "factor among others"[40] in determining whether the public use requirement is satisfied. This rule reflects the court's acknowledgement of the importance of both the State's eminent domain power, which the court characterized as "an inseparable incident of sovereignty,"[41] and individual property rights, which the court called "original and fundamental right[s], existing anterior to the formation of the government itself."[42]

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[37] *Id.*

[38] *Id.* (internal quotation mark omitted).

[39] *Id.* The court also held that section 163.19 of the Ohio Revised Code, which precluded a court from enjoining the government from taking and using property prior to appellate review, violated the separation of powers doctrine and was therefore unconstitutional. *Id.* at 1151. The court further held that severance of the constitutionally defective section of the Code was appropriate. *Id.*

[40] *Id.* at 1141.

[41] *Id.* at 1129 (quoting Giesy v. Cincinnati, Wilmington & Zanesville R.R. Co., 4 Ohio St. 308, 328 (1854)) (internal quotation marks omitted).

[42] *Id.* at 1128 (emphases omitted) (quoting Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 664 (1853)).

The court's middle-ground rule and the reasoning behind it give Ohio's judiciary a large role in defining the circumstances under which the State can successfully exercise its eminent domain power in the context of economic development. The court explained that the standard used by the judiciary to review takings had been misunderstood by the lower courts as demanding absolute deference to legislative decisions.[43] The court noted that the proper standard of review demanded that a court conduct an independent review of the State's eminent domain decision.[44] In effect, therefore, the court enlarged the judiciary's role by clarifying the standard of review.

This clarified standard of review will likely take on a particularly large role in the context of economic development takings. The court's failure to either define economic development or explain what other "factors" would need to be present to transform an impermissible taking into a permissible one means that legislative officials are given limited guidance as to what constitutes a constitutional taking. It is likely, therefore, that the same economic development cases that would have been brought before the judiciary prior to *Norwood* will continue to be brought. But, under *Norwood*'s standard of review, decisions that the Ohio judiciary used to allow the legislative branch to make will now be made by judges. Moreover, the rule will not provide judges with any more guidance than it provides legislative officials. Consequently, judges, rather than legislative officials, will be the ones deliberating about and making the final decision on whether the taking will benefit the public.

The scope of the role afforded the judiciary rested on two assumptions that may not be warranted: that the political process is unlikely to adequately safeguard individual rights and that judicial review is the solution.[45] First, although a contractor, as a discrete entity with a large stake in the outcome, might have a "disproportionately great influence on the political process,"[46] property owners, who both constitute a discrete group and have a large stake in the outcome, arguably also wield considerable influence on the political process.[47] Though the property owners might be at a disadvantage as ad hoc, one-time

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[43] *Id.* at 1138–39.

[44] *Id.*

[45] *Id.* at 1140 ("[D]ue to the mutuality of public and private interests . . . , a danger exists that the state's decision to take may be influenced by the financial gains that would flow to it or to the private entity because of the taking . . . . In such circumstances, both common sense and the law command independent judicial review of the taking." (citations omitted)).

[46] Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 130 (1992).

[47] *Id.*

players,[48] they would be likely, in the context of a taking, to organize given their shared geographical connection and community ties.[49] Moreover, if the facts of *Norwood* are representative, property owners will also be heard at public hearings and town meetings.[50] Even assuming, however, that property owners will not be as effective as a contractor in influencing the political process, the process will likely take property owners' interests into account. Optimistically, legislative officials will weigh all costs and benefits, including those costs associated with individuals losing their property, and thus will not be disproportionately influenced by financial gain for the city or for the contractor.[51] Pessimistically, even if the legislative goal is to enrich a contractor, the legislative officials and the contractor will be forced to take the property owners' interests into account by virtue of the just compensation requirement.[52] Even assuming, then, that property owners have no political influence, just compensation remains as a proxy for property owners' organizing and advocating their interests.[53]

Second, even if the political process is likely to fail individual property owners, judicial review may not be the solution. Supporters of expansive judicial review argue that the judiciary is independent of political and interest-group influence,[54] but this argument is undermined by two observations. First, it is unlikely that the judiciary would independently possess the information necessary to properly weigh all the costs and benefits; the relevant information will likely be funneled to it through interest groups' briefs.[55] Second, litigation is likely the area in which the ad hoc, one-time-player nature of a group of private property owners will be most pronounced because the group will likely have neither the expertise nor the money needed to prevail in court.[56]

If it is true that the political process will not necessarily fail and the judiciary may itself be susceptible to disproportionate influence by

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[48] *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306–07 (1990).

[49] *See* Farber, *supra* note 46, at 130.

[50] *See Norwood*, 853 N.E.2d at 1125–26.

[51] *See* Farber, *supra* note 46, at 130.

[52] *See* Levmore, *supra* note 48, at 320.

[53] *See id.*

[54] *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 80 (1991) (citing RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 501–02 & n.1 (3d ed. 1986)).

[55] *Id.* at 77.

[56] *See id.* at 70–71. This argument will not be true in every situation. For example, in both *Norwood* and *Kelo*, the property owners were represented by the Institute for Justice, a national advocacy group. *See* Brief for Petitioners, Kelo v. City of New London, 125 S. Ct. 2665 (2005) (No. 04-108); Brief of Appellants, *Norwood*, 853 N.E.2d 1115 (Nos. 05-1210, 05-1211). Other property owners, however, may not be so lucky.

strong interest groups, the court would have done better to formulate a rule that not only balances individual property rights and the State's eminent domain power, but also balances the roles of the legislative and judicial branches. The court could have achieved both goals by defining economic development and elucidating the additional factors needed for an economic development taking to be constitutionally permissible. This would have allowed the court to prohibit unconstitutional uses of the eminent domain power while at the same time providing enough guidance to legislative officials so that they, rather than judges, would be able to make the final decisions on the use of the takings power. As other state supreme courts determine how to interpret their own states' constitutions, they should be cognizant that rising to the challenge of clearly elucidating the takings doctrine will yield better jurisprudence.