Regional Economies and the Constitutional Imperative of Eminent Domain

Steven S. Kaufman
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INTRODUCTION

"The most important lesson the global economy teaches is that regions—not cities or counties—will be the units of economic competition." Our cities and the metropolitan areas within the regions, however, are central to the success of any regional economic competition. As stated by the Brookings Institution in its Blueprint for American Prosperity, "the ability of the United States to compete globally and to meet the great environmental and social challenges of the 21st century rests largely on the health, vitality and prosperity of the nation's major cities and metropolitan areas." Therefore, any of the metropolitan regions in the United States have a mandate to be able to effectively engage in regional competition.

Some regions will sink and some will swim. Those that swim will require foresight, courage, and the willingness to lead and be

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collaborative. Among the tools that such regions have to meet the challenge of regional economic competitiveness of the twenty-first century is the use of the constitutional tool of eminent domain, when necessary, for regional economic development purposes. The United States Supreme Court has now expressly recognized that among those fundamental purposes recognized by the Fifth Amendment of the United States Constitution for the use of eminent domain is the sole public purpose of economic development.\(^3\)

As quickly as this constitutional tool was recognized by the United States Supreme Court in 2005, the decision was the subject of a firestorm of politically and legally charged efforts to limit or undo the decision’s clear mandate. There was a myriad of state legislation in an estimated thirty-seven states. There was federal legislative activity and new state court decisions. The “cloud” that has now formed over the use of eminent domain for economic development purposes requires us to step back and reflect.

Two recent controversial economic development projects in Northeast Ohio serve as lessons and warnings for the effective uses and abuses of the power of eminent domain to serve the real development needs of struggling regions. Each case illuminates the challenges that the courts, state legislatures, and local governments face in balancing the fundamental individual rights of property ownership by either private or public owners with the Fifth Amendment of the United States Constitution’s (and comparable provisions of state constitutions’) requirement that land only be taken for a public purpose consistent with the “Public Use Clause.” These cases exemplify the complicated public policy and legal issues and related strategies inherent in the conflicts between governments seeking to advance important economic development agendas and private or public property owners when the use of eminent domain is necessary to accomplish those objectives.

The recent U.S. Supreme Court decision, the ensuing state court decisions, and the wave of congressional and state legislative activity all underscore the political and legal divide over the private ownership/Fifth Amendment conflict surrounding the use of eminent domain for economic development programs. Enlightened approaches by governmental leadership planners and likely future court cases scrutinizing these actions will invite new jurisprudence. Future court decisions may pave the way for the effective use of eminent domain for regional economic development projects. The ultimate question is:

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Will Congress and the state legislatures retrench and restrain in light of these likely jurisprudence protections?

I. THE REGIONAL COMPETITION IMPERATIVE DRIVES CHANGE

A. Regional Competitiveness and Corporate Retention and Attraction

The future of our domestic economy is inextricably linked to the competitive successes of "regions" within the United States. These "regions,"\(^4\) to be successful, will compete not only with each other but also globally. Regional communities will inevitably evolve if such geographic regions will be players in this new economy.\(^5\) Regions will "organize" to compete for success.\(^6\) If they do not, they will be relegated to a slow, but sure, demise. Communities of stakeholders—government, residents, business organizations, corporations, arts, religious, and cultural institutions—all have a common interest in guiding the manner by which the community proceeds to organize and act as a "region" to compete economically. Economic development issues and the very viability of regional communities are directly related.\(^7\)

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\(^4\) "Region" may be defined as a real economic, social, and ecological unit. "Regions, not the cities within them, function as labor markets and housing markets, and businesses look to the region, rather than to the localities in which they are located, for their suppliers, workers and customers. Cultural and educational institutions, like museums, orchestras, and universities, serve broader regions than just their home cities. Environmental and natural resource questions—like air and water quality, water supply, waste disposal, or the availability of open space—affect regions that transcend local boundaries." Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 3 (2000) (citation omitted).


\(^6\) The business community of Northeast Ohio organized years ago to look at economic development in an eight-county region in Northeast Ohio as The Northeast Ohio Regional Economic Development Strategy Initiative (more commonly referred to as the "Cluster Project"). See Jack E. Kleinhenz, *Economics at Work—The Greater Cleveland Growth Association*, BUS. ECON., Apr. 2002, at 66, 67. "This project stretches over eight counties and is the seminal collaborative effort by the region’s four leading economic development organizations: the Greater Akron Chamber of Commerce, the Cleveland-Cuyahoga County Port Authority, Cleveland Tomorrow (comprised of CEO’s from the largest area corporations), and the Greater Cleveland Growth Association. The ongoing Project’s purpose is to accelerate economic growth and development in the Northeast Ohio region." *Id.*

The regions of the United States most in danger of a systematic incapacity for such regional competition are the mature, old manufacturing towns in the Northeast, Old South, and Midwest. At risk “core cities” include Cleveland, Youngstown, Warren, and Cincinnati, Ohio, Detroit and Saginaw, Michigan, and Buffalo, New York in the Midwest; Baltimore, Maryland, Scranton, Pennsylvania, Providence, Rhode Island, and New Haven, Connecticut in the Northeast; and New Orleans, Louisiana, Birmingham, Alabama, and Jackson, Mississippi in the Old South. Most of these cities and their metropolitan regions have fragmented and poorly planned land uses, brownfields from abandoned steel and other manufacturing facilities, severely economically and functionally deteriorated core inner cities, and major urban sprawl issues. In short, dysfunctional land-use patterns, severely deteriorated conditions, and failing core cities beg for the successful redevelopment strategies that are vital to their very survival and hope for future economic success.

Regional success hinges on the capacity of such regions to develop and implement a competitive strategy. Multiple layers of government and diverse and multiple stakeholders must truly “get” this need and successfully transform their “old separate ways” into a new regional approach. Pittsburgh and Allegheny County “got it”

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8. “In 1990, 193 million people, or seventy-eight percent of the total population of the United States, lived in metropolitan areas. The twenty-one most populous metropolitan areas (those with two million people or more) included 101 million people, or forty percent of the population. Slightly more than half of all Americans in 1990 lived in the thirty-nine metropolitan areas that contained one million people or more. Composed of multiple local governments, the metropolitan region falls between city and state. It is usually far larger in area and population than any of the local governments, particularly the municipalities that lie within it.” Briffault, supra note 4, at 4 (citations omitted).

9. See VEY, supra note 7, at 12, for a complete listing of America’s sixty-five most “in need” older industrialized cities.

10. See generally Briffault, supra note 4, at 8 nn.24, 25, 28.

11. Another element of regionalism is “the desire for regional instead of purely local policies,” which “is reflected in the many proposals concerning land use planning, economic development, affordable housing, the financing of public services, and the protection of the regional environment. Many of these proposals would leave local powers and structures in place, but through a combination of incentives or requirements that local actions conform to regional standards, would superimpose on local decision-making regional goals or norms concerning such matters as the management of new growth, the allocation of affordable housing, or the sharing of the local revenue gains from new property tax base growth.” Briffault, supra note 4, at 5.

12. See VEY, supra note 7, at 64–65 (“Restoring prosperity in older industrial cities, in short, means building the capacity to make it happen. In practice, this means both building the capacity of state and local governments to more effectively administer programs and services, as well as building the capacity of political, business, and community leaders—at the local, regional, and state level—to create and sustain collaborative, cross-sector networks within and across existing municipal boundaries.”); Jay Romano, Regional Approach to Services Reconsidered, N.Y. TIMES, Nov. 25, 1990, § 12 (New Jersey Weekly), at NJ1 (acknowledging that the concept of regionalization has had a long and controversial history in New Jersey and is
ten years ago. In the words of John E. Murray, Jr., then President of Duquesne University and head of a blue-chip committee to prepare Allegheny County for the twenty-first century: "Nobody cares about cities or counties anymore. They care about regions."\textsuperscript{13}

Regional success depends upon the comparative attractiveness of the region to corporations. Regions must be able to lure new business seeking to relocate or expand by also being able to attract the talented labor force each needs to grow and succeed. The ability of the region to provide the essential "infrastructure" such businesses and corporations require is, thus, one of the largest challenges. By example, airport capacity and access, quality of education, cost of living and housing, reasonable aggregate levels of taxation, quality and diversity of residential offerings, and sustainable cultural and arts institutions are all crucial. The bottom line is that if the talent such businesses need for success (including the Corporate CEO leadership) is not attracted, the businesses will not stay, expand, or relocate within or to those regions.

The lynch-pin of regional success ultimately depends upon the capacity of regions to engage in redevelopment, physical growth, and change designed to achieve the "infrastructure" needs for basic core growth and attraction engines and services. This "infrastructure" includes high capacity airports, attractive and affordable housing, tax base expansion through real economic development, and community rehabilitation and revitalization needed to restore the viability of "core cities."

\textbf{B. Regional Economic Development Leadership and the Use of Eminent Domain}

Regional redevelopment success requires the intestinal fortitude of community leaders. In the face of legal and policy challenges, regional leaders must be prepared to use the constitutional tool of eminent domain when necessary for their economic development plans. Refusal to use it when necessary or its unavailability as a tool in that state could be the region's ticket to failure.

There are multiple strategies needed to achieve regional economic redevelopment success. These strategies will include the

\textsuperscript{13} Jim Urban, \textit{They Care About Regions,} EXECUTIVE REPORT (Greater Pittsburgh Chamber of Commerce), Oct. 1996, at 40, 40.
re-architecture of core city and urban area land use. This will allow the rehabilitation and redevelopment of residential areas creating new market interest and the capacity to meet those demands. These strategies will be central to the enhancement of tax bases needed for increased funding to support city public school systems, as well as the creation of housing to meet the needs of empty nesters and young professionals alike. Most critically, these strategies will include redevelopment of large zones within metropolitan areas through integrated development plans. Such plans will be designed to rejuvenate and accelerate economic development through meaningful job creation, tax-base enhancement through tax revenue increases, the rebirth and rejuvenation of residential neighborhoods needed to meet demand and to increase quality and density, and finally the related business and talent retention and attraction needed to sustain true growth and sustainability of the economy.

Economic development of this nature and scale will inherently require the assembly of large areas of land for redevelopment. Such land assembly needs run into the sizable barriers that exist in core cities and urban areas in general: to wit, many disparate land uses, fragmented ownership by many different land owners, obsolete and blighted properties, and environmental contamination impeding commercial and residential reuse. Government agencies leading such redevelopment initiatives must be able to complete such land assembly through the use of eminent domain, if necessary. Such land assembly cannot be assured through normal operation of the market. Without this constitutional tool of government to achieve what the United States Supreme Court held to be a valid, public purpose, such redevelopment will not be probable or possible. Without such projects, these regions are doomed to failure in the battle of regional competition in the global economy. This is because another region with the fortitude and the tools of eminent domain will develop.

Regions cannot succeed without the level of determination borne through the community consensus and collaboration of its stakeholders. Through the determination and energy such consensus and collaboration bring, the governmental stakeholders could be empowered to appropriately use the tool of eminent domain to achieve the needed redevelopment of land. If its use is the only means of such land assembly, such leadership will be the key to success. Leadership is also required to secure the availability of the “tool” through legislation. Success, therefore, requires meaningful community engagement, consensus, and collaboration by the stakeholders. Regions cannot succeed without a fundamental change
in how the multiple layers of government function together on bold regional initiatives. Diverse and independent community stakeholders must also be able to find common ground to collaborate on inter-governmental led initiatives. Frankly, such public-private collaboration on common development agendas and projects is the only path to regional survival and some level of competitive success.

II. HAVE WE MET THE ENEMY AND ARE THEY US?: THE LEGAL AND POLICY BARRIERS THAT ARE SURMOUNTABLE

There are considerable legal and policy barriers that successful regional communities will need to overcome. There are an abundance of deleterious institutional structures and behavioral patterns that communities have built up over the last century. Regions must escape the vice-like grip inertia placed on their capacity to achieve competitive success in the new global reality. Some of the significant tools to escape the grip of failed structures and ineffective behavior are government reform and systems of collaboration. These systematic changes can allow these regions to obtain effective leadership for comprehensive regional planning.

A. Government Reform, Collaboration, and Comprehensive and Integrated Development Plans

The principle barriers to regional success are the very stakeholders who, as a group or individually, are poorly organized, fragmented, unengaged, dysfunctional, "territorial," uncollaborative, and myopic. Most regions have some or all of these problems to varying degrees. Regions that have broken from the pack and gained some competitive advantage have managed to understand and then successfully overcome many of these barriers. Some of these regions include: Indianapolis and Marion County; the cities of Minneapolis/St. Paul; Dayton and Montgomery County; Louisville, Kentucky and Jefferson County; the cities of Charlotte/Mecklenburg; and Los Angeles and Los Angeles County. These areas have regionalized and consolidated their economic and/or governmental functions to different degrees toward cooperative governance. Yet, each retains some local-level responsibility for certain services. This consolidation has helped spur the redevelopment of downtown city

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15 Id. at 9-10.
districts and caused growth in the surrounding counties and/or regions.

The Greater Cleveland/Cuyahoga County Metropolitan area in Northeast Ohio is a classic case of governmental organization that creates huge barriers to regional development effectiveness. This area once enjoyed the heyday of steel manufacturing, a central port for large ore traffic on the Great Lakes, and other successful Fortune 500 companies with headquarters, such as TRW, Standard Oil (BP) and Diamond Shamrock Corp. They are all gone. Yet now, there are fifty-seven separate municipal governments in Cuyahoga County. The "core" City of Cleveland has a Mayor and twenty-one City Council members representing twenty-one Wards, but the City has no real power outside of its border. The County itself serves a population of over 1.3 million, and has an annual budget of $1.2 billion. The governmental structure mandated by the state's statute consists of three County Commissioners plus eight "row offices," including: Auditor, Clerk of Courts, Coroner, Engineer, Prosecutor, Recorder, Sheriff, and Treasurer. The County Commissioners serve in a capacity that includes executive and administrative functions, with an appointed County "Administrator" to oversee the County's day to day affairs that are not under the supervision of the "row offices." In other words, there is no real CEO to lead with a mandate. The three-headed Commission often tries to go in as many directions or change course as the majority swings. Occasional gridlock, lack of leadership, and short-lived initiatives are the result.

There is clearly a need for governmental reform in many urban regions and a "step up" in real political leadership to align with the need for intergovernmental collaboration around regional economic development. County and City government reform are critical to providing a strong, cohesive structure to aid, not impede, regional leadership and actions. A number of counties and their core cities around the country have already restructured themselves using new forms of cooperative governance. Allegheny County, Pennsylvania and Summit County, Ohio have adopted a home rule charter; Indianapolis/Marion County, Indiana have a full city/county consolidation; Louisville/Jefferson County, Kentucky and Nashville/Davidson County, Tennessee have a partial city/county consolidation; Miami/Dade County, Florida utilize a "two-tier" system governance; Minneapolis/St. Paul, Minnesota have a
voluntary cooperative body known as the Metropolitan Council of Governments ("COG"); and Portland, Oregon has adopted regional governance created by referendum (known as "Metro") that merges two existing organizations, one responsible for a three-county region and the other has responsibility for the urban area.¹⁹

The redesign and master planning for the core cities within these regions are a crucial piece of the puzzle. What is equally important, is for each area or jurisdiction within a region not to cannibalize the other, resulting in "zero" regional "net gain." Rather, a regional cooperative approach is crucial to the accretive value regions need to succeed. Likewise, any area redevelopment should be accomplished in a fully integrated, non-piecemeal fashion. Fully integrated plans look like that in New London, Connecticut, ²⁰ which was the subject of the historic United States Supreme Court decision in Kelo v. City of New London.²¹

Government reform may improve the quality of regional governance. The strategy that is more likely to be achieved is intergovernmental and public-private cooperation or "partnerships." These partnerships and collaborations can "champion" planned economic development projects and institutionally support the use of the necessary, although politically unpopular, tools for success, such as eminent domain.

**B. The Kelo Decision: The Constitutional Tool for Regional Economic Success? Maybe Not in Many States**

In its 2005 Kelo v. City of New London²² decision, the United States Supreme Court provided the legal stake in the ground needed for the regional competitiveness of areas most in danger of economic obsolescence. The Court found that economic development satisfies the "public use" requirement of the Fifth Amendment’s Public Use Clause²³ where there was a single, fully-integrated plan for the City of New London that resulted from a thorough and comprehensive planning process, and where the plan was not adopted to benefit a

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¹⁹ For a full explanation of the types of governance, see *id.* at 18–22.

²⁰ For one example of a Regional Master Plan, see THE REG’LCTR., SOMERSET COUNTY REGIONAL CENTER STRATEGIC MASTER PLAN (2006), available at http://www.somervillenj.org/redev/regionalcenter.pdf. The plan sets forth the regional planning process for the Somerville Borough, Raritan Borough, and part of Bridgewater Township also known as the "Bridgewater Core" in Central New Jersey. *Id.* at 1.


²² *Id.*

²³ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
particular class of identifiable individuals.\textsuperscript{24} The fact that there was a private owner-to-private owner property transfer (to a private developer who provided the means to achieve the public purpose) did not matter.\textsuperscript{25}

The \textit{Kelo} decision recognized that economic development is a long-accepted function of government\textsuperscript{26} and that it is a valid "public purpose" under the Public Use requirement of the Fifth Amendment.\textsuperscript{27} The Court reasoned that such a public use could not be intellectually differentiated from other public purposes historically recognized by the Court.\textsuperscript{28} Moreover, "[i]t would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests."\textsuperscript{29} The Court thus found that there was no basis for excepting economic development from its "traditionally broad understanding of public purpose."\textsuperscript{30} The \textit{Kelo} decision seemed to seal the opportunity for other struggling urban core cities to revitalize and survive economically and compete regionally.

The \textit{Kelo} decision did not endorse pure private-to-private transfers of property for the purpose of private benefit rather than public use.\textsuperscript{31}

\textsuperscript{24} \textit{Kelo}, 545 U.S. at 478–84 ("The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore . . . the City's development plan was not adopted 'to benefit a particular class of identifiable individuals.' . . . The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community. . . . Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." (citation omitted)).

\textsuperscript{25} \textit{Id.} at 483–84 ("[T]he City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. . . . Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

\textsuperscript{26} \textit{Id.} at 484 ("Promoting economic development is a traditional and long accepted function of government.").

\textsuperscript{27} \textit{Id.} at 485 ("Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.").

\textsuperscript{28} \textit{Id.} at 485 (citing, for example, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906) (upholding takings that facilitated agriculture and mining because of the importance of those industries to the welfare of the States in question); Berman v. Parker, 348 U.S. 26 (1954) (endorsing the purpose of transforming a blighted area into a "well-balanced" community through redevelopment); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984) (upholding the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the State's residential land market"); and Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014–15 (1984) (accepting Congress' purpose of eliminating a "significant barrier to entry in the pesticide market"). In \textit{Berman}, the Supreme Court noted that "[t]he concept of the public welfare is broad and inclusive" so as to permit takings for any purpose within the scope of Congressional authority. \textit{Berman}, 348 U.S. at 33.

\textsuperscript{29} \textit{Kelo}, 545 U.S. at 485.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.} at 477 ("[T]he City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party.").
The *Kelo* decision did not sanction private benefit under a pretextual governmental purpose. The Supreme Court certainly continued to recognize the important principle that private property is protected from a governmental taking, unless the public use requirement of the Fifth Amendment is satisfied. *Kelo* reiterated the crucial rule of "deference" to *bonafide*, reasonable, legislative action designed to achieve clearly articulated and fully planned economic benefits that thus serve the public purpose. The Court affirmed the inherent role of the legislative branch to lead on public and policy formulation and implementation. The use of private enterprise (redevelopers) to serve as the means to such public purpose achievement is, in the eyes of the *Kelo* majority, no different than a private owner of a public carrier facility or other utility providing public uses accordingly. The *Kelo* Court ultimately recognized the "living" aspect of the Fifth Amendment and its need to apply to the cutting-edge public purposes identified by government.

The thrust of the *Kelo* decision is to uphold economic development takings for a constitutional public purpose where it is based upon sound, detailed planning and analysis. The Court did not require proof of the reasonable certainty that the anticipated benefits would be achieved. Nor did the Court invite piece-meal challenges to each part of the plan. Rather, the Court held that challenges would be considered "in light of the entire plan." The *Kelo* decision forecasts that collaborative regional efforts should focus on the significant role for quality planning by highly qualified planners. Planning should establish the legal necessity for the use of eminent domain for these types of projects. Such *bonafide* planning linked to achievement of important public policy objectives is the *Kelo* decision's legal

32 Id. at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.").
33 Id. at 477 (citing *Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").
34 See id. at 480.
35 Id.
36 Id. at 483 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").
37 Id. at 487-88 ("Alternatively, petitioners maintain that for takings of this kind we should require a 'reasonable certainty' that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. 'When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.' (quoting *Midkiff*, 467 U.S. at 242-43)).
38 Id. at 484.
roadmap for regions in need of land assembly that is pivotal to redevelopment capability.

The Court in *Kelo* thus recognizes that under the Fifth Amendment to the U.S. Constitution, the courts will defer to reasonable legislative judgments that a taking will serve a public purpose of economic benefits and rejuvenation of an economy. *Kelo* empowers regions to assemble the land needed for economic viability for whole communities in the twenty-first century.

**C. Will Congress, State Legislatures, and Courts Strip Regions of Their Constitutional Tool for Viability?**

The *Kelo* decision ignited a firestorm of protest, reaction, and ensuing state and federal legislative and state judicial reaction to undo or limit the *Kelo* decision's promise. The *Kelo* Court actually invited states to do so by saying, "[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."39 State legislatures across the country immediately seized upon the United States Supreme Court's invitation.

State and local governments and regional organizations around the country hailed the decision as an important recognition of the power of government to lead and implement its own efforts to achieve the public purpose of economic development.40 Yet, a firestorm of protest was led by political forces outraged by the notion that private property, particularly residences, could be taken through the use of eminent domain and transferred to other private owners for similar or identical uses promising to provide potential economic benefit to the community. The political "right" felt this was nothing more than a deprivation of the constitutional right to enjoy one's property free of government abuse.41 The political "left" felt that it particularly made the less powerful and economically disadvantaged property owners vulnerable to government abuse.42 These rarely aligned political forces sought actions in Congress and state legislatures to "undo" *Kelo*. The argument was that protection of the right of private ownership from other private use, and the fear of government abuse

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39 Id. at 489.
42 See id. at 6 ("Losses from eminent domain abuse fall disproportionately on the poor, and particularly on minorities." (internal quotation omitted)).
of power, mandate that economic development, per se, should not be deemed a public purpose for use of eminent domain.

While the Supreme Court in *Kelo* did invite state legislatures to carve more “narrow” limits on the use of eminent domain in those states, the holding under the Fifth Amendment’s “public use” clause was a hugely important recognition of constitutional validity. The *Kelo* rule, that eminent domain is a historically rooted public purpose that cannot be intellectually distinguished from the other “public uses” recognized by the Supreme Court, should be a powerful, historical, and jurisprudential message to state governments and courts that are nevertheless free to decide otherwise under applicable state laws.43 When our Supreme Court applies and construes the Fifth Amendment, it construes and applies the legal foundation in America for the limits of private property rights and the power of government to use eminent domain under the “public use” exception. That should have significance to state legislatures and courts.

The Fifth Amendment’s “public use” requirement limits the government’s taking power. The historical context is clearly to protect the fundamental right of private property subject to the constitutional right of government to take for a public use, so long as the taking is compensated. In *Kelo*, the Court succinctly stated that its jurisprudence has recognized the legislative role in public purpose policy judgments:

> Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the taking power.44

The lesson is not to read the Fifth Amendment as a broad prohibition against the taking for certain “public uses” of an

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44 *Kelo*, 545 U.S. at 482–83 (citation omitted).
otherwise fundamentally protected right of private property ownership. Nor should it be read to enlarge the protection and therefore narrow the constitutional right of government—particularly the judicial deference to the legislative function. The legislatures should clearly express the "will of the people" as to public policy and, therefore, reasonably decide what are necessary public uses. When the *Kelo* Court recognized that such judgments constitutionally extend to property takings to serve the government purpose of economic development, the Court recognized the right of government in today's global economy to create community viability through the economics of tax base enhancement and job creation. While legislatures can now decide that their public policy under their own statutes or constitutions is to prohibit such governmental purpose for takings, they do so in the face of the judgment of our Supreme Court under the Fifth Amendment that such a public use, through an integrated plan and thorough planning process, is what the U.S. Constitution was meant to allow government to use eminent domain to accomplish.

1. The Legislative Assault on the *Kelo* Decision

The legislative retreat from *Kelo* builds large, new barriers to the regional redevelopment imperatives around the United States. Since 2005, more than thirty states have severely limited the right of the states and their political subdivisions to use eminent domain as a tool, if needed, to assemble property needed for economic development.\(^{45}\)

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The state legislation enacted or proposed centers around the key issues of defining public use as compared to public purpose, the definition of "blight," and appropriate measures of compensation and relocation payments when property is taken.\textsuperscript{46} Populous constituencies have sought greater protections for private property rights. Governmental authorities, and their inherent political sensitivities, have been torn between the anti-	extit{Kelo} sentiments and the recognition that eminent domain is a critical historic tool for advancing the public welfare and particularly twenty-first century need for economic viability.

The post-	extit{Kelo} legislation that has been enacted generally falls into one or more of eight categories:

1) Prohibiting eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private use.\textsuperscript{47}

2) Limiting eminent domain to the traditionally recognized "public purposes" or "public use."\textsuperscript{48}

3) Restricting eminent domain to blighted or mostly blighted properties and/or establishing criteria for or new definitions of blight.\textsuperscript{49}

4) Enacting moratoriums.\textsuperscript{50}

\textsuperscript{46} See Nat'l Conference of State Legislatures, \textit{supra} note 45, for a complete listing of the various state legislation enacted as a response to the \textit{Kelo} decision.

\textsuperscript{47} Legislation in the following states falls in this category: Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. \textit{See id.}

\textsuperscript{48} Legislation in the following states falls in this category: Arizona, Delaware, Georgia, Indiana, Iowa, Kentucky, Minnesota, South Carolina, and Tennessee. \textit{See id.}

\textsuperscript{49} Legislation in the following states falls within this category: Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Ohio, Pennsylvania, South Carolina, West Virginia, and Wisconsin. \textit{See id.}

\textsuperscript{50} Legislation in the following states falls within this category: California, Georgia, and Ohio. \textit{See id.} Ohio became the first state to enact a moratorium when, on November 16, 2005, Governor Bob Taft signed Substitute Senate Bill 167 the Ohio Moratorium on Eminent Domain, which went into immediate effect imposing a one year moratorium until December 31, 2006. \textit{See Amended Substitute S.B. 167, 126th Gen. Assem. (Ohio 2006).} The moratorium banned the use of eminent domain to take property that was not within a blighted area, as determined by the local public body, when the primary purpose for the taking was economic development that will ultimately result in ownership of that property being vested in another private person. \textit{Id.} The Bill also set monetary penalties for the prohibited takings and established an eminent domain task force that subsequently released a recommendation that a statewide standard of blight be established. \textit{Id.}
5) Establishing task forces to study the issue.51

6) Increasing compensation for those whose residences are taken by eminent domain.52

7) Defining what is a "public use" or "public purpose."53

8) Requiring greater public notice, more public hearings, and approval by elected governing bodies.54

Additionally, after Kelo, several states passed constitutional amendments pertaining to eminent domain. While states are free to enact any constitutional provision they desire, the constitutional bar on legislative judgments that a taking is required for economic viability of one of its regions can be the slow poison that will ultimately destroy the capacity of those regions to compete economically.

Yet, a number of states have severely limited their government's capacity to compete. Michigan passed a constitutional amendment in 2005 that was approved on the ballot in November 2006.55 Now the Michigan Constitution prohibits "the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues" and requires government to prove its authority to take a piece of property for blight removal by clear and convincing evidence.56

In 2006, two states passed constitutional amendments that were subject to and approved by the voters—Louisiana and South Carolina. The Louisiana amendment prohibits local governments from condemning private property merely to generate taxes or jobs and ensures that the state’s blight laws can only be used for the removal of a genuine threat to public health and safety on a specific piece of property.57 The South Carolina amendment prohibits municipalities from condemning private property for "the purpose or benefit of

51 Legislation in the following states falls within this category: Ohio, Indiana, South Carolina. See Nat’l Conference of State Legislatures, supra note 45.
52 Legislation in the following states falls within this category: Connecticut, Indiana, Kansas, Michigan, and Ohio. See id.
53 Legislation in the following states falls within this category: Georgia, Idaho, Indiana, Kentucky, Nevada, New Hampshire, North Dakota, Tennessee, Utah, West Virginia, and Wyoming. See id.
54 Legislation in the following states falls within this category: Connecticut, Georgia, Iowa, Minnesota, Missouri, Utah, West Virginia, and Wyoming. See id.
55 Id.
56 MICH. CONST. art. X, § 2.
economic development, unless the condemnation is for public use.”\(^5\) It also confines blight to include those properties that are a danger to public health and safety, thus restricting the state’s broad blight definition.\(^5\)

2. Post-Kelo Congressional Activity

Congress also weighed in with proposed legislation in response to the *Kelo* decision. The great attention on the topic that greeted the *Kelo* decision has since subsided. Little action is expected in the 110th session of the United States Congress, which convened January 3, 2007 and will end on January 3, 2009.\(^6\)

Most of the congressional activity in reaction to *Kelo* occurred in the 109th session. More than sixty bills were introduced in the 109th Congress for the purpose of limiting the right of the government to take private property. But, only one of those bills was enacted.\(^6\)

The Housing and Urban Development (“HUD”) Appropriations Bill for Fiscal Year 2006 was enacted. It included the Bond Amendment, precluding funding for projects that use eminent domain for economic development without a traditionally recognized public


\(^{59}\) *Id.* In addition, voters also approved constitutional amendments in November 2006 in Florida, Georgia, and New Hampshire as part of laws passed in 2006. *See* Nat’l Conference of State Legislatures, *supra* note 45 (follow “2006 State Legislation” hyperlink). The Florida Amendment prohibits the government from taking property for so-called “blight” removal and from transferring land from one owner to another through the use of eminent domain for ten years. *Id.* (follow “2006 State Legislation” hyperlink). The Georgia Amendment requires a vote by elected officials any time eminent domain will be used. *Id.* (follow “2006 State Legislation” hyperlink). The New Hampshire Amendment defines public use to include the “possession, occupation and enjoyment of property by the public, public agencies or public utilities; the removal of properties that pose a threat to the public health and safety; or private uses that occupy an incidental area within a public project.” *Id.* (follow “2006 State Legislation” hyperlink).

\(^{60}\) Three measures have been introduced but little attention is being given to them. Under the Strengthening the Ownership of Private Property (STOPP) Act of 2007, introduced on Feb. 7, 2007, states and localities using the power of eminent domain to transfer private property for “private development purposes” would in most cases lose access to all federal economic development funding for up to two years. *See* H.R. 926, 110th Cong. (2007). The bill has been referred to the House Financial Services Committee, where no action has yet been scheduled. There is no companion bill in the Senate. The Private Property Rights Protection Act of 2007, H.R. 3053, 110th Cong. (2007), S. 48, 110th Cong. (2007), is similar in nature and is pending in both the House and Senate, with no action scheduled. Additionally, Congress has imposed limitations on the local use of federal funds for eminent-domain related activities as part of the FY 2006 Department of Housing and Urban Development Appropriations Acts by inserting a provision now known as the Bond Amendment. H.R. 3058, 109th Cong. (2005) (enacted). Language similar to the Bond Amendment appears in the Senate version of the FY 2008 Department of Housing and Urban Development Appropriations Act. S. 1789, 110th Cong. (2007).

purpose. The Appropriations Bill prohibited the use of any funds covered in the Act from being used to support any federal, state, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a traditional public use.

The Private Property Rights Protection Act of 2005 was passed by the U.S. House of Representatives and referred to the U.S. Senate. The bill never became law. The bill would have prohibited state and local governments from exercising eminent domain for the purpose of economic development ("private-to-private" property transfers to build tax base, create jobs, and foster economic vitality), and would have cut federal funding for those who take land for economic development purposes.

3. Presidential Executive Order on Use of Eminent Domain

The Executive Branch of the government also weighed in on the Kelo decision. On June 23, 2006, the one-year anniversary of the Kelo decision, President George W. Bush signed an Executive Order so as to "put the federal government on record opposing eminent domain for merely economic development purposes." The Executive Order provides that federal agencies cannot seize private property except for public projects such as hospitals or roads. The kinds of projects that President Bush's order says justify the taking of private property include parks, roads, medical facilities, government office buildings, and utilities. Takings also would be allowed to prevent land uses that are harmful to the environment or public safety or to acquire abandoned property.

4. State Court Retreats and Rejections of Kelo

State supreme courts also weighed in on the Kelo decision. Approximately one year after the Kelo decision, on July 26, 2006, the

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63 Partly in response to the Appropriations Bill, the U.S. Conference of Mayors sent a letter to Congress asking that it move slowly and thoughtfully before enacting legislation that would alter the right of states and localities to determine the use of eminent domain and undermine the ability of state and local governments to promote economic development. See Letter from the U.S. Conference of Mayors to the Senate Judiciary Comm., supra note 40.


66 Id.
Ohio Supreme Court issued its landmark decision in *City of Norwood v. Horney*, reframing the standards for the exercise of eminent domain powers under Ohio Constitution. The court ruled in its unanimous decision that taking property solely to achieve economic benefits violated the Ohio Constitution. The ruling reversed the First District Court of Appeals, which had upheld the City of Norwood's authority to use eminent domain to take property in a Cincinnati suburb for economic redevelopment purposes from unwilling home owners. Their property was not blighted, but instead was "in danger of deteriorating" into blight.

The Ohio Supreme Court was the first state supreme court following the *Kelo* decision to examine the issue of whether economic development alone is a proper public purpose for appropriating property. Although the United States Supreme Court's *Kelo* decision held that economic development in and of itself is a valid public purpose for which property may be taken under the U.S. Constitution, the Ohio Supreme Court found that economic development alone is not a valid public purpose in Ohio for exercising eminent domain powers. The Ohio Supreme Court held that, "although economic factors may be considered in determining whether private property may be appropriated" in connection with another public use, "the fact that the appropriation would provide economic benefit to the government and community, standing alone,.

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67 853 N.E.2d 1115 (Ohio 2006).
68 7 Id.
69 7 Id. at 1144–46.
70 Since *Kelo* and in the wake of *Norwood*, state courts are closely focusing upon the "substantial rationale for allowing a condemnee a fair and final opportunity to test the sovereign's exercise of authority when it is invoked in the name of redevelopment." Harrison Redevelopment Agency v. DeRose, 942 A.2d 59, 89 (N.J. Super. Ct. App. Div. 2008). "Since *Kelo* was decided, greater judicial and legislative scrutiny of redevelopment-based takings has occurred." *Id.* The *Harrison* court went on to cite *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007) ("allowing a condemnee to plead claims that the government's asserted public use for his property was pretextual, noting *Kelo's* admonition that government may not 'take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit'" (internal quotation omitted)); *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324, 334 (Md. 2007) ("rejecting a city's exercise of 'quick take' condemnation powers for redevelopment purposes, citing the Supreme Court's 'controversial' decision in *Kelo* and the need for judicial scrutiny in enforcing the constitution's public use requirement"); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) ("reversing a municipal finding that an area targeted for redevelopment was blighted or deteriorated, noting the courts 'critical' role, after *Kelo*, in reviewing public use designations with 'vigilance'"); and *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 465 (N.J. 2007) ("stating municipal power to pursue redevelopment is 'not unfettered,' and that [the New Jersey] Constitution 'reflects the will of the [p]eople regarding the appropriate balance between municipal redevelopment and property owners' rights.'").* *Harrison*, 942 A.2d at 89 (parenthetical information quoted from *Harrison*).
does not satisfy the public use requirement of Section 19, Article 1 of the Ohio Constitution.”

The Norwood court ruled that “any taking based solely on financial gain is void as a matter of law, and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to the community.” The underpinning of this decision is that the perpetual threat to private ownership that another private party would put the land to “better” use requires that other public uses or conditions be present to justify a taking and transfer to another private party. Obviously, the court in Norwood rejected and, in effect, substituted its own judgment for that of the legislature as to the importance of the public use of economic development. By rejecting the legislative determination, and requiring that such “public” benefits be coupled with another “public purpose” for a taking and transfer to a developer, the court has created a “second class” of public uses that defies the Fifth Amendment meaning. This rule can cripple certain economic development projects in Ohio.

5. Further Retreat and Reconsideration?

There will be considerable political pressure on government to both legislate limits on the use of eminent domain and to refrain from use where it has the right to do so under applicable state law. Ultimately, the public policy need is for a rational balance between private property rights protection and the redevelopment needs for the “rust-belt” and “old economy” regions of the Northeast, Midwest, and

71 Norwood, 853 N.E.2d at 1123. The other central holdings in Norwood continued the Ohio Supreme Court’s retreat from empowering governments to achieve competition success through the use of eminent domain. The court held that courts in Ohio will apply a heightened scrutiny and will not simply yield to the discretion of legislative bodies when reviewing statutes and ordinances that regulate the use of eminent domain powers. Id. (“[T]he void-for-vagueness doctrine applies to statutes that regulate the use of eminent-domain powers. Courts shall apply heightened scrutiny when reviewing statutes that regulate the use of eminent-domain powers.”). The actions of legislative bodies will be afforded some deference, but courts will be the final arbiters of whether those actions satisfy proper public purpose requirements, and a court can enjoin or stop the appropriating entity from taking and using the property appropriated during the pendency of an appeal. Id. Norwood reaffirmed that a municipality can take a slum or blighted or deteriorated property and it remains proper to do so when the city transfers the property to a private party for redevelopment. Id. Accordingly, the economic benefits of a project may be considered as long as the eminent domain actions seek to appropriate blighted property, or seek to take property for any other traditionally recognized public purposes, including roads, hospitals, parks, etc. But such a taking solely for economic development purposes is now prohibited in Ohio.

72 Id. at 1142.

73 In rejecting Kelo’s conclusion, the Norwood court accepted as a rule the dissenting judges’ view in the Connecticut State Supreme Court decision in Kelo, and the dissent in the United States Supreme Court in Kelo. Id.
Old South. The protection of individual property rights may be best obtained not in precluding the public use of economic development, but rather by adopting sound standards and criteria for review of such legislative determinations.74

The challenge now is for state legislatures to take a measure of what their states really require to be successful regional competitors in the twenty-first century. Perhaps states that legislated too quickly and too harshly have disabled their chances of such success. Perhaps those reactive, yet thoughtful legislatures will “repair” their statutes in the future to balance the rights of private property owners with the imperative of the government’s purpose of regional economic development.

Finally, other state supreme courts, unlike Ohio’s, may choose a similar path of individual property rights protection through adoption of workable review standards without eliminating the public purpose of governments in legislating projects for crucial economic development.

III. NORTHEAST OHIO REGIONAL DEVELOPMENT: TWO CASE STUDIES ON USE OF EMINENT DOMAIN

During the last eight years, two large, hotly-contested, and controversial development projects in Northeast Ohio involved the use of eminent domain: the Cleveland Hopkins International Airport expansion and the Cleveland Flats East Bank Development. Each case is emblematic of the political and public policy challenges to regional economic competition and the role of eminent domain. But each case also shows that there is hope for effective and courageous community leadership prepared to use its constitutional legal tools for the benefit of the region’s future viability.

The Cleveland Hopkins International Airport expansion eminent domain litigation demonstrates the critical role of airport “infrastructure” in regional competitiveness. The case also shows how the City of Cleveland’s airport growth efforts were threatened by another city’s use of eminent domain for economic development. Limited land in mature urban metropolitan regions will likely see

74 See Kelo v. City of New London, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring) (“There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”); id. at 497 (O’Connor, J., dissenting) (“[The Court] give[s] considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff.”).
such intergovernmental conflict in the future—unless true regional collaboration and joint planning can be accomplished.

The City of Cleveland Flats East Bank Development represents the achievement of intergovernmental collaboration for both the planning, plan adoption and execution of an integrated development plan. Such an important achievement for the Cleveland Metropolitan and Northeast Ohio areas was met by the *Kelo* backlash of the *Norwood* Ohio Supreme Court decision. Ohio then "rushed" a legislative moratorium on the use of eminent domain for economic development purposes. These *Kelo* "retreats" and its impact on important economic development initiatives exemplify the threat to the development efforts of key regions in the United States.

### A. Cleveland Hopkins International Airport Expansion Eminent Domain Litigation in 2000

One of the principal considerations for corporate expansion or relocation decisions is the major area airport’s current capacity and long-term plans to grow. This is directly linked to the need in our global economy for business to have direct air service for major domestic and foreign destinations, particularly Europe and Asia and the Pacific Rim. Like other states, Ohio recognized that proposition.

In 1999, the Cleveland Hopkins International Airport ("CHIA") was (and still is) the major economic development engine for the Northeast Ohio Region. The City of Cleveland owns and operates the CHIA, the region’s major international and domestic airport. CHIA is a "public utility" under Ohio law.

In 1990, the City of Cleveland focused on its need to insure its ability to service long-term demand through an increase in capacity—i.e., "airport expansion." Expansion requires land, not only for additional runways, but also for all the supporting "landside" facilities, such as passenger terminals, hangers, maintenance facilities,

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75 City of Brook Park v. Brook Park Cmty. Urban Redevelopment Corp., No. 76711, 2000 Ohio App. LEXIS 225 (Ohio Ct. App. May 25, 2000). The author was lead trial counsel for the City of Cleveland, together with his co-counsel William Jacobs. The trial was held in September 2000, and the verdict in favor of the City of Cleveland was issued on November 28, 2000.

76 See Press Release, Office of the Governor of Ohio, Continental Airlines Announces Major Expansion at Cleveland Hopkins International Airport (Sept. 14, 2007), available at http://governor.ohio.gov/Default.aspx?tabid=755 (quoting Lieutenant Governor Lee Fisher as saying “Ohio’s world-class transportation infrastructure and airports are strengths for our communities that enhance our economic development goals, and this expansion will bolster Cleveland Hopkins and support business development in Northeast Ohio”).

cargo facilities, and parking. All important airports need for these purposes. Airports in fully developed and "mature" metropolitan areas are generally "land-locked" and have great difficulty assembling additional lands for needed expansion. The City of Cleveland faced such difficulty as its airport was surrounded by a metro-park gorge (totally unavailable for expansion), a major Ford manufacturing plant, and residential areas. In the center of the airport grounds, but just over the border inside a neighboring city's jurisdiction, sat 188 acres of land where the privately owned International Exposition Center ("IX Center") and a private air facility ("IX Jet Center") operated (collectively referred to as the "IX property"). The City of Cleveland's essential airport expansion had no reasonable alternative site.

With the assistance of nationally recognized airport planners, the City of Cleveland concluded that the forecasts of demand for air travel at the airport, significantly driven by the presence of its hub carrier—Continental Airlines—would exceed the City of Cleveland's existing runway capacity in approximately 2015. The City thus required an additional runway, with the addition of a 12,000 international length runway between 2015 and 2025. The FAA agreed. Cleveland's corporate community commissioned a study that confirmed the need, and various leading business groups in the region supported such expansion. The IX property land was needed for that expansion.

The City of Cleveland purchased the IX property for long-term airport expansion on January 14, 1999, after nine years of preparing for and taking steps toward the acquisition. The City of Cleveland negotiated the purchase of all the IX property and then leased it back to the owner, the Park Corporation, under a fifteen-year lease. The lease allowed the City of Cleveland to terminate the remainder of the lease, if the city required the land sooner for airport expansion. On the day the deed transferred to the City of Cleveland, the City of Brook Park (where the IX property was located), filed an eminent domain action to take the property for its own economic development purposes pursuant to an Economic Development Plan enacted hastily by Brook Park's City Council on the eve of the City of Cleveland's purchase.

In this litigation, two governments each sought to acquire a large area of land for the dueling governmental purposes of economic development and public utility expansion. While Kelo had not yet been decided, Brook Park argued that economic development was a traditionally acknowledged public purpose for use of eminent domain
and that the City of Cleveland’s purchase of the IX property directly threatened such public purpose. The City of Cleveland felt the historical planning by the City of Cleveland first established the inevitability of future public use, i.e., airport use, through required expansion (and thus, provided the requisite “reasonable assurance” of such future use).

The trial proceeded for five weeks as Brook Park pressed its eminent domain case to acquire the IX property from the City of Cleveland. In a landmark Ohio ruling hailed by the Plain Dealer as a “Victory for Progress,” the City of Cleveland successfully defended the case and prevented the taking after establishing the reasonable assurance of the future use of the property for “public purposes” of the airport utility expansion.

The redevelopment and competitive needs of regions will drive actions that will inevitably focus on land use, reuse, and redevelopment in maturely developed urban areas. The Cleveland Hopkins International Airport expansion is emblematic of the cases of competition for critical but scarce urban land. Scenarios where different governmental agencies have divergent public uses for the same land are not unlikely in the future. Collaborative regional planning and “compromises” of multiple government layers to achieve agreed action for the benefit of the area will be keys to avoiding conflicts. Tax revenue sharing may be the “highest and best” joint development decision. In addition, through long-range planning, a government agency can assure the future public uses that constitute a valid basis to acquire property through eminent domain.

78 City of New Haven v. Town of East Haven, 402 A.2d 345, 351–52 (Conn. Super. Ct. 1977) ("In determining whether the . . . property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered.' . . . The test must be whether there is a reasonable assurance that the intended use will come to pass.") (citation omitted).

79 Editorial, A Victory for Progress, PLAIN DEALER (Cleveland), Nov. 29, 2000, at 10B ("The City of Cleveland, Mayor Michael R. White and—most importantly—a region in need of future expansion of Cleveland Hopkins International Airport won big yesterday. The victory came in the form of a ruling by Cuyahoga County Probate Judge John Donnelly that the city of Brook Park cannot appropriate the International Exposition Center property adjacent to the airport. Instead, Donnelly found that the greater public purpose was for Cleveland to acquire the property for runway expansion in the 'reasonably foreseeable' future.").
B. Cleveland's Flats East Bank Development Eminent Domain Litigation, 2007

Five years after the City of Cleveland's success in the airport expansion litigation, legislation was enacted that ignited another battle over the use of eminent domain in Northeast Ohio. The Flats East Bank development was a classic prototype of intergovernmental cooperation and planning that shines a light for other regions seeking to advance their competitive needs through regional leadership.

1. Intergovernmental and Stakeholder Planning

In April 2002, the City of Cleveland convened the Waterfront District Planning process. It involved a series of meetings over a thirty-two-month period to devise a plan for the waterfront. The meetings began with a cooperative effort between what became known as the Cleveland Lakefront Partners, who worked together as a steering committee to fund, support, and work on the Plan. The initial group included the City of Cleveland, the Cleveland-Cuyahoga County Port Authority, the Ohio Department of Natural Resources, the Ohio Department of Transportation, the Cleveland Neighborhood Development Coalition, the Greater Cleveland Partnership (a Regional Chamber of Commerce), and the Northeast Ohio Areawide Coordination Agency ("NOACA").

The Waterfront District Planning process spanned a year and a half long period through November 2004. The process involved hundreds of meetings including a considerable number of public meetings: public meetings with city neighborhoods, smaller community meetings, and association and group meetings. The process also included receiving various ideas regarding waterfront development from a number of developers.

2. The City of Cleveland Waterfront District Plan Adopted

On December 17, 2004, the City of Cleveland Planning Commission approved and adopted "Connecting Cleveland: The Waterfront District Plan." The Waterfront District Plan calls for the

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80 Steve Kaufman was lead trial counsel, and William Jacobs was co-counsel, for the Cleveland-Cuyahoga County Port Authority in the consolidated litigation styled, Cleveland-Cuyahoga County Port Authority v. Old River Road Cleveland, LLC, No. 2006 ADV 0113995 (Ohio C.P. Cuyahoga Cty. Probate Div., 2007). The trial proceeded for five weeks in May 2007 and ended with a full settlement of all claims by all parties.

development of an eight-mile shoreline, including the East Bank of the Flats. This hallmark plan called for open access to Lake Erie and the Cuyahoga River for public use, connecting pedestrian promenades along the river, creating and expanding parks, creating new roadways, and enhancing river transportation. Most significantly, it called for the development of 7,000 new downtown waterfront housing units.82

3. Legislation to Implement the Flats East Bank Redevelopment

The Cleveland Cuyahoga County Port Authority proceeded to implement the part of the integrated Waterfront District Plan focused on the Flats East Bank. The Flats was a historically successful entertainment district that profoundly failed. It became a blighted community and economically distressed all due to fragmented ownership and resulting incompatible uses. The Waterfront District Plan proposed to transform a deteriorated, blighted area into: a new, viable neighborhood, including for-sale and rental residential units, retail and commercial development, parking facilities, and other public infrastructure improvements, including streets, sidewalks, street lights, public utilities, new water and sewer lines, a public promenade along the Cuyahoga River, a public park, marina, new bulk heading along the Cuyahoga River, a navigable waterway for recreational and maritime purposes, and other public spaces and improvements to be located on approximately eighteen acres of land.

The Port Authority then adopted a resolution establishing the project's purpose to eliminate conditions of blight and deterioration, to further enhance, foster, aid, provide, or promote economic development within the jurisdiction of the Port Authority, and in conjunction with the City, to make available certain of the property for public streets and other public infrastructure improvements, and recreational and park lands.83 The Port Authority also adopted a

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82 Id. The plan was supported by a study led by Dr. Thomas Bier at the Levin College of Urban Affairs' Center for Housing Research & Policy, Cleveland State University, which confirmed the demand for 7,000 new housing units, particularly waterfront housing. Housing Analysis for Lakefront Development prepared for Cleveland Lakefront Partners by Cleveland State Univ., Nov. 6, 2003. The Waterfront District Plan built on the goals established in earlier years in the city-adopted plan entitled the "Civic Vision 2000 Downtown Plan," which proposed to create new housing downtown and a public open space and park system that takes advantage of the region's natural resources to encompass not only the lake but also the Cuyahoga River. See CLEVELAND CITY PLANNING COMM'N, CLEVELAND CIVIC VISION 2000 DOWNTOWN PLAN (1988).

83 The Port Authority derives its power to appropriate from Ohio statutes and the Ohio Constitution. See OHIO CONST. art. VIII, § 13 ("Laws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by
resolution authorizing and approving an agreement for the acquisition, disposition, and redevelopment of property between the Port Authority and Flats East Development LLC (the developer chosen to implement the plan). In the Acquisition Agreement, the developer agreed that the Project was to be constructed and completed in accordance with a final plan approved by the City and Port Authority, not the other way around.

4. Unprecedented Intergovernmental Collaboration to Implement the Development

a. Planning

The level of intergovernmental collaboration that preceded the Port Authority Resolutions was unprecedented in Cleveland, Cuyahoga County, and Northeast Ohio: (1) January 2005—the first meetings between the City, the Port Authority, and the developer took place and involved conceptual discussions about the Project; (2) March 2005—the Port Authority met with representatives from the City, the County, the State of Ohio, the Cleveland Municipal School District, the Northeast Ohio Regional Sewer District, and the developer in order for the Port Authority to determine the feasibility of the Flats East Bank Neighborhood Project and to set the role, if any, the Port Authority could play; (3) April 2005—working groups were established and met to deal with legal and legislative, financing, infrastructure, and planning and development issues for the Project. Meetings, held regularly, included Port Authority staff, representatives of the proposed developer, as well as the staff of various governmental entities to determine the feasibility of the Project, conduct due diligence and analyze the financing structure and plans to receive other public funding for the Project’s infrastructure needs from these various aspects.

any of them as such agencies or instrumentalities . . . .”); id. § 16 (providing that state and political subdivisions may finance housing for individuals and families); OHIO REV. CODE ANN. § 4582.06(A)(8) (West 2008) (giving the Port Authority the power to “exercise the right of eminent domain to appropriate any land, rights, rights of way, franchises, easements or other property, necessary or proper for any authorized purpose, pursuant to the procedures provided in sections 163.01 to 163.22 of the Revised Code”); id. § 4582.01(B) (stating that the authorized purpose includes activities that enhance, foster, aid, provide and promote inter alia, housing, recreation, transportation and government operations).

84 Cleveland-Cuyahoga County Port Authority Resolution No. 2005-45, Nov. 1, 2005.
85 In addition to the Port Authority’s express statutory power, the Port Authority, also has the express power to do anything “necessary or proper” to carry out these authorized purposes. See OHIO REV. CODE ANN. § 4582.06(A)(15).
b. Financing

Funding for the Project was provided through an unprecedented level of cooperation and involvement. Federal, state, and local financial support sought to implement this important part of the Waterfront District Plan included: a federal $6 million federal grant for river-related improvements; a state $3.5 million Clean Ohio Fund for brownfields remediation; a City of Cleveland $6 million loan and $11 million TIF bond financing for land costs and infrastructure improvements including streets and services; a Cleveland Development Advisors $3.5 million loan for land costs; a Cleveland Public Power $3.5 million grant for electric infrastructure; and a Cleveland Division of Water $750,000 grant for water infrastructure.

c. Blight Removal

The City of Cleveland conducted a Blight Study and prepared a Community Development Plan for the Project. The Blight Study and the Community Development Plan were publicly reviewed. This process included public hearings at the City Planning Commission, at the Flats Oxbow Association, a Flats East Bank neighborhood association, Cleveland City Council, and the Port Authority was briefed regularly as to the project status.86

d. Port Authority Determination of Multiple Public Purposes Including Economic Development and Use of Eminent Domain

The Port Authority enacted legislation to adopt the Blight Study and Community Development Plan of the City. The Board took official action, declaring the ultimate use of eminent domain to be a public purpose to eliminate blight and deterioration and for public infrastructure, recreational, transportation, and economic development purposes. After negotiations took place with each property owner, some agreed to a sale and others remained at an impasse.87 The Port Authority then adopted a resolution authorizing the filing of appropriation proceedings to acquire the remaining properties.88

87 At the time of the appropriations, the Developer owned approximately 24 percent of the Project site, Cuyahoga County and the City of Cleveland owned 36 percent of the site, and the hold out property owners owned 40 percent of the Project site.
88 The Port Authority's legislation was based upon its authority and in accordance with its authorized purposes. See supra notes 83–84.
5. The Eminent Domain Litigation is Met by the Norwood Decision

The Port Authority filed a series of eminent domain suits to acquire each of the separately owned parcels that constituted the remaining land needed for the development area.\(^89\)

The Ohio Supreme Court decision in *Norwood v. Horney*\(^90\) was announced in the midst of the filing of these actions. Essentially rejecting the Supreme Court's holding in *Kelo*, the *Norwood* court determined that under Section 19, Article I of the Ohio Constitution (the state's version of the Fifth Amendment eminent domain clause) "[a]lthough 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."\(^91\)

The Ohio Supreme Court in *Norwood* recognized and reaffirmed the long-standing law that deference is still "due" to legislative findings, but further recognized that the deference is "not absolute."\(^92\) Thus, the court in *Norwood* reaffirmed both the rule of deference to legislative judgments (unchanged from prior law) and the increased role for and intensity of judicial scrutiny (heightened under certain circumstances) that should be applied to an eminent domain proceeding involving "novel" public uses, such as arguably the Port Authority matters. There is to be judicial "deference" to legislative pronouncements, but the courts are "independent" of them.\(^93\) The review is to be "narrow in scope" even though the judicial review is not to be "meaningless."\(^94\) Although the "deferential" review is not satisfied by "superficial scrutiny,"\(^95\) the scrutiny of the courts in appropriation cases is limited in scope.\(^96\) Therefore, deference to the legislative determination, pursuant to its statutory authority to achieve public purposes granted by the Ohio legislature, remains clearly the standard under *Norwood*.

\(^89\) The Port Authority continued to negotiate with property owners and did not file the first appropriation actions until May 23, 2006. In total, thirteen cases were filed. Case Nos. 2006 ADV 0113995, 2006 ADV 0113996, 2006 ADV 0113997, 2006 ADV 0113999, and 2006 ADV 0114001 were filed on May 23, 2006. Case Nos. 2006 ADV 0114160 and 2006 ADV 0114161 were filed on May 26, 2006. Case Nos. 2006 ADV 0114443, 2006 ADV 0114444, 2006 ADV 0114445, 2006 ADV 0114446, and 2006 ADV 0114448 were filed on June 6, 2006. Finally, Case No. 2006 ADV 0116461 was filed on August 3, 2006.
\(^90\) 853 N.E.2d 1115 (Ohio 2006).
\(^91\) Id. at 1120.
\(^92\) Id. at 1136.
\(^93\) Id. at 1138–39.
\(^94\) Id. at 1137.
\(^95\) Id. at 1136–37.
\(^96\) Id. at 1138–39.
Norwood also adopted and reaffirmed prior Ohio law that the standard of review of a legislative determination remains whether the government “abused its power” or “acted in bad faith.” Norwood did not change previous Ohio law that established a high burden of proof on an owner to prove either abuse of discretion or bad faith. The “heightened scrutiny” of Norwood does not mean that the “scope” of what is examined is expanded, nor does it mean that the courts are any less deferential than they have been historically under the long-standing law of Ohio that still remains intact. The standard of judicial review of legislative judgments for the use of eminent domain, according to Norwood, remains the same (abuse of discretion and bad faith). But, in the context of judicial deference to legislation, the judicial scrutiny is even more important in cases where there is a transfer of property to a private owner, a novel theory of public use, bad faith, or impermissible financial gain. In Norwood, the Ohio Supreme Court reaffirmed the long-standing principle that “[t]he federal and Ohio constitutions forbid the state to take private property for the sole benefit of a private individual.”

Therefore, property may not be given to a private entity unless there is a valid public use. But “the fact that an ‘incidental benefit’ flow[s] to a private actor [is] not a critical aspect of the analysis (even if that benefit [is] significant), provided that there [is] a clear public benefit in the taking.”

The Norwood court left vague and undefined what “heightened” scrutiny meant. Are there other specific criteria to be applied? Are the standards of abuse of discretion and bad faith unchanged? If so, did not courts reviewing legislative acts always “carefully” scrutinize where the claim was for an abuse of discretion or bad faith? Clearly, the Norwood case did not change the owner’s or government’s burden of proof for such claims or defenses. Absent any clarity, the Ohio Supreme Court has opened the door for a lot of litigation testing the vague ruling’s meaning and certainly inviting different trial court outcomes. The confusion this will cause may be reflected in ad hominem attacks on legislative activity and judgments under the rubric of “heightened scrutiny.”

The defendant property owners in the Flats litigation challenged the takings through various attacks ostensibly grounded on the Norwood decision by:

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97 Id.
98 Id. at 1140.
99 Id. at 1130–31 (emphasis added and citations omitted).
100 Id. at 1133 (emphasis added).
1) Seeking to declare as unconstitutional the Ohio Revised Code sections on the public purposes of housing, transportation, government operations, parks (leisure), and economic development. The trial court rejected these defense arguments by denying their motions for summary judgment.

2) Arguing that *Norwood* authorized the court to fully examine through a "heightened scrutiny," the Port Authority’s legislative motives seen as pretextual to simply benefit another private owner (redeveloper), whose identity was known at the outset of the legislative process. The scrutiny was broadened to every step of the process of the "planning" and other actions by the City of Cleveland and other public collaborators on the project. The defense examined the issue of whether the public benefits were for economic development purposes. The collaboration of multiple government entities was portrayed, instead, as collusive and involving unlawful delegations of the Port Authority’s “taking” responsibilities to other public bodies and private parties.

During five weeks of trial, these defenses were vigorously presented. A settlement was forged with each remaining defendant owner after the defense rested, thus ending the litigation. The opportunity for a new legal decision clarifying the gaps left in the *Norwood* decision would not arise out of this litigation.


Today, there are considerable challenges for government authorities’ strategic efforts to achieve regional economic competitiveness. Yet, these challenges are made more difficult and problematic by the uncertainty and volatility in the emerging law of eminent domain. Changes in the law continue to flow from court decisions and state legislative bodies around the country. It is likely that the United States Supreme Court and even Congress will further define, limit, and question the current standards for the use of eminent domain.

The state legislatures and Congress will continue to wrestle with balancing the needs of government for economic development with the fundamental individual rights of property owners. When they do so, it is crucial to both our national regional economies and the individuals who live and work there that the focus not be on
deprivation of the government's capacity to engage in projects to further the public purpose of economic development, but rather on the protection against the abuse of such power. Courts, the state legislatures, and Congress all have to reconcile their desires to "retreat" from Kelo's pronouncement that the Constitution's Fifth Amendment, and its long history of embracing other indistinguishable public uses, clearly entitles a government to take private property solely for the public purpose of economic development.

While the Ohio Supreme Court in Norwood spoke of a "heightened scrutiny" the court left wide open any explanation as to what that really meant. The court clearly invited trial judges to look beneath the legislation to determine if there were any other motives behind the purposes for which eminent domain would be used, such as benefiting private parties involved in the development.

Courts will continue to face pressure to articulate an increased level of review of legislative action for purposes of economic development where property is taken and transferred to other private parties, i.e., redevelopers. The selection of a developer to provide the means for governments to implement economic development initiatives for such public purposes will continue to be a focal point of the property owners defending takings. The “more expansive” judicial role of review of these legislative judgments, borne out of the need to guard against the motive to benefit other private parties, will create practical problems of deterring private redeveloper involvement in such projects. Private redevelopers may shy away from the “cost” of involvement in legal proceedings and public scrutiny of the project's involvement of private redevelopers. To the extent that such redevelopers participate in funding such project's legal expenses, and "premiums" that will be paid for land held by private owners challenging these takings, the increased costs may cause many desirable and qualified developers to choose not to participate in these projects.

The criteria and scope of these “heightened” reviews should be established in subsequent litigation so that these reviews are not open-ended, runaway witch hunts, but rather are reasonably focused upon the legislative rationale and motives, not the private developer's benefits. After all, the Kelo Court and others all recognize as constitutional the transfer of property taken by eminent domain from one private owner to another private owner (developer) to serve as the “means” of providing the public use. Since the role of courts remains limited in the general context of deference to the legislative judgments, the frameworks for such “heightened” reviews
within that context must be better articulated to avoid an erosion of
the proper role of the courts. The consequence of a failure to do so
will be a chilling effect on the government’s ability to attract private
redevelopers to serve as “change agents” for constitutional public
purposes such as economic development.

Kelo, particularly Justice Kennedy’s concurring opinion, forecasts
a potential future review standard. Future courts should be mindful
that in order to allow governments the ability to proceed with
economic development initiatives, there will need to be a balance
stuck between the needs of legislatures to receive the deference to
which the law entitles them and the court’s and private property
owners’ need to scrutinize these legislative decisions to be sure that
there is no “private purpose” afoot. A standard that clarifies the level
of deference to legislative determination and perhaps the level of
proof required to overturn those legislative determinations based upon
more “compelling evidence” of some ulterior motive or pretextual
conduct by the legislature, may be the result of future challenges
where “private purpose” seems “afoot.” The circumstances
warranting a “trigger” to use the new “standard” apart from Kelo’s
rule of deference may also be the subject of such future litigation.
Such triggers might include the absence of: (1) a level of thorough
and comprehensive planning; or (b) a “fully integrated plan.”

There could also be clarity brought to this process by definitive
standards regarding the selection of a developer. The Kelo Court and
other courts have already held that since developers provide the
means for such public purposes, it is not, per se, a “private purpose”
when there is a transfer of private property from one owner to the
redeveloper. Rather, the courts should be clear on the degree of
legislative deference that will be permitted in the selection of a
developer, i.e., will the courts impose some type of “competitive
bidding” or proposed scrutiny requirement? Will the courts simply
require a more affirmative disclosure by legislatures of the bases on
which they select such developers? Will an investigation of the

101 See Kelo v. City of New London, 545 U.S. 469, 491–93 (2005) (Kennedy, J.,
concurring) (“A court confronted with a plausible accusation of impermissible favoritism to
private parties should treat the objection as a serious one and review the record to see if it has
merit, though with the presumption that the government’s actions were reasonable and intended
to serve a public purpose. . . . There may be private transfers in which the risk of undetected
impermissible favoritism of private parties is so acute that a presumption (rebuttable or
otherwise) of invalidity is warranted under the Public Use Clause. This demanding level of
scrutiny, however, is not required simply because the purpose of the taking is economic
development.” (citations omitted)).

102 Id. at 502 (O’Connor, J., dissenting) (asserting the concern that courts would not be
able to divine illicit purposes by reviewing the process by which a legislature arrives at a
decision to take, and that only a “stupid staffers” would fail the test).
legislature’s view of the public benefit vs. the private gain be required as part of a legislative record? Without more clarity on the nature of the judicial review, developers may be less likely to be willing to participate in these public, private efforts to rejuvenate economies. Inviting litigation over this type of an issue is counterproductive to everyone’s interests in regional economic competitiveness.

CONCLUSION

The economic reality is clear. Our nation’s future is inextricably tied to the competitive viability of our regional economies. Because many of these regional economies require substantial rejuvenation through physical redevelopment, the challenge to those regions is obvious. Without cutting through the institutional barriers of “localism” and transforming divergent local focus into regional thinking and action, regions will be unable to compete. But, once all regional stakeholders can truly engage in planning and develop broad, long-term integrated plans, the implementation of those plans may hinge on governments’ ability and will to assemble all the land needed. Without the constitutional tool of eminent domain, these plans will likely fail.

Our founding fathers, in adopting the Fifth Amendment’s public use and just compensation provisions, provided the legal basis to achieve these important public purposes. The Supreme Court in Kelo confirms this important legal foundation for the regional economic development imperative. The imperative now is for state legislatures and courts, as well as Congress, not to ignore the constitutional principle that a taking of private property for a “public use,” as determined by the legislature, is justified so long as just compensation is paid. If a state now chooses to elevate private ownership above the principle of taking for an important public use in the twenty-first century, it does so in derogation of the historical, fundamental principles of this country. Such a radical rewriting of our constitutional principles and jurisprudence for the states puts in great peril the future economic viability of the state in our new world economy. With those interests in the balance, the hope is that legislative vision and judicial wisdom will prevail as the period of the emergence of the law of eminent domain enters its most challenging and important time.