STATE COURT

DOCKET WATCH®

March 2006

The Federalist Society for Law and Public Policy Studies–State Courts Project

Texas Supreme Court Declares the State School Finance System Unconstitutional

The Texas Supreme Court recently issued a decision interpreting two key provisions of the state constitution concerning public education. The case, *Neeley v. West Orange-Cove Consolidated Independent School District*,[1] upheld a state district court's ruling that local property taxes used to fund schools have effectively become a statewide property tax in violation of article VIII, section 1-e of the Texas Constitution. In the same opinion, the supreme court reversed the lower court's finding that the current system violates article VII, section 1, which establishes standards of adequacy, efficiency, and suitability for public education.

I. School Districts Lack "Meaningful Discretion" to Set Local Property Tax Rates.

A group of 47 mostly affluent districts challenged the school finance system under article VIII, section 1-e , which provides simply that "No state ad valorem taxes shall be levied upon any property within this State." Texas, like many other states, has historically relied primarily upon local property taxes to fund its public schools. In the early 1990's, in *Edgewood III*, the supreme court declared the then-existing school finance system unconstitutional.[2] The court held that an article VIII, section 1-e violation results when a tax "is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion."[3]

In the wake of *Edgewood III*, the legislature passed Senate Bill 7, which, among other things, imposed a cap on local property taxes for school maintenance and operations of $1.50 per $100 of assessed value.[4] In 1993-1994, ninety percent of Texas school districts taxed at rates below $1.40.[5] By 2005, only twenty percent of districts still taxed below this same rate, with nearly fifty percent of the districts taxing at the $1.50 cap.[6]

The trend toward higher local taxation has come about as the result of a confluence of factors. Like other states, Texas has pushed for more stringent curriculum, testing, and accreditation

Continued on pg. 5

Inside...

2 Florida Supreme Court Strikes Down School Voucher Program

4 Courts As School Boards

The State of Eminent Domain Law

Introduction

When Justice John Paul Stevens wrote the majority opinion in *Kelo v. New London*, in which the Court held that the federal constitution does not prohibit the use of eminent domain to take property purely for economic development, he penned arguably the most important words toward the end: "[N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." *Kelo v. New London*, 125 S.Ct. 2655, 2668 (2005). Legislators in 40 states have since considered—or are planning to consider—legislation to curb the use of eminent domain for private commercial development at the state level.

The Ohio Supreme Court now has under consideration the first eminent domain abuse case in this post-*Kelo* world and Supreme courts in Arizona and Washington have been asked to consider issues related to eminent domain. The Arizona Supreme Court had an opportunity to take a case that would have definitely answered the *Kelo* question in that state, but declined to hear the case while leaving undisturbed a lower court ruling solidly favoring private property rights, while Washington's Supreme Court failed to accept a property rights claim in the face of a robust constitutional prohibition on takings for private use. All eyes remain on the Ohio court to see how it will apply

Continued on pg. 7

Florida Supreme Court Strikes Down School Voucher Program

Since 1999, Florida's Opportunity Scholarship Program (the "OSP")[1] provided students in failing public schools,[2] which do not meet minimum state standards, to obtain alternate means of education. On January 5, 2006, the Florida Supreme Court held the OSP unconstitutional as a matter of Florida law in *Bush v. Holmes*.[3] The remainder of this article addresses the OSP and the Florida Supreme Court opinion in *Bush v. Holmes*.[4]

I. Florida's Opportunity Scholarship Program

The OSP is the only program of its kind in the nation. Since enacted in 1999, many have maintained that the OSP improved the quality of education for numerous Florida students, particularly minority students attending schools in urban areas. According to the Florida Department of Education of the 763 Opportunity Scholarships students enrolled in private schools in 2004 through 2005, 61% are African American and 33% are Hispanic.[5] The OSP is designed to "provide enhanced opportunity for students in [the state of Florida] to gain the knowledge and skills necessary for postsecondary education, a career education, or the world of work."[6] The OSP is an effort to improve the quality of education in Florida by expanding educational choice to include private schools.

In addition, the OSP attempts to spur competition among schools and stimulate public schools to provide the best education available.[7] In the event a student's public school obtains a poor performance grade, failing to make adequate progress, and has two (2) school years in a four (4) year period of low performance,[8] the OSP allows children in kindergarten through grade twelve to choose between two (2) options: (i) the student may move to a different public school, maintaining a satisfactory record, or (ii) the student may attend an eligible private school when the student's parent chooses to apply the equivalent of the public education funds generated by the student to the cost of tuition in the eligible private school.[9]

II. The Florida Supreme Court Opinion in *Bush v. Holmes*[10]

In *Bush v. Holmes*, the Florida Supreme Court clearly states that it does not intend to review the political motivations of the Florida Legislature in passing the OSP, but rather to measure the OSP against the dictates of the Florida Constitution.[11] The Florida Supreme Court cited three main reasons for holding the OSP unconstitutional: first, the OSP violates Article IX, Section 1(a) of the Florida Constitution, second, the OSP diverts public funds from the public schools, and, third, under the OSP, private schools participating in the OSP violate the "uniformity" requirements of Article IX, Section 1 of the Florida Constitution. Since the OSP violates Article IX, Section 1(a) of the Florida Constitution, the Florida Supreme Court did not address whether the diversion of public funds under the OSP violates Florida's Blaine Amendment or the "no aid" provision in Article I, Section 3 of the Florida Constitution.[12]

A. The State's Obligation Pursuant to Article IX, Section 1(a) of the Florida Constitution

Article IX, Section 1(a) of the Florida Constitution imposes an obligation on the state to provide "a uniform, efficient, safe, secure, and high quality *system of free public schools*."[13] The Florida Supreme Court compared the constitutional language of Article IX, Section 1(a) with the language adopted by the Florida Legislature in the OSP statute. The OSP statute states: "The Legislature finds that the State Constitution requires the state to provide a uniform, safe, secure, efficient, and high quality system which allows the opportunity to obtain a high quality education."[14] The Court emphasized that the Legislative statements contained in the OSP statute omit "critical language in the constitutional provision,"[15] such as the obligation of the state to provide a system of free public schools, pursuant to the Florida Constitution. The Florida Supreme Court maintained that the omission from the OSP statute of the operative phrase, "to provide a system of free public schools," is of critical importance:

> "The constitutional language omitted from the legislative findings [of the OSP statute] is crucial […] Article IX, Section 1(a) is a limitation on the

From The Editor…

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents this first issue of *State Court Docket Watch* in 2006. This newsletter is one component of the Society's State Courts Project. *Docket Watch* presents original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts. The articles and opinions reported here are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in assiduously tracking state court jurisprudential trends.

The March 2006 issue presents several case studies, including a Florida Supreme Court decision that held that the state's Opportunity Scholarship Program was unconstitutional. This issue also features an in-depth look at some of the decisions made by states with regard to the issue of eminent domain. Additionally, we have highlighted a recent South Carolina case that demonstrates the role that the supreme court plays in school finance issues in that state.

> Legislature's power because it provides both a mandate to provide for children's education and a restriction on the execution of that mandate."[16]

Since the Florida Constitution imposes an obligation on the state to make adequate provision for the education of all children within its borders, Article IX, Section 1(a) is a limitation on the exercise of legislative power to provide for alternate means of education. As the Court stated: "The OSP violates the provision, [to make adequate provision for the education], by devoting the state's resources to the education of children within our state through means other than a system of free public schools."[17] Since the Constitution provides one way of education, through Article IX, Section 1(a), then any other method or means of public education or exercising Legislative power is prohibited by the Florida Constitution. The Florida Supreme Court concluded: "[Article IX, Section 1(a) of the Florida Constitution] mandates that the state's obligation is to provide for the education of Florida's children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternative."[18]

To support this conclusion, the Florida Supreme Court relied on the principle of construction, "*expressio unius est exclusio alterius*," or "the expression of one thing implies the exclusion of another." Justice Kenneth Bell's dissent challenged the majority's finding that Article IX, Section 1 provides the sole means in which the state fulfills its duty to provide for the education of children. The dissent states: "[T]here is no language of exclusion in the text [of the Florida Constitution]. [Article IX, Section 1] does not preclude the Legislature from using its general legislative powers to provide a private school scholarship to a finite number of parents who have a child in one of Florida's relatively few failing public schools […] Given these irrefutable facts, it is wholly inappropriate for a court to use a statutory maxim such as *expressio unius est exclusio alterius* to imply such a proscription."[19] The Court stated that Article IX, Section 1(a) "mandates that a system of free public schools is the manner in which the [State of Florida] is to provide a free education to the children of Florida […] and that providing a free education […] to attend private schools is a substantially different manner of providing publicly funded education than the one prescribed by the [Florida] Constitution."[20] The OSP conflicts with the primary purpose of the relevant constitutional provision related to education, namely Article IX, Section 1(a), which provides a "comprehensive statement of the state's responsibilities regarding the education of its children."[21]

B. Diversion of Funds form the Public Schools

The Florida Supreme Court emphasized that Article IX, Section 1(a) of the Florida Constitution prohibits the systematic diversion of public dollars to separate private schools, competing with public schools. Such diversion of public dollars reduces funds available to the public schools and is incompatible with Article IX, Section 1(a), but also, as the Court held: "funds private schools that are not uniform when compared to each other or the public system."[22] Since Article IX, Section 1(a) provides the exclusive means to provide for the education of children and the OSP diverts funds otherwise earmarked for public education to private schools, the OSP is an unconstitutional Legislative act. The Court concluded its analysis stating: "[Because] voucher payments reduce funding for the public education system, the OSP […] undermines the system of high quality free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida."[23]

C. The OSP Violates the Uniformity Provision of the Florida Constitution

Florida public schools are subject to the uniformity requirements of Article IX, Section 1(a). In other words, Florida's system of "free public education" enumerated in Article IX, Section 1 of the Florida Constitution must be uniform throughout the state. The OSP fails to apply the uniformity element set forth in Article IX, Section 1 to private schools participating in the OSP. The Court noted that student's participating in the OSP do not take the same statewide assessment tests required of a public school student. In addition, the "private school's curriculum and teachers are not subject to the same standards as those in force in public schools."[24] Since public schools are subject to additional requirements of state law, such as background checks for teachers, teacher certification requirements, and minimum curriculum standards, and private schools are not subject to the same public school requirements, "[t]he OSP contravenes [Article IX, Section 1 of the Florida Constitution] because it allows children to receive a publicly funded education through an alternate system of private schools that are not subject to the uniformity requirements of the public school system."[25] In sum, through the OSP, the "state is fostering plural, non-uniform systems of education in direct violation of the constitutional mandate for a uniform system of free public schools."[26]

III. Conclusion

As a result of *Bush v. Holmes*, over 700 students are required to return to their former schools at the beginning of the next school year. *Bush v. Holmes* prohibits any alternative form of public education other than the type provided for in Article IX, Section 1 of the Florida Constitution.[27]

Footnotes

[1] Fla. Stat. §1002.38.

[2] Florida Statutes §1008.34 establishes the methodology for grading public schools according to student achievement. In 1999, Fla. Stat. §1008.34 was passed simultaneous with Fla. Stat. §1002.38 or the OSP.

[3] No. SC04-2323 (Florida Supreme Court 2006) (citation omitted).

[4] *Id.*

[5] *See* http://www.floridaschoolchoice.org/informaiton/OSP.

[6] Fla. Stat. §1002.38(1).

Continued on pg. 4

[7] As the district court stated in *Bush v Holmes*, 767 So. 2d 668, 676 (Fla. 1st DCA Aug. 16, 2004): "Although, in establishing the OSP, the Legislature recognized that some public schools may not perform at an acceptable level, the Legislature attempted to improve those schools by raising expectations for and creating competition among schools, while at the same time not penalizing the students attending failing schools."

[8] Fla. Stat. §1002.38(1).

[9] *Id*.

[10] No. SC04-2323 (Florida Supreme Court 2006) (citation omitted).

[11] *Id*. at 17.

[12] A Blaine Amendment places some form of additional limitation on government aid to private, sectarian schools beyond the limitations imposed by the Establishment Clause of the U.S. Constitution. Currently, thirty seven (37) states have Blaine Amendments of varying severity, including Florida. Florida's Blaine Amendment set forth in Article I, Section 3 of the Florida Constitution states: "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Florida's Blaine Amendment prohibits taking revenue of the state from the public treasury to aid a sectarian institution. The Florida Supreme Court did not address Florida's Blaine Amendment or whether the OSP violates the Establishment Clause of the U.S. Constitution.

[13] Fla. Const. art. IX, §1(a), (*emphasis added*).

[14] Fla. Stat. §1002.38(1).

[15] *Bush v. Holmes*, No. SC04-2323 at 20 (Florida Supreme Court 2006) (citation omitted).

[16] *Id.* at 21, 22.

[17] *Id*. at 22.

[18] *Id*. at 25.

[19] *See Bush v. Holmes*, No. SC04-2323 at 40, 41 (Florida Supreme Court 2006) (citation omitted).

[20] *Bush v. Holmes*, No. SC04-2323 at 23 (Florida Supreme Court 2006) (citation omitted).

[21] *Id*. at 23.

[22] *Id*. at 4.

[23] *Id*. at 27.

[24] *Id*. at 28.

[25] *Id*. at 34.

[26] *Id*. at 5.

[27] *See* Andrew Coulson, *War Against Vouchers*, Wall St. J., Jan. 9, 2006.

Courts As School Boards

Public schools in South Carolina are now under judicial oversight. Right after Christmas, a state circuit judge issued his final order in the South Carolina school funding litigation. The plaintiffs in the litigation (school districts, parents, and students) argued that the South Carolina General Assembly has failed to provide children with the opportunity to acquire a minimally adequate education under the state constitution. Finding for the school districts, the trial court ordered the General Assembly to increase funding for early childhood educational programs. The school funding order raises many issues, but none more important than the role of our courts, if any, in making education policy.

This school funding litigation began over a decade ago, and, in 1996, the trial judge issued an order declaring that the adequacy of the education system was a political question for the elected branches of government and thus beyond his authority. The state supreme court, however, disagreed and reversed. The state supreme court issued specific instructions and sent the matter back for a trial which resulted in the order entered during the last week of 2005.

At the core of the litigation is the state constitution's education clause, which provides that "[t]he General Assembly shall provide for the maintenance and support of a system of free public schools open to all children and shall establish, organize and support such other public institutions of learning, as may be desirable." In instructing the trial judge after his 1996 order, the state supreme court held that the clause requires more than just public schools—the General Assembly must "provide the opportunity for each child to receive a minimally adequate education." (Note that the phrase "minimally adequate education" appears no where in the state constitution.) The supreme court went on to define minimally adequate education as including skills in English, mathematics, science, economics, history, and government.

After many weeks of receiving evidence, the trial court found that low academic achievement in the Plaintiff school districts was not related to money, teacher characteristics, or other school inputs. Instead, the trial court found that "the principal factor that is directly associated with different kinds of student performance is poverty" and that the relationship between poverty and performance is "greater in the very young." The judge found that the supreme court's instructions "impose[] an obligation upon the General Assembly and the State of South Carolina to create an educational system that overcomes, to the extent that it is educationally possible, the effects of poverty on the very young."

standards over the last decade. This push has come with significant cost in the form of higher property taxes. Senate Bill 7 also established a recapture system—known as "Robin Hood"—in an attempt to reduce the disparity in public education funds available for property-rich and property-poor districts. Under Robin Hood, property-rich districts are required to transfer available tax revenue above a fixed level to the state for redistribution to property-poor districts. The amount of funds subject to recapture has doubled to over $1 billion in less than a decade.

Applying the standard articulated in *Edgewood III*, the supreme court found that the $1.50 tax rate has become both a "floor" and a "ceiling."[7] The court stated that "[t]he current situation has become virtually indistinguishable from one in which the State simply set an ad valorem tax rate of $1.50 and redistributed the revenue to the districts."[8] The court rejected the view that the raw number of districts taxing at the maximum rate was determinative of its finding of a constitutional violation. The court also rejected the state defendants' suggestion, and the position embraced by Justice Brister in his lone dissent, that there can be no article VIII, section 1-e violation without a showing by the districts that their expenditures are truly "necessary for accreditation."[9] Such a position, the majority found, would undermine the control given local officials over school expenditures.

II. Public Education Meets the Requirements of Adequacy, Efficiency, and Suitability, at Least for Now.

Various districts also challenged the state education system under article VII, section I of the Texas Constitution. Article VII, section 1 states:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

This right-to-a-quality-education provision incorporates three separate requirements for Texas schools—that they be adequate, efficient, and suitable.

Following a five week bench trial, the lower court found that Texas schools were unconstitutionally inadequate and unsuitable. The lower court focused on what the supreme court identified as "inputs"—factors such as funding, accreditation standards, and the number of teachers, curriculum, and statewide testing.[10] The lower court concluded that school districts were without sufficient resources to provide an accredited education as defined by the legislature—that is, a "general diffusion of knowledge."

The supreme court disagreed, but not before rejecting several of the state defendants' key arguments. The state had asked the supreme court to reconsider a holding from its prior cases and find claims invoking the constitutional standards of adequacy, suitability, and efficiency to be non-justiciable political questions. The political question doctrine cautions judicial abstention from questions involving either "a textually demonstrable constitutional commitment of the issue[s] to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving [them]."[11]

While conceding that the standards enunciated in article VII, section 1 are "imprecise," the supreme court stated that such standards "are not without content."[12] The court noted that "[t]he judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness."[13] Somewhere between the extremes of a remedial education and graduate level work, the court suggested, is a broad area that is consistent with the constitutional requirements. The state defendants also argued that courts would be treading into the realm of "judicial policy making" were they to evaluate the adequacy, efficiency, and suitability of Texas schools.[14] The supreme court reaffirmed that the legislature has "'the sole right to decide *how* to meet the standards set by the people in article VII, section 1,'" but that there is no question that "'the Judiciary has the final authority to determine *whether* they have been met.'"[15]

The court also rejected a related argument by the state defendants that article VII, section 1 is not self-executing because "'it merely indicates principles, without laying down rules by means of which these principles may be given the force of law.'"[16] The court conceded that the provision "does not provide the courts a basis for declaring what education or finance systems will *alone* satisfy its standards."[17] But, by dictating what "the public education system *cannot* be"—that is, a system that fails to provide for a "general diffusion of knowledge"—article VII, section 1 is self-executing.[18]

The supreme court reviewed the public education system for "arbitrariness."[19] Arbitrariness, the court said, could be found at two levels: the legislature's determination of the education necessary to meet the constitutional standard, and the provision of means for meeting the legislatively-designed standard.

In holding that the public system satisfies the constitutional standard of adequacy, the court found that Texas school districts "are *reasonably* able to provide their students the access and opportunity" to a quality education.[20] The supreme court credited "undisputed evidence" that "standardized test scores have steadily improved over time, even while tests and curriculum have been made more difficult."[21] The court faulted the district court for relying too heavily on educational "inputs" such as funding, and for finding a constitutional violation merely because districts have not yet achieved goals established by the legislature. Nevertheless, the court recognized that "the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change takes the form of increased funding, improved efficiencies, or better methods of education."[22] The court predicted a future finding of inadequacy absent imminent action by the legislature.

Continued on pg. 6

The supreme court also reversed the lower court's finding that the system for funding school facilities violates the efficiency, or equity, requirement of article VII, section 1. While evidence exists that many districts' facilities are inadequate, the court agreed with the state defendants that inefficiency cannot exist without a showing "that the districts' needs are similar."[23] The districts also failed to produce evidence that without additional or improved facilities they are unable to provide for a general diffusion of knowledge. The court stated that "[e]fficiency requires only substantially equal access to revenue for facilities necessary for an adequate system."[24] For similar reasons, the court turned down the districts' challenging of the entire school funding system on efficiency grounds.

Finally, the court rejected out-of-hand the lower court's finding that the public education system is not "suitable" due to inadequate funding. The court noted that the suitability requirement "refers specifically to the means chosen to achieve an adequate education through an efficient system."[25] With the districts having failed to appreciate the particularities of suitability, the court nevertheless found no violation on the record.

In dissent, Justice Brister argued that the school districts lacked standing to assert claims under article VII, section 1. This point, also raised by the state defendants, relies upon the plain language of the provision, which appears to grant rights to the people, but not school districts. Justice Brister noted the obvious shortcomings in evaluating the vitality of the public education system from the vantage point of district officials, whose interests presumably conflict with children and parents. The majority found otherwise, noting that parents were free to intervene in the litigation but had chosen not to, and that the school districts had stated a concrete injury—being forced to implement unconstitutional educational statutes—sufficient to create standing.

In the end, the Texas Supreme Court ordered the legislature to cure the article VIII, section 1-e violation by June 1, 2006. The legislature, despite having focused on school finance and property tax relief during its regular session and two special sessions called by Governor Rick Perry, failed to enact any sort of reform in 2005. No doubt a third special session will also provide an opportunity to reform the public education system so that the looming article VII, section 1 violation does not come to pass.

Footnotes

[1] No. 04-1144, slip op. (Tex. Nov. 22, 2005).

[2] Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) ("*Edgewood III*").

[3] *Id.* at 502.

[4] Act of May 28, 1993, 73rd Leg., R.S. ch. 347, 1993 Tex. Gen. Laws 1479.

[5] *Neeley*, No. 04-1144, slip op. at 77.

[6] *Id.*

[7] *Id.* at 79.

[8] *Id.* at 81.

[9] *Id.* at 79.

[10] *Id.* at 65-66.

[11] *Id.* at 49 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

[12] *Id.* at 50.

[13] *Id.* at 51.

[14] *Id.*

[15] *Id.* at 48 (quoting West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 563-64 (Tex. 2003).

[16] *Id.* at 55 (quoting Mitchell County v. City National Bank of Paducah, Ky, 43 S.W. 880, 883-84 (Tex. 1898)).

[17] *Id.* at 58.

[18] *Id.* at 57.

[19] *Id.* at 59.

[20] *Id.* at 64.

[21] *Id.* at 68.

[22] *Id.* at 69.

[23] *Id.* at 72-73.

[24] *Id.* at 73.

[25] *Id.* at 75.

***State Court Docket Watch* invites its readers to submit articles on cases in their respective states. Please contact Ken Wiltberger at 202-822-8138 or kenw@fed-soc.org for more information.**

Eminent Domain (Cont. From Pg. 1)

the Ohio Constitution's language offering arguably heightened private property rights protections to citizens of that state.

1. Ohio Supreme Court: *Norwood v. Horney, et al*

Section 19, Article I of the Ohio Constitution provides that "[p]rivate property shall ever be held inviolate, but subservient to the public welfare." While "subservient to the public welfare" provides a limit on a property owner's ability to keep his land, it, along with "inviolate," also places a meaningful limit on the ability of local governments to take it from him for the private use of others. The Ohio Court has previously recognized this limit,—*See* State ex rel. Bruestle v. Rich 110 N.E.2d 778, 786 (Ohio 1953) (holding that eminent domain may not merely or primarily be used to take property for private purposes), AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., 553 N.E.2d 597, 600-601 (Ohio 1990) (instructing lower courts to examine the validity of blight designations in order to ensure that private ends are not being served)—but the Court is now faced with its first post-*Kelo* look at whether the Ohio Constitution affords more protection than the federal Constitution.

The case began in 2002 when private developer Jeffrey Anderson decided that he wanted to expand his $500,000,000 real estate empire by building a complex of chain stores, condominiums and office space on top of the neighborhood where Plaintiffs Joy and Carl Gamble and Joe Horney owned homes. Using a 2003 "study" initiated and paid for by Anderson, Norwood declared the well-kept neighborhood "deteriorating" so it could use eminent domain.

The Institute for Justice, representing the property owners, challenged Norwood's use of eminent domain. In June 2004, Judge Myers of the Hamilton County Court of Common Pleas found that the neighborhood is not blighted, but agreed with the City that the neighborhood is "deteriorating" because, among other reasons, it had "diversity of ownership"—in other words, people own their own homes and businesses. The First District Court of Appeals affirmed the trial court's decision, and the plaintiffs appealed to the Ohio Supreme Court the question whether Ohio's Constitution will provide more protection to property owners than the federal constitution provides under *Kelo*.

The Ohio Supreme Court heard oral argument on January 11, 2006. At one point during the argument, visiting Judge James Brogan asked Timothy Burke, an attorney representing Norwood, why the court should give deference to the findings of a city council that stands to make as much as $2 million a year in revenue from the project. Burke responded that local elected officials are responsible for determining land use, stating: "They've lived there all their lives, they've walked those neighborhoods, they've seen how it has changed."

In a now widely publicized moment, Judge Maureen O'Connor then asked Burke, "Couldn't the same argument be made for the homeowners?"

Institute for Justice Senior Attorney Dana Berliner, arguing on behalf of the property owners, said in her closing remarks:

> As the members of this court drive home today, I ask you to think about which of the dozens of neighborhoods you pass would not be "deteriorating" under Norwood's definition. Which of them have no diversity of ownership, no older buildings, no cul-de-sacs, and no driveways people have to back out of? Those neighborhoods are full of people like Carl and Joy Gamble and unless this court rules in their favor today, all of those neighborhoods will be subject to condemnation for private development under Ohio's Constitution.

A decision on this case is expected in the next few months.

2. Washington Supreme Court: *HTK Mgmt v. Seattle Popular Monorail Authority*

At issue in this case was Seattle's "Sinking Ship" parking garage in Pioneer Square owned by HTK Management, LLC (HTK). In the spring of 2004, the Seattle Monorail Project—the city's transportation authority created to facilitate development of a monorail system in Seattle—passed a resolution authorizing the use of eminent domain to acquire HTK's property for a monorail station. The Monorail sought to condemn part of this property to build a station for the planned monorail expansion, but the "footprint" of this station would not cover the entire property. The Monorail also needed to temporarily use the remainder of the parcel as a construction staging ground for building the station.

All the parties agreed that the Monorail could constitutionally take the property for the station and for the temporary construction staging area. However, the Monorail also sought to take the portion of the property needed for a temporary construction staging area permanently from HTK, with the Monorail's need for this property ending with construction.

At the trial court, HTK produced evidence that the Monorail sought to permanently condemn the entire property because it wished to sell the property outside the footprint of the station to private developers once construction was complete in order to generate revenue. On October 20, 2005, the Washington Supreme Court held that the Monorail, and any other governmental entity in Washington, may constitutionally take private property so long as some portion of the property is devoted to the public use. *See* HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth**.,** 121 P.3d 1166 (Wash. 2005).

In a strange twist to the case, Seattle's citizens voted on November 8, 2005 to terminate the Monorail Project after years of disastrous leadership and financial mismanagement. Subsequently, HTK and the Monorail worked out a deal that allowed HTK to keep its property in exchange for its agreement to drop all

Continued on pg. 8

claims against the Monorail. But the precedent remains on the books.

3. Arizona Supreme Court: *Tempe v. Valentine, et al*

In 2003, the Arizona Court of Appeals considered the extent of private property protection under the Arizona Constitution in *Bailey v. Meyers*, 76 P.3d 898 (Ariz. Ct. App. Oct. 1, 2003). In *Bailey*, the City of Mesa sought to condemn a family-owned brake shop in order to turn that property over to the owner of an ACE Hardware store who wanted to relocate his business from a nearby corner to expand his business. The Institute for Justice Arizona Chapter challenged the taking. The Court of Appeals rejected the taking finding, as Judge John C. Gemmill wrote: "The constitutional requirement of 'public use' is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use." *Bailey*, 76 P.3d at 904.

The City chose not to appeal, but only two years later the Arizona Supreme Court had an opportunity to consider the appropriate standard for determining "public use" under Arizona's Constitution. The case of *Tempe v. Valentine* involved the City of Tempe's attempt to condemn businesses in an industrial park and turn it over to a private developer who wished to build a 1.3 million square foot retail shopping center.

In March of 2005, Tempe initiated 19 condemnation suits against those property owners who chose not to sell their property under the threat of condemnation. Under the terms of the redevelopment agreement entered into with the private developer, the developer was responsible for all costs associated with the acquisition of property, including any condemnation actions. Tempe claimed at trial that the land was environmentally contaminated and that the properties needed to be consolidated to be cleaned up—the parcels lay atop a former city dump, which allegedly resulted in dangerously high methane build up under the surface.

In September of 2005, Maricopa County Superior Court Judge Kenneth Fields found Tempe's attempted use of its eminent domain power a violation of the Arizona Constitution under *Bailey*'s "substantially predominate" standard. The judge found that the environmental remediation was a self-justifying rationale because it only needed to occur to build the developer's planned retail center. It was not required if the current uses remained in place. The developer admitted at trial that the majority of problems were not environmental, but geotechnical and that such concerns "relate solely to the construction of improvements and pose no threat to human safety if the property in the Redevelopment Area is allowed to remain in its current state." The trial court went on to find that the private developers were the driving force behind the project not the City of Tempe.

The City of Tempe filed a Petition for Special Action, an extraordinary writ seeking to bypass Arizona's Court of Appeals and go straight to the state's highest court. In doing so, Tempe explicitly asked the Arizona Supreme Court to overrule the *Bailey* standard and to adopt a *Kelo*-like standard where "public use" actually means "public benefit."

On November 28, 2005 the Arizona Supreme Court declined to hear the City's Petition, and thus left for another day a review of the *Bailey* standard. Tempe still has the option of a traditional appeal, although it appears unlikely such a step will be necessary: since November, the developer has announced the project will move forward regardless of whether it acquires all of the remaining property owners who decided not to sell.


J. MADISON

The Federalist Society for Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036