

LEXSEE 75 U. CIN. L. REV. 1769

Copyright (c) 2007 University of Cincinnati  
University of Cincinnati Law Review

Summer, 2007

*75 U. Cin. L. Rev. 1769*

**LENGTH:** 13725 words

COMMENT AND CASNOTE: DETERIORATED VS. DETERIORATING: THE VOID-FOR-VAGUENESS DOCTRINE AND BLIGHT TAKINGS NORWOOD V. HORNEY

**NAME:** Sarah Sparks\*

**BIO:** \* Associate Member, 2005-2006 University of Cincinnati Law Review. The author would like to thank Richard Tranter, Bryan Pacheco, and CJ Herron.

**SUMMARY:**

... The seas of change are upon eminent domain in the United States. ... For the city to exercise its eminent domain powers, however, the Norwood City Code (NCC) required that the parcels be a "slum," "blighted," "deteriorated" or "deteriorating. ... Blight statutes should not be subjected to a vagueness challenge based on the purpose of prevention of arbitrary enforcement because, in sum, blight statutes are not enforced. ... If blight statutes are subject to a void-for-vagueness challenge under the Ohio Supreme Court's reasoning, then so is the phrase "public use." ... The purpose of aiding appellate review is rarely used but may still shed some light on whether or not application of the void-for-vagueness doctrine to a blight statute is logical. ... Blight definitions can include both parcel and area factors. ... An area factor, on the other hand, deals with multiple parcels of land. ... The Norwood definition of "deteriorating" specifically dealt with area blight factors. ... Area blight factors allow an agency to condemn a well-maintained property, because a property may be free of blight but be located in a blighted neighborhood. ... In determining that "deteriorating" was vague, the court noted that such a standard violated the Public Use Clause. ...

**TEXT:**

[\*1769]

I. Introduction

The seas of change are upon eminent domain in the United States. On July 26, 2006, the Supreme Court of Ohio joined a wave of state governments n1 and held that "the fact that [an] appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of ... the Ohio Constitution." n2 The court did not stop there, but continued on into uncharted waters. Applying a heightened form of the void-for-vagueness doctrine, n3 the court held that "the use of 'deteriorating area' as a standard for determining whether private property is subject to appropriation is void for vagueness." n4 In so doing, the court preemptively struck at what some property rights advocates say is [\*1770] another avenue for eminent domain abuse - blight takings. n5

A blight taking is the use of eminent domain to acquire property that is substandard. The United States Supreme Court held blight takings constitutional in 1954. n6 Critics of blight takings contend that these condemnations allow connected insiders to use the government's eminent domain power for their own financial benefit. n7 Proponents of blight takings argue that they provide a way for communities to renew urban areas, decrease crime, encourage economic development, and stop suburban sprawl. n8 Blight takings are much more common than economic-development takings. n9 These criticisms will surely be addressed by more courts and legislatures who continue to hear public protest about eminent domain abuse. n10

This Note addresses whether the void-for-vagueness doctrine, as applied by the Supreme Court of Ohio, is an appropriate means to limit statutory definitions of blight and blight takings. Part II of this Note reviews both the purposes

and applications of the void-for-vagueness doctrine. Part III outlines the trial court, appellate court, and Ohio Supreme Court decisions in *Norwood v. Horney* (*Norwood*). Part IV discusses whether this extension of the void-for-vagueness doctrine is logical or wise. Finally, Part V concludes that the Supreme Court of Ohio's decision in *Norwood* was ill-advised and that other state courts should use alternative means to ensure that the eminent domain power is not abused in the realm of blight takings. Such alternative means may include changes in trial and appellate review, changes in evidentiary standards, or, simply, a stricter interpretation of the public use requirement.

[\*1771]

## II. The Void-for-Vagueness Doctrine

The United States Supreme Court currently utilizes a two-prong test to determine whether a statute is void for vagueness. The statute must "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." n11 Generally, someone challenging a statute must show that it is vague as applied to his or her specific circumstances. n12 This test suggests that the doctrine has only two purposes and is applied only in the criminal context. However, four additional rationales for the test have been described, and the doctrine has been transplanted to other areas of law.

### A. Purposes

The vagueness doctrine has been described as a means to (1) provide citizens with notice, (2) prevent arbitrary enforcement, (3) maintain the separation of powers, and (4) aid in appellate review. n13

The first prong of the test includes the basic purpose of notice required by the Due Process Clause. n14 Notice permits citizens to "steer between lawful and unlawful conduct." n15 In addition, a clear definition of unlawful conduct prevents citizens from steering too wide and refraining from engaging in constitutionally protected behavior. n16 Thus, the doctrine was described as applying to two types of cases:

the "true" uncertainty case ... in which a legislature which might constitutionally have proscribed either or both of two classes of behavior, A and B, has chosen to proscribe only A, but in language so uncertain that whether most fact situations are A or B is a matter [\*1772] for guesswork; and the "spurious" uncertainty cases ... in which a legislature, constitutionally free to regulate sphere A, but forbidden to encroach upon sphere B, has included indiscriminately within the broad wording of a criminal statute both A cases and B cases, thereby leaving the individual to guess at his peril whether he can or cannot be constitutionally punished for violation of the statute. n17

The "spurious" cases have been given their own doctrine referred to as overbreadth, n18 but the doctrines are often conflated. n19 Thus, the purpose of notice in the void-for-vagueness doctrine is to inform citizens exactly what conduct is or is not proscribed.

The second prong of the test contends that clearly worded statutes prevent arbitrary enforcement. n20 Laws that are too vague allow prejudice to enter decisions of enforcement; the legislature in effect authorizes "rule by whim rather than law." n21 Justice Owen Roberts first articulated this purpose in his dissent in *Screws v. United States*, n22 forty-five years after the purpose of notice was expressed. n23 "As misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties. As such it is included in the constitutional guaranty of due process of law." n24 Though it was not an original rationale for the doctrine, the Supreme Court has subsequently stated that prevention of arbitrary enforcement may be more important than notice. n25

Prior to Justice Roberts' expression of the second rationale, the void-for-vagueness doctrine was often suggested as a means of maintaining [\*1773] the separation of powers. n26 Vaguely worded statutes allowed the legislative branch to "abdicate their responsibilities for setting the standards of the criminal law." n27 Thus, the task of defining laws inappropriately fell to the executive and judicial branches. Although it has been replaced by the rationale of prevention of arbitrary enforcement, at one time the separation of powers rationale was the second prong, and in some cases the only prong, to a void-for-vagueness inquiry. n28

The void-for-vagueness doctrine also has been described as aiding in appellate review in two ways - creating a standard for appeal and creating a record for appeal. n29 In *Joseph Burstyn Inc. v. Wilson*, n30 Justice Frankfurter, in

his concurrence, suggested that vague statutes rendered appellate review impossible for want of a standard. n31 Review of a statute that permitted a board to ban "sacrilegious" films would be "inoperative," he stated, because "the judiciary has no standards with which to judge the validity of administrative action which necessarily involves ... subjective determinations." n32 The Court used this rationale once in 1968 n33 but has not mentioned it since. n34 Professor Amsterdam, who wrote the seminal article reviewing the Supreme Court's use of the doctrine, has suggested that without clearly worded statutes, trial court findings can be general as well, leaving little on the record for appellate courts to reverse. n35 Vague statutes, therefore, can impede appellate review by limiting the standard available for review and by limiting the record available for review.

Thus, maintenance of the separation of powers and aid for appellate review have been cited or suggested as additional purposes of the void-for-vagueness doctrine. Currently, however, notice and prevention of arbitrary enforcement are the main rationales behind the doctrine, and they are evident in the recent application of the vagueness doctrine to various statutes.

[\*1774]

#### B. Application of the Void-for-Vagueness Doctrine

Both state and federal courts apply the void-for-vagueness doctrine, though findings of vagueness are rare. n36 The doctrine is most often applied to criminal statutes, or other proscriptive or conduct-prohibiting statutes, and ordinances which may infringe on First Amendment rights. n37 This section will consider atypical applications across the United States n38 and application of the doctrine in Ohio specifically.

The United States Supreme Court applied the vagueness doctrine to a non-proscriptive statute in *Giaccio v. Pennsylvania*. n39 In that case, a jury acquitted Giaccio of a misdemeanor, but was also tasked with determining whether he should pay court costs relating to the trial. n40 Giaccio objected that the statute requiring such a determination was unconstitutionally vague because it authorized "juries to assess costs against acquitted defendants ... without prescribing definite standards to govern [their] determination." n41 The Supreme Court agreed. "The law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement." n42

More recently, statutes permitting punitive damages have been constitutionally challenged based on vagueness. In *Pacific Mutual Life Insurance Co. v. Haslip*, n43 the United States Supreme Court upheld an [\*1775] Alabama law which permitted punitive damages because trial and appellate review of such awards provided adequate due process. n44 In doing so, the Court refused to specifically address a void-for-vagueness argument. n45

In *Mattison v. Dallas Carrier Corp.*, n46 the Fourth Circuit Court of Appeals addressed a similar issue and noted the decision in *Haslip*, but relied heavily on *Giaccio*. Unlike the Alabama statute, South Carolina provided complete jury discretion. n47 The court observed that notice of lawful conduct and a standard for appellate review were important and concluded that the statute lacked meaningful standards. n48 A jury could apply "what they think "the law should be instead of what it is." n49

Another damages issue was challenged based on vagueness in the California Supreme Court case of *Evangelatos v. Superior Court of Los Angeles*. n50 An initiative measure n51 had replaced joint and several tort liability with several liability for noneconomic damages. n52 Challengers argued that the initiative failed to answer numerous procedural questions n53 regarding the application of several liability. n54 The court found this argument "flawed." n55 First, in order to mount a facial challenge against a statute which did not infringe on First Amendment rights, the challenger had to show that the statute was invalid in all of its applications. n56 Thus, a few procedural questions were not enough to render the initiative vague. n57 "Many, probably most, statutes are ambiguous in some respects ... [,]" but such problems could be solved by the judiciary. n58

[\*1776] An interesting vagueness challenge involving a non-proscriptive statute and the constitutional right to liberty arose in *In re the Commitment of Dennis H.* n59 In that case, several people n60 sought to have Dennis H. committed under the standard of dangerousness in the Wisconsin civil commitment statute. n61 Though the statute was long and complex, the court found it passed constitutional muster. The statute was not vague because it identified five elements and required proof of a substantial probability of each. n62 Despite the possible loss of liberty, the Wisconsin Supreme Court did not mention varying levels of vagueness scrutiny and applied the normal two prong test of notice and prevention of arbitrary enforcement. n63

A review of cases from across the country shows that the void-for-vagueness doctrine has been applied to non-proscriptive statutes. However, such challenges seem most likely to succeed when they are aimed at statutes which provide juries decision-making power without standards and are thus supported by Supreme Court precedent. n64 Otherwise, courts may easily fill "in the gaps of statutory schemes" n65 that may be vague in some applications.

Like courts in most jurisdictions, Ohio courts have generally entertained vagueness challenges only to criminal statutes. n66 A little over a year before deciding the Norwood case, the Supreme Court of Ohio had an opportunity to enunciate its guidelines for applying the void-for-vagueness doctrine in a group of tax evasion cases. n67 In *Buckley v. Wilkins*, three separate plaintiffs contended that the statutory provision which permitted taxation of "adjusted gross income" was void for vagueness. n68 The phrase was not explicitly defined in the Ohio Revised Code, but rather was connected to definitions in the federal [\*1777] Internal Revenue Code. n69 The court first noted that the void-for-vagueness doctrine is rooted in due process, and then quoted the two-prong test of notice and prevention of arbitrary enforcement. n70 The court also stated,

We must of course adhere to the oft-stated rule that a court's power to invalidate a statute "is a power to be exercised only with great caution and in the clearest of cases." Laws are entitled to a "strong presumption of constitutionality," and any party challenging the constitutionality of a law "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." n71

Furthermore, courts may use any ""reasonable interpretation in favor of finding the statute constitutional." n72 The court concluded its articulation of the doctrine by noting that "the bar is not a high one[.]" and civil statutes unconcerned with the First Amendment will be struck down only if they are ""substantially incomprehensible." n73 Applying this standard, the court held that the language in question easily passed the vagueness test. n74

Ohio, like other jurisdictions, has on occasion reviewed non-criminal statutes for vagueness. n75 In *Perez v. Cleveland*, the court heard a vagueness challenge to a non-criminal statute which described judicial review of a coroner's verdict regarding cause and manner of a death. n76 The trial court held the statute was vague because it failed to specifically describe to potential litigants how to seek judicial review. n77 The appellate court affirmed, but the Ohio Supreme Court reversed. n78 The court determined that the statute did not prohibit conduct and thus, the [\*1778] notice requirement of the vagueness doctrine was moot. n79 Furthermore, courts could properly determine the "procedures to employ in hearing a cause of action." n80 The court concluded that neither of the dual purposes of the void-for-vagueness doctrine was implicated and thus, the statute was not vague. n81

In *Ohio v. Williams*, the court heard a vagueness challenge to a statute that required registration of "sexual predators." n82 For the registration requirement to apply, the statute mandated that the state show by clear and convincing evidence that a sex offender would be "likely to commit future offenses." n83 Despite being in the area of criminal law, the statute in question was "remedial" and did not "prohibit any conduct." n84 Thus, less specificity was required to satisfy the challenge. n85 In addition, the statute provided factors to be considered regarding the probability of the sex offender's future conduct. n86 Finally, the court noted that in this context, an individual assessment for each case was warranted and thus, the broad language of the statute was ideal. n87

The Ohio Supreme Court has entertained vagueness challenges in the property rights arena before *Norwood*. n88 In 1987, an appellate court held that an ordinance creating an overlay zoning district was unconstitutionally vague in *Franchise Developers Inc. v. City of Cincinnati*. n89 The ordinance in question included a guideline that "new businesses should contribute to the desired mix of commercial activities; franchise type establishments are acceptable provided that they are primarily pedestrian and not automobile oriented." n90 The Supreme Court did not address whether the words of the statute were vague, but rather chastised the appellate court for applying the test at all and then reversed. n91 "[A vagueness] argument is inherently deficient in a zoning case where the zoning resolution, by its very nature, puts a property owner on notice that use of the property is subject to regulation." n92

[\*1779] Prior to *Norwood*, Ohio, like other jurisdictions, applied the void-for-vagueness doctrine to criminal statutes and ordinances. In addition, the Ohio Supreme Court was reluctant to apply the void-for-vagueness doctrine to statutes that did not proscribe behavior.

### III. *Norwood v. Horney*

#### A. Trial and Appellate Court Opinions

In 2002, a development group approached the City Council of Norwood, Ohio with a redevelopment project proposal, and asked the council to exercise its power of eminent domain to aid in the project. n93 Despite a need for increased revenue base, n94 the Norwood council refused and told the developers to privately acquire the property. n95 After acquiring all but five of the parcels it needed, the developers convinced Norwood that the remaining property could not be attained without condemnation proceedings. n96 For the city to exercise its eminent domain powers, however, the Norwood City Code (NCC) required that the parcels be a "slum," "blighted," "deteriorated" or "deteriorating." n97

Thus, Norwood hired an independent firm to conduct an urban-renewal study. The study found that the bifurcation of the neighborhood by the construction of an interstate and, consequently, the commercialization of the area "had a negative effect on the renewal area as a residential neighborhood." n98 The study further indicated that continued piecemeal development was likely and would have further adverse effects on the area. n99 After completing various procedural requirements, n100 Norwood approved the appropriation of the owners' properties in September of 2003. n101

[\*1780] The mandatory appropriation hearing lasted five days. The trial court found that the Norwood City Council abused its discretion in determining that the area was a "slum, blighted, or deteriorated" area. However, the trial court also found that the council did not abuse its discretion in finding that the area was "deteriorating." n102 Three owners appealed, asserting five errors including that the trial court erred in holding that "Norwood did not abuse its discretion in determining under [NCC] 163.02 that the ... area was "deteriorating.'" n103 More specifically, the property owners argued that (1) the survey "interfused the definition of 'slum, blighted or deteriorated area' with the definition of a 'deteriorating area,'" (2) the survey contained numerous errors, and (3) "the plan area did not meet the definition of ... deteriorating." n104

The NCC defined "deteriorating" as

an area, whether predominantly built up or open, which is not a slum, blighted or deteriorated area, but which because of incompatible land uses, nonconforming uses, lack of adequate facilities, faulty street arrangement, obsolete platting, inadequate community and public utilities, diversity of ownership, tax delinquency, increased density of population without commensurate increases in new residential buildings and community facilities, high turnover in residential or commercial occupancy, lack of maintenance and repair of buildings, or any combination thereof, is detrimental to the public health, safety, morals and general welfare, and which will deteriorate or is in danger of deteriorating, into a blighted area. n105

Citing a 1990 Ohio Supreme Court case, n106 the appellate court stated that the standard of review for challenges to a blight taking was only whether the declaration of blight was based on "a sound reasoning process," and a constitutional basis for the use of eminent domain existed. n107 Furthermore, appellate review of a trial court's determination that there was a sound reasoning process was limited to abuse of discretion. n108 The court also noted that such determinations were the province of the legislature and should not be disturbed or replaced by decisions of the judiciary. n109

[\*1781] The appellate court then determined that the issue was "whether the urban renewal area as a whole meets the definition of 'deteriorating,' not whether any individual structure or house exhibits these characteristics." n110 The court found the area as a whole did meet this definition based on six specific conditions relied upon by the city council. n111 Some of the factors particularly relevant to the court's finding were safety and traffic concerns, inadequate street layout, faulty lot layout, and diversity of ownership. n112

The owners did argue on appeal that the determination of deteriorating was an error. However, no party argued at trial, on appeal, or before the Ohio Supreme Court that the statute was void for vagueness. n113

#### B. Ohio Supreme Court Opinion n114

The opinion of the Supreme Court of Ohio first described the void-for-vagueness doctrine and then applied it to the term "deteriorating." The court's discussion of the void-for-vagueness doctrine began with the two-prong test of notice and prevention of arbitrary enforcement. n115 The court then noted that varying levels of scrutiny can apply. "If the enactment "threatens to inhibit the exercise of constitutionally protected rights,' a more stringent vagueness test is to be applied." n116 Next, the court stated that the doctrine is generally applied to criminal laws and [\*1782] First Amendment claims. n117 The court then observed that "neither the rationale underlying the doctrine nor the case law interpret-

ing it suggests that it should not be applied in any case in which the statute challenged substantially affects other fundamental rights." n118 The court also noted that due process requires "fair notice be given to a property owner in an appropriate action." n119

From this analysis of the void-for-vagueness doctrine, the court determined that the doctrine should apply because the "right to garner, possess and preserve property" is a fundamental right; eminent domain "necessarily entails the state's intrusion" on those rights; and notice "is the critical core of the void-for-vagueness doctrine." n120 Furthermore, the court held that a heightened standard of review should be employed. n121

Next, the court applied the void-for-vagueness doctrine to Norwood's use of the phrase "deteriorating area" and the numerous factors the city used to determine deterioration. n122 The court found the factors "suspect" because they "exist in virtually every urban American neighborhood." n123 The court then examined the specific factor of diversity of ownership and found it to be vague because of its two meanings. n124 The court concluded that

The evidence is a morass of conflicting opinions on the condition of the neighborhood. Though the Norwood Code's definition of "deteriorating area" provides a litany of conditions, it offers so little guidance in application that it is almost barren of any practical meaning. In essence, "deteriorating area" is a standardless standard. n125

The court continued, attacking "deteriorating" based on its speculative nature. n126 The standard "is also satisfied by a finding that it "is in danger of deteriorating into a blighted area.' ... Such a speculative standard is inappropriate in the context of eminent domain, even under the modern, broad interpretation of "public use.'" n127 The appropriation [\*1783] "would grant an impermissible, unfettered power to the government to appropriate." n128 Thus, the court held that

The use of "deteriorating area" as a standard for determining whether private property is subject to appropriation is void for vagueness and offends due process rights because it fails to afford a property owner fair notice and invites subjective interpretation. Further ... the term "deteriorating area" cannot be used as a standard for a taking, because it inherently incorporates speculation as to the future condition of the property ... . n129

#### IV. Discussion

This Note does not discuss whether the Ohio Supreme Court accurately applied the void-for-vagueness doctrine. n130 Rather, it discusses whether the Ohio Supreme Court appropriately applied the void-for-vagueness doctrine and consequently, whether other state courts should follow suit. Two inquiries are relevant to determine whether the Norwood decision to apply a void-for-vagueness standard to blight definition should be adopted by other courts. First, is the extension logical when considering the purposes of the doctrine? Second, will the extension have any negative consequences? After these two questions are answered, alternative solutions to the supposed problem of blight takings abuse will be proposed.

##### A. Purposes

As previously discussed, the void-for-vagueness doctrine has several purposes - notice to citizens of prohibited conduct, prevention of arbitrary enforcement, maintenance of the separation of powers, and aid in appellate review. The Supreme Court of Ohio's application of the doctrine is not logical in light of each of these purposes.

In *Norwood*, the Ohio Supreme Court stated that "notice is the critical core of the void-for-vagueness doctrine." n131 Notice was famously described by Justice Thurgood Marshall as allowing citizens to "steer between lawful and unlawful conduct." n132 As this quote makes perfectly [\*1784] clear, this purpose is pertinent only when a statute proscribes conduct. The Supreme Court of Ohio noted this narrow application previously in *Perez v. Cleveland*. n133 "[The statute] does not proscribe or prohibit conduct. Accordingly, the reasons advanced to find the judicial review provision of that statute void for vagueness relate solely, if at all, to the possibility of arbitrary or discriminatory enforcement ... ." n134

*Giaccio v. Pennsylvania* n135 does not support applying the doctrine to non-prohibitive statutes in order to provide citizens with sufficient notice. In that case, the statute in question allowed juries to decide arbitrarily if an acquitted defendant should be required to pay court costs. n136 The law failed a vagueness challenge, not for want of notice to citizens, but because it lacked "legal standards that courts must enforce." n137

Some may argue that blight statutes do, in effect, prohibit conduct with condemnation as "punishment." However, this is hardly the case. Many blight factors are outside of the property owner's control. For example, area factors n138 allow for condemnation based on a finding that the surrounding area is blighted, even though the specific parcel being condemned may not be blighted. n139 Even individual parcel factors may be outside of a property owner's control. For example, Indiana allows for the taking of a parcel which has a building unfit for its intended use because its utilities, sewerage, heating, or other such facilities have been disconnected, destroyed, removed, or rendered ineffective. n140 Surely, few property owners intentionally destroy their own sewer lines.

Furthermore, statutes exist which make blight-type conduct illegal and prescribe punishments including civil fines. For example, the Cincinnati City Code prohibits unsanitary buildings and provides penalties for violation of the ordinance. n141 Blight statutes do not prohibit behavior; rather they provide guidelines for municipalities to determine whether or not a property may be condemned under the Public Use Clause. Thus, the application of the void-for-vagueness doctrine to blight statutes is illogical because the purpose of notice is not implicated [\*1785] by such non-proscriptive statutes.

Application of the void-for-vagueness doctrine also is illogical when viewed in light of the purpose of prevention of arbitrary enforcement. Blight statutes are, by their nature, arbitrarily enforced. Not every property that meets the statutory definition of blight will be condemned, and few people, if any, would advocate for such a position. Blight statutes should not be subjected to a vagueness challenge based on the purpose of prevention of arbitrary enforcement because, in sum, blight statutes are not enforced. No executive agency has responsibility for enforcing the statute, and neither does the judiciary.

The Norwood court, however, found the statute so broadly worded that the "definition of a deteriorating area describes almost any city" n142 including upscale urban neighborhoods such as "Beacon Hill in Boston, Greenwich Village and Tribeca in lower Manhattan, and Nob Hill in San Francisco." n143 One might argue that such a standard would allow judges and juries to enforce condemnations arbitrarily, and thus, the doctrine should be applied.

However, such a contention ignores the origins of blight statutes. These statutes delineate guidelines for the taking of property. Without a statute, the only requirement for the taking would be that of a "public use." All properties in the United States could be subject to a taking, so long as the appropriating agency meets this constitutional requirement and pays just compensation. Thus, even properties in Beacon Hill, Greenwich Village, Tribeca, or Nob Hill could face appropriation if the public use requirement were met. If blight statutes are subject to a void-for-vagueness challenge under the Ohio Supreme Court's reasoning, then so is the phrase "public use." As will be discussed below, this problem may have the unintended negative consequence of decreasing the standard by which properties are condemned.

Prior to the current understanding of the void-for-vagueness doctrine as a means to prevent arbitrary enforcement of statutes, courts often described the doctrine as a means of maintaining the separation of powers. In this case the legislature voluntarily chose to limit its ability under the Public Use Clause by providing a further standard for blight takings. Then the judiciary found that statute vague. The separation of powers purpose of the doctrine would be implicated if the legislature inappropriately left the statute open-ended so that the executive or judiciary was left to legislate through enforcement and interpretation.

[\*1786] Without a blight statute, the appropriating agency would condemn property based on a finding of a public use, and then the judiciary would determine whether the public use requirement was indeed met. The blight statute merely adds more requirements that the appropriating agency must meet and that the judiciary may use to judge a particular taking. A legislature's decision to limit a broad constitutional power cannot be construed as an abdication of its duties. Thus, a blight statute does not generally violate the separation of powers. Furthermore, even the most broadly worded blight statute would survive this inquiry because all such statutes voluntarily limit government power. n144

The purpose of aiding appellate review is rarely used but may still shed some light on whether or not application of the void-for-vagueness doctrine to a blight statute is logical. This purpose states that vague statutes hinder appellate review in two ways. First, such statutes leave appellate courts without a standard. Second, vague statutes allow for trial courts to create vague findings and thus, leave appellate courts without a record.

Blight statutes do not implicate this purpose of the void-for-vagueness statute. First, blight statutes provide for a greater standard by which appellate courts may judge a taking. As previously mentioned, without the blight statutes, a taking would be based on nothing more than the public use requirement. Second, such a standard allows trial courts to produce very factual findings that can then be reviewed by appellate courts.

For example, in *Norwood*, the trial court engaged in "an extensive review" of the factors which the Norwood City Council relied on in its finding that the area was "deteriorating." n145 However, that court was limited to reviewing the finding of blight by a reasonableness standard, and the appellate court was limited to reviewing the trial court's findings under an abuse of discretion standard. n146 The statute would have aided in appellate review both by creating a record and by providing a standard. However, the judges' proverbial hands were tied by the standards of judicial review, not the standard of blight.

[\*1787] When viewed in light of its purposes, the void-for-vagueness doctrine is not applicable to blight statutes. The doctrine's purpose of notice is never implicated by non-proscriptive statutes, and the purpose of prevention of arbitrary enforcement is not implicated because such statutes are not enforced, but rather used as guidelines. In addition, blight statutes will generally not violate the purpose of maintaining the separation of powers because these statutes are voluntary limits on a broad, constitutionally bestowed power. Finally, blight statutes do not implicate the purpose of aiding appellate review because the statutes do not leave courts without a standard or record for appeal, but rather add to the standard and record.

## B. Consequences

In addition to failing to fulfill the purposes of the void-for-vagueness doctrine, the Supreme Court of Ohio's decision will have negative future consequences and is therefore unwise. First, application of the doctrine will eliminate the possibility of using area blight factors to condemn a single non-blighted property in a blighted neighborhood. This could substantially inhibit urban renewal projects. Second, once applied to eminent domain, numerous litigators will mount vagueness challenges to other land-use regulations, including zoning, health codes, and aesthetic controls. Third, the court's decision could lead cities to eliminate blight definitions completely and rely merely on the Public Use Clause, thereby decreasing the standard by which courts review blight takings, not increasing it as the court may have hoped.

### 1. Area Factors and Urban Renewal

Blight definitions can include both parcel and area factors. A parcel factor relates to one parcel of land. Examples of such factors include the following: a building on the parcel constitutes a public nuisance; the parcel is subject to tax delinquencies; or a building on the parcel lacks adequate sewerage, heating, or other such facilities. n147 An area factor, on the other hand, deals with multiple parcels of land. Examples of area factors include incompatible land uses; inadequate community and public utilities; and high turnover in residential or commercial occupancy. The *Norwood* definition of "deteriorating" specifically dealt with area blight factors. n148

[\*1788] The Ohio Supreme Court's decision will eliminate the use of area blight factors in Ohio. As previously discussed, one of the purposes of the current void-for-vagueness doctrine is to put citizens on notice of what they can and cannot do. Area blight factors allow an agency to condemn a well-maintained property, because a property may be free of blight but be located in a blighted neighborhood. In that situation, the property is not condemned because the owner failed to follow a standard, violated an ordinance, or permitted his property to deteriorate. Notice becomes irrelevant because the property owner's conduct has nothing to do with the rationale of the taking.

*Norwood* offers a perfect example. The residents of the neighborhood in question did not let their properties become run down. Rather, the residents sat and watched as the state built an interstate highway that cut their neighborhood in half. This highway created increased traffic and numerous dead end streets, which made it difficult for emergency vehicles to enter the neighborhood. In addition, the area became increasingly commercialized, creating an unwelcome environment for the residential neighborhood that had been there all along.

The petitioners in *Norwood* could not have steered their conduct one way or the other, no matter how precisely the statute was written, because their conduct had done nothing to create blight. The same goes for a property owner who watches the neighborhood deteriorate into a slum. She may keep her property in excellent condition, but her neighbors do not and the neighborhood becomes blighted. Thus, the void-for-vagueness doctrine as applied to blight definitions would completely eliminate area factors.

Blight takings - and specifically area factors of blight definitions - are an important tool for effectuating urban renewal projects. Cities in the United States currently face substantial problems and have been for decades. n149 Crime; turnover in residency and commercial occupancy; drug trafficking; and overall unkempt buildings are often the problems [\*1789] associated with blighted areas. However, urban renewal programs are not just for the "bad side of the tracks." Cities grow and change. Residential neighborhoods become commercialized and vice versa. New roads are built or new infrastructure is needed. In addition, cities continue to lose residents to an ever sprawling suburbia. n150

But without area factors, several of these scenarios cannot be addressed by eminent domain. Without area factors, one person with a beautiful property can stall the transformation of an otherwise entirely run-down neighborhood. Without area factors, neighborhoods would be left in their current conditions. Governments are loathe to redevelop areas and instead turn condemned property over to developers. One non-blighted (and thus, non-condemnable) property will limit investor interest and ultimately deter a local government from attempting to alter the landscape at all. Without area factors, urban renewal will be stymied.

Some may argue that the market will effectuate such changes. These advocates would argue that property owners such as those in Norwood would eventually sell and the area would commercialize; property prices in run-down neighborhoods would eventually drop low enough to attract investment and redevelopment; and gas prices or other limitations would eventually drive suburbanites back to the city. However, cities and states are constantly competing with one another for new businesses, new factories, and, in general, new economic development. Urban renewal programs allow government bodies to increase their chances at such development, thus creating jobs and, hopefully, prosperity for their citizens. Prophylactic measures such as the use of area factors to effectuate urban renewal increase a community's competitiveness.

The void-for-vagueness doctrine should not be applied to blight definitions because such an application will eliminate the use of area factors and subsequently limit urban renewal programs. n151 Such programs are important tools for government agencies to combat classic "blight" problems, as well as manage city growth, compete with other cities and states for economic development, and curb suburban sprawl.

[\*1790]

## 2. Void-for-Vagueness Applied to Other Property Contexts

In Norwood, the court held that eminent domain statutes and regulations must be reviewed under the heightened standard of the void-for-vagueness doctrine because they interfere with a fundamental right. n152 "Given that eminent domain necessarily entails the state's intrusion onto the individual's right to garner, possess, and preserve property ... the court shall use the heightened standard of review employed for a statute or regulation that implicates a First Amendment or other fundamental constitutional right." n153

This broad definition of the "fundamental" right to own property may open the floodgates to litigation over the vagueness of zoning, nuisance, other eminent domain statutes, and land use regulations in general. n154 Eminent domain statutes rarely interfere with or deprive a person of his or her property. This is due to a lack of "enforcement" - no police force or agency has responsibility to enforce blight statutes. Yet, zoning regulations, housing codes, fire codes, and nuisance statutes are enforced. Long grass or over-sized signs can subject a citizen to civil fines, because these statutes do proscribe certain behaviors. Thus, the void-for-vagueness doctrine is more applicable to these other land-use regulations. Previously, however, vagueness challenges were unlikely to be successful in these areas because a low level of scrutiny would be applied. Norwood will increase this standard and also increase the likelihood that a vagueness challenge will be successful.

The unreported case of *Dixon v. Toledo* provides an example of how the court's decision could be easily transplanted to other areas of property regulation. n155 In this case, the Toledo Nuisance Abatement Housing Appeals Board determined that a yard constituted a nuisance. n156 The statute defined a nuisance as any property or part of a property that [\*1791] was a danger to anyone by being a health hazard, fire hazard, generally unsafe, or not being adequately maintained. n157

Merle Abbott's "yard contained tall grass and weeds, junk, debris, trash and litter ... ." n158 Abbott argued on appeal that the statute was vague because it did not specifically mention "vegetation or weeds." n159 The appellate court applied a low standard of the void-for-vagueness doctrine and found the statute constitutional. n160 The court found that it was not unreasonable for passers-by to be "inconvenienced or possibly harmed due to the dense vegetation." n161

Maintenance of one's yard would be included in the right to "garner, possess, and preserve" property, and according to *Norwood*, a heightened standard of the doctrine should apply. A statute generally prohibiting "unsafe" property would not pass a heightened vagueness standard. Thus, the application of *Norwood* to *Dixon* would result in an average nuisance statute being found unconstitutionally vague.

Aesthetic zoning controls may be the most susceptible to vagueness challenges. This type of land use regulation is often not found in municipal codes. Rather, city ordinances delegate aesthetic controls to a review board, which may be called the historic control board, architectural board of review, or something similar. These boards are responsible for promulgating and enforcing design guidelines for a municipality or a historic district.

For example, the municipal code of Shaker Heights, Ohio provides for an Architectural Board of Review (ABR).<sup>n162</sup> The ABR produces [\*1792] "Design Guidelines and Standards" for Shaker Heights.<sup>n163</sup> The "guidelines" are designed to be vague. They "are for projects which will be reviewed by the ABR... . These guidelines are not absolute rules, although they are applicable in many cases."<sup>n164</sup> One residential guideline promulgated by the ABR exemplifies the vagueness inherent in these rules. It requires that owners of new residences "consider the rich architectural heritage of the city as well as the relationship in massing, scale, texture, and color of the residence to its neighbors."<sup>n165</sup> A resident of Shaker Heights seeking to paint a house purple may find new hope in the *Norwood* decision. The standard for new residences permits arbitrary enforcement and fails to put a resident on sufficient notice of what color choices are permitted.

The void-for-vagueness doctrine should not be applied to blight statutes because it will open the door to vagueness statutes to all types of land use regulations. Prior to *Norwood*, these statutes and ordinances were generally immune to vagueness challenges because a low level of scrutiny applied. Now, the Supreme Court of Ohio has prepared the way for a number of vagueness challenges.

### 3. Elimination of Blight Definitions

Finally, the Ohio Supreme Court's decision may produce a relaxing of the standard by which courts may judge blight takings - a consequence inapposite to the use of the void-for-vagueness standard. The Ohio constitution states, "private property shall ever be held inviolate, but subservient to the public welfare ... where private property shall be taken for public use, a compensation therefore shall first be made ... ." <sup>n166</sup> Undeniably, eminent domain is still available to cities and the state as long as the public use criteria is met. The surest way for a city to evade vagueness challenges is to eliminate definitions of blight completely. A city would need only to create a simple eminent domain statute and to conduct all of its takings, blight or otherwise, under it. <sup>n167</sup> During condemnation proceedings, the city would then have [\*1793] to argue only the (vague?) standard of public welfare, which is provided for in the Ohio constitution.

Obviously, this would do nothing to eliminate eminent domain abuse. The result would be even less of a standard by which properties may be taken.

### C. Alternative Solutions

In determining that "deteriorating" was vague, the court noted that such a standard violated the Public Use Clause. "A municipality has no authority to appropriate private property for only a contemplated or speculative use in the future."<sup>n168</sup> The inquiry should have stopped there. The court should not have dragged the void-for-vagueness doctrine into the realm of property rights when it could have reached the same result by doing what courts do best - constitutional interpretation. Other courts should first define the contours of the public use requirement and then determine whether a particular blight statute falls within its bounds. If a blight statute is worded so that any finding of blight under it would violate the public use requirement, then the statute is void for violating the state's constitution.

In addition to this more logical judicial review of blight statutes, legislators are free to increase the standards of review by which courts handle blight takings. As previously mentioned, the trial court in *Norwood* was limited to reviewing whether the process was reasonable, and the appellate court was limited to reviewing for an abuse of discretion. Appropriating bodies could be required to prove by clear and convincing evidence that the property or area in question was blighted. Property owners could be allowed to rebut findings of blight with alternate urban renewal studies. Appellate courts could review condemnation proceedings *de novo*. All of these methods could provide better judicial oversight of blight takings, and prevent eminent domain abuse.

### V. Conclusion

It is often easy to be swept away in a current of change. However, state supreme courts should not adopt the void-for-vagueness doctrine as a tool to protect against takings abuse and particularly blight takings abuse. Such an inquiry does not make sense - the purposes of the void- [\*1794] for-vagueness doctrine are not implicated by blight statutes. Application of the doctrine is also unwise because it limits governments from utilizing area factors to effectuate urban renewal programs and may open the proverbial floodgates of litigation, resulting in numerous vagueness challenges to other land use regulations.

Furthermore, the end result of the application of the doctrine to blight statutes may be the elimination of blight statutes altogether. Without a statute, appropriating bodies and courts reviewing takings will be left with only the public use requirement by which to judge a taking. Thus, one must conclude that the Supreme Court of Ohio's analysis was backwards - it is the public use requirement and not the statute from which the court should have begun its review of the taking. Other state courts should first define the boundaries of the Public Use Clauses in their states' constitutions and then determine whether a blight statute conforms to it. Then legislators can require that findings of blight be subjected to tougher judicial scrutiny. Then blight statutes will serve their purpose - providing further guidelines for the exercise of eminent domain.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Overbreadth & Vagueness Criminal Law & Procedure Appeals Standards of Review General Overview Governments Legislation Vagueness

### FOOTNOTES:

n1. For an overview of legislative action regarding eminent domain see Legislative Action Since Kelo, Institute for Justice, Jan. 16, 2006, <http://www.castlecoalition.org/pdf/publications/State-Summary-Publication.pdf> (last visited Feb. 14, 2007). Of forty-seven states with legislative sessions in 2006, all but thirteen of those enacted some type of eminent domain reform. In addition, twelve states had ballot initiatives in the 2006 elections that would limit the power of eminent domain. Ten of these passed. See Terry Pristin, Voters Back Limits on Eminent Domain, N.Y. Times, Nov. 15, 2006, at C6. Previously, in *County of Hathcock v. Wayne*, 684 N.W.2d 765, 787 (Mich. 2004), the Supreme Court of Michigan held that "alleviating unemployment and revitalizing the economic base of the community" does not fulfill that state's public use requirement (citing and overruling *Pole-town Neighborhood Council v. Detroit*, 304 N.W.2d 455 (1981)). The Supreme Court of Ohio's decision, however, was the first state supreme court decision to denounce economic development takings after Justice Stevens suggested that states could put "further restrictions on [the] exercise of the takings power." *Kelo v. New London*, 545 U.S. 469, 489 (2005) (holding that economic development alone does satisfy the "public use" requirement of the federal constitution).

n2. *Norwood v. Horney*, 853 N.E.2d 1115, 1120 (Ohio 2006).

n3. Statutes which carry only civil penalties are often held to a lower standard of vagueness scrutiny than those statutes where loss of liberty is a possible penalty and those which infringe on fundamental constitutional rights. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982).

n4. *Norwood*, 853 N.E.2d at 1120. The void-for-vagueness doctrine is generally used in the criminal context and requires that proscribed conduct be detailed so that (1) an ordinary person knows what conduct he can or cannot engage in and (2) arbitrary and discriminatory enforcement is avoided. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

n5. See generally Castle Coalition, Citizens Fighting Eminent Domain Abuse, [www.castlecoalition.org](http://www.castlecoalition.org) (last visited Feb. 14, 2007). A weekly feature of the site is a picture of a property determined to be blighted with the caption "Is this property blighted? You be the judge." Castle Coalition, Is This Property Blighted? You be the Judge, [www.castlecoalition.org/CastleWatch/bogusblight/index.html](http://www.castlecoalition.org/CastleWatch/bogusblight/index.html) (last visited Feb. 14, 2007).

n6. *Berman v. Parker*, 348 U.S. 26 (1954). For a critical review of the development of urban renewal programs and blight takings see Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 *Yale L. & Pol'y Rev.* 1, (2003).

n7. See Christopher S. Brown, Note, Blinded by the Blight: A Search for a Workable Definition of Blight in Ohio, 73 *U. Cin. L. Rev.* 207, 213 (2004-2005). Critics further state that when an area takes a downward turn, the possibility of condemnation based on a finding of blight destabilizes property rights. Thus, owners are unwilling to develop their property and new businesses are unlikely to enter the area. Ilya Somin, Blight Sweet Blight, *Legal Times*, Aug. 14, 2006.

n8. See Brown, *supra* note 7, at 213.

n9. See also Somin, *supra* note 7 ("The sheer scale of forced relocations caused by blight condemnations dwarfs the harms inflicted by Kelo-style economic development takings.").

n10. See Pristin, *supra* note 1; *Brief of Appellant at 108-113, Great Rivers Habitat Alliance v. City of St. Peters*, No. WD67047, 2006 WL 3424016 (Mo. Ct. App. Oct. 18, 2006) (arguing that definition of blight is void-for-vagueness and citing *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006)).

n11. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

n12. See *United States v. Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

n13. Andrew E. Goldsmith, The Void-For-Vagueness Doctrine in the Supreme Court, Revisited, 30 *Am. J. Crim. L.* 279 (2003).

n14. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)) ("The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.""). See also Robert H. Wright, Today's Scandal Can Be Tomorrow's Vogue: Why Section 2(A) of the Lanham Act is Unconstitutionally Void for Vagueness, 48 *How. L.J.* 659, 661 (2005).

n15. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

n16. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

n17. Anthony G. Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 *U. Pa. L. Rev.* 67, 76 (1960) (footnotes omitted) (quoting Rex A. Collings, Jr., Unconstitutional Uncertainty - An Appraisal, 40 *Cornell L.Q.* 195, 219 (1955)). Professor Amsterdam's Note on the doctrine is often the first citation accompanying a discussion of void-for-vagueness.

n18. See *Broadrick*, 413 U.S. 601 (1973).

n19. See, e.g., *County of Kenosha v. C. & S. Mgmt., Inc.*, 588 N.W.2d 236, 246 (Wis. 1999) ("A vague statute ... is one which operates to hinder free speech through the use of language which is so vague as to allow the inclusion of protected speech in the prohibition or to leave the individual with no clear guidance as to the nature of the acts which are subject to punishment."); Joseph E. Bauerschmidt, Note, "Mother of Mercy - Is This the End of RICO?" - Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern", 65 Notre dame L. Rev. 1106, 1113 (1989-1990) ("The concepts of 'ambiguity' and 'overbreadth' are judicial creatures that are quite distinct from the doctrine of 'vagueness.' A proper analysis [of] the void-for-vagueness doctrine must, necessarily, recognize these as separate doctrines. Only one of them is truly applicable.").

n20. See *Hill v. Colorado*, 530 U.S. 703, 708 (2000).

n21. *Timmons v. City of Montgomery, Alabama*, 658 F. Supp. 1086, 1089 (M.D. Ala. 1987).

n22. *Screws v. United States*, 325 U.S. 91, 149 (1945) (Roberts, J., dissenting).

n23. *United States v. Reese*, 92 U.S. 214 (1875).

n24. *Screws*, 325 U.S. at 149 (Roberts, J., dissenting).

n25. *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

n26. Goldsmith, *supra* note 13, at 284-86. See also *Reese*, 92 U.S. 214 (1875); *Goguen*, 415 U.S. at 575; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries ...").

n27. *Goguen*, 415 U.S. at 575.

n28. Goldsmith, *supra* note 13, at 285.

n29. *Id.* at 293-94.

n30. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring).

n31. *Id.*

n32. *Id.*

n33. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 684-85 (1968).

n34. Goldsmith, *supra* note 13, at 294.

n35. *Id.*; Amsterdam, *supra* note 17, at 80.

n36. In analyzing whether RICO could be subject to a void-for-vagueness challenge, one commentator summed up applications of the doctrine as follows: "Statutes with independent scienter requirements are never

vague. Federal statutes are rarely vague. Civil statutes which do not impinge upon the first amendment are almost never vague." Bauerschmidt, *supra* note 19, at 1124.

n37. Wright, *supra* note 14, at 665 (noting that the United States Supreme Court "has liberally applied" the doctrine to criminal statutes and "has been particularly quick to apply the Void for Vagueness Doctrine to legislation which negatively impacts an individual's First Amendment rights ..."). See also *Cowan v. Bd. of Comm'rs of Fremont County*, 148 P.3d 1247, 1259 (Idaho 2006) ("most decisions invoking the "void for vagueness" doctrine deal with criminal statutes and ordinances ...").

n38. Review of the jurisdictions of the United States was not exhaustive. State supreme court cases in California, Florida, and Wisconsin arising after the enunciation of the two-prong test in 1983 were reviewed. In addition, cases citing *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966) (discussed *infra* notes 39-42) were also reviewed.

n39. 382 U.S. 399 (1966).

n40. *Id.* at 400.

n41. *Id.* at 401.

n42. *Id.* at 403. The state also argued that judicial guidelines saved the statute from vagueness. Judges would explain to juries that costs should be imposed when the jury found a defendant's conduct not unlawful, but still "reprehensible" or "improper." *Id.* at 403-404. The Court held that even this standard "falls short of the kind of legal standard due process requires." *Id.* at 404. Justice Stewart, however, concurred basing his decision on that fact "that Pennsylvania allows a jury to punish a defendant after finding him not guilty." *Id.* at 405.

n43. 499 U.S. 1 (1991).

n44. *Id.* at 22-23.

n45. The Court stated that *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), was not on point. "The Court there struck down a Pennsylvania statute allowing costs to be awarded against a defendant acquitted of a misdemeanor. The statute did not concern jury discretion in fixing the amount of costs. Decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." *Id.* at 24 n.12.

n46. 947 F.2d 95, 98 (4th Cir. 1991).

n47. *Id.* at 100.

n48. *Id.* at 105-106.

n49. *Id.* at 106 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966)).

n50. 753 P.2d 585 (Cal. 1988).

n51. The measure appeared in a June 1986 election and passed. *Id.* at 591.

n52. *Id. at 590-591.*

n53. Such questions included: "Does it retroactively apply to this case? Does it apply if the jury finds Gregory 0% at fault? Does it apply if the jury finds Van Waters & Rogers liable based on strict products liability?" *Id. at 592 n.8.*

n54. *Id. at 592.*

n55. *Id.*

n56. *Id.*

n57. *Id. at 593.*

n58. *Id. at 592-593.*

n59. *647 N.W.2d 851 (Wis. 2002).*

n60. The minor's father, psychiatrist, and case manager jointly sought the involuntary commitment. *Id. at 855.*

n61. *Id.*

n62. *Id. at 859.*

n63. *Id. at 857-858.*

n64. See *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), discussed supra notes 39-42.

n65. *Evangelatos v. Superior Court of Los Angeles*, 753 P.2d 585, 593 (Cal. 1991).

n66. Since 1983 (when the current void-for-vagueness test was announced in *Kolender v. Lawson*, 461 U.S. 325, 357 (1983)), the Supreme Court of Ohio has heard vagueness challenges in twenty-five cases. Twenty-one of those cases applied the doctrine to criminal statutes.

n67. *Buckley v. Wilkins*, 826 N.E.2d 811 (Ohio 2005) (per curium). The make-up of the court did not change between May of 2005 when Buckley was decided and July 2006 when Norwood was decided. Justice Judith Ann Lanzinger is the most recent addition to the Court. She joined the Court on January 1, 2005. Justice Terrence O'Donnell ran successfully for re-election in 2006.

n68. *Id. at 815.*

n69. *Id. at 814.*

n70. *Id.*

n71. *Id.* at 815 (quoting *Yajnik v. Akron Dept. of Health, Housing Div.*, 802 N.E.2d 632, 635 (Ohio 2004)).

n72. *Id.* at 816 (quoting *Perez v. Cleveland*, 678 N.E.2d 537 (Ohio 1997)).

n73. *Id.* (quoting *Chavez v. Housing Auth. of El Paso*, 973 F.2d 1245, 1249 (5th Cir. 1992) (quoting *United States v. Clinical Leasing Services, Inc.*, 925 F.2d 120, 122 n.2 (5th Cir. 1991) (quoting *A.B. Small Co. v. Am. Sugar Refining Co.*, 267 U.S. 233, 239 (1925), and *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981))).

n74. *Id.* at 816.

n75. The Ohio Supreme Court has heard four vagueness challenges outside of the criminal context since 1983. *State, ex rel. Rear Door Bookstore v. Tenth District Court of Appeals*, 588 N.E.2d 116 (Ohio 1992) (terms "lewdness" and "assignation" are not void-for-vagueness as they are found in a public nuisance statute); *Perez v. Cleveland*, 678 N.E.2d 537 (Ohio 1997), discussed *infra* notes 76-81; *Ohio v. Williams*, 728 N.E.2d 342 (Ohio 2000), discussed *infra* notes 82-87; *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d 966 (Ohio 1987), discussed *infra* notes 88-92.

n76. 678 N.E.2d 537 (Ohio 1997).

n77. *Id.* at 538.

n78. *Id.*

n79. *Id.* at 540.

n80. *Id.*

n81. *Id.*

n82. *Ohio v. Williams*, 728 N.E.2d 342 (Ohio 2000).

n83. *Id.* at 360; see also *Ohio Rev. Code Ann. § 2950.01(E)* (West 1997).

n84. *Williams*, 728 N.E.2d at 361.

n85. *Id.*

n86. *Id.* at 362.

n87. *Id.*

n88. *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d 966 (Ohio 1987).

n89. *Id.*

n90. *Id. at 968* (quoting Cincinnati, Oh, Ordinance No. 398 (1978)).

n91. *Id. at 970.*

n92. *Id.*

n93. *Norwood v. Horney*, 830 N.E.2d 381, 384-85 (Ohio Ct. App. 2005) (overruled by *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006)) [hereinafter *Norwood App.*].

n94. In its decision, the Supreme Court noted that "Norwood's industrial base [had been] eroded, taking with it tax dollars vital to the city. Municipal jobs and many services [had been] eliminated, and the city [was] millions of dollars in debt." *Norwood*, 853 N.E.2d at 1124.

n95. *Norwood App.*, 830 N.E.2d at 385.

n96. *Id.*

n97. *Id. at 385.*

n98. *Id.*

n99. *Id.*

n100. The NCC required that the Norwood Planning Commission review the study and make a recommendation to the Norwood City Council. After recommending that the study be adopted, a public hearing was held and several ordinances were adopted, including an authorization for the mayor to contract with the developers for the redevelopment of the area. *Id.*

n101. *Id. at 386.*

n102. *Id. at 383.*

n103. *Id. at 384.*

n104. *Id. at 388.*

n105. *Id. at 388*; Norwood, Oh, Code § 163.02 (2006).

n106. *AAAA Enterprises, Inc. v. River Place Cmty. Urban Redevelopment Corp.*, 553 N.E.2d 597 (Ohio 1990).

n107. *Norwood App.*, 830 N.E.2d at 388.

n108. *Id. at 384.*

n109. *Id. at 388-389.*

n110. *Id. at 390.*

n111. *Id.* These factors were "(1) the increase in traffic congestion around the existing [development] (2) the negative impact of noise from the traffic on Edwards, Edmondson, and I-71, (3) the high diversity of ownership of small parcels of land in the renewal area, (4) the safety issues arising from the truncating or dead-ending of Dacey and Garland Avenues, which created inadequate turnarounds [for emergency vehicles] (5) the numerous curb cuts and driveways onto Edwards and Edmondson Roads that required vehicles to either enter or leave the driveways by backing onto or off Edwards or Edmondson Road, (6) the widening of Edmondson Road, which was required to accommodate traffic from the I-71 exit ramp, and which resulted in a substantial reduction in the front yards along Edmondson Road - in some cases reducing front yards to only a few feet between the road and the front steps, and (7) the negative impact on the quality of residential living in the area at night resulting from the lights from adjacent developments." *Id.*

n112. *Id.*

n113. This is in direct contravention to the Supreme Court of Ohio's decision in *Buckley v. Wilkins*, 826 N.E.2d 811 (Ohio 2005) (per curium) (holding that a party presenting a vagueness challenge must show that it is vague beyond a reasonable doubt), discussed supra at note 71. In a separate part of the Supreme Court of Ohio's Norwood decision, the court held a statute unconstitutional despite the fact that during oral arguments counsel for the plaintiff's specifically stated they were not mounting a constitutional challenge. *Norwood v. Horney*, 853 N.E.2d 1115, 1146-52 (Ohio 2006).

n114. The Ohio Supreme Court's decision in Norwood is quite lengthy. Thus, this discussion will be limited to the parts relevant to the void-for-vagueness doctrine, specifically Parts II.C and III.A.

n115. *Norwood*, 853 N.E.2d at 1142.

n116. *Id. at 1143* (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)).

n117. *Id.*

n118. *Id.* The court cited the following cases for that proposition: *Jordan v. De George*, 341 U.S. 223 (1951) (applying the doctrine to a deportation statute); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), discussed supra notes 39-42.

n119. *Norwood*, 853 N.E.2d at 1143.

n120. *Id.*

n121. *Id.*

n122. *Id. at 1143-1144.*

n123. *Id. at 1144.*

n124. *Id.* Diversity of ownership "could mean either "several owners of a single property or several owners of different properties." *Id.*

n125. *Id. at 1145.*

n126. *Id.*

n127. *Id.*

n128. *Id. at 1146.*

n129. *Id.*

n130. Such a discussion might be interesting. The court began by evaluating one factor, diversity of ownership, against the vagueness standard, but did not continue to the other ten factors. *Id. at 1144-45.* Rather, the court summarily dismissed the entire definition of deteriorating as "standardless." *Id.*

n131. *Id. at 1143.*

n132. *Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).*

n133. *678 N.E.2d 537, 540 (Ohio 1997).*

n134. *Id.*

n135. *382 U.S. 399 (1966)*, discussed supra notes 39-42.

n136. *Id. at 402.*

n137. *Id. at 403.*

n138. Area factors will be discussed infra notes 145-149.

n139. This was the type of taking at issue in *Norwood*.

n140. *Ind. Code § 32-24-4.5-7(1)(D) (2006).*

n141. Cincinnati, Oh, Code ch. 602 (2006). The entire Cincinnati City Code is available at <http://www.municode.com/resources/gateway.asp?pid=19996&sid=35>. Penalties for violation of the chapter include fines. *Id.* at ch. 602-99.

n142. *Norwood v. Horney, 853 N.E.2d 1115, 1144 (Ohio 2006).*

n143. *Id. at 1144 n.13.*

n144. As previously noted, this case note will not discuss whether the Ohio Supreme Court accurately applied the void-for-vagueness doctrine. If applied to a very loosely worded blight statute, perhaps the purpose would be implicated. However, the legislature would probably be motivated to word blight statutes precisely because such statutes limit their power and the legislature would want to avoid having the statute construed to limit the power of eminent domain more than intended. For a discussion of incentives legislators have to word statutes vaguely, see Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 *Cal. L. Rev.* 541, 550 (1994).

n145. *Norwood v. Horney*, 830 *N.E.2d* 381, 390 (Ohio Ct. App. 2005).

n146. *Id. at 384, 388.*

n147. See, e.g., *Ind. Code* § 32-24-4.5-7(1) (2006).

n148. The *Norwood Code* is reproduced *supra* note 98.

n149. See *Wyo. Stat. Ann.* § 15-9-102 (2006) ("It is hereby found and declared that there exists in municipalities of the state slum and blighted areas (as herein defined) which constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, constitutes an economic and social liability imposing onerous municipal burdens which decrease the tax base and reduce tax revenues, substantially impairs or arrests the sound growth of municipalities, retards the provision of housing accommodations, aggravates traffic problems and substantially impairs or arrests the elimination of traffic hazards and the improvement of traffic facilities; and that the prevention and elimination of slums and blight is a matter of state policy and state concern."). According to some scholars, these "problems" are often merely rhetoric. See generally Pritchett, *supra* note 6; Robert A. Beauregard, *Voices of Decline: The Postwar Fate of U.S. Cities* (Routledge, 1993); Robert Fogelson, *Downtown: Its Rise and Fall, 1880-1950* (Yale University Press, 2001).

n150. See Keith Naughton, *The Long and Grinding Road*, *Newsweek*, May 1, 2006 (reporting US Census statistics which show that the number of commuters who drive more than ninety minutes to work, one way, is the fastest growing group of commuters).

n151. Interestingly, several states which have recently enacted legislation aimed at curbing eminent domain have kept area factors in their statutory schemes. See, e.g., Pa. Cons. Stat. Ann. § 205(c) (West 2006) (requiring that a majority of parcels meet individual blight factors in order for the entire area to be determined blighted); H. B. 1310 (Me. 2006) (prohibiting the use of eminent domain for private development, but maintaining area blight factors). But see *Ind. Code* § 32-24-4.5-7 (2006) (requiring that each parcel meet a blight standard if the condemned properties will be transferred to a private party).

n152. *Norwood v. Horney*, 853 *N.E.2d* 1115, 1143 (Ohio 2006).

n153. *Id.*

n154. Two conflicting appellate decisions also offer a glimpse of the possible litigation that may result from *Norwood*. Relying on *Norwood's* strong language regarding property as a fundamental right, the Second District Court of Appeals found an Ohio statute restricting certain sex offenders from living near schools unconstitutional. *Nasal v. Dover*, 862 *N.E.2d* 571 (Ohio Ct. App. 2006). The court held that that statute would "require him

to leave his home, at least, if not also to divest himself of ownership of his home." Thus, the statute affected a substantive right and was not merely remedial. *Id.* at 575. The same day, the First District Court of Appeals held the exact opposite, though it noted that a misunderstanding of the Norwood opinion was "understandable." *Hyle v. Porter*, No. C-050768, 2006 WL 2987735, at 5 (Ohio Ct. App. Oct. 20, 2006).

n155. *Dixon v. Toledo*, No. L-05-1409, 2006 WL 2321004 (Ohio Ct. App. Aug. 11, 2006). The decision in this case was rendered approximately two weeks after Norwood. This note assumes that the Sixth District appellate court did not hear arguments or decide its case with analysis from Norwood.

n156. *Id.* at 2.

n157. *Id.* at 1. Toledo, Oh, Municipal Code § 1726.01 (2006). This section of the Toledo Municipal Code is under the chapter on Health and Safety. In full the statute pertains to any premises "by reason of the condition in which the same is found or permitted to be or remain, shall or may endanger the health, safety, life, limb or property, or cause any hurt, harm, inconvenience, discomfort, damage or injury to any one or more individuals in the City, in any one or more of the following particulars: (1) By reason of being a menace, threat and/or hazard to the general health of the community. (2) By reason of being a fire hazard. (3) By reason of being unsafe for occupancy, or use on, in, upon, about or around the aforesaid premises. (4) By reason of lack of sufficient or adequate maintenance of the structure, location and/or premises ... which depreciates the enjoyment and use of the property in the immediate vicinity to such an extent that it is harmful to the community ... [in which it] exists." *Id.*

n158. *Dixon*, 2006 WL 2321004, at 1.

n159. *Id.* at 2.

n160. *Id.* The appellate court quoted the Sixth Circuit Court of Appeals for the following standard: "A civil statute that is not concerned with the First Amendment is only unconstitutionally vague if it is "so vague and indefinite as really to be no rule or standard at all' or if it is "substantially incomprehensible." *Id.* See also *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1104 (6th Cir. 1995).

n161. *Dixon*, 2006 WL 2321004 at 3.

n162. Shaker Heights, Oh, Codified Ordinances § 1212.05 (2006), available at <http://www.conwaygreene.com/lpshakerhts/lpext.dll?f=templates&fn=main-hit-h.htm&2.0>.

n163. Design Guidelines and Standards, Shaker Heights Architectural Board of Review (Rev. March 2, 1998), available at [http://www.shakeronline.com/media/pdfs/forms/FP\\_117200310284Designguide.pdf](http://www.shakeronline.com/media/pdfs/forms/FP_117200310284Designguide.pdf).

n164. *Id.* at Introduction.

n165. *Id.* at Residential Design Guidelines.

n166. Ohio Const. § 1.19.

n167. It is important to note that in Ohio, cities are entitled to Home Rule pursuant to the Ohio Const. § 18.07. Thus, all powers of the state are also given to the cities. The state legislature could not enact a common

blight definition for the entire state without abrogating Home Rule, which requires a constitutional amendment. The state can legislate for townships, however, which are statutory bodies, without Home Rule.

n168. *Norwood v. Horney*, 853 N.E.2d 1115, 1145 (Ohio 2006).