April 2015

City of Norwood v. Horney - Much More Than Eminent Domain: A Forceful Affirmation of the Independent Authority of the Ohio Constitution and the Court's Power to Enforce It

Kathleen M. Trafford
ktrafford@porterwright.com

CITY OF NORWOOD V. HORNEY – MUCH MORE THAN EMINENT DOMAIN: A FORCEFUL AFFIRMATION OF THE INDEPENDENT AUTHORITY OF THE OHIO CONSTITUTION AND THE COURT'S POWER TO ENFORCE IT

*Kathleen M. Trafford**

I. INTRODUCTION

City of Norwood v. Horney,[1] a unanimous opinion authored by

* The author of this Article, Kathleen M. Trafford, is a partner at Porter, Wright, Morris, & Arthur, LLP and chairs its Appellate and Ohio Supreme Court Practice Group. She is a Fellow of the American College of Trial Lawyers and a past president of the Columbus Bar Association. She attended the University of Akron School of Law for two years and received her juris doctorate from Capital University School of Law in 1979.

1. City of Norwood v. Horney ("*Norwood*"), 110 Ohio St. 3d 353, 2006-Ohio-3799, 853

Chief Justice Maureen O'Connor in 2006, is well known for its holdings on eminent domain. But, as important as its eminent domain holdings are, there is much more to the *Norwood* opinion. Indeed, *Norwood* is every bit as important for its articulation of fundamental principles governing the constitutional role of the judiciary in modern times.

Norwood recalibrates the balance thought to be struck in the Ohio Constitution between an individual's inalienable right to acquire and possess property and the need to protect the public welfare.[2] It does so by declaring that "economic or financial benefit alone is insufficient to satisfy the public use requirement" established in article I, section 19 of the Ohio Constitution and that "any taking based solely on financial gain is void as a matter of law."[3] This holding tips the scale toward giving broader protection to individual property rights after several decades of case law allowing greater latitude for governmental takings. The Ohio Supreme Court's holding concerned a significant point of law rendered early in the legal, social, and cultural debates over the use of eminent domain to seize property so that it could be transformed into a more lucrative tax base. However, the broader significance of *Norwood* lies in its discussion of three important principles that the Court reaffirmed and sharpened before reaching its holding on takings.

First, *Norwood* followed closely on the heels of *Kelo v. New London*,[4] in which the United States Supreme Court upheld a taking of individual property for purely economic reasons[5] as not violative of the federal Fifth Amendment.[6] The Ohio Supreme Court, however, was not cowed by the High Court's ruling nor persuaded by its analysis. By breaking company with the United States Supreme Court and grounding its analysis almost exclusively on the Ohio Constitution and Ohio

---

N.E.2d 1115.

2. OHIO CONST. art. I, § 1 states: "All men . . . have certain inalienable rights, among which are those of . . . acquiring, possessing and protecting property." OHIO CONST. art. I, § 19 states:

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

3. *Norwood*, 2006-Ohio-3799 at ¶ 80.

4. Kelo v. City of New London, 545 U.S. 469 (2005).

5. *Id.* at 485.

6. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

values[7], the Court took a step forward in establishing the principle of Ohio constitutional independence and moving the Court more solidly into the New Judicial Federalism camp.[8]

Second, the Court made clear, in no uncertain terms, that the determination of what constitutes a "public use" for purposes of an Ohio takings clause analysis is a judicial question.[9] While acknowledging that some deference to legislative findings is appropriate, the opinion leaves no doubt that judicial review of whether the public use requirement has been satisfied cannot be accomplished by "superficial scrutiny" or reduced to "hortatory fluff."[10] *Norwood* is, in this regard, an important separation-of-powers opinion that likely will affect how the Court balances legislative and judicial authority in areas other than eminent domain.

Third, the Court breathed new life into the dormant, if not dead, void-for-vagueness doctrine. *Norwood* makes clear that the doctrine still has utility in eminent domain cases[11] and suggests that it may have utility in other cases in which a civil statute affects fundamental constitutional rights.[12]

This Article will argue that the *Norwood* opinion not only enhances the individual's protection under Ohio's eminent domain law but also refines the judiciary's approach to Ohio constitutional analysis. Part I will set forth the pre-*Norwood* standard of review in Ohio eminent domain law, which took an increasingly expansive approach to determining what constitutes public use out of deference to the legislature. It will outline the standard of review for eminent domain cases at the federal level following the United States Supreme Court's holding in *Kelo*, which upheld the taking of private property for purely economic reasons. Finally, Part I discusses the facts and holding of *Norwood*, which struck down the taking of private property for purely

7. *Norwood*, 2006-Ohio-3799 at ¶ 9.

8. "New Judicial Federalism" refers to a movement that emerged in the 1970s advocating the "renewed reliance by state courts on state constitutions as independent sources of constitutional rights, often with the aim of extending greater protection to individual liberties than is available under current interpretations of the federal constitution." Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143, 143 (1984); *see also* Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415, 423 (2004); Richard A. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437, 443 (2004); Marianna Brown Bettman, *Ohio Joins the New Judicial Federalism Movement: A Little To-ing and a Little Fro-ing*, 51 CLEV. ST. L. REV. 491, 491 (2004).

9. *Norwood*, 2006-Ohio-3799 at ¶ 67.

10. *Id.* at ¶ 66.

11. *Id*. at ¶ 88.

12. *Id*.

economic reasons on the authority of the Ohio Constitution. Part II will explore how the *Norwood* opinion exemplifies Ohio constitutional independence and New Judicial Federalism by grounding its analysis in the Ohio Constitution and departing from the federal paradigm. Part III will consider how *Norwood* affects judicial deference to legislative authority, given the fine line between judicial deference and judicial abdication and the Court's emphasis on separation of powers. Finally, Part IV will discuss the legislative clarity required under *Norwood*'s use of the rarely invoked void-for-vagueness doctrine.

II. ANALYSIS

A. Norwood Rebalances the Takings Scale

1. Pre-*Norwood* Standards of Review in Ohio Eminent Domain Law

Two of the significant aspects of *Norwood* are its reliance on the protections within the Ohio Constitution, rather than federal constitutional protections,[13] and Chief Justice O'Connor's adamant insistence that judicial review of takings is commensurate with the fundamental right to property that is at issue in takings cases.[14] Prior to *Norwood*, Ohio eminent domain law increasingly favored the legislative right to take private property for the "public welfare" by broadly expanding the notion of what constitutes a public use and giving increased deference to legislative determinations of public use. Three points along the continuum show this evolution of the law before *Norwood* brought it to its current state.

In the early twentieth century case of *Pontiac Improvement Company v. Board of Commissioners*, the Ohio Supreme Court held that a public corporation could not use the power of eminent domain to assert regulatory control over private property in the absence of either a physical taking or compensation.[15] The case came before the Court after the Cleveland Metropolitan Park District (District) successfully prosecuted an appropriation suit to acquire, in fee simple, a portion of an entire tract of private property and to assert ongoing control over the remainder of the property without further compensation.[16]

13. *Id*. at ¶ 65.
14. *Id*. at ¶ 69.
15. Pontiac Improvement Co. v. Bd. of Comm'rs, 135 N.E. 635, 641 (Ohio 1922).
16. *Id*. at 636.

The District's goal was to build a park on the parcel acquired from the owner and create a park-like appearance on the adjacent parcel by asserting the right to control plantings, grading, and drainage on the property and the right to prevent the owner from placing buildings, fences, poles, signs, or other structures on the property.[17] The District claimed it had the right to assert this type of regulatory taking because the Ohio Legislature had authorized metropolitan park boards to exercise the power of eminent domain to acquire not only fee interests but also "any lesser interest . . . as the board may deem advisable."[18] Both the trial court and the court of appeals found in favor of the District, but the Ohio Supreme Court reversed.[19]

The Court strictly construed article I, section 19 of the Ohio Constitution, stating, "[i]t is very clear that the purpose of the constitution was to safeguard the rights of private property and to preserve it to the owner, except where it 'shall be *taken* for a *public use.*'"[20] The Court concluded that "[t]he natural import of the words, 'taken for public use,' used in our constitution is that the thing is to be used by the public or by some agency of the public."[21] The Court found that the phrase, "taken for public use," "implies possession, occupation and enjoyment of the property by the public, or by public agencies, to be used for public purposes."[22] Although the Court's analysis was predominantly textual and focused on interpreting the phrase, "taken for a public use," the Court was not inattentive to the property owner's interests. Indeed, the Court expressed a genuine concern that allowing the type of indefinite, uncompensated regulatory takings intended by the District left too much uncertainty and confusion regarding the property owner's ongoing rights and privileges.[23]

17. *Id.* at 637-38.

18. *Id*. at 637.

19. *Id*. at 641.

20. *Id*. at 638. While the prefatory sentence in article I, section 19 places private property "subservient to the public welfare," the "taken for a public use" language was added as a result of the amendment to the Ohio Constitution in 1891 that describes how compensation is to be determined and paid when the power of eminent domain is exercised.

21. *Id*.

22. *Id*. at 635. The Court acknowledged that, under the weight of existing judicial authority, a taking may be made by a private entity to serve the public with some necessity or convenience, or even by a private individual to enable him or her to cultivate the land or carry on a business that could not otherwise be done. However, it held that in all such instances, there must be "an actual taking of the land, or an acquisition of an easement in the land, a going upon and acquiring either a fee or lesser interest." *Id*. at 639.

23. *Id*. at 640 ("It does not appear that any provision has been made concerning the method of exercising these rights to control, regulate and prevent the various matters stated in the petition, nor does it appear how they are to be enforced, nor how often they may be altered, nor what notice

The Court's strict interpretation of article I, section 19 to require an actual taking for a public use, however, did not withstand the test of time. Three decades later, in *State ex rel. Bruestle v. Rich*, the Court overruled that branch of the *Pontiac Improvement* holding[24] and substituted a broad interpretation of the government's eminent domain power for an interpretation that was more protective of individuals' property rights.[25]

The issue in *Bruestle* was whether the taking of property for urban redevelopment is a public use for which the power of eminent domain may be exercised.[26] The redevelopment plan at issue contemplated the use of eminent domain power by a city to acquire all the property in a blighted area for the purpose of demolishing existing buildings and reselling the property to private developers for redevelopment.[27] The plan envisioned continuing restrictions on the redevelopment effort to guard against the recurrence of blight.[28]

The Court rejected the argument that the constitutional "public use" requirement meant "there must be a use or right of use on the part of the public or some limited portion thereof," finding that such an argument ignored the first sentence of article I, section 19 of the Ohio Constitution, which renders private property "subservient to the public welfare."[29] The Court held that property taken for the public welfare is property taken for a public use, even when there may be an incidental nonpublic use of the property or benefit of the taking.[30] The Court summarily dismissed the notion that the elimination of slums and initiation of provisions to guard against the recurrence of blight is not conducive to the public welfare.[31]

Bruestle also sent a strong signal that, going forward, the Court would defer to legislative findings as to whether property was taken for

---

must be given to the owner of the property who remains in possession, nor whether he shall have a right to be heard touching the various matters. The uncertainty, confusion and contention that would necessarily arise are very apparent").

24. State *ex rel*. Bruestle v. Rich, 110 N.E.2d 778, 780 (Ohio 1953). *See also id*. at 786 (citing *Pontiac Improvement Co.*, 135 N.E. at 635) (concluding that the syllabus of *Pontiac Improvement Co.* "appears to be contrary to the intention expressed by the people by the words used in Section 19 of Article I of the Constitution and inconsistent with other pronouncements of this court").

25. *Id*. at 787-88.

26. *Id*. at 784.

27. *Id*.

28. *Id*. at 780-81.

29. *Id*. at 785.

30. *Id*. at 780.

31. *Id*. at 787.

the public welfare and not overturn those determinations unless they were found to be "manifestly arbitrary and unreasonable" – the same level of deference applied to municipal spending decisions.[32] Yet, by importing into the eminent domain context the test applied to municipal spending decisions,[33] the *Bruestle* Court failed to acknowledge the critical difference between the power of eminent domain and the power to tax and spend: the former affects an inalienable right, while the latter does not.[34]

The signal sent in *Bruestle* was amplified in *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp*.[35] There, the Court held that the abuse-of-discretion standard applies to judicial review of a legislative determination that an area is a "blighted area" appropriate for exercise of the power of eminent domain.[36] The Court rejected the view that to satisfy that standard the property owner must come forward with evidence of subjective bad faith but, nevertheless, held that the property owner had to clear the high hurdle of showing that the legislative determination was "unreasonable, arbitrary or unconscionable."[37] Even this modified abuse-of-discretion standard, however, gives inordinate weight to the legislative public-welfare determination and significantly discounts the value of the inalienable right to acquire, possess, and protect private property. The standard invoked in *AAAA Enterprises* is routinely and appropriately applied to any number of discretionary governmental decisions that do not invade fundamental constitutional rights.[38] Where governmental action invades a fundamental right, however, the courts have typically applied a heightened standard of review.[39]

---

32. *Id*.

33. *Id*. (citing State *ex rel.* Gordon v. Rhodes, 100 N.E.2d 225 (Ohio 1951)).

34. Article 1, section 1 of the Ohio Constitution deems the acquisition, possession, and protection of property an "inalienable" right. Similarly, the *Norwood* opinion characterizes property rights as "fundamental." *See Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 38; *see also* note 65 *infra* and accompanying text.

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

36. *Id*. at 600.

37. *Id*. at 601.

38. *See, e.g.*, State v. Schreckengost, 282 N.E.2d 50, 53 (Ohio 1972) (noting that an abuse-of-discretion standard applied to the state legislature's decision to vest authority in the Division of Parks and Recreation to create regulations to govern parks without providing guidelines for such regulations).

39. *See generally* State v. Burnett, 755 N.E.2d 857, 865 (Ohio 2001) (Cook, J., concurring). Legislation that affects a fundamental right is generally subject to strict scrutiny; that is, it "must be narrowly tailored to achieve a compelling governmental interest." *Id.* at 866 (citing Reno v. Flores, 507 U.S. 292, 301-02 (1993)).

The Court's increasing willingness to defer to the legislature mirrored the progression of federal eminent domain law.[40] Federal courts also deferred to the legislature, noting that the role of the judiciary in reviewing legislative findings is "an extremely narrow one"[41] and that courts should "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[42]

2. Standards of Review in Federal Eminent Domain Law

The consequences of lowering the bar for judicial review in eminent domain cases were dramatically brought home in *Kelo v. New London*, decided by a sharply divided United States Supreme Court merely six months before *Norwood* was argued before the Ohio Supreme Court.[43] *Kelo* put forth the issue of whether a municipality could take unblighted private property solely for the purpose of economic development[44] – the same issue that the Court would take up in *Norwood*.[45]

The economically distressed city of New London adopted a comprehensive development plan projected to create jobs, increase revenue, and substantially revitalize the development area, which included downtown and waterfront areas on the Long Island Sound in southern Connecticut.[46] In order to implement the plan, the city reactivated the New London Development Corporation, a private nonprofit entity, and authorized it to acquire property in the 90-acre development area by purchase or eminent domain.[47] Owners of 15 of the properties in the area refused to sell their homes or businesses – none of which were blighted or in poor condition – and challenged the city's delegation of eminent domain power to the private corporation on the

40. *See* Kelo v. City of New London, 545 U.S. 469, 482 (2005) (noting federal precedent had developed a deferential approach to legislative determinations in this area).

41. Berman v. Parker, 348 U.S. 26, 32 (1954).

42. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

43. *Norwood* was first argued on September 28, 2005, with argument limited to the constitutionality of the provision in R.C. 163.19 prohibiting courts from enjoining an appropriation after compensation for the property is deposited with the court but prior to appellate review. On January 11, 2006, the Court heard argument on the broader issue of the constitutionality of taking private property by eminent domain and transferring the property to a private entity for redevelopment.

44. *Kelo*, 545 U.S. at 477.

45. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 7.

46. *Kelo*, 545 U.S. at 472.

47. *Id.* at 473-75.

ground that taking private property for the purpose of economic development violated the public use restriction in the Fifth Amendment to the United States Constitution.[48]

The Court declined the petitioners' invitation to adopt a bright-line rule that economic development does not qualify as a public use, invoking the Court's long-standing deference to legislative determinations of which public needs justify the use of the takings power and its own traditionally broad understanding of public purpose to find that the "plan unquestionably serves a public purpose."[49] While the majority believed its holding was readily predictable from over a century of Supreme Court case law interpreting the Takings Clause,[50] the four dissenters found it an astonishing abandonment of "long-held, basic limitations on governmental power" that effectively deleted the public use requirement from the federal Takings Clause.[51] The four dissenting justices read the majority's opinion as making all private property vulnerable to being taken and transferred to another private owner, simply because it might be upgraded in a manner that a legislative body deems more beneficial to the public.[52]

Kelo provoked caustic criticism and debate about eminent domain abuse and was a call to action for state legislatures and courts across the country.[53] Ohio was poised to enter the post-*Kelo* arena because the Ohio Supreme Court had already accepted *Norwood* for review.

3. Setting the Stage for Constitutional Consideration

Norwood, an island completely surrounded by the city of Cincinnati, was a thriving city with a strong industrial base and desirable, low-density residential communities until the late 1960s when the city was transected by construction of Interstate 71 (I-71).[54] The I-71 construction truncated numerous residential streets, eliminated houses, and changed the character of many neighborhoods, including the area in the vicinity of Madison and Edwards Roads where the Horneys and their neighbors lived.[55] This later became the Edwards Road Urban Renewal

48. *Id*. at 469.
49. *Id*. at 484.
50. *Id*. at 490.
51. *Id*. at 494.
52. *Id*.
53. Julia D. Mahony, Kelo's *Legacy: Eminent Domain and the Forfeiture of Property Rights*, 2005 SUP. CT. REV. 103, 104 (2006).
54. City of Norwood v. Horney ("*Norwood II*"), 161 Ohio App. 3d 316, 2005-Ohio-2448, 830 N.E.2d 381, at ¶¶ 7-8.
55. *Id*.

Area.[56]

In 2002, a private developer approached the city of Norwood (City) and proposed to redevelop the area into a conglomerate of higher density residential areas, retail and office spaces, and large public parking facilities.[57] The City supported the redevelopment proposal but declined to use its power of eminent domain to assist the developer in acquiring the properties to be redeveloped.[58]

Subsequently, the developer successfully acquired all but five of the necessary parcels and renewed its plea to the City to acquire the remaining properties through appropriation.[59] The City acquiesced, commissioning an urban renewal study to determine whether the area that included the properties to be acquired was a "'slum, blighted, or deteriorated' or 'deteriorating'" as required by statute.[60] The study concluded that the construction of I-71 and resulting commercialization of the area had a negative effect on the area as a residential community and that piecemeal redevelopment was likely to occur, which would have an "adverse effect on the physical, aesthetic, and functional qualities of the area."[61]

In August 2003, the Norwood City Council passed an ordinance "to eliminate deteriorating and deteriorated areas within the City of Norwood and to improve safety and traffic conditions and other deteriorating conditions" by "encouraging their prompt redevelopment" along with a companion ordinance authorizing the mayor to contract with the private developer for the redevelopment of the area.[62] The following month, City Council authorized the use of the power of eminent domain to acquire the remaining parcels owned by the Horneys and their neighbors.[63]

In the appropriation cases that followed, the property owners asserted the City had abused its discretion in determining that the renewal area was a "deteriorating" area over which the power of eminent domain could be lawfully exercised.[64] The trial court disagreed, approved the appropriation of the properties, and declined to enjoin the

56. *Id*.; *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 14.
57. *Norwood II*, 2005-Ohio-2448 at ¶ 9.
58. *Id.* at ¶ 10.
59. *Id*. at ¶ 11.
60. *Id.* at ¶ 11.
61. *Id*. at ¶ 12.
62. *Id*.
63. *Id*. at ¶¶ 2-3.
64. *Id*. at ¶ 5.

developer from using or destroying the properties pending appeal.[65]

In May 2005, the First District Court of Appeals affirmed. Both the trial court and the court of appeals felt constrained to uphold City Council's determination that the area was "deteriorating" by the deference required to be given such legislative judgments under prior precedent.[66] The court of appeals read *AAAA Enterprises* as requiring the court to "give the definition of 'blighted area' a liberal interpretation" and believed its "role in determining whether governmental power has been exercised for a public purpose is an extremely narrow one."[67] The court of appeals understood *AAAA Enterprises* and *Bruestle* as broadly holding "that a taking under an urban renewal plan is for a valid public purpose and is constitutional."[68]

4. The *Norwood* Decision

The Ohio Supreme Court unanimously disagreed with the court of appeals' reading of its precedents as well as the result on the merits.[69] The *Norwood* decision assures that, in Ohio, property owners do not have to live under the *Kelo* threat that their homes or other property can be taken simply because some other party might put the property to a "better" use that conceivably furthers the "public welfare."

Chief Justice O'Connor's opinion for the Court explained, citing 150 years of precedent, that "Ohio has always considered the right of property to be a fundamental right" and that "the bundle of venerable rights associated with property is strongly protected by the Ohio Constitution and must be trod upon lightly no matter how great the weight of other forces."[70] The Court acknowledged that the concept of

65. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 31. The court of appeals also denied a stay, finding that R.C. 163.19 prohibited such relief. The Ohio Supreme Court issued an order on February 22, 2005, enjoining any further destruction or alteration of the properties pending the appeal on the merits. City of Norwood v. Horney, 105 Ohio St. 3d 1445, 2005-Ohio-669, 822 N.E.2d 1261. The Court ultimately held the anti-injunction provision in R.C. 169.13 unconstitutional as an infringement on inherent judicial authority. *Norwood*, 2006-Ohio-3799 at ¶ 123.

66. *Norwood*, 2006-Ohio-3799 at ¶ 26 (quoting trial court opinion); *see also Norwood II*, 2005-Ohio-2448 at ¶¶ 27-28.

67. *Norwood II*, 2005-Ohio-2448 at ¶ 31.

68. *Id*. at ¶ 44.

69. *Norwood*, 2006-Ohio-3799 at ¶ 63.

70. *Id*. at ¶ 38 (citing Reece v. Kyle, 31 N.E. 747, 750 (Ohio 1892), *overruled in part on other grounds*; Mahoning Cty. Bar Ass'n v. Ruffalo, 199 N.E.2d 396 (Ohio 1964); Hatch v. Buckeye State Bldg. & Loan Co., 16 Ohio Law Abs. 661 (1934); *In re* Vine St. Congregational Church, 20 Ohio Dec. 573 (1910); Caldwell v. Baltimore & Ohio Ry. Co., 14 Ohio Dec. 375 (1904); Kata v. Second Nat'l Bank of Warren, 271 N.E.2d 292 (Ohio 1971)).

public use had evolved into a broad and flexible standard, exemplified by its holding in *Bruestle* that "a taking of blighted property for purposes of redevelopment was within the broad and inclusive concept of public use."[71] The Court, however, saw two critical distinctions in the case before it: (1) the properties were not blighted, and (2) the contemplated use of the property was dependent upon a private party.[72] These distinctions led the Court to define the issue before it as whether "an economic or financial benefit alone" is sufficient to satisfy the public use requirement of the Ohio Constitution; the Court then reached the swift, sure, and unanimous conclusion that it is not.[73]

The *Norwood* decision rebalanced the takings scale by withdrawing the judicial thumb, placed there under prior law in the form of judicial deference, and by allowing the property owners' pan to naturally weigh against the legislature's pan. Nevertheless, as discussed below, *Norwood* has broad import well beyond its public use holding and is likely to affect the development of the law in other substantive areas.

B. Norwood *Invigorates the Court's Commitment to Ohio Constitutional Independence*

Norwood has significance beyond its immediate holding because the Court takes an independent constitutional stance by rejecting *Kelo* and using the Ohio Constitution to safeguard individual property rights not recognized under federal law. It is one of only a few cases in which the Ohio Supreme Court has invoked state constitutional independence to reach an outcome different from federal law in a non-criminal case.

Over the last 40 years, courts, judges, lawyers, and scholars have increasingly recognized the potential of state constitutions to provide greater protection for individual rights and liberties than the federal Constitution as interpreted by the United States Supreme Court. The birth of this "New Judicial Federalism" movement is traced to Justice William J. Brennan's call to arms to cure what he saw as the depreciation of federal constitutional protections, particularly those protecting the rights of criminal defendants, due to the growing conservatism of the United States Supreme Court at that time.[74] The

71. *Id*. at ¶ 59.

72. *Id*. at ¶¶ 62, 71.

73. *Id*. at ¶ 80.

74. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's

movement, as matured over time, however, is not viewed as either "liberal" or "conservative" but rather as recognizing, appreciating, and advocating state constitutions as an independent source of fundamental law that can place a wide array of individual rights and liberties on a level higher than the federal constitutional floor.[75]

Ohio officially joined the New Judicial Federalism movement in *Arnold v. City of Cleveland*, in which the Court was called on to decide the constitutionality of a municipal ordinance banning the possession and sale of assault weapons.[76] Presumably, because the question whether individuals have a fundamental right to bear arms under the United States Constitution had already been decided in the negative,[77] *Arnold* asserted that the ordinance violated the fundamental right to bear arms under article I, section 4 of the Ohio Constitution.[78] The Court openly embraced the notion that it was free to interpret the Ohio Constitution – a document of "independent force" – to provide greater civil liberties and protections to individuals and groups than required by the federal constitutional "floor."[79] The Court analyzed the text of article I, section 4 of the Ohio Constitution, contrasted it with the Second Amendment to the United States Constitution, and found the Ohio provision broader in that it "secures to every person a fundamental individual right to bear arms for 'their defense and security.'"[80] The Court held that the right to bear arms was a fundamental right under the Ohio Constitution, although not an absolute right.[81] While the defendant in *Arnold* made the case for Ohio constitutional independence, he ultimately did not prevail, as the Court held that the ordinance was a proper exercise of the police power

interpretation of federal law); Michigan v. Mosely, 423 U.S. 96, 121 (1975) (Brennan, J., dissenting) ("[S]tate courts and legislatures are, as a matter of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court.").

75. *See generally* Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901 (2011); Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165 (2009).

76. Arnold v. City of Cleveland, 616 N.E.2d 163, 164 (Ohio 1993). Although *Arnold* represents the first overt statement of the New Judicial Federalism in Ohio law, the Ohio Supreme Court had, on several prior occasions, interpreted the Ohio constitutional provisions more broadly than their federal counterparts. *See* Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 573-74 (Ohio Ct. App. 1993) (collecting cases).

77. *Arnold*, 616 N.E.2d at 166 (collecting cases).

78. "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

79. *Arnold*, 616 N.E.2d at 169.

80. *Id*.

81. *Id*. at 171.

and did not violate article I, section 4.[82]

Notwithstanding the Court's pronouncement in *Arnold* that it was joining the New Judicial Federalism movement,[83] the occasions on which the Court has asserted constitutional independence since *Arnold* have been few and far between. In *State v. Robinette*, the Court declined to hold that the Ohio Constitution gives greater protection against searches and seizures than the Fourth Amendment of the federal Constitution, even though the Court initially believed that greater protection was warranted.[84]

The question in *Robinette I* was whether police officers are constitutionally required to inform citizens validly detained for a traffic offense that they are "free to go" before the officer attempts to engage in a consensual interrogation.[85] The Court initially held that a "free to go" statement was required as a matter of both federal and Ohio constitutional law.[86] The state of Ohio appealed this ruling to the United States Supreme Court.[87] The High Court reversed as to the United States Constitution, stating that the Fourth Amendment does not require such a statement, and that it was reluctant to apply "bright-line" tests in determining whether searches are valid.[88] The Court remanded the case back to the Ohio Supreme Court for it to determine whether the statement was required solely as a matter of state constitutional law.[89] On remand, the Ohio Supreme Court elected to conform Ohio law to federal law even though it previously held that such statements were required under its interpretation of the federal and Ohio Constitutions.[90]

Although the *Robinette II* Court acknowledged the "wave of New Federalism," it narrowed Ohio's commitment to the movement. The Court stated that "where the provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio's Constitution are coextensive with those provided by the United States Constitution."[91] The Court concluded that the language of article I, section 14 of the

82. *Id*. at 173.
83. *Id*. at 169.
84. State v. Robinette, 653 N.E.2d 695 (Ohio 1995) (*Robinette I*), *rev'd*, 516 U.S. 1157 (1996); State v. Robinette, 685 N.E.2d 762 (Ohio 1997) (*Robinette II*).
85. *Robinette I*, 653 N.E.2d at 698.
86. *Id*. at 699.
87. *Robinette II*, 685 N.E.2d at 765.
88. *Id*. at 765.
89. Ohio v. Robinette, 516 U.S. 1157, 1157 (1996).
90. *Robinette II*, 685 N.E.2d at 771.
91. *Id*. at 766.

Ohio Constitution was virtually identical to the Fourth Amendment and cited its history of interpreting the Ohio Constitution as affording the same, and no greater, protection as the Fourth Amendment.[92]

The Ohio Supreme Court's reluctance to robustly embrace Ohio constitutional independence has not been limited to search-and-seizure cases or even criminal law. In *Eastwood Mall, Inc. v. Slanco*, the Court declined an invitation to construe article I, section 11 of the Ohio Constitution more broadly than the First Amendment to the United States Constitution in order to protect free speech activities on privately-owned property open to the public. [93] Similarly, in *Simmons-Harris v. Goff*, the Court formally adopted the traditional *Lemon v. Kurtzman* analysis,[94] used to adjudicate federal Establishment Clause challenges,[95] to decide a claim that the state's school voucher program violated article I, section 7 of the Ohio Constitution.[96] In a nod to state constitutional independence, however, the Court stated that it was adopting the *Lemon* test "not because it is the federal constitutional standard, but rather because the elements of the *Lemon* test are a logical and reasonable method by which to determine whether a statutory scheme establishes religion."[97] The Court "reserve[d] the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant reason."[98]

A year later, the Court found a persuasive reason to assert Ohio constitutional independence in a religious free exercise case, *Humphrey v. Lane*.[99] Wendall Humphrey was a Native American employed as a

92. *Id*. While the *Robinette I* case was on hiatus at the United States Supreme Court, the Ohio Supreme Court issued its decision in State *ex rel.* Wright v. Ohio Adult Parole Bd., 661 N.E.2d 728 (Ohio 1996). The Court reversed a prior precedent from 1984 which held that under article I, section 14 of the Ohio Constitution, evidence obtained through an unreasonable or unlawful search and seizure is inadmissible in a probation revocation proceeding. In *Wright*, the Court realigned its position to conform to federal Fourth Amendment jurisprudence and the majority Ohio rule that the exclusion rule should not apply in probation revocation proceedings.

93. Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 60 (Ohio 1994).

94. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

95. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

96. Simmons-Harris v. Goff, 711 N.E.2d 203, 208 (Ohio 1999) ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted.")

97. *Id*. at 211.

98. *Id*. at 212.

99. Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000).

corrections officer at a state prison.[100] Humphrey received notice that he was to be terminated for refusing to cut his waist-length hair in order to comply with a departmental grooming policy.[101] His refusal to do so was based upon his sincerely held religious beliefs - beliefs the department of corrections had accommodated for years by allowing him to wear his hair tucked neatly under his uniform hat.[102] Humphrey had no viable federal Free Exercise claim because, in 1990, the United States Supreme Court had relaxed the standard for such claims by holding that strict scrutiny was no longer required.[103] Humphrey's only viable choice was to bring suit under article I, section 7 of the Ohio Constitution and to convince the courts that the Ohio Constitution should continue to follow the strict-scrutiny test and afford broader protection to religious freedom than the new, federal constitutional floor.

Humphrey prevailed in the trial court but lost in the court of appeals, where the Ninth District predicted that the Ohio Supreme Court would transition to the new federal constitutional test and narrow the protection afforded to religious free exercise.[104] The Ohio Supreme Court accepted the case for discretionary review and reversed, electing to adhere to the long-held strict scrutiny standard, even for challenges to generally applicable, religiously neutral laws and regulations, despite the recent federal divergence.[105] The Court analyzed the difference between the rich language in article I, section 7 of the Ohio Constitution and the abbreviated statement in the First Amendment and concluded that there was a qualitative difference: the Ohio Constitution prohibits any "interference with the rights of conscience," while the First Amendment concerns itself with laws that prohibit the free exercise of religion.[106]

Six years later, with Chief Justice O'Connor now a member of the Court, *Norwood* was released. The Court reaffirmed its commitment to Ohio's constitutional independence in *Norwood*,[107] but it did so with little fanfare. Perhaps because the United States Supreme Court, in *Kelo*, invited the state legislatures and state supreme courts to afford greater

100. *Id*. at 1041.

101. *Id*. at 1042.

102. *Id*. at 1041.

103. The strict scrutiny standard requires a state, seeking to justify a law that infringes upon religious freedom, to demonstrate that the law employs the least restrictive means to further a compelling state interest. In Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 872 (1990), the Court held that a state law did not violate the federal Free Exercise Clause so long as the law was religiously neutral and generally applicable.

104. *Humphrey*, 728 N.E.2d at 1042.

105. *Id*. at 1043.

106. *Id*. at 1044.

107. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 65.

protection to individual property rights by restricting public use takings,[108] the Court did not find it necessary to conduct a detailed textual analysis (as it had done in *Humphrey*) or to otherwise justify its divergence from the federal reconciliation of property rights and public use takings. In effect, *Norwood* unsettles the presumption that federal constitutional law is the dominant law to follow, absent some textually based and persuasive reason to make a change. *Norwood* reinforces the role of the Ohio Constitution as a truly independent instrument that may be invoked to protect property and other fundamental rights and civil liberties.

C. Judicial Deference Cannot Bleed into Judicial Abdication

Chief Justice O'Connor came onto the Court at a point in time when the Court's decade-long struggle with the legislature over tort reform and school funding had made "judicial activism" a popular invective.[109] Chief Justice O'Connor is a strong advocate of judicial restraint and is quick to speak out when she sees the Court stepping out from behind the bench or picking up the legislative pen.[110] Yet, as *Norwood* illustrates, the doctrine of "separation-of-powers,"[111] which

108. Kelo v. City of New London, 545 U.S. 469, 489 (2005).

109. The Court addressed the constitutionality of tort reform legislation six times over a period spanning from 1991 to 2007 and, on all but the last occasion, found some aspect of tort reform law unconstitutional. *See* Morris v. Savoy, 576 N.E.2d 765, 768 (Ohio 1991) (holding a cap on general damages awarded for medical malpractice unconstitutional); Sorrell v. Thevenir, 633 N.E.2d 504, 508 (Ohio 1994) (holding the collateral benefits rule unconstitutional); Galayda v. Lake Hosp., 644 N.E.2d 298, 302 (Ohio 1994) (holding a statute requiring certain awards of tort damages to be payable over time unconstitutional); Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 399 (Ohio 1994) (holding a statute allowing judge, not jury, to determine punitive damages unconstitutional); Acad. of Trial Lawyers v. Sheward, 751 N.E.2d 1062 (Ohio 1999) (striking down Tort Reform Act of 1987 in toto); Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 8 (upholding caps on non-economic damages and punitive damages enacted in 2005).
The school funding controversy commanded the Court's attention from 1997 through 2002, during which time the Court held Ohio's school funding system unconstitutional twice. DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000). In 2001, the Court found that changes enacted by the Legislature, with some on-the-spot judicial tweaking, finally allowed the system to pass constitutional muster. DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001). Nevertheless, in short order, the Court vacated that decision and reinstated the prior holding of unconstitutionality. DeRolph v. State, 97 Ohio St. 3d 434, 2002-Ohio-675, 780 N.E.2d 529, at ¶¶ 10-11.

110. *See, e.g.*, Schussheim v. Schussheim, 137 Ohio St. 3d 133, 2013-Ohio-4529, 998 N.E.2d 446, at ¶ 18 (O'Connor, C.J., dissenting); State *ex rel*. Gross v. Indus. Comm'n, 115 Ohio St. 3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, at ¶ 33 (O'Connor, C.J., dissenting).

111. "The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government." State *ex rel.* Dann v. Taft, 109 Ohio St. 3d 364, 2006-Ohio-1825, 848 N.E.2d 472, at

extols judicial restraint and abhors judicial activism, is a two-way street. And when it comes to constitutional interpretation, the Court is indeed "Supreme" and has the rightfully dominant role in construing the constitutional text, consistent with the separation-of-powers doctrine.

At its core, *Norwood* is an opinion about the separation of powers. The Court spends considerable time and effort correcting what it viewed as the error in cases holding that economic development alone is sufficient to satisfy the public use requirement – an "artificial judicial deference" to legislative determinations as to what is a sufficient public use.[112] The Court opines that, "[d]espite the relative reluctance of courts to intervene in determinations that a sufficient public benefit supported the taking, the separation-of-powers doctrine 'would be unduly restricted' if the state could invoke the police power to virtually immunize all takings from judicial review."[113] The opinion succinctly captures the difference between the legislative and judicial roles in redevelopment takings cases, stating that due deference is rightfully given to a legislative factual finding that an area is blighted or deteriorated, but that no such deference must be given to a legislative determination that eliminating a deteriorating area is a valid public use under article I, section 19 of the Ohio Constitution.[114]

As to the determination of the constitutionality of a taking, rather than the need or rationale for the taking, the Court reaffirmed its "traditional role as guardian of constitutional rights and limits."[115] The Court declared the courts are the sole arbiters of the scope of eminent domain appropriations and stated that "[j]udicial review is even more imperative in cases in which the taking involves an ensuing transfer of property to a private entity, where a novel theory of public use is

¶ 56. "While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *Id*. at ¶ 55 (quoting South Euclid v. Jemison, 503 N.E.2d 136, 137-38 (Ohio 1986)).

112. *Norwood*, 2006-Ohio-3799 at ¶ 61. Scholarship has similarly criticized the *Kelo* opinion. *See* Lynda J. Oswald, *The Role of Deference in Judicial Review of Public Use Determinations*, 39 B.C. ENVTL. AFF. L. REV. 243, 268-69 (2012); Kristi M. Burkard, Comment, *No More Government Theft of Property! A Call to Return to A Heightened Standard of Review After the United States Supreme Court Decision in* Kelo v. City of New London, 27 HAMLINE J. PUB. L. & POL'Y 115, 119 (2005); Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of* Kelo v. City of New London, 54 DRAKE L. REV. 171, 205 (2005).

113. *Norwood*, 2006-Ohio-3799 at ¶ 67 (quoting United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 556-57 (1946) (Reed, J., concurring)).

114. *Id*. at ¶ 63.

115. *Id*. at ¶ 69.

asserted, and in cases in which there is a showing of discrimination, bad faith, impermissible financial gain, or other improper purpose."[116] In so doing, the Court does not make a point of explicitly applying the doctrine of separation of powers. Later in the opinion, however, the Court takes the doctrine of separation-of-powers head on in a different context.

Ohio's eminent domain statute contained a provision, R.C. 163.19, banning the issuance of stays and injunctions during appellate review of an order allowing the taking.[117] The statute reflects a strong legislative preference for assuring the speedy culmination of necessary public projects, including demolition projects, by allowing them to proceed pending appellate review. The Court, however, held the statute's no-stay, anti-injunction provision was "an unconstitutional encroachment on the judiciary's constitutional and inherent authority."[118]

The two discussions of the separation-of-powers doctrine in *Norwood* have significance well beyond the support they give to the Court's case-specific holding. *Norwood* helps restore the luster of the separation-of-powers doctrine after it was tarnished in the era of tort reform and school funding debates. Once thought to have become a tool for judicial activism, the doctrine of separation of powers is now described as the "first, and defining, principle of a free constitutional government" and a principle of restraint and respect intended to protect the integrity and independence of all three branches of government.[119]

Chief Justice O'Connor continued the restoration of the doctrine of separation of powers in *State v. Bodyke*.[120] In that case, the Court struck down a provision in the Adam Walsh Act, which required the attorney general to reclassify sex offenders who had been classified by court order under the prior Megan's Law.[121] The Court held that the provision violated the separation-of-powers doctrine because it impermissibly instructed the executive branch to review prior judicial decisions.[122] Chief Justice O'Connor's opinion, joined fully by Justices Lundberg Stratton and Lanzinger, reviews the purpose of the doctrine as it has been viewed over time.[123] Importantly, however, it also reminds the

116. *Id*. at ¶ 74.

117. OHIO REV. CODE ANN. § 163.19 (West, Westlaw through Files 1 to 140 and Statement Issue 1of the 130th GA (2013-2014)).

118. *Norwood*, 2006-Ohio-3799 at ¶ 125.

119. State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at ¶ 39.

120. *Id*. at ¶¶ 39-54.

121. *Id*. at ¶¶ 60-61.

122. *Id*. at ¶ 60.

123. *Id*. at ¶¶ 39-53.

public, and perhaps the courts, that the Court's vigilance in protecting the separation of powers "is not borne of self-reverence" but rather is necessary to "protect the borders separating the three branches in order to ensure the security and harmony of the government."[124]

The *Bodyke* opinion not only draws favorably on *Norwood* but also, surprisingly, on the Court's controversial opinion in *Ohio Academy of Trial Lawyers v. Sheward.*[125] *Sheward* was at the epicenter of the firestorm over tort reform and was branded by some as a case of extreme judicial activism because of its invocation of a novel form of public interest standing to allow trial lawyers to seek an immediate review, and invalidation, of tort reform legislation by the Ohio Supreme Court.[126] By citing *Sheward* as well as *Norwood*, Chief Justice O'Connor helped put the Court's past behind it and soothe the controversy that had surrounded the separation-of-powers doctrine.

The opinion reminds us that the judiciary "has both the power and the solemn duty to determine the constitutionality and validity of acts by other branches of government" and that courts must "'jealously guard the judicial power against encroachment from the other two branches of government and . . . conscientiously perform our constitutional duties and continue our most precious legacy.'"[127] Through *Norwood* and *Bodyke*, Chief Justice O'Connor has made clear that the separation of powers is not simply about judicial power or judicial restraint but also focuses on mutual respect for the proper and necessary roles of all three branches of government.

D. The Counterpoise of Judicial Restraint is Legislative Clarity

Having decided that an economic or financial benefit alone is insufficient to satisfy the public use requirement, the Court turned to the question of whether the takings could be justified based on the finding that the Horneys' neighborhood was a "deteriorating area" or whether that term was too vague as a takings standard.[128] *Norwood's* treatment of

124. *Id*. at ¶ 47.

125. *Id*. at ¶ 43 (quoting summary of separation of powers from *Sheward* majority opinion).

126. *See, e.g.*, Jonathan I. Blake, Note, State *ex rel*. Ohio Academy of Trial Lawyers v. Sheward: *The Extraordinary Application of Extraordinary Writs and Other Issues; The Case That Never Should Have Been*, 29 CAP. U. L. REV. 433, 434 ("The majority in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* moved jurisdictional and procedural mountains to address the unjusticiable issue of tort reform. In so doing, Ohio's highest court egregiously ignored well-established jurisdictional rules laid down by the court itself, decades of procedural formalities, and a stream of consistent case law dating back to colonial America.").

127. *Bodyke*, 2010-Ohio-2424 at ¶ 46.

128. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶¶ 90-104.

the property owners' separate void-for-vagueness claim is also noteworthy.[129]

The void-for-vagueness doctrine is a well-accepted principle of due process that demands "the state provide meaningful standards in its laws."[130] Its purpose is to ensure that the citizenry has fair notice of the conduct proscribed and that laws will not be arbitrarily enforced.[131] The doctrine, however, is rarely invoked successfully. The Ohio Supreme Court has reviewed void-for-vagueness claims in only 58 cases,[132] and it has held a state law or municipal ordinance unconstitutionally vague in only nine cases. Seven of these cases involved criminal statutes or ordinances.[133] Prior to *Norwood*, the Court struck down a civil law on vagueness grounds only once.[134]

Norwood recognizes that the vagueness doctrine is usually applied in criminal law or First Amendment cases but holds that "neither the rationale underlying the doctrine nor the case law interpreting it suggests that it should not be applied in any case in which the statute challenged substantially affects other fundamental constitutional rights."[135] The Court also holds that a more stringent or heightened test for vagueness will apply when a legislative enactment affects a constitutionally protected right, rather than merely economic or non-fundamental interests.[136]

Applying a heightened standard of review, the Court found that the City ordinance was unconstitutionally vague in its effort to assert the power of eminent domain over "deteriorating areas."[137] The Court acknowledged that the Norwood Code set forth a "fairly comprehensive array of conditions that purport to describe a 'deteriorating area'" but

129. *Id.* at ¶ 81.

130. *Id.*

131. *Id.*

132. As revealed by a Lexis search using "void w/10 vague!".

133. *See* City of Akron v. Rowland, 618 N.E.2d 138, 148-49 (Ohio 1993) (municipal loitering ordinance); City of South Euclid v. Richardson, 551 N.E.2d 606, 606 (Ohio 1990) (ordinance prohibiting brothels); City of Columbus v. New, 438 N.E.2d 1155, 1155 (Ohio 1982) (falsification ordinance); State v. Young, 406 N.E.2d 499, 500 (Ohio 1980) (organized crime statute); City of Columbus v. Rogers, 324 N.E.2d 563, 563 (Ohio 1973) (ordinance prohibiting cross dressing); City of Cincinnati v. Taylor, 303 N.E.2d 886, 887 (Ohio 1973) (anti-prowling ordinance); Dragelevich v. City of Youngstown, 197 N.E.2d 334, 334 (Ohio 1964) (prohibition on exhibiting gambling machinery).

134. State *ex rel.* Miller v. Brown, 150 N.E.2d 46, 48 (Ohio 1958) (holding state election statute unconstitutional because it was "so confused, vague, unworkable and discriminatory that it amounted to no effective legislation").

135. *Norwood*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 87.

136. *Id*. at ¶ 88.

137. *Id*. at ¶ 104.

noted that the described conditions – e.g., incompatible land uses, lack of adequate parking, faulty street arrangement, obsolete platting, small front yards – "are endemic to urban neighborhoods, including some of the most exclusive in America, e.g. Beacon Hill in Boston, Greenwich Village and Tribeca in lower Manhattan and Nob Hill in San Francisco."[138] In the end, the Court concluded that the Norwood Code's definition of a "deteriorating area" was a "standardless standard" that "offer[ed] so little guidance in its application that it is almost barren of any practical meaning."[139]

The new life *Norwood* gives to the void-for-vagueness doctrine is consistent with the opinion's earlier views on the scope of judicial review and separation of powers. In essence, the Court recognized that the *quid pro quo* for judicial restraint is legislative precision. Although the Court is committed to enforcing statutes and ordinances as written, the legislative standard must be clear, especially where the law impacts fundamental rights that could be lost through arbitrary enforcement. While *Norwood* has not, and likely will not, spark a new trend of successful vagueness challenges, it may have a palliative effect on legislative efforts to curtail fundamental civil rights and a positive effect on the clarity of new laws and regulations in all areas.

III. CONCLUSION

Chief Justice O'Connor's opinion in *Norwood* is significant, without more, for its resolution of legally and emotionally charged question regarding the reach of the power of eminent domain. This case about taking, however, gives us much more. In *Norwood*, Chief Justice O'Connor and the Court deliver an important, modern recalibration of fundamental principles of Ohio constitutional analysis. Thus, the broader significance of *Norwood* lies in its strong affirmation of New Judicial Federalism and the importance of the Ohio Constitution as an independent source of possible greater protection of fundamental rights, its firm articulation of the separation of powers doctrine rooted in the doctrine's importance to free constitutional governance, and its expansion of the void-for-vagueness doctrine to protect fundamental rights in a civil context not involving free speech.

138. *Id*. at ¶ 93 n.13.
139. *Id*. at ¶¶ 97-98.