

# Cincinnati and Home Rule

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Ohio, in 1912, adopted a municipal Home Rule amendment, Sections 3 to 14, inclusive, Article XVIII, of its Constitution. Thus our state became the seventh, with Missouri the bellwether in 1875, to recognize that municipal corporations should be freed from the complete control, remote and often unsympathetic, of state legislatures.<sup>1</sup>

Section 3 reads:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This section is not crystal clear and has called for interpretation. What is the meaning of "all powers of local self-government," and of "such local police, sanitary and other similar regulations as are not in conflict with general laws?" Does the latter limit the former? While this amendment has been declared to be self-executing,<sup>2</sup> the extent to which it emancipates municipal corporations from state control has been the subject of many decisions of the Ohio Supreme Court. It is a truism, but one often forgotten, that no constitution or enactment will, of itself, automatically achieve the objects for which it was promulgated. There must be as well, to make it effective, an enlightened citizenship and favorable public opinion, created in part and supported by a public-spirited radio and press. Legislators and courts must be sympathetic rather than indifferent or hostile to its objectives. As observed by the English Bishop of Bangor, Benjamin Hoadly, in an often quoted passage:

"Whoever hath an *absolute authority to interpret* any written . . . laws, it is he who is truly the law giver to all

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<sup>1</sup>Seasongood, *Municipal Home Rule*, Encyclopedia Americana, Vol. 19, p. 581 (1947); SEASONGOOD, LOCAL GOVERNMENT IN THE UNITED STATES, A CHALLENGE AND AN OPPORTUNITY (1933).

<sup>2</sup>State *ex rel.* City of Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913).

intents and purposes, and not the person who first wrote . . . them."<sup>3</sup>

Some judges that served on the Ohio Supreme Court after 1912, including Judges Allen, Donahue, Johnson, Wanamaker, and Chief Justices Nichols and Marshall, by their opinions, attempted to effectuate and liberalize the Home Rule provision of the constitution. The dissents of Judge Turner, too, are in the spirit of friendliness to our city Magna Charta. But it often appears to home rule enthusiasts that the Court has displayed an opposition comparable to the resentment Blackstone felt toward statutes. These, he said,

"have destroyed common law symmetry, distorted its proportions, exchanged its majestic simplicity for specious embellishments and fantastic novelties."<sup>4</sup>

For instance, in the *Lynch* case,<sup>5</sup> warning that the amendment would not be allowed to go too far was implicit in the court's opinion by Schauck, C. J., refusing a writ of mandamus to compel the city auditor to certify an ordinance for acquisition of a municipal motion picture theatre. Judge Wanamaker, beginning his twenty-five page dissenting opinion "I decisively dissent,"<sup>6</sup> referred to *People v. Hurlbut*<sup>7</sup> as authority that there is an inherent right of self-government in municipalities, which, he averred, should not be sabotaged by limitations judicially imposed through narrow interpretation of the new amendment. Opposing Chief Justice Schauck's view that home rule does not permit cities to engage in business competitive with private ventures,<sup>8</sup> Judge Wanamaker cited the great variety of such undertakings mentioned in Dillon which even then had been entered upon, without any home rule grant, by English cities. The dissent further rightly urged that a moving picture theatre might afford educational and recreational facilities. But the prevailing adverse opinion said these were not its primary purposes and served notice that there would be definite limits put by the court on any attempted unrestrained uses of the home rule amendment.

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<sup>3</sup>Quoted in CURTIS "LIONS UNDER THE THRONE," p. 235, from GRAY'S NATURE AND SOURCES OF THE LAW, and in Mr. Justice Frankfurter's recent address on "Some Reflection on the Reading of Statutes," published by the Association of the Bar of the City of New York, 1947.

<sup>4</sup>WARDEN, THE BIOGRAPHY OF SIR WILLIAM BLACKSTONE, p. 157.

<sup>5</sup>State *ex rel.* City of Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913).

<sup>6</sup>*Id.* at 125, 102 N.E. at 681.

<sup>7</sup>24 Mich. 44 (1871). This is an eloquent decision by the great Judge Cooley. But, in view of *Trenton v. State of New Jersey*, 262 U.S. 182 (1923), it cannot now be said to represent the law.

<sup>8</sup>Such view is repeated in the city garage case, *Cleveland v. Ruple*, 130 Ohio St. 465, 200 N.E. 507 (1936).

That notice and the inhospitable spirit in which this amendment was received by the majority of the court are further evidenced by the first paragraph of the syllabus in the *Lynch* case,<sup>9</sup> wherein it was declared that before a municipality could exercise the powers of local self-government, it would have to frame or adopt or amend a charter for its government. Not until ten years later, in *Village of Perrysburg v. Ridgway* was this misreading of the amendment expressly disapproved.<sup>10</sup>

The officials of the City of Cincinnati did little to take advantage of or test the potentialities of municipal home rule from 1912 to 1926.<sup>11</sup> They did resort in 1918 to an occupational tax to meet a serious financial situation. *State ex rel Zielonka v. Carrell*<sup>12</sup> legitimated this home rule offspring, since the state had not pre-empted the excise tax domain. But, limitations on the use of this tax were later imposed in *Cincinnati v. A.T.&T. Co.*<sup>13</sup> where it was held that the state had pre-empted this tax field as to telephone and other companies. Although the occupational tax was repealed by the Cincinnati Charter administration after its advent in 1926, restrictions on such a local tax are made more apparent by *Haefner v. City of Youngstown*,<sup>14</sup> another instance of where the state was held to have pre-empted the taxing field. The third paragraph of the syllabus is:

"Municipalities have power to levy excise taxes to raise revenue for purely local purposes; but under Section 13, Article XVIII of the constitution, such power may be limited by express statutory provision or by implication flowing from state legislation which pre-empts the field by levying the same or a similar excise tax."

At page 61 of the opinion it is again said the General Assembly may impose the limitation not only expressly, but also impliedly. It is a fair argument to say, however, this should not be so, and that the mere fact the state has levied a tax or entered a field of control is no reason why local subdivisions may not also levy a tax or go into the field, unless the state has declared the state exaction or control exclusive.<sup>15</sup>

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<sup>9</sup>*State ex rel. City of Toledo v. Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913).

<sup>10</sup>108 Ohio St. 245, 5th paragraph of syllabus, 140 N.E. 595 (1923).

<sup>11</sup>THE GOVERNMENT OF CINCINNATI AND HAMILTON COUNTY, REED, THE CITY COUNCIL, 189, 191 (1924).

<sup>12</sup>99 Ohio St. 220, 124 N.E. 134 (1919).

<sup>13</sup>112 Ohio St. 493, 147 N.E. 806 (1925).

<sup>14</sup>147 Ohio St. 58, 68 N.E. 2d 64 (1946).

<sup>15</sup>See 14 U. OF CHI. L. REV. 297 (1947) criticizing adversely *Neil House Hotel v. City of Columbus*, 144 Ohio St. 248, 58 N.E.2d 665 (1944) and the extent to which the Ohio Supreme Court has gone in finding ordinances to be in conflict with state law. Cf. *The Globe Security, etc. Co. v. Carrel, Auditor*, 106 Ohio St. 43, 138 N.E. 364 (1922); *The Marion Foundry Co. v.*

In *Cincinnati v. Roettinger*<sup>16</sup> the city was told emphatically the home rule amendment would not permit use of surplus water works receipts for general municipal purposes.<sup>17</sup> In Ohio and almost all other jurisdictions a city is said to hold and operate its water-works in what is termed its private or proprietary, not governmental capacity.<sup>18</sup> The distinction is so uncertain, illogical, and shadowy that, if invoked at all, it should be limited to torts<sup>19</sup> and not used as a guide for determining whether local home rule provision or state enactment governs. But, as will appear later, the Ohio Supreme Court has sometimes invoked the governmental proprietary test as a basis for solution of home rule questions.

The Cincinnati Association, formed in Cincinnati shortly after World War I, principally to discuss local and national affairs, was a group of some fifty young citizens, mostly Republican by descent. Study and debate opened the eyes of these voters; they saw how deplorable were prevalent conditions in their locality; how misleading is the shibboleth "party responsibility" in local affairs. They took an interest in helping overcome the sway of the professional politicians, and, in considerable number, these young men of promise came to occupy positions in the non-partisan citizen administrations that resulted. Before this group in 1923, the author fired the initial salvo for change in an address condemning the waste, incompetence and archaic form of the local government "on the banks of the beautiful river" and sounded a solo call for something of the kind later adopted.

The Association, by reason of the home rule amendment, was enabled to chalk up one of its first successes when bringing about

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Landes, Auditor, 112 Ohio St. 166, 147 N.E. 302 (1925); *Holsman v. Thomas*, 112 Ohio St. 397, 147 N.E. 750 (1925); *King & Co. v. Horton*, 116 Ohio St. 205, 223, 156 N.E. 124, 129 (1927); *Mayer, Taxpayer v. Ames, Director*, 133 Ohio St. 458, 14 N.E. 2d 617 (1938).

<sup>16</sup>105 Ohio St. 145, 137 N.E. 6 (1922).

<sup>17</sup>The use of surplus waterworks funds for general municipal purposes, in Boston and elsewhere, is an unscientific, deceptive and discriminatory method of taxation and poor technique, since it does not make apparent to the citizens how high their taxes really are. But the legality of such use does not depend upon its wisdom, but whether self-executing §4 of Art. XVIII, permitting municipalities to operate municipally owned public utilities, is, in any way qualified by §13 of Art. XVIII that

"Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes . . ."

*State ex rel. v. Bish*, 104 Ohio St. 206, 135 N.E. 816 (1922); *Pfau v. Cincinnati*, 142 Ohio St. 101, 50 N.E. 2d 172 (1943); *Colley v. Village of Englewood*, 80 Ohio App. 540, 71 N.E. 2d 524 (1947).

<sup>18</sup>*Interstate Sash Co. v. City of Cleveland*, 148 Ohio St. 325, 73 N.E. 2d 236 (1947); *Brush v. Commissioner*, 300 U.S. 352, 357, 363 (1937); *City of Barberton v. Milksch*, 128 Ohio St. 169, 190 N.E. 387 (1934).

<sup>19</sup>*Seasongood, Municipal Corporations; Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (June 1936).

adoption of daylight saving time, applicable to all municipal offices and legal proceedings for the City of Cincinnati, and in effect each year from the last of April to the last of September. It prevailed upon an unwilling administration and council to submit the issue at a primary election to be held in April, 1920. This was before Eastern Standard Time was adopted by statute for the state. *State ex rel. Cist v. City of Cincinnati* adjudged that General Code Sections 5979 and 5980, fixing conflicting time for the state, applied only to state matters, but that Section 3, Article XVIII allowed fixing by a city of its own time for its own purposes.<sup>20</sup>

In 1925, the city council had submitted to it an ordinance wherein rates for electricity were fixed for a ten year period beginning October 8, 1925. Consumers felt the rate fixed was too high and the ten year period too long, inasmuch as electric rates were coming down steadily. The ordinance was passed, however, over the mayor's veto. A few of us initiated a referendum to prevent its taking effect. The petition was filed October 1, 1925, with the city auditor, in accordance with what was thought the applicable statute, General Code Section 4227-2. The filing was within thirty days after the ordinance was passed over the mayor's veto, but more than thirty days after the ordinance was first filed with the mayor. The Company accepted the ordinance October 9, 1925. Subsequently, one of its attorneys brought suit, as a taxpayer, to prevent charging any other rates than the higher ones fixed in the accepted ordinance.

*Kuertz v. Union Gas & Electric Co.*<sup>21</sup> held the referendum proceedings void: first, because the petition had been filed with the auditor under Section 4227-2<sup>22</sup> rather than with the executive authority of the city under Section 5 of Article XVIII; and, second, because the filing was not in time, inasmuch as the referendum petition should have been filed within thirty days from the first filing with the mayor, and filing within thirty days from the overriding of the veto was insufficient. This latter proposition seems obviously incorrect.<sup>23</sup> What point would there be in a referendum petition directed against an ordinance which had been vetoed? The ordinance became effective only after being passed over the veto; and the referendum review vouchsafed to cities should not have been given a strained or unnatural interpretation. The first point on which the case was decided, however, is sustained by the later decisions of *State ex rel. Mitchell v. Council of Village of*

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<sup>20</sup>101 Ohio St. 354, 129 N.E. 595 (1920).

<sup>21</sup>27 Ohio N.P. (N.S.) 221 (1927).

<sup>22</sup>*City of Youngstown v. Craver*, 127 Ohio St. 195, 187 N.E. 715 (1933).

<sup>23</sup>*State ex rel. Diehl, Jr. v. Abele*, 119 Ohio St. 210, 162 N.E. 807 (1928).

*Milan*<sup>24</sup> and *State ex rel. City of Middletown v. City Commission of Middletown*.<sup>25</sup>

Nevertheless, the referendum petition served its purpose. In November, 1924, long before the *Kuertz* decision in 1927, Cincinnati adopted a home rule charter under Section 7 of Article XVIII of the Ohio Constitution. In November, 1925, the city conducted the first councilmanic election under its charter provision for the Hare System of proportional representation. The new administration, in 1926, repealed the ten-year ordinance and passed another, fixing a shorter period and lower rate, which would effect an annual saving of about \$750,000. The Company accepted this ordinance.

The charter, by its terms, calling for amplification, was supplemented and in 1926 adopted, in substantially its present form. Our city has thus operated under a home rule charter for more than twenty-one years. In that time, it has displayed initiative and has experimented. Some few of its attempts to be free of the restraints of state law have succeeded and many, of which examples follow, were rebuffed by court decisions, and failed.

This Charter<sup>26</sup> begins:

"We, the people of the city of Cincinnati, Ohio, in order to secure home rule, do adopt the following as the charter of our city:

"Article I. Powers of the City

"The city shall have all the powers of local self-government and home rule and all powers possible for a city to have under the constitution of the state of Ohio. The city shall have all powers that now or hereafter may be granted to municipalities by the laws of the state of Ohio. All such powers shall be exercised in the manner prescribed in this charter, or if not prescribed herein, in such manner as shall be provided by ordinance of the council.

"Article II. Legislative Power

"Section 1. All legislative powers of the city shall be vested, subject to the terms of this charter and of the constitution of the state of Ohio, in the council. The laws of the state of Ohio not inconsistent with this charter, except those declared inoperative by ordinance of the council, shall have the force and effect of ordinances of the city of Cincinnati; but in the event of conflict between any such law and any municipal ordinance or resolution the provisions of the ordinance or resolution shall prevail and control."

Cincinnati was fortunate to have had Cleveland establish, in 1923, in the companion cases of *Reutener v. Cleveland*,<sup>27</sup> and *Hile v. Cleveland*,<sup>28</sup> the constitutional validity of election of a council

<sup>24</sup>133 Ohio St. 499, 14 N.E. 2d 772 (1938).

<sup>25</sup>140 Ohio St. 368, 44 N.E. 2d 459 (1942).

<sup>26</sup>Charter and Code of Ordinances, Cincinnati, 1945, p. 11.

<sup>27</sup>107 Ohio St. 117, 141 N.E. 27 (1923).

<sup>28</sup>107 Ohio St. 144, 141 N.E. 35 (1923).

by the Hare System. The single transferable vote, P.R. provision has been one of the most valuable features of the charter.<sup>29</sup> Our city Bill of Rights was adopted over violent opposition, and the P.R. method of election, the Charter's principal bastion, has been subjected, over a period of years, to three tremendous but, happily, unsuccessful onslaughts. The first of these was at a primary, the second at a special election, and the most recent and serious occurred at the general municipal election of November, 1947. In this last, the opposition press pointed out that the P.R. system of voting had been declared unconstitutional in Michigan in *Wattles ex rel. Johnson v. Upjohn*.<sup>30</sup> But, it was not disclosed that the Ohio Supreme Court had conclusively established constitutionality of the Hare P.R. system in the Ohio cases before referred to. The Michigan opinion had been expressly distinguished by Judge Allen of the Ohio court in the *Reutener* case by reason of a more limited power of local self-government in Michigan. Neither did the publicity of the opposition refer to the more recent decision of *Johnson v. City of New York*,<sup>31</sup> sustaining the P.R. method of election in New York by virtue of the home rule powers granted, nor to *Moore v. Election Commissioners of Cambridge*,<sup>32</sup> a Massachusetts case in which this method of election was validated for Cambridge.<sup>33</sup>

The cases of *Bising v. Cincinnati*,<sup>34</sup> *State ex rel. Ellis v. Urner*,<sup>35</sup> and *Witzelberg v. Cincinnati*<sup>36</sup> involved a catastrophic situation that resulted temporarily when Cincinnati tried, under home rule powers, to save publication costs for official matter. The Ohio Supreme Court displayed broad-mindedness in reversing its first decision and thereby extricating the city from the calamitous results caused by it. The council had availed itself of the provisions of General Code Section 4676-1, which allow municipal corporations operating under a special charter to authorize a method of publication of legislation, the making of improvements and the levying of assessments, differing from the method prescribed by general statute law. Section 6 of Article II of our charter provides for publication "in a newspaper of general circulation in the city of Cincinnati, or a newspaper regularly published under the authority of council."

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<sup>29</sup>Seasongood, *The Merits of Proportional Representation in City Elections*, 16 SOCIAL SCIENCE 237 (July 1941).

<sup>30</sup>211 Mich. 514, 179 N.W. 335 (1920).

<sup>31</sup>274 N.Y. 411, 9 N.E. 2d 30 (1937).

<sup>32</sup>309 Mass. 303, 35 N.E. 2d 222 (1941).

<sup>33</sup>Note, *Constitutionality of Unorthodox Election Methods*, 55 HARV. L. REV. 114 (1941).

<sup>34</sup>126 Ohio St. 218, 184 N.E. 837 (1933).

<sup>35</sup>127 Ohio St. 84, 187 N.E. 76 (1933).

<sup>36</sup>132 Ohio St. 216, 6 N.E. 2d 2 (1937). *Dismissed for want of a federal question*, 302 U.S. 635 (1937).

In May 1927, under ordinance of council, the regular publication of the "City Bulletin" began, with a resultant saving to the city as against publishing the matter in a regular newspaper estimated to be about \$40,000 a year. In the *Bising* case, the Supreme Court ruled that the City Bulletin, because it had nothing in it except official matter, was not a "newspaper" within the meaning of that term in the ordinance and charter of Cincinnati, and, hence, that publication of a notice of assessment in it was invalid. As General Code Section 4233 provides that

"It shall be deemed a sufficient defense to any suit or prosecution under an ordinance, to show that no such publication . . . as herein required was made."

the serious consequences of this decision will be apparent. A gas rate ordinance, materially lowering rates, had been published in the City Bulletin. The utility had appealed therefrom to the Public Utilities Commission and moved to dismiss the appeal on the ground of the invalidity of the ordinance. The counsel for the Gas Company was the successful counsel in the *Bising* case which involved only a trifling assessment. The Union Terminal ordinance had been similarly published and the lack of publication clouded the validity of titles and other important matters included in that ordinance. Persons accused in the Municipal Court made the point of lack of publication of the ordinances under which they were prosecuted and were promptly acquitted. Besides the Terminal Company, numerous others interested in ordinances that had been published in the Bulletin joined the city in a petition for rehearing. It was overruled. Chaos prevailed.<sup>37</sup> We were able to present the matter anew, however, in the *Ellis* case, a suit in mandamus to require the auditor to certify a contract for expert services in the gas rate litigation arising out of the Company's appeal from the rate ordinance. The auditor's defense was that the ordinance was void. In this second case, we showed such really immaterial facts as that the Bulletin had been entered as second-class matter at the Post Office and that it contained

"news and happenings of local and general interest, social, political, moral, business, professional and educational intended for the information of the general reading public of Cincinnati."

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<sup>37</sup>After the *Bising* case, the author was employed as special counsel for the city in the gas rate controversy. The disadvantages to which the city is put under existing Ohio law in such controversies is recounted in "*Those Old Age Rate Cases*," Seasongood, XV PUBLIC UTILITIES FORTNIGHTLY 702 (June 6, 1935), and in Seasongood, Chapter on John W. Bricker in "*Public Men In and Out of Office*," University of North Carolina Press (1946). It seems illogical that in fixing rates for private companies, home rule cities should be subjected to the decisions of the state public utilities commission, whereas by Ohio Gen. Code §614-2a municipalities owning and operating their own utilities are free of such state control.



The Court overruled the *Bising* decision, sustained the Bulletin as a publication and, in June, 1933, allowed the writ, with five of the judges, not including the Chief Justice, concurring, and one of the judges not participating. The argument that publication in the Bulletin, because of its small circulation and otherwise, did not constitute due process was finally set at rest in the *Witzelberg* case, the third one of this series.

The original decision in the *Bising* case was indefensible; a "newspaper" is a paper that prints news. There are many newspapers that print only one kind of news. What was shown in the second case did not legally differentiate it from the first case. In retrospect, under the rule that *res judicata* extends not only to what was actually decided but as well to what might have been decided,<sup>38</sup> the question should perhaps not even have been considered afresh. But the new matter adduced in the second case afforded the court opportunity to recede from an untenable position and may be said to have saved home rule charter government in Cincinnati.

In *State ex rel. Schorr v. Viner*,<sup>39</sup> the Supreme Court, Judge Allen not concurring and Marshall, C.J. not participating, rendered an opinion seriously affecting that portion of the Queen City's charter intended to discourage "voluntary" campaign contributions by city employees. Schorr, while legal counsel for the Board of Rapid Transit Commissioners, in February 1928, was appointed chairman of a party campaign committee for a primary election to be held the following August. Those who had brought about the charter administration in the city wished to protect, by electing county officials in sympathy with rather than opposed to a non-partisan, merit system, the good government gains that had been won. Schorr, as campaign manager, was charged with violation of Section 4, Article V of the city charter. In July, 1928, the Civil Service Commission notified him of this charge of violation of the charter provision that

"No person in the administrative service shall directly or indirectly give, solicit or receive, or in any manner be concerned in giving, soliciting or receiving any assessment, subscription or contribution for any political party or for any candidate."

The penalty for violation was forfeiture of the position held and ineligibility to any municipal position for one year. The notice advised Schorr the Commission would hold a hearing, so that, if the facts showed this charter provision had been violated, his

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<sup>38</sup>*State ex rel. v. Bowen*, 132 Ohio St. 583, 9 N.E. 2d 494 (1937); *Covington & Cincinnati Bridge Co. v. Sargent*, 27 Ohio St. 233 (1875); *State ex rel. Lanker v. Kelsey*, 127 Ohio St. 332; *id.* at 588, 188 N.E. 4, 190 N.E. 456 (1933).

<sup>39</sup>119 Ohio St. 303, 164 N.E. 119 (1928).

position would be vacated. Schorr brought suit for and obtained a writ of prohibition against the Commission. The Court's opinion overruling respondent's demurrer, was rather unrealistic in the passage which noted there was in the petition no allegation that Schorr was in any way concerned with any contribution, nor that by any act or conduct of his he was connected with or had any contribution made; and, hence, there was no violation of the charter provisions admitted or confessed in the petition.<sup>40</sup>

The provision against soliciting or receiving campaign contributions is in the civil service portion of the charter and places a general duty of enforcement on the Civil Service Commission with respect to all persons in the administrative service, i.e., not in the executive or legislative branch. Such work as the Rapid Transit Commission did would seem to have been administrative, but the court held that Schorr was not in the "administrative service" within the purview of Section 4, Article V of the City Charter. Incidentally, this is one of the few instances where the Supreme Court has issued the writ of prohibition; and it is a question whether the Civil Service Commission should not have had the authority, after hearing the evidence, to determine for itself, subject to court review, whether the facts justified and the law permitted imposition of the penalty.<sup>41</sup>

The Supreme Court has decreed home rule for cities does not extend to matters concerning the courts.<sup>42</sup> The original Municipal Court Act for Cincinnati, General Code Section 1558-35, contained a provision that court personnel, such as clerks and bailiffs, should be appointed under the merit system. But, for some reason, this requirement had not been met and these officials were largely political appointees. Their interest in political affairs at election times interfered seriously with the performance of their official duties. The salaries of these court officials had been fixed after a standardization study, in line with the pay of other city employees doing comparable work. The administration called upon the Civil Service Commission as the Constitution, Article XV, Section 10 implemented by law commanded, to vouch these attaches into the classified service, not with the idea of prying them out, but to stop the bad practices and political activity. An easy non-competitive examination was given. A few were so incompetent they failed.

The General Assembly, however, in 1929 passed a special act<sup>43</sup> taking all our city court personnel out of the merit system, fix-

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<sup>40</sup>*Id.* at 306, 164 N.E. at 120.

<sup>41</sup>*State ex rel. Moss v. Clair*, 148 Ohio St. 642 (1947).

<sup>42</sup>*State ex rel. Cherrington, Pros. Atty v. Hutsinpillar*, 112 Ohio St. 468, 147 N.E. 647 (1925); *State ex rel. Ramey v. Davis, County Comrs.*, 119 Ohio St. 596, 165 N.E. 298 (1929).

<sup>43</sup>119 Ohio Laws 45 amending OHIO GEN. CODE §1558-35 and others.

ing their number in excess of needs, and their minimum salaries at figures considerably higher than were paid other city employees under the standardized wage scale.<sup>44</sup> This action of the General Assembly was sustained in *Ellis v. Urner*.<sup>45</sup> The conclusion that such details relating to the personnel of Municipal Courts are outside the home rule domain seems wrong.<sup>46</sup>

There is also a non-home rule difficulty with the decision in this case. Under Section 10 of Article XV of the constitution appointments and promotions in the civil service must be made according to merit, ascertained as far as practicable by competitive examinations. When once the General Assembly had enacted that the court officials should be in the classified civil service and the City Civil Service Commission had found it "practicable" to hold examinations and to place them in the classified service, it was then too late to decide, as the court did, that it was not practicable to do so. On this ground, decisions of the highest courts of other jurisdictions have been different from that of the Ohio Supreme Court.<sup>47</sup>

It would be a distinct help to forward-looking cities if they could include in their charters provisions covering the establishment, operation and maintenance of their own municipal courts as is sanctioned in Michigan by a 1927 amendment to the Home Rule Act.<sup>48</sup>

With respect to Cincinnati's home rule development through enlightened city planning, the Ohio Supreme Court has also rendered

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"Representatives of half a dozen of the leading good government agencies in Cincinnati made a special trip to Columbus to oppose the bill, but without avail.

<sup>44</sup>125 Ohio St. 246, 181 N.E. 22 (1932).

<sup>45</sup>*State ex rel. Stanley v. Bernon*, 127 Ohio St. 204, 187 N.E. 733 (1933).

<sup>46</sup>*Friedman v. Finegan*, 268 N.Y. 93, 196 N.E. 755 (1935). The *Ellis v. Urner* decision is logically followed in *Underwood v. Isham*, Judge, 61 Ohio App. 129, 22 N.E. 2d 468 (1939), *appeal dismissed* 135 Ohio St. 320, 20 N.E. 2d 719 (1939), where a city charter placing bailiffs, clerks, etc. of its Municipal Court in the classified service was declared invalid because the General Assembly had exempted such positions; also in *State ex rel. Welsh v. Hoffman*, 68 Ohio App. 171, 40 N.E. 2d 204 (1941), regarding the Youngstown Municipal Court. In *DeWoody v. Underwood*, 136 Ohio St. 575, 27 N.E. 2d 240 (1940), following *State ex rel. Ryan v. Kerr*, 126 Ohio St. 26, 183 N.E. 535 (1932), a charter provision for city legal counsel being selected and put in the classified service was invalidated. Cf. *Seasongood, Should the Merit System Be Used in Making Appointments of Lawyers for Public Service*, 15 U. OF CIN. L. REV. 209 (1941).

<sup>48</sup>MICHIGAN MUNICIPAL REVIEW, No. 11, November, 1947, p. 123. This Review is the official publication of the Michigan Municipal League, an association of Michigan cities and villages organized in 1899 for improvement of municipal government by united action. It, in turn, is a member of the American Municipal Association with eight thousand municipal members in forty-two states.

constrictive decisions establishing the supremacy of conflicting state statutes over local planning procedures. In *State ex rel. Ellis v. Blakemore*,<sup>40</sup> county plans for constructing a viaduct over a city street were disapproved by the City Planning Commission, which pointed out that a shorter and less expensive structure would serve the purpose equally well and save perhaps \$800,000. Consent to the county plans was, nevertheless, given by a five-to-four vote of the council. The mayor and the clerk caused the journal to read that the consent ordinance had failed. The Supreme Court, however, issued a writ of mandamus to compel correction of the record, holding that neither the charter nor General Code Section 4366-2, requiring a two-thirds vote to override disapproval by the Planning Commission, relates to a bridge or viaduct on an inter-county or main market road. Among the reasons given by the City Planning Commission for its disapproval was not only the useless expense of this project as planned by the county,<sup>50</sup> but that if so large a sum were lavished on this one viaduct, resources would not be available for other paralleling arteries of travel, necessary for access to and from the western section of the city and county.

Another hindrance to good local planning is *Cincinnati v. Wess*.<sup>51</sup> There the holding is that, notwithstanding Article VII, Section 5, of Cincinnati's charter which requires, for a council street vacation, consent of the Planning Commission or overriding by two-thirds of the council, a court may vacate, under General Code Section 3730, without reference to the charter provision. Ordinarily, a Planning Commission would have better means of ascertaining and more expert knowledge than a judge, whether the vacation would be injurious to the orderly development of the region. A civic-minded jurist could, it is true, ask, before deciding, for an advisory opinion from the Commission. But he might be literal and not civic-minded and grant a vacation which a city planner would have envisaged as a most regrettable impairment of future traffic routes. This decision has another unfortunate aspect. In Cincinnati, before a petition for council vacation of a street would be considered, the petitioner was required to deposit two-thirds of the appraised value of the portion of the street to

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<sup>40</sup>116 Ohio St. 650, 157 N.E. 330 (1927). Marshall, C. J. and Jones, J. not concurring.

<sup>50</sup>As just one instance of how the same service can be rendered more esthetically and cheaply by superior technique, the county plans called for separate poles for various electric services such as overhead Street Railway trolley wires, electric lighting, etc., whereas the city practice was to hang all such services on one pole. A decided difference in appearance can be noted by comparison of city charter constructed Harrison Avenue viaduct and the parallel county machine constructed Eighth Street viaduct.

<sup>51</sup>127 Ohio St. 99, 186 N.E. 855 (1933).

which he would succeed on vacation. If vacation were not ordered, the sum would be returned. This was thought fair in view of the great benefit to the abutter if a portion of often valuable property in a street or alley vacated would become his. But if court vacations are ordered without such payment, the owner of abutting property will often choose these in order to get a valuable wind-fall not obtainable without payment otherwise.<sup>52</sup>

*State ex rel. Arey v. Sherrill*<sup>53</sup> is the culmination of a series of decisions striking down Cincinnati's use of certain desirable home rule procedures. The charter provides in Article IV, Section 1, for a city manager to be

"the chief executive and administrative officer of the city and not necessarily when elected, a resident of the city or state."

Under Article IV, Section 3, he is

"to make all appointments and removals in the administrative and executive service. . . ."

The council twice appointed a city manager who was not a resident of the city or state "solely on the basis of his executive and administrative qualifications," in keeping with the charter. This provision conflicts, assuming the city manager to be an officer,<sup>54</sup> with Section 4, Article XV, and Section 1, Article V of the Ohio Constitution, requiring officers to be electors, but prevails.<sup>55</sup> Here is a great advantage, since a city manager without local ties or commitments and possessing special training and qualifications that might not be enjoyed by a resident, comes in under favorable auspices.

But, in the *Arey* case, the Supreme Court dealt a severe blow to the council-manager system and home rule in prohibiting the manager from trying a policeman and in ruling that the Ohio statute law, requiring policemen and firemen to be under a director of safety, overrode the provisions of the charter.<sup>55a</sup>

The court held that a safety director, provided for in General

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<sup>52</sup>While there is no express statute authorizing such procedure, similar statutes elsewhere have been sustained. *People ex rel. Hill v. Eakin*, 383 Ill. 383, 50 N.E. 2d 474 (1943). It is thought, therefore, that home rule permits an Ohio city to adopt such procedure. Resort to a court instead of council vacation can by-pass such an exaction.

<sup>53</sup>142 Ohio St. 574, 53 N.E. 2d 501 (1944).

<sup>54</sup>*City of Lexington v. Thompson*, 250 Ky. 96, 61 S.W. 2d 1092 (1933).

<sup>55</sup>*Reutener v. Cleveland*, 107 Ohio St. 117, 141 N.E. 27 (1923) and *Hile v. Cleveland*, 107 Ohio St. 144, 141 N.E. 35 (1923).

<sup>55a</sup>*Goodwin v. Oklahoma City*, 182 P. 2d 762 (Okla. 1947), upholding city manager's removal of a policeman for refusal to resign from membership in Fraternal Order of Police. At page 764, this opinion states:

"We believe it firmly established that the provisions of the city charter relating to the removal or discharge of appointed officers or employees, are solely matters of municipal concern and control over the general laws."

Code Section 4367, 4368, 4380, must be the official to hear the cause of suspension and to render judgment thereon, to make appointments of police officers and to supervise them. Yet, many previous decisions of the same court had declared local government includes the power to select officers and define their duties and powers contrary to general laws of the state.<sup>56</sup> A policeman is generally regarded as an officer.<sup>57</sup> Moreover, there is no real conflict between the charter and Section 4368, which provides:

"... He [the director of public safety] shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments (police and fire departments) except as otherwise provided by law. . . ."

So there is to be a director of public safety over the police and fire departments with the following exception, namely, "except as otherwise provided by law." A charter is "law."<sup>58</sup> The whole reading of these sections shows them inapplicable to a city charter. Section 4367 says the director of public safety shall be appointed by the mayor. Section 4368 begins:

"Under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments."

This section also gives him other duties wholly inconsistent with the city manager idea that all administrative power shall be lodged exclusively in the manager. The inappositeness of these sections to the city manager city is evident from Section 4369 which says such director shall make all contracts in the name of the city with reference to the management of such departments and for the purchase of all supplies necessary for such departments. Section 4370 says he shall manage and make all contracts in reference to police stations, infirmaries, hospitals, pesthouses, and all other charitable and reformatory institutions. Section 4371 allows the safety director to make contracts and expenditures of money for acquiring lands for the erection of station houses and for the purchase of engines, apparatus and all other supplies necessary for police and fire departments. The optional plan statutes, Sections 3515-17, -25, -29 expressly allow creation and discontinuance of offices, departments, and employments in the commission plan, city manager plan and federal plan. It is only where of the three pat-

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<sup>56</sup>State *ex rel.* Aut. Registering etc. Co. v. Green, 121 Ohio St. 301, 168 N.E. 131 (1929); State *ex rel.* Stanley v. Bernon, 127 Ohio St. 204, 187 N.E. 733 (1933).

<sup>57</sup>Canteline v. McClellan, 282 N.Y. 166, 25 N.E. 2d 972 (1940).

<sup>58</sup>In *Holsman v. Thomas*, City Clerk, 112 Ohio St. 397, 147 N.E. 750 (1925), the holding is that the licensing of an auctioneer under OHIO GEN. CODE §5868, "according to law by the common pleas judge" did not prevent a Cleveland ordinance limiting auctions of jewelry to sixty days in the year, etc. under Section 3 of Article XVIII.

terms offered by the General Assembly for local adoption the federal plan is adopted that, under Section 3515-41 there is to be a director of public safety appointed by the mayor.

Since the General Assmblly has expressly provided that positions such as safety director may be discontinued in the optional commission and city manager plans of government, and since only the strong mayor plan contemplates necessity of a safety director appointed by him, is it not reasonable to suppose that a city adopting a council-manager charter under direct self-executing constitutional permission may have the same choice as to whether it shall have a safety director and as to what his powers shall be? The logic of the court's decision might well be that since Section 4367 requires appointment of a safety director by the mayor, the maker of the appointment also was a matter of state concern and that the mayor, rather than the city manager, would be required to make this key appointment.

The *Arey* case relies on and outdoes *Cincinnati v. Gamble*.<sup>59</sup> There the city had adopted, after careful study, an actuarially sound pension and retirement scheme. The police and firemen's fund was in bad shape financially and on an unscientific basis. The police and the firemen, as all city employees, were included on one retirement plan which would have worked to their advantage. The holding was that the state law relating to police and firemen pensions and retirement fund was supreme and could not be superseded by charter provisions for these.

In *State ex rel. Strain v. Houston*<sup>60</sup> the state two-platoon law for firemen was held to prevail over a Cincinnati ordinance saying it should not. The basis of the decision is that fire protection is a matter of state concern and, therefore, the state is supreme. In the *Gamble* case, in *In re Fortune*<sup>61</sup> and in *State ex rel. Daly v. Toledo*,<sup>62</sup> the argument is that nothing of state concern and regarding which the state has acted is comprised within the home rule grant. But Section 3, Article XVIII, of the Ohio Constitution does not compel such a conclusion. There, municipalities are given authority: first, to exercise all powers of local self-government and second, to adopt "local police, sanitary and other similar regulations," not in conflict with general law. The second should not limit the first. Also, unde the *ejusdem generis* canon of construction, "similar regulations" should be of the general character of the specific "police" and "sanitary" regulations enumerated. It is almost a play on words to say, as some of these decisions do, any matter relating to the police is a police regulation. Police

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<sup>59</sup>138 Ohio St. 220, 34 N.E. 2d 226 (1941).

<sup>60</sup>138 Ohio St. 203, 34 N.E. 2d 219 (1941).

<sup>61</sup>138 Ohio St. 385, 35 N.E. 2d 442 (1941).

<sup>62</sup>142 Ohio St. 123, 50 N.E. 2d 338 (1943).

regulation has a definite and well understood meaning, i.e., a regulation under the police power for the general good.<sup>63</sup> The dissenting opinion of Judge Turner in the *Gamble* case points out that police and fire departments are made up of municipal employees and their employment, discharge, organization, pay, pensions, etc., should remain matters of local self-government until the state, by general laws, takes over the city police and fire departments. The court in the *Gamble* case cites the decisions of other states that fire and police retirement funds are objects of state concern; but it is believed no other court has gone so far as has ours in the *Arey* case making it impossible for a city to decide how its own police officers shall be disciplined. The *Gamble* case reasons that city home rule cannot extend to functions which a city performs in its governmental capacity, citing *Wooster v. Arbenz*.<sup>64</sup> But that case holds merely the city is not liable in tort for negligence in repairing or constructing a street since these activities are governmental. Such a test is troublesome enough in the tort field, and full of exceptions,<sup>65</sup> and its use for determining the extent of a constitutional grant of home rule powers to cities seems particularly inappropriate.

Cincinnati's efforts to use the power of excess condemnation, conferred in Section 10, Article XVIII, of the Ohio Constitution, have been halted by court decisions. Resort to this power, in 1927, seemed a way out of difficulty caused by insistent demands of powerful groups to widen a short downtown stretch of three blocks of a main thoroughfare. The cost of ordinary condemnation of the property required was bound to be heavy and beyond the city's resources if other urgent meritorious improvements were to be made. So, excess condemnation proceedings were begun. But, as the city had not been able to determine, with any definiteness, just what it would do with the property to be condemned in excess of that actually needed for the widening of the street, its resolution of necessity under General Code Section 3679, was in general terms. A property owner resisted the taking. In *Cincinnati v. Vester*,<sup>66</sup> Judge Hickenlooper, writing the court's opinion, seemed to rest it on the ground that Section 10 of Article XVIII in the Ohio Constitution violates the Fourteenth Amendment of the Federal

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<sup>63</sup>King & Co. v. Horton, 116 Ohio St. 205, 156 N.E. 124 (1927).

<sup>64</sup>116 Ohio St. 281, 156 N.E. 210 (1927).

<sup>65</sup>A city acting in its governmental capacity is liable for injury if its actions constitute a nuisance, just as if it were acting in a private capacity. *Cleveland v. Ferrando*, 114 Ohio St. 207, 150 N.E. 747 (1926); *District of Columbia v. Totten*, 5 F.2d 374 (App. D.C. 1924), *certiorari denied*, 269 U.S. 562 (1925).

<sup>66</sup>33 F. 2d 242 (C.C.A. 6th 1929).



Constitution. The United States Supreme Court, however, granted certiorari and affirmed the order of injunction<sup>67</sup> only on the narrow ground that the proceedings were not taken in conformity with the applicable law of the state. The court refrained from expressing an opinion whether there is any force in Section 10, Article XVIII.<sup>68</sup> Subsequently, in *City of East Cleveland v. Nau*,<sup>69</sup> it appeared that that city purposed taking an excess of land beyond the amount required for extension and widening of a street. The legislation set forth that the excess was needed for slope grading for lateral support for the improvement. The lower courts found that the larger portion of the excess land was not necessary for such purpose and that in fact, it was not being appropriated for such asserted use. Under these circumstances, the supreme court enjoined the taking of the excess amount, asserting:

"we cannot sanction an arbitrary and unreasonable taking of excess private property for the contemplated use, under the guise that it is necessary for the improvement, where the weight of the evidence shows it to be otherwise."

Why not, if the real purpose was legitimate? But this decision has been referred to as indicating that Section 10 of Article XVIII has been expunged from the Ohio Constitution.<sup>70</sup> It is believed, however, that this power properly exercised still exists and will be sustained if it is again questioned in the federal courts.<sup>71</sup> But what its ability to survive will be in Ohio courts is uncertain.

That fate assumes new importance in the redevelopment laws being enacted in many states. The usual pattern of these laws is that after redevelopment has been achieved, the property may be sold to private individuals and freed of restrictions. Yet, such laws have been upheld in the courts.<sup>72</sup>

Decisions, too, in cases originating in other Ohio cities have strait-jacketed the full development of home rule in them and in Cincinnati. *State ex rel v. Semple*, decided that the municipality could not contribute dues to a "Conference of Ohio Municipalities."<sup>73</sup> The decision was announced in a per curiam in which Chief Justice Marshall and Judge Allen did not concur, in which

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<sup>67</sup>280 U.S. 545 (1929); 281 U.S. 439 (1930).

<sup>68</sup>See 4 U. OF CIN. L. REV. 94; and Bevis, *Excess Condemnation*, *id.* 474 (1930).

<sup>69</sup>124 Ohio St. 433, 179 N.E. 187 (1931).

<sup>70</sup>Tooke, NAT. MUNIC. REV., April 1935, p. 25, footnote 3.

<sup>71</sup>6 U. OF CIN. L. REV. 196 (1932); *Constitutionality of Excess Condemnation*, 46 COL. L. REV. 108 (1946).

<sup>72</sup>*People ex rel. Tuohy v. City of Chicago*, 394 Ill. 477, 68 N.E. 2d 761 (1946); *City Housing Authority v. Mueller*, 270 N.Y. 333, 1 N.E. 2d 153 (1936); *Belovsky v. Redevelopment Authority of City of Philadelphia*, 54 A. 2d 277 (Pa. 1947).

<sup>73</sup>112 Ohio St. 559, 148 N.E. 342 (1925).

Judge Kinkade concurred only in the judgment, and in which it was stated the Director of Laws office represented both sides "in a rather perfunctory presentation of the question." As a result of this ruling, efforts here to organize such a conference failed for lack of ability of the constituents to pay dues. Thereby, the court prevented Ohio municipalities from enjoying the obvious benefits of such an organization of which prototypes exist in more than half the states of the Union, often with headquarters at a university.<sup>74</sup> The basis of the court's decision is disturbing. The opinion is minatory:

"It does not follow, from the broad powers of local self-government conferred by Article XVIII of the Constitution of the state, that a municipal council may expend public funds indiscriminately and for any purpose it may desire. . . without considering the validity of such a provision. . . there is no express provision of the charter. . . relative to the contribution from the treasury of the city. . . , and no general provision from which authority may be inferred to expend the funds of the city to assist in creating and maintaining an organization with offices and officers entirely separate from those of the city, selected by representatives of various municipalities of the state, with salaries and expenses also fixed by them."<sup>75</sup>

This seems tantamount to a statement that Ohio home rule cities have only the powers that non-home rule cities can exercise, namely, such as are expressly granted and those necessarily implied<sup>76</sup> or that there must be some express provision in a charter to exercise powers of local self-government. But, as before mentioned, the constitutional grant of home rule power to municipalities in Article XVIII is self-executing and extends equally to municipalities which do or do not adopt a charter.<sup>77</sup>

One can only hope that if this question should be thoroughly presented anew, the court would recede from its position as it did in the *Bising* case, *supra*, and as it did in *City of Middletown v. City Commission of Middletown*,<sup>78</sup> overruling, without expressly doing so, *Village of Brewster v. Hill*,<sup>79</sup> after that case had been expressly disapproved by a lower court in *Vollmer v. Village of Amherst*.<sup>80</sup> In the *Brewster* case, an arrangement by the village to

<sup>74</sup>Cf. note 48, *supra* and *Hayes v. Kalamazoo*, 316 Mich. 443, 25 N.W. 2d 787 (1947), annotated 169 A.L.R. 1218 (1947), the latest case upholding contribution to such a league as for a public purpose, even though part of its activities were concerned with state legislation.

<sup>75</sup>112 Ohio St. 559, 560, 148 N.E. 342, 343 (1925).

<sup>76</sup>I DILLON, MUNICIPAL CORPORATIONS §237 (5th ed. 1911).

<sup>77</sup>*Village of Perrysburg v. Ridgway*, *supra*, note 10 syl. pars. 3, 4 and 5, 108 Ohio St. 245, 140 N.E. 595 (1923).

<sup>78</sup>138 Ohio St. 596, 37 N.E. 2d 609 (1941).

<sup>79</sup>128 Ohio St. 343, 190 N.E. 766 (1934).

<sup>80</sup>65 Ohio App. 26, 29 N.E. 2d 379 (1940).

issue mortgage revenue bonds to finance construction of an electric generating plant to be operated as a unit with its own electric distribution system was held to be pledging of credit prohibited by Section 6, Article VIII, although payment was to be made only from revenues of the system. In the two cases, it was pointed out Sections 4 and 12 of Article XVIII relating to the acquisition of utilities and issuing bonds therefor are self-executing and self-sufficient and that these sections of home rule Article XVIII are not affected by other parts of the Constitution.

Another decision impinging upon city home rule is *Wilson v. City of East Cleveland*,<sup>81</sup> to the effect that a municipal corporation is without power to prescribe by charter a condition precedent to liability for breach of the duty imposed upon it by the requirement of Section 3714 of the General Code that streets "be kept open, in repair and free from nuisance." Such enactments, requiring that notice of claim be given within a stipulated time of the date of injury, are common in many states and are sustained, even in non-home rule states, as reasonable conditions<sup>82</sup> of assertion of liability. The decision is especially unfortunate for Cincinnati, which, recognizing the injustice of the defense of exemption of liability based on governmental capacity has, by ordinance, waived such immunity.<sup>83</sup> A city should not be penalized for its fairness by having to meet claims first asserted too late for thorough investigation and preservation of the testimony of material witnesses.

Concerning civil service, the Supreme Court in its earlier decisions after 1912, held it was generally a matter of municipal concern and subject to regulation and control by the municipality.<sup>84</sup> *In re Fortune*<sup>85</sup> was a *volte face*. It ruled that Section 486-17a, giving police and firemen court appeal, was a matter of state-wide concern, which governed over an ordinance making the decision of the Civil Service Commission final.<sup>86</sup>

Other instances of judicial hobbling of municipal home rule powers could be adduced. But those that have been mentioned show that the Ohio Supreme Court has placed a restricted meaning on "authority to exercise all powers of local self-government" and

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<sup>81</sup>121 Ohio St. 253, 167 N.E. 892 (1929).

<sup>82</sup>The case is adversely criticized, Hitchcock, *Ohio Ordinances in Conflict with General Laws*, 16 U. OF CIN. L. REV. 1 (1942).

<sup>83</sup>SEASONGOOD, *LOCAL GOVERNMENT IN THE UNITED STATES*, p. 133, note 1, *supra*.

<sup>84</sup>*State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 107 N.E. 768 (1914); *Hile v. Cleveland*, 107 Ohio St. 144, 141 N.E. 35 (1923).

<sup>85</sup>138 Ohio St. 384, 34 N.E. 2d 984 (1941).

<sup>86</sup>See, also, *State ex rel. O'Driscoll, Taxpayer v. Cull*, 138 Ohio St. 516, 37 N.E. 2d 49 (1941); *State ex rel. Giovanello v. Village of Lowellville*, 139 Ohio St. 219, 39 N.E. 2d 527 (1942); *State ex rel. Daly v. City of Toledo*, 142 Ohio St. 123, 50 N.E. 2d 338 (1943).

has interpreted such "local police, sanitary and other similar regulations as are not in conflict with general laws" to include as in conflict, all matters thought to be of state-wide concern, a wide area embracing not alone health and police power matters but regulations concerning police and firemen, the conduct of elections,<sup>87</sup> education, regulation of public utilities, debts and taxes, courts and administration of justice.<sup>88</sup>

The ideal which Timothy Walker seeks to establish in his "Introduction to American Law,"<sup>89</sup> that "a judge should be an intellectual statue," is impossible of attainment. Training, climate of opinion, experience, feelings and habits of thought are Pygmalion forces which cause the statue to be animated, to be like other human beings and to tend to divagate towards one path or other. With these variables, it is not strange there are decisions, in other states, somewhat similar to the majority views of the Ohio Supreme Court on almost identical home rule questions; or that there should be many judges who interpret home rule provisions more liberally for the cities.

Again, attainment of true home rule does not depend entirely on judicial pronouncements. Other factors can make it not barmecide, but irrefragable. The article entitled "Let Cities Manage Themselves" by the experienced administrator and professor of political science of Ohio State University, Dr. Harvey Walker,<sup>90</sup> is well summarized in the head line following the title, "Home rule will continue to be hampered unless legislators, city officials and judges learn to understand its aims."<sup>91</sup>

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<sup>87</sup>State *ex rel.* Blank Book Co. v. Ayres, Auditor, 142 Ohio St. 216, 51 N.E. 2d 636 (1943).

<sup>88</sup>As regards the amendment adopted in 1933 of Article X granting opportunities for county home rule, State *ex rel.* Howland v. Krause, *et al.*, Board of Elections, 130 Ohio St. 455, 200 N.E. 512 (1936) (commented on 5 Ohio Op. 64, case comment O.S.U. students, IX Ohio Bar p. 92 (1936); Gale Lowrie, 10 U. OF CIN. L. REV. 454 (November 1936) has made the hope of getting serviceable county home rule charters illusory. County home rule is outside the scope of this paper. But, seemingly, the court's attitude towards that much needed improvement in local government is the same as has been described towards municipal home rule, with the result that supporters of it have had to content themselves by echoing Angelo, in Measure for Measure, "... let us hope: The Law hath not been dead though it hath slept."

<sup>89</sup>Cited in CARTER, THE OLD COURT HOUSE 375 (1880).

<sup>90</sup>36 NAT. MUNIC. REV., No. 11, p. 19 (December 1947).

<sup>91</sup>To the same effect, but including teachers, students, and lawyers, as soldiers for an invincible home rule legion, see, SEASONGOOD, CASES ON MUNICIPAL CORPORATIONS, (2d ed. 1941), preface iv; Seasongood, *Should Lawyers Be Citizens?* 36 NAT. MUNIC. REV., No. 9 (October 1947), reprinted from Vol. Harvard Law School Record, No. 9 (September 11, 1946).

In 1952, there will be opportunity for strengthening Article XVIII by constitutional amendment so as to give cities a more genuine home rule, vital to them.<sup>92</sup> The cities are faced, in this era of rapid changes, with multiple problems: loss of population due to hegiras toward outlying territory, rising salary and other costs, insistent demands for many new and expanded services, and diminished revenues. If, therefore, these governmental agencies are to persist, as democracy requires they should, vigorous and efficient, it is essential they be recognized as great business corporations as well as instrumentalities of government; that their aspirations be sympathetically regarded; and that, in the development of their own personalities and lawful aims, they be awarded irrefrangible home rule powers.

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<sup>92</sup>Section 3, Article XVI of the Constitution provides that at a general election every twentieth year after 1932 the question of whether there should be a convention to revise, alter or amend the Constitution shall be submitted to the electors and that, in case of favorable vote, the General Assembly, at its next session, provide for the election of delegates and the assembling of such convention, the convention in turn to submit amendments agreed upon to the electors for adoption by a majority of those voting. This opportunity should not be neglected.