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Home Rule in Ohio: General Laws, Conflicts, and the Failure of the Courts to Protect the Ohio Constitution

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HOME RULE IN OHIO: GENERAL LAWS, CONFLICTS, AND THE FAILURE OF THE COURTS TO PROTECT THE OHIO CONSTITUTION

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ABSTRACT

The Home Rule Amendment to Ohio's Constitution vest with municipalities the power to legislate on issues of most concern to that locality. Ideally, the concept of home rule creates shared powers between the state and the municipality. However, in Ohio, such is not the case. Instead, the state has almost complete control despite the home rule constitutional amendment. Although home rule is complicated historically and practically with many working parts between the legislature and the municipality, what is clear is that the courts play a substantial role in the doctrine's application. The court's role is difficulty considering the competing interests, but the ultimate goal should be to harmonize state and local law to allow flexibility, innovation, and to recognize the needs of one part of the state may be different than another. Despite this ultimate goal, Ohio courts have failed to promote the meaning of home rule and allowed the state to retain too much power, essentially removing the Home Rule Amendment. To restore the balance intended by the Ohio Constitution, it is critical the Ohio Supreme Court revise its interpretation of the Amendment to allow for harmony between the state and the municipalities.

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I. I. INTRODUCTION

> "*A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.*"[1]

Ohio is nearing a constitutional crisis. At the center of this crisis is the balance of power between the state legislature and municipalities, both of which have constitutional power to legislate. The state legislature is vested with the power to make all laws under Article II of the Ohio Constitution.[2] However, municipalities throughout the state also have some legislative powers to meet the needs of their communities through the Home Rule Amendment.[3] It has been left to the courts to balance these dueling provisions, but the courts have failed to provide a consistent approach to resolving the disputes between these two powers. The inconsistency in judicial interpretation has led to confusion and uncertainty. For example, the Ohio Supreme Court has held that a city cannot regulate the use of firearms to certain

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[1] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127 (1831).

[2] *See* OHIO CONST. art. II, § 1 ("The legislative power of the state shall be vested in a general assembly consisting of a senate and a house of representatives . . .).

[3] *See* OHIO CONST. art. XVIII, § 3 ("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.").

locations,[4] ban predatory lending,[5] or regulate fracking,[6] but cities can regulate the use of tow trucks,[7] regulate the location on manufactured homes,[8] and limit the number of bullets a gun can discharge in one round.[9] In 2017, Justice DeWine voiced his frustration with the court's interpretation of the Home Rule Amendment: "[f]ew areas of our law have proved as troublesome as the application of the Home Rule Amendment."[10]

It is no wonder the Home Rule Amendment has given Ohio courts trouble; most home rule provisions across the nation are vague and ambiguous, making a "clear invitation to policy making by judges" to which courts have "no alternative but to accept the invitation."[11] In just the last decade, Ohio courts have seen an influx of

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[4] *See* City of Cleveland v. State, 942 N.E.2d 370, 372 (Ohio 2010). The Ohio Supreme Court struck down six ordinances passed by the City of Cleveland involving firearms: the possession of firearms by minors; possessing weapons on private property; possessing certain weapons in public places; prohibiting children's access to firearms; prohibiting the sale of assault weapons; and the registration of hand guns. The Court held that the ordinances conflicted with a general state law which extends the right to bear arms to the fullest extent possible under the Ohio Constitution.

[5] *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 778 (Ohio 2006). The Court struck down a City of Cleveland ordinance which prohibited predatory lending using a formula to identify loans that could be predatory in nature. The Court held the state law regulating lending was a general law and Cleveland's ordinance conflicted with the state-wide scheme. For a more thorough and in-depth discussion of this case and the Court's application of the Home Rule Amendment, see Brett Altier, *Municipal Predatory Lending Regulation in Ohio: The Disproportionate Impact of Preemption on Ohio's Cities*, 59 CLEV. ST. L. REV. 125, 126 (2011).

[6] *See* State ex rel. Morrison v. Beck Energy Corp., 37 N.E.3d 128, 133 (Ohio 2015). The Court found a municipal regulation that required the obtaining of a license to frack conflicted with a state law which permitted fracking. For more of a discussion of *Beck Energy Corp.*, see *infra* Part IV.

[7] *See* City of Cleveland v. State, 5 N.E.3d 644, 647 (Ohio 2014). Here, the Ohio Supreme Court found that a state law impermissibly violated the Home Rule Amendment by enacting a law that regulated the tow trucking industry when the City of Cleveland had regulations for the industry already that were stricter than the state law.

[8] *See* City of Canton v. State, 766 N.E.2d 963, 967–68 (Ohio 2002). The Court found that a state law improperly encroached on municipal power under the Home Rule Amendment when it passed legislation prohibiting the ability of municipalities from regulating the use, placement, and structure of manufactured homes.

[9] *See* City of Cincinnati v. Baskin, 859 N.E.2d 514, 532 (Ohio 2005). For more discussion on this case, see *infra* Part IV.

[10] Dayton v. State, 87 N.E.3d 176, 191 (Ohio 2017) (DeWine, J., dissenting). Justice DeWine further commented that "we have considered no fewer than 100 cases . . . [t]he sheer volume of these case is indicative of—and a consequence of—our failure to articulate and apply clear and consistent standards." *Id.*

[11] Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 660–61 (1963). Sandalow discusses the ambiguity in home rule provisions around the nation and argues that courts struggle to determine a set test because "the language of constitutional home rule provisions provides remarkably little guidance concerning" questions of what is a local power and what is a state power. *Id.* at 658. Further, even those constitutional amendments that do define certain aspects of home rule, the "language

litigation invoking the doctrine of home rule across vast issues, greatly influencing the way local and state government operate.[12] The need for judicial certainty and consistency in Ohio regarding home rule is now more important than ever as Ohio continues to face new issues. But the Ohio Supreme Court has struggled to create a rule that makes the home rule analysis clear, which "has led to wildly inconsistent results."[13]

This article addresses two main issues that arise under the current home rule analysis in Ohio and provides a historical analysis for changing it. First, the judicially created *Canton* test, which determines if a state law is a general law, conflicts with the purpose of home rule and strictly limits its application.[14] Second, the current conflict analysis, which includes a conflict by implication test, grants Ohio courts with too much discretion in determining when there is a true conflict.[15] This discretion leads to courts engaging in policymaking.[16] Taken together, the Ohio home rule analysis is inconsistent, unstable, and cannot continue in its current form. Ohio courts should modify the *Canton* test and employ a balancing test to determine if a state law is a general law. Further, Ohio should reject the conflict by implication test, finding conflicts only when there is a direct and irreconcilable conflict using a pure head-on collision test.

Part II of this Note explains the background of home rule and how the doctrine has developed through case law in Ohio. Part III discusses the *Canton* test and the conflict test as currently adopted in Ohio. Lastly, Part IV discusses alternatives to the current analysis including how other states analyze home rule. Part IV also proposes a new test to provide consistency and stability to the home rule analysis that is firmly rooted in the historical context of home rule.

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employed . . . is barely more instructive." *Id.* at 660. As Sandalow points out, Ohio's Home Rule Amendment suffers from ambiguous language, but Ohio is surely not alone. *See id.*

[12] *See, e.g.*, *Dayton*, 87 N.E.3d at 179 (use of speed cameras); Mendenhall v. City of Akron, 881 N.E.2d 255, 265 (Ohio 2008) (speed cameras in school zones); Ohioans for Concealed Carry, Inc. v. Clyde, 896 N.E.2d 967, 968 (Ohio 2008) (gun restrictions in public places); *Baskin*, 859 N.E.2d at 515–16 (semiautomatic gun regulations); *Beck Energy Corp.*, 37 N.E.3d at 133 (fracking); City of Cleveland v. State, 5 N.E.3d at 646–47 (tow truck licensing); Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 778 (Ohio 2006) (financial regulations relating to predatory lending); City of Lima v. State, 909 N.E.2d 616, 618 (Ohio 2009) (requirement of city workers to live within the city).

[13] *Dayton*, 87 N.E. 3d at 196–97 (DeWine, J., dissenting) (arguing that the current home rule analysis is fatally flawed and must be changed).

[14] *See Canton*, 766 N.E.2d at 967–68 ("[T]o constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.").

[15] *See generally* GEORGE VAUBEL, MUNICIPAL HOME RULE IN OHIO 677–39 (1978).

[16] *See* GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 181 (1985) (noting that "further dispute will generate further twists and turns in interpretation as different circumstances conspire to negate previous interpretations.").

II. II. HOME RULE IN THE UNITED STATES

A. A. What is Home Rule?

Before discussing home rule and the complexities of judicial interpretation of the doctrine, it is important to define what home rule is and what it is not.[17] Generally, home rule is the idea that local municipalities should have the authority to legislate over areas of purely local concern and the power to address local needs without the state's interference.[18] In this way, home rule can be likened to the principle of federalism enjoyed between our federal government and the states.[19] Home rule does not, and cannot, mean complete local autonomy; municipalities "must always remain integral parts of state government."[20] Thus, home rule should be understood as a concept where municipalities have some autonomy, but not complete autonomy.[21] It is the balancing of municipal authority that is the root of the home rule issue for courts.

However, a single definition is difficult to formulate because home rule is often misunderstood and can mean different things to each state.[22] Part of the confusion is

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[17] The concept of home rule is generally thought to have come from Alexis de Tocqueville in his famous work *Democracy in America*. *See id.* at 159–60. In that work, de Tocqueville discussed his admiration for the structure of the U.S. government in the 1830s and specifically stressed the importance of local government in the concept of liberty. He explained that "[t]own-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." DE TOCQUEVILLE, *supra* note 1, at 127. De Tocqueville further noted that "I have heard citizens attribute the power and prosperity of their county to a multitude of reasons, but they all placed the advantages of local institutions in the foremost rank." *Id.* at 186. Thus, home rule can be understood as involving three overarching themes: agency theory; practical politics; and philosophy of government. *See id.* For more on the discussion of local democracy, it's ideals, and the contemplations of local government by the founding fathers, see ROBERT NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 89–116 (2005).

[18] DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 71 (2003). The idea of home rule was to "construct a strict division between state and local powers." *Id.*

[19] HOWARD MCBAIN, LAW AND PRACTICE OF MUNICIPAL HOME RULE 110 (1916) ("Indeed it would seem to be even more reasonable to apply such a principle to relations between cities and the state government than to relations between the states and the national government."). Daniel Elazar, an influential scholar in the field of federalism, noted that although home rule may not have "brought all the benefits its champions sought, it did represent a major step in the transformation (or restoration) of local government as a recognized partner in its own right within the federal system." Daniel J. Elazar, *State-Local Relations: Union and Home Rule*, *in* GOVERNING PARTNERS: STATE-LOCAL RELATIONS IN THE UNITED STATES 38 (Russel L. Hanson, ed., 1998).

[20] Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280 (1968).

[21] "[L]ocal governments function within a larger society, and on matters that extend beyond a single community, each locality must act within the legal framework of the overarching state and nation." DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 1 (2001).

[22] Vanlandingham, *supra* note 20, at 279 ("It is very difficult to formulate a precise definition of home rule, inasmuch as there exists no unanimity of agreement among authorities concerning its meaning."); *see also* Sandalow, *supra* note 11, at 644 ("there is perhaps no term

due to the "dual purposes" that home rule invokes as a political and legal doctrine.[23] Politically, home rule is thought of as freedom of local government to enact laws they see proper for their local constituents.[24] To that end, local government claims to have better political judgment and argues that local government can better serve local needs that the state cannot address effectively.[25] As a legal concept, home rule is thought of as a method for distributing power to legislate between the state and municipalities.[26] These distinctions are important when discussing home rule and the historical reasons for its adoption.

B. B. Pre-Home Rule and the Establishment of Home Rule in the United States

The development of home rule is complicated and involves many working parts.[27] However, three main changes in the political and economic environment within the United States precipitated the doctrine's creation: Dillon's Rule; the growth of cities; and the Progressive Movement.[28]

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in the literature of political science or law which is more susceptible to misconception and variety of meaning than 'home rule.'"); Rubin G. Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27, 27 (1956) (describing constitutional home rule as a "paradoxical enigma, attractive and appealing, yet unattainable to any significant degree.").

[23] Sandalow, *supra* note 11, at 644. Most people identify the political implications of home rule, while ignoring the doctrine as a legal concept. This leads to confusion and oftentimes frustration when discussing the doctrine. *Id.*

[24] *See id.* at 644–46. Sandalow explains that politically, home rule is understood to be "synonymous with local autonomy, the freedom of a local unit of government to pursue self-determined goals without interference." *Id.* at 644. These ideas are rooted in our American democracy; that the government closest to the people can best serve their interests. But home rule "as a political symbol lacks precise meaning because of its failure to specify either the extent of local autonomy or the manner in which it is to be achieved." *Id.* at 645. Instead, it is just an ideal to aspire to. In any event, "[c]itizens and scholars who have an interest in the quality of democracy and its relationship to the quality of civil society in our communities cannot ignore home rule and its related issues." KRANE, RIGOS & HILL, JR., *supra* note 21, at 19.

[25] *See* Vanlandingham, *supra* note 20, at 280.

[26] *See* Sandalow, *supra* note 11, at 645 ("As a legal doctrine . . . home rule does not describe the state or condition of local autonomy, but a particular method for distributing power between state and local governments.").

[27] For a more extensive history of municipal government and the political ideology that manifested into home rule prior to 1875, see Frank J. Goodnow, MUNICIPAL HOME RULE: A STUDY IN ADMINISTRATION 1–32 (1897) (discussing colonial municipal governments and the adoption of city and township power as "an importation from England rather than indigenous growth."). Further, for more information on the development of home rule as a political and legal doctrine since the "home rule movement," see David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2255 (2003) (discussing the history of home rule with particular emphasis on the idea that home rule "enable[s] cities to promote visions of urban governance that the prior legal regime had foreclosed.").

[28] *See* CLARK, *supra* note 16, at 77; BERMAN, *supra* note 18, at 55; DELOS WILCOX, THE AMERICAN CITY: A PROBLEM IN DEMOCRACY 14 (1906).

Before 1875, most states followed Dillon's Rule.[29] John Dillon, an influential jurist from Iowa, argued in 1868 that municipalities only had three categories of powers: those "expressly granted" by the state, those implied as an incident, and those "essential to the accomplishment of the declared objects and purposes of the corporation."[30] Essentially, municipalities only had those powers granted to them by the state.[31] Dillon's Rule created a "general doctrine of state supremacy" which in turn gave states the "constitutional rationale for intervening" in local affairs.[32] At the same time, cities grew substantially in size and power.[33] For example, in 1790, New York had a population of 33,000 people, but in 1830, the population had increased to 202,000.[34] Along with this growth came important issues that needed to be solved quickly and efficiently.[35] Generally, states believed that they were better suited than municipalities to deal with the difficult issues that came with this dramatic growth.[36] These states employed Dillon's Rule as a basis for extensive intervention. However, it became abundantly clear that states were ill equipped to handle the numerous

[29] CLARK, *supra* note 16, at 77 ("Dillon's rule is the major judicial model of local government powers and dominates American debates of the proper role of localities with respect to state governments.").

[30] *See* City of Clinton v. The Cedar Rapids and Mo. River R.R., 24 IOWA 455, 462–63 (Iowa 1868). Dillon discussed the idea of local powers in this famous opinion where he spoke out against municipal power, with the strictly limiting rule of that power bearing his name.

[31] "Municipal corporations owe their origins to and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy." *Id.*

[32] John G. Grumm & Russel D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS OF AM. ACAD. OF POL. SOC. SCI. 120, 123–24 (1974). This concept is also known as the "doctrine of expressed powers" and brought together many individuals who wanted more local autonomy because of perceived unfair influence by state governments who refused to give municipalities many expressed powers. *See id.* ("The continual legislative interference in purely local matters . . . has caused us to resort to the remedy . . . to protect the sphere of freedom of private individuals.").

[33] For more information on how cities grew in size and power during this time period, see Patricia E. Beeson, David N. DeJong & Werner Troesken, *Population Growth in U.S. Counties, 1840–1990*, 31 REG'L SCI. & URB. ECON. 669 (2001) (analyzing population statistic trends with the growth of the economy, infrastructure, and access to natural resources).

[34] BERMAN, *supra* note 18, at 55. "Much of the growth of these cities came from the migration of Americans from farm areas, but foreign immigration, largely from Europe, also contributed a substantial amount." *Id.*

[35] For instance, "local officials were suddenly faced with the need to provide useable streets, sanitation facilities, an adequate water supply, and competent fire and police services," among other public health concerns. *Id.*

[36] These feelings surfaced because of the magnitudes of the issues that cities faced and how quickly they were growing. Further, there were concerns that the new populations in the cities were ill-equipped to govern themselves because of their backgrounds and unfamiliarity with city issues. These fears were worsened by the corruption and political machines that often heavily influenced local government. *See id.* at 55–57.

issues,[37] and in the early 1870s, local protests over state intervention began to spring up, questioning the "wisdom or fairness of the state actions."[38]

The Progressive Movement was woven throughout the development of Dillon's Rule and local frustration with state interference. The Movement began in the late nineteenth century and lasted into the early twentieth century, dramatically changing political life and, important to this note, cities.[39] It grew out of the "inequalities of the 'Gilded Age'" and unified diverse groups who "shared a common distrust of laissez-faire capitalism, unrestrained monopolies, and the corrupt political machines of the era."[40] The influence of the Progressive Movement and the increased frustration with state interference led to an era of state constitutional change "toward lessening state legislative interference in the affairs of municipal governments, particularly the larger cities."[41]

As a response to Dillon's Rule, increased state intervention, and the Progressive Movement, Americans turned to home rule to push for municipal reform.[42] In 1875, Missouri became the first state to adopt the doctrine of home rule.[43] By 1963, twenty-eight states adopted home rule in one form or another.[44] These states rejected Dillon's Rule and instead adopted a system where "localities are primarily responsive to the preferences of their residents" and give residents a "source of legitimacy" and increased "functional diversity."[45] Most home rule provisions were adopted as an amendment to state constitutions.[46] Some states had more powerful provisions, while

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[37] "It had become clear in many parts of the country that state intervention had done little to cure the problems of the cities." *Id.* at 61.

[38] *See id.*

[39] The Progressive Movement and thoughts about cities is perhaps best seen through the eyes of Delos Wilcox, a historian who wrote extensively on the topic of municipal rule during the Movement. He observed that "[n]ot only is the city involved most deeply in the great political experiment of the present and the future, but it is the dominating element in that experiment." DELOS F. WILCOX, THE AMERICAN CITY: A PROBLEM IN DEMOCRACY 14 (1906). For more information on the Progressive Movement and urban reform, *see* Alexandra Lough, *The Politics of Urban Reform in the Gilded Age and Progressive Era, 1870–1920*, 75 AM. J. ECO. AND SOC. 8 (2016).

[40] STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 46 (2011).

[41] BERMAN, *supra* note 18, at 62.

[42] Justice Brewer of the United States Supreme Court called Missouri's constitutional provision granting municipalities exclusive control in areas where the state could not interfere *imperio in imperium*, meaning a government within a government, the most common form that states employ home rule. *See* St. Louis v. W. Union Tel. Co., 149 U.S. 465, 468 (1893).

[43] MO. CONST. art. IX, §§ 16, 23 (1875).

[44] Sandalow, *supra* note 11, at 645.

[45] CLARK, *supra* note 16, at 78.

[46] Sandalow, *supra* note 11, at 668. Home rule has been adopted constitutionally and through legislative enactment, or sometimes both. Most states favored the constitutional amendment, believing that this would grant more power and protections to municipalities. Legislative enactments suffer from the flaw that the state could decide at any time to no longer comply with home rule and repeal the statute. Further, judicial interpretation of home rule

others adopted more ceremonial ones. Ohio adopted one of the more powerful provisions to reflect Ohioans' will to reject Dillon's Rule and give municipalities power independent of state influence.[47]

C. C. Home Rule in Ohio

Ohio, like other states influenced by the Progressive Movement and inspired to reject Dillon's Rule, adopted home rule during Ohio's 1912 constitutional convention.[48] The new constitution now included Article XVIII, Section 3, which states: "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."[49] Because each state's adoption of home rule is unique, a brief history of why and how Ohio came to adopt home rule is necessary.

Before the 1912 constitutional convention, Ohio adopted Dillon's Rule in *Bloom v. City of Xenia*[50] in 1877. During this time, Ohioans developed the same distaste for state interference in their local affairs. Specifically, Ohioans felt state laws burdened economic growth and the transition from an agrarian society into an industrial powerhouse.[51] Ohio's current political system lacked any meaningful local governance, leaving voters feeling a lack of legitimacy and confidence in their democratic system.[52] To further frustrate and anger Ohioans, the Ohio Supreme Court decided two cases in 1902 that solidified Dillon's Rule, adopting a restrictive approach to the power of municipalities in relation to the state.[53] By 1910, frustrations boiled

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statutes has confined municipal powers to only those that are expressly stated within the statute. *See id.* at 668–70.

[47] For more information on other states and their home rule provisions, see KRANE, RIGOS & HILL, JR., *supra* note 21. For more reading on Ohio's history as it relates to home rule prior to the 1912 constitutional amendment, see Harvey Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1 (1948).

[48] *See* John Gotherman, *Municipal Home Rule in Ohio Since 1960*, 33 OHIO ST. L. J. 589, 591 (1972). Of course, the 1912 Ohio constitutional convention was not merely to adopt home rule, but was meant to address a number of other serious issues within Ohio. One of the main issues, however, was the restructuring of power between municipalities and the state government. *See* STEINGLASS & SCARSELLI, *supra* note 40, at 45–51.

[49] OHIO CONST. art. XVIII, § 3.

[50] 32 Ohio St. 461, 465 (1877) (holding that the power of municipalities is "strictly limited" and only has that power "expressly granted or clearly implied, and no other").

[51] STEINGLASS & SCARSELLI, *supra* note 40, at 46. This was especially true in Ohio who saw during this time a great "expansion of the railroads, technological innovation, rapid industrialization, and a wave of southern and eastern European immigration." *Id.*

[52] *See id.* Although during this time period there was "creation of enormous wealth," the late nineteenth and early twentieth centuries "also saw the emergence of what seemed to be a permanent underclass, urban slums, and the worst depression the country had yet experienced." *Id.* The creation of this economic class divide allowed for those at the bottom to feel distrust in the government who did not seem to have their interests in mind. *See id.* at 46–48.

[53] *See* State ex rel. Attorney Gen. v. Beacom, 64 N.E. 427, 428 (Ohio 1902) (holding the municipal code granting power to local governments was unconstitutional as it conflicted with

over and Ohioans pushed to overhaul their current constitution, voting to hold a constitutional convention 693,263 to 67,718.[54] During the 1912 constitutional convention, which was dominated by Progressives,[55] one of the most important tasks was to give municipalities more power and independence from state interference.[56]

The framers of the Home Rule Amendment had three ideas in mind when crafting the Amendment: to "liberate municipalities from the control of the state" by giving municipalities the power to exclusively govern over local affairs; to give power to municipalities to own and operate utilities; to "grant charter municipalities the right to exercise self-determination over their form of government."[57] Further, the drafters intended the Home Rule Amendment to "reverse the rule that municipal powers were strictly limited by the legislature to allow cities to exercise all powers of local government."[58] With these purposes in mind, the constitutional convention adopted the Home Rule Amendment which the voters of Ohio approved, along with thirty-three other amendments to the Ohio constitution.[59]

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the state's general power to legislate); State ex rel. Kinsely v. Jones, 64 N.E. 424, 425 (Ohio 1902) (finding municipal law similarly in conflict with constitution as discussed in *Beacom*).

[54] STEINGLASS & SCARSELLI, *supra* note 40, at 47. One commenter at the time noted that the vote was so lopsided because "[n]ever before in the sixty-year span has this date fallen at such a psychologically favorable time. There was a pent-up demand among various groups for such reforms as municipal home rule, legal protection of workers, improvements in court procedures, and woman suffrage." Robert E. Cushman, *Voting Organic Laws: The Action of the Ohio Electorate in the Revision of the State Constitution in 1912*, 28 POL. SCI. Q. 208, 210 (1913).

[55] STEINGLASS & SCARSELLI, *supra* note 40, at 47.

[56] *See id.* at 48.

[57] KRANE, RIGOS & HILL JR., *supra* note 21, at 331.

[58] STEINGLASS & SCARSELLI, *supra* note 40, at 50. The Home Rule Amendment was seen as an explicit rejection of Dillon's Rule because of its strict withholding of power from municipalities.

[59] *See id.* at 53. Many of the other amendments concerned the judiciary, specifically the "structure and operation of the courts to address the problem of overcrowded dockets and to limit the ability of the Ohio Supreme Court to hold acts of the legislature unconstitutional." *Id.*

III. III. OHIO JUDICIAL INTERPRETATION OF HOME RULE, THE *CANTON* TEST, AND THE CONFLICT ANALYSIS

D. A. Development of Ohio Home Rule Jurisprudence

Interpreting the Ohio Home Rule Amendment is no easy task.[60] Like many other state's home rule provision, Ohio home rule suffers from being ambiguous.[61] Because of this ambiguity, courts were naturally thrusted into the interpretation of the Amendment. Commentators have noted that this ambiguity leads to "ad hoc decisions in balancing state and local interests because they have failed to establish firm guidelines."[62] This is precisely what happened in Ohio. Thus, for a strong home rule doctrine in any state, the "suggested role for the courts requires the exercise of judgment—and self-restraint—on their part."[63] With Ohio's ambiguous Home Rule Amendment, there is a "risk that courts may lay down rules which are too restrictive."[64] The tendency of the courts to adopt more restrictive approaches to home rule erodes the purpose of home rule and leads to judicial uncertainty in an already complicated field.[65]

A rule for the home rule analysis eventually took shape in Ohio. To determine if a state law preempts a municipal law, Ohio courts developed a three-part test, each of which must be satisfied for preemption:[66] (1) the state law must be in conflict with the municipal ordinance; (2) the ordinance is an exercise of police power, rather than local

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[60] Many commentators and scholars have noted the difficulty in interpreting home rule amendments. *See, e.g.*, BERMAN, *supra* note 18, at 71–73 ("In practice… courts have found it difficult to distinguish between what is a local affair and what is of statewide concern."); Sandalow, *supra* note 11, at 661 ("Without the benefit of guidance from history, constitutional tradition, or sharply delineated principle, courts have been required to grapple with the questions of what affairs are municipal . . . [a]cclaim has not been their reward."); CLARK, *supra* note 16, at 172 (the home rule "practical provisions are less clear than its rhetorical image. [I]mplementing home rule . . . has been a tortious affair.").

[61] "The Ohio provision . . . is perhaps the worst of such provisions. [T]hese sections 'have been highly and often bitterly controversial even from the time they were first proposed.'" Vanlandingham, *supra* note 20, at 288.

[62] George Vaubel, *Municipal Home Rule in Ohio (1976-1995)*, 22 OHIO N. U. L. REV. 143, 213 (1995).

[63] Sandalow, *supra* note 11, at 721.

[64] *See id.* at 707.

[65] *See* Vaubel, *supra* note 62, at 148. Vaubel argues that Ohio courts have been too willingly to "embark upon a court of expansion of state authority by too often ignoring the validity of pre-existing restrictive theories . . . [C]ourts need to reexamine and reassert their role as the defender of constitutional home rule against unnecessary expansive invasion by legislative authority, the predatory nature of which was so evident in pre-Home Rule days . . . ." *Id.*

[66] The three-part test developed over the years of judicial interpretation. It was first constructed in Auxter v. Toledo, 183 N.E.2d 920 (1962) and then solidified in Ohio Ass'n Private Detective Agencies, Inc. v. City of N. Olmsted, 602 N.E.2d 1147 (Ohio 1992) and City of Canton v. State, 766 N.E.2d 963, 966 (Ohio 2002).

self-government; and (3) the statute is a general law.[67] This Note only focuses on the first and third prongs of this test; the general law analysis and the conflict analysis.

E. B. The Canton Test and the General Law Analysis

Delegates to the 1912 Ohio constitutional convention believed the term general laws meant laws of general application "which have uniform application throughout the state and laws dealing with matters of a general, not local concern, which in fact and in form touched the whole state."[68] Over the years, Ohio courts developed certain factors that went into the general law analysis, and in 2002, the Ohio Supreme Court attempted to consolidate almost one hundred years of that case law as it relates to general laws.[69] In *Canton v. State*,[70] the Court laid out a four-part test to determine if a law is a general law, deriving the elements from precedent throughout the years since the passage of the Amendment in 1912.[71] Under this analysis, a statute is a general law if the statute:

> (1) [is] part of a statewide and comprehensive legislative enactment, (2) appl[ies] to all parts of the state alike and operates uniformly throughout the state, (3) set[s] forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe[s] a rule of conduct upon citizens generally.[72]

As discussed more fully below, the *Canton* test is problematic mostly because the four-part test only considers the state law, without taking into consideration the municipal law.[73] A balancing test better suits this complicated legal topic because a balancing test would focus on the totality of the circumstances, rather than just analyzing the state law.

F. C. The Conflict Analysis

The Ohio Supreme Court first dealt with the issue of conflicting laws in *Struthers v. Sokol*.[74] There, the Court held that there is a conflict when "an ordinance permits or

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[67] *See Ohio Ass'n Private Detective Agencies*, 602 N.E.2d at 1149–50. This three-part test has essentially been used throughout home rule jurisprudence, but was first ascertained as a three-part test in this case. Since 1992, Ohio courts exclusively use this test for the home rule analysis.

[68] VAUBEL, *supra* note 15, at 771.

[69] *See* City of Dayton v. State, 85 N.E.3d 176, 191–92 (Ohio 2017) (DeWine, J., dissenting). A full analysis of the development of the *Canton* test through case law is not necessary for this Note, but more information can be found at, VAUBEL, *supra* note 15, at 769–813.

[70] *See generally Canton*, 766 N.E.2d at 965.

[71] *See id.* at 966–68 (discussing the major landmark cases involving the development of the general law analysis as the basis for the creation of the *Canton* test).

[72] *Id.* at 968.

[73] *See infra* Part IV, § A.

[74] *See generally* Struthers v. Sokol, 140 N.E. 519 (Ohio 1923).

license that which the statute forbids and prohibits, and vice versa." [75] This became known as the "head-on collision" test where "there must be a direct confrontation" to find a conflict, thus invalidating the municipal law.[76] In interpreting the conflict language of the Home Rule Amendment, the *Sokol* court held that the "opposition or collision must be expressed" and cannot be "left to inferences."[77] This test is a strict approach to the conflict analysis, only finding a conflict when absolutely necessary and was made in accordance with the intent of the Home Rule Amendment.[78]

Ohio courts have since eroded the *Sokol* decision and expanded the meaning of conflict as to further limit municipal powers. The so called "conflict by implication" test recognizes that "sometimes a municipal ordinance will indirectly prohibit what a state statute permits or vice versa."[79] However, it should be noted that the *Sokol* court expressly rejected a test based on inferences.[80] Thus, the current landscape of the Ohio conflict analysis appears to be in disarray.[81] To make matters worse, Ohio courts, including the Supreme Court, have essentially engaged in picking and choosing when it comes to which conflict analysis the court will use, and sometimes they use both.[82] In the end, this allows courts to pick and choose what is a state concern and what is a local concern, without allowing for local discretion when there is no direct conflict.

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[75] *See id.* at 521.

[76] VAUBEL, *supra* note 15, at 685. The test has also been referred to as the "contrary directives" test where "no real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa." *See* Mendenhall v. City of Akron, 881 N.E.2d 255, 262–63 (Ohio 2007). Either way, courts look to see if the two laws direct Ohioans to do different things.

[77] VAUBEL, *supra* note 15, at 685–87.

[78] The Constitutional Convention stressed three main points with respect to the conflict analysis: "(1) There could be conflict without express denial of municipal authority. (2) A stricter municipal regulation than that imposed by the state was not to be treated as being in conflict with it. (3) A less strict municipal regulation was to be treated as being in conflict." *Id.* at 708.

[79] *Mendenhall*, 881 N.E.2d at 263. The idea of conflict by implication is most easily explained by an example. For instance, imagine a state legislature forbids having a gun that can fire more than thirty-one bullets in a round. The statute expressly prohibits someone from possessing a gun that can fire more than thirty-one bullets per round, but it also implicitly permits someone having a gun that can fire less. Thus, any municipal law restricting that number to, say ten bullets per round, would implicitly be in conflict with the state law. Using this example, it is hard to imagine a situation in which a municipal law would not conflict with a state law in some way. *See* City of Cincinatti v. Baskin, 859 N.E.2d 514, 515 (Ohio 2005).

[80] VAUBEL, *supra* note 15, at 707.

[81] The conflict by implication test has been seen as a way for courts to rescue a state law that does not truly conflict with the municipal law. *See* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E. 2d 766, 791 (Ohio 2006) (Resnick, J., dissenting) (arguing that, as the majority concedes, the statutes are not in direct conflict "but along comes the majority with a newly created 'conflict-by-analysis test'" to save the law in question).

[82] Altier, *supra* note 5, at 147 (noting that "Ohio courts have been unpredictable as to which conflict analysis they will apply in any scenario . . . .").

IV. IV. MODIFYING THE *CANTON* TEST AND DEVELOPING A NEW CONFLICT ANALYSIS

G. A. The Canton Test Should be Modified and Ohio Courts Should Adopt a Balancing Approach

Creating an appropriate test for the general law analysis is not simple and no one test may be perfect for this area of the law, but the *Canton* test has failed to provide Ohioans the protections that home rule is supposed to offer.[83] The *Canton* test is inconsistent, strictly limits the application of municipalities' home rule powers, and ignores the municipalities' law. Therefore, Ohio courts should adopt a balancing test that considers the totality of the circumstances, including the *Canton* test factors currently used.

1. 1. The *Canton* Test Fails to Apply the Home Rule Analysis Correctly

Like the conflict analysis discussed below, the *Canton* test suffers from being inconsistent. The interpretation of the four-part test varies not only between the justices on the Ohio Supreme Court, but between the Ohio appellate courts as well.[84] Proponents of the *Canton* test argue that because each "home rule case involves unique facts" and "no two statutes are exactly alike," there are bound to be inconsistencies.[85] Thus, just because cases come out differently does not mean that they are inconsistent, but rather reflective that the home rule analysis requires a "fact-intensive" inquiry with "varying facts applied to varying statutes" which "compel varying outcomes."[86] Although the *Canton* test is fact intensive, this is does not explain how two similar cases come out differently, or how appellate courts and Ohio Supreme Court justices themselves routinely argue about the application of the test.[87]

Moreover, the *Canton* test places strict limits on municipal home rule powers. Because the *Canton* test is flexible to judicial maneuvering, courts can interpret state laws to be general laws more often than the court should. For many reasons, state

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[83] "Due primarily to the dynamic nature of American society—altering social, economic, and technological factors can change a local function today into a state function tomorrow—no home rule plan satisfactory to everyone can probably ever be devised." Vanlandingham, *supra* note 20, at 297.

[84] City of Dayton v. State, 36 N.E.3d 235, 245 (Ohio Ct. App. 2015), *rev'd*, 87 N.E.3d 176, 179 (Ohio 2017).

[85] *Dayton*, 87 N.E.3d at 187. The Court also pointed out that Ohioans have not used their constitutional right to alter the language of the Home Rule Amendment, thus, there is additional support that the *Canton* test should not abandoned. However, this argument is not credible because we cannot say each time the people do not act, they are satisfied with how the government is operating. Constitutional amendments are not so easy to accomplish as the Court made it seem.

[86] *Id.* at 186.

[87] In fact, it's interesting to note that the case in which Justice Fischer defended the *Canton* test, the Court reversed the appellate court who found that the state law satisfied the home rule analysis. *See* Dayton, 87 N.E.3d at 187. Further, the decision had only three justices join the main opinion, with two more filing concurring opinions holding that the law violated *Canton* in a different way, and two more justices filing a dissenting opinion. *See id.* This is hardly inconsistency because of different fact patterns.

courts "frequently rule in favor of the state" when it comes to home rule.[88] In fact, courts favor the state so much so that "when a state supreme court in a case involving municipal versus state interest rules against the state and in favor of the municipality, its decision is usually noteworthy."[89] In using the *Canton* test, Ohio courts have managed to justify favoring the state under the guise of a legal doctrine. This favoritism of state law creates an implicit limitation on home rule authority.

The *Canton* test favors state law because the analysis focuses only on the state law and disregards the municipal law. When using the *Canton* test, each of the parts look to the state law, but do not address how the municipal law effects the local citizens or interacts with the state law.[90] Thus, judges have a narrow view of the state law and do not consider the nature of the municipal law or how the laws interact and overlap. This plainly ignores the purpose and nature of home rule which invariably involves an analysis of both state and municipal law.[91] This focus leads to judges not considering a plethora of other factors that should be taken into consideration when applying the general law analysis. Some of these factors include how the municipal

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[88] Vanlandingham, *supra* note 20, at 293. Vanlandingham notes that there are three practical concerns that state courts may have. First, state courts, specifically the state supreme court, is a coequal body with the state legislature and may input bias because of this relationship. This relationship, in turn, creates a presumption that state laws are constitutional. *See id.* Second, the "determination of the character of governmental functions is admittedly a very difficult task." *Id.* Lastly, Vanlandingham notes that because the state has some sort of interest in most governmental functions, the "judiciary usually allows it to prevail" even if the interest is only minor. *Id.*

[89] *Id.* Justice Cardozo, then a justice of the New York Court of Appeals, exemplified the favoritism state courts have towards state laws noting that ". . . affairs, though concerns of a city, are subject none the less to regulation through the usual forms of legislation if they are concerns also of the state." *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929).

[90] The first part of the *Canton* test asks whether the state law is part of a comprehensive legislative enactment. *See Canton*, 766 N.E.2d at 968. This includes whether the state law is in furtherance of some larger scheme the state has adopted. *See* Clermont Envtl. Reclamation Co. v. Wiederhold, 442 N.E.2d 1278, 1280 (Ohio 1982); *see also* Ohio Ass'n Private Detective Agencies, Inc. v. City of N. Olmsted, 602 N.E.2d 1147, 1149 (Ohio 1992). The second part asks whether the state law operates uniformly throughout the state. *See Canton*, 766 N.E.2d at 968. Thus, the state law must "apply to all parts of the state alike," rather than just some parts of the state. Schneiderman v. Sesanstein, 167 N.E. 158, 159 (Ohio 1929). Third, the *Canton* test asks whether the state law is a police, sanitary, or similar regulation that does not merely limit municipal power. *See Canton*, 766 N.E.2d at 968. State laws that "purport only to grant or to limit the legislative powers of a municipal corporation" are not general laws. W. Jefferson v. Robinson, 205 N.E.2d 382, 383 (Ohio 1965). Lastly, the *Canton* test asks whether the state law prescribes a "rule of conduct upon citizens generally." *Canton*, 766 N.E.2d at 968. Thus, the state law is not a general law if it only relates to some citizens or group of people but not others. *See* Youngstown v. Evans, 168 N.E. 844, 845 (Ohio 1929). As one can see, each part of the *Canton* test analyzes the state law, but the municipal law is absent from the discussion.

[91] VAUBEL, *supra* note 15, at 11. Vaubel noted that home rule, "in addition to a vesting of power, it is a distribution of power by the people between two levels of government—state and local." *Id.* Thus, "home rule becomes a fitting together of various state-municipal corporation relationships evidencing varying degrees of municipal autonomy." *Id.* Ohio courts ignore this dynamic when they use the *Canton* test without considering the municipal law. The issues that implicate home rule usually have some compelling local interest involved and by ignoring the municipal law, Ohio courts disregard those important interests.

law interacts with the state law, reasons that the municipality passed the law in the first place, and the individual needs of the municipality.

2. 2. A New Balancing Test

Ohio should adopt a general law analysis that balances the needs of the state with that of municipalities by considering the totality of the circumstances. In this way, courts can balance how the state law effects the general population while focusing on how that law effects municipal laws. This shift in focus allows for greater flexibility by asking whether the state law is necessary, whether local laws would better suit this issue, and whether the state law uproots important local issues. The major difference between this test and the *Canton* test is the focus on municipal law.[92] The *Canton* test exclusively focuses on the state law and how that law operates, while the balancing test would consider existing municipal regulations and how those laws will be affected. This allows for a more informed and intensive analysis of how the two laws operate together. Furthermore, a balancing approach promotes the purpose of the Home Rule Amendment by giving municipalities the largest grant of power without overreaching into state concerns.

Balancing tests have been used by other states throughout the country and have been more successful at promoting the purpose of home rule. Colorado has effectively implemented a balancing approach that has been successful in not only creating consistency, but also in balancing the needs of both the state and locality.[93] Colorado courts look to a number of factors, including the "relative interests of the state and the home rule municipality," the need for "statewide uniformity of regulation," historical considerations of whether the state or locality has traditionally legislated on the matter, extraterritorial impact, and whether there can be cooperation on the subject matter.[94] Although the *Canton* test does appear to take some of these factors into consideration, Colorado's test is far more focused on both the state law and the municipal law. Thus, Ohio should modify the *Canton* test to include an analysis of the municipal law.

It is true to some extent that balancing tests do not create predictable outcomes. Balancing tests inherently give more power to judges in making decisions. But in the context of home rule, it is the only test that can appropriately balance the needs of the state and municipalities. The switch in focus to examining the state law and municipal law together, rather than just the state law, is sufficient to ensure judges cannot make

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[92] The *Canton* test, however, is not irrelevant to the analysis. These are factors that the courts should consider, but additionally, courts must also consider the municipal law and the field of law in which both state and local are involved in. *Canton*, 766 N.E.2d at 968.

[93] *See* Denver v. Colorado, 788 P.2d 764, 767 (Colo. 1990) ("We have not developed a particular test which could resolve in every case the issue . . . [i]nstead, we have made these determinations on an ad hoc basis, taking into consideration the facts of each case."). Colorado's home rule analysis differs slightly from Ohio in other respects. Namely, Colorado first determines if the subject area is of purely local concern, mixed local and state concern, or purely state concern. *See id.* When there is a mixing of state and local concern, Colorado courts use the balancing approach to determine which law prevails when there is a direct and irreconcilable conflict. *See id.*

[94] *Id.* at 768. For more information on Colorado's home rule provision and unique history with home rule, see Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964) (discussing the development of home rule through Denver's demand of independence from the state legislature); *see also* Alfred S. Reinhart, *Municipal Home Rule in Colorado*, 28 MICH. L. REV. 382, 383–84 (1930).

pure policy decisions. In the overall home rule analysis, there must be some judicial discretion to decide what is a state matter over a local matter. The balancing test does just that; it gives judges the ability to balance the needs of the citizens of Ohio with the needs of state law uniformity.[95]

H. B. Ohio Should Reject the Conflict by Implication Test and Use a Pure Head-On Collision Test

3. 1. Ohio Courts Should Reject the Conflict by Implication Test

As discussed above, Ohio originally adopted a direct conflict analysis immediately following the passage of the Home Rule Amendment.[96] Since then, Ohio has strayed away from the original "head-on collision" test and began implementing a "conflict by implication" test.[97] Overall, Ohio case law has failed to determine a solid and workable rule for the conflict analysis, often times using both tests, or one or the other. Ohio courts should clarify the conflict analysis by explicitly rejecting the conflict by implication test because the test destroys the Home Rule Amendment and leads to inconsistent application of the home rule conflict analysis.

"Municipalities' constitutionally granted right to self-governance should not be undone by implication."[98] If Ohio courts applied the conflict by implication test to its full potential, "municipal autonomy in the important police power field would come to an end."[99] The mere existence of a conflict by implication test essentially destroys home rule because the test is unworkable; courts could infer a "wide array of state regulations" to conflict with municipal regulation almost always when the subject

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[95] Whatever the fate of the *Canton* test, it is clear that the test will not continue in the same form as it is now. The Ohio Supreme Court even eluded to abandoning the *Canton* test in *Dayton v. State*. *See* Dayton v. State, 87 N.E.3d 176, 185–86 (Ohio 2017). There, the Court sidestepped the question of the continued viability of the test because neither party argued for its reversal and because there is no other clear test that could be used. *See id.* at 186.

[96] *See Struthers v. Sokol*, 140 N.E. 519, 520 (Ohio 1923).

[97] The conflict by implication test is relatively new in the home rule analysis first appearing in a dissenting opinion in City of Cincinnati v. Hoffman, 285 N.E.2d 714, 725 (Ohio 1971), and affirmatively recognized by the Ohio Supreme Court in Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 784 (Ohio 2006).

[98] *Am. Fin. Servs. Ass'n*, 858 N.E.2d at 798 (Pfeifer, J., dissenting) (arguing that the majority's application of the conflict by implication test with regards to a predatory lending application essentially reads Article XVIII, Section 3 out of the Ohio Constitution because it allows the courts to find a conflict in almost any situation).

[99] VAUBEL, *supra* note 15, at 709. For Vaubel, the mere existence of a conflict by implication test is destructive to home rule because it gives the courts the ability to make policy-based decisions hidden behind the pretext of a legal rule. Further, Vaubel argues that there are no safe guards in place to keep this rule in check, arguing that "even if limited by considerations of reasonableness or by the fact that inferences are not to be drawn lightly" every state law could be interpreted as conflicting in some way to any municipal ordinance in that field. *Id.* Other scholars are not so sure that the conflict by implication test is unworkable, but they still acknowledge the difficulties in applying such a test consistently. *Cf.* Jefferson Fordham & Joe Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 47–50 (1948).

matter is the same, or related in any fashion.[100] This would lead to "[d]eadening, often unnecessary uniformity between state statutes and municipal ordinances," eliminating the purpose of home rule.[101] Thus, the conflict by implication test destroys the Home Rule Amendment. Whether the Home Rule Amendment is wise is not the concern of Ohio courts;[102] it is their job to interpret the Amendment as adopted by the people. In using the conflict by implication test, Ohio courts supplant the true meaning of the Home Rule Amendment as adopted by the people of Ohio with their own view of the Amendment.

Essentially, a court could almost always find a law in conflict applying the conflict by implication test.[103] A case example is illustrative. In *State ex rel. Morrison v. Beck Energy Corp.*,[104] the Ohio Supreme Court held that a municipal regulation requiring oil and gas companies to obtain municipal licenses conflicted with a state law that granted oil and gas companies licenses to frack because the municipal regulation required the companies to comply with more restrictions than the state.[105] Thus, in creating a law more restrictive than the state law, the court held the municipal law conflicted with state law and could not stand. But, under the *Sokol* head-on collision test the municipality should be able to regulate fracking in this way; the regulation does not prohibit fracking entirely, but only further regulated it in accordance with the municipality's needs. The case falls squarely within municipal home rule authority where a coexistence of state and municipal law could stand together.[106] Instead, the Court held the statutes conflicted implicitly.[107]

However, in *City of Cincinnati v. Baskin*,[108] the Court held that a municipal regulation that restricted the number of bullets available in a cartridge to ten did not conflict with a state regulation that allowed the number of bullets in a cartridge to be

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[100] *Id.* Vaubel's prediction about the conflict by implication test appears to be coming true as Ohio courts have thoroughly expanded what kind of conflicts exist in certain areas of the law.

[101] *Id.* One of the many purposes of home rule was to create a system where there could be flexibility. Thus, if the result of the conflict by implication test is "deadening uniformity," home rule will not have meaning.

[102] *Id.* at 710. Proponents of the conflict by implication test argue that it is important to recognize the complexities of modern government and that because of these complexities, a conflict by implication test is necessary.

[103] City of Cincinnati v. Baskin, 859 N.E.2d 514, 520 (Ohio 2005) ("[i]f this court were to adopt the concept of conflict purely by implication, we would essentially be holding that a statute's prohibiting one thing is the same as permitting everything else.").

[104] *See* State ex rel. Morrison v. Beck Energy Corp., 37 N.E.3d 128, 135 (Ohio 2015).

[105] *See id*. at 135–38.

[106] *See id.* at 141 (Pfeifer, J., dissenting) (arguing that the state statute "leaves room for municipalities to employ zoning regulations that do not conflict with the statute" such as the municipal regulation in question here).

[107] *Id.* at 135 (applying the conflict by implication test to find that the statutes in question conflict because the municipal law essentially made obtaining a license harder than how the state wanted it to be).

[108] *See Baskin*, 859 N.E.2d at 518–19.

thirty-one.[109] The Court did not employ the conflict by implication test, but the statutes appear to be almost exactly alike. In *Beck Energy Corp.*, the municipal law created stricter regulations on fracking,[110] while in *Baskin*, the municipal law created stricter regulations on guns. Yet, the court came to different conclusions on these cases. To put it simply, the cases cannot be reconciled without extreme judicial maneuvering. They illustrate the inconsistent nature of the conflict by implication test and reveals how Ohio courts pick and choose which areas municipalities can regulate on and which ones they cannot.

Proponents of a conflict by implication test point to the Ohio Supreme Court's decision in *Schneiderman v. Sesanstein*[111] and argue that it is more practical given our complex society.[112] However, reliance on this authority for establishing a conflict by implication test is misplaced. This case, and those like it, did recognize a conflict by implication test, but the cases "involved statutory language requiring application of the implied conflict [test]."[113] Thus, the expansion of the conflict by implication test into every home rule analysis is not truly consistent with *Schneiderman*; only in rare cases where the statutory language expressly create a conflict by implication prohibition.

Taking into consideration the historical background of home rule in Ohio, the conflict by implication test is inconsistent with the purpose of home rule. Ohio cannot continue to employ the conflict by implication test because it produces inconsistent, arbitrary results and allows courts to dismiss the conflict analysis.

4. 2. Ohio Should Adopt a Pure Head-on Collision Test

The strict head-on collision test is not a perfect rule, but it is the better rule. First, a pure head-on collision test creates judicial certainty. Second, a pure head-on collision test effectuates the purpose of home rule and shifts the focus of the home rule analysis back to conflicting laws, allowing municipalities flexibility in law making. Thus, Ohio should simply ask; "Does the municipal law forbid what the state law permits?", or vice versa. If so, there is a conflict and the municipal law cannot stand. If not, the statutes will coexist, unless the state law is otherwise unconstitutional.[114] Additionally,

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[109] *See id.* ("the General Assembly intended to allow municipalities to regulate the possession of lower-capacity semiautomatic firearms in accordance with local conditions").

[110] *See* MUNROE FALLS, OHIO, CODIFIED ORDINANCES ch. 1163.02(a)(1)–(4). The ordinances required companies to obtain licenses and to obtain them, companies needed to hold a notice and public hearing, pay a filing fee, notify all residents of drilling who live within 1,000 feet, and reapply for the license every year.

[111] Schneiderman v. Sesanstein, 167 N.E. 158, at 158 (Ohio 1929) (holding that a municipality law prohibiting driving over fifteen miles per hour conflicted with a state law prohibiting driving over twenty-five miles per hour).

[112] *See id.* The argument of practicality centers around the idea that the head on collision test is too strict and does not recognize the complexities of dual local and state rule.

[113] *Baskin*, 859 N.E.2d at 523 (O'Connor, J., concurring) (discussing case law where the court applied a conflict by implication test and finding that only in exceptional cases where it is explicitly required did the court actually apply it).

[114] *Id.* at 522. A statute could be unconstitutional by violating the general law analysis because it merely limits a municipalities authority over police powers or otherwise constricts the municipalities power to enact its own laws.

courts should adopt a presumption that municipal laws are not in conflict and attempt to harmonize the laws if possible. Only in a case where no harmonization could take place would the municipal law be in conflict.

a. a. A Pure Head-On Collision Test Creates Judicial Certainty

Where the conflict by implication test lacks the most is creating a set rule that allows for predictable outcomes.[115] The pure head-on collision test, however, eliminates this issue and presents a more stable rule. The head-on collision test enforces judicial restraint such that courts cannot pick and choose which statutes to uphold. In other words, it either directly conflicts or it does not and the court cannot find otherwise. This would allow municipalities to know whether their laws are acceptable and enable them to enact laws that cooperate with state law.

Take, for example, minimum wage.[116] Recently, the City of Cleveland wanted to pass a law that required the minimum wage to reach $15 per hour, but the state legislature passed a law that explicitly stated that municipalities cannot increase the minimum wage over the amount set by the state.[117] Because of the legal uncertainty surrounding home rule, those lobbying for the City of Cleveland to increase its minimum wage withdrew their support. To them, it was not worth the risk of losing on the home rule issue because it would be a toss-up. New issues like this will continue to arise in Ohio and if the courts continue to employ inconsistent tests, the future looks more difficult than ever.

b. b. A Pure Head-On Collision Test Effectuates the Purpose of Home Rule

The main purpose of the Home Rule Amendment was to give municipalities authority to legislate over certain areas of the law even when the state has similarly legislated on the same issue.[118] Essentially, home rule should harmonize state and local law; that is, the state should be able to set minimum standards and municipalities should be able to vary from those standards as their local needs demand.[119] As shown

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[115] This is a result of the ability of the courts to recognize a conflict, even when there seemingly is none. The conflict by implication test "suffers from placing unnecessary emphasis upon inferences to be drawn when a more direct approach to conflict is available" that would provide more consistency and simplicity in the law. Vaubel, *supra* note 62, at 194.

[116] Minimum wage and home rule has been a hotly debated topic in recent years. In Ohio, a group called Raise Up Cleveland began collecting signatures to obtain a $15 minimum wage in Cleveland, but the group ultimately pulled out because of state preemption measures. Peter Krouse, *Is a Cleveland-only Minimum Wage Back in Play?*, CLEVELAND.COM (June 6, 2017), https://www.cleveland.com /metro/index.ssf/2017/06/is_a_cleveland-only_minimum_wa.html.

[117] *See* S.B. No. 331, 131st Gen. Assemb., (Ohio 2017) ("[n]o political subdivision shall establish a minimum wage rate different from the wage rate required under this section."). Ohio is not the only state to pass such a law; twenty-five other states have also passed preemptive legislation preventing municipalities from enacting minimum wages that are higher than the states. See National Employment Law Project, *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, http://www.nelp.org/content/uploads/Fighting-Preemption-Local-Minimum-Wage-Laws.pdf. (last visited November 4, 2017).

[118] *See* Section II, *supra* at C.

[119] *See* State ex rel. Morrison v. Beck Energy Corp., 37 N.E.3d 128, 144–45 (Ohio 2014).

above, the conflict by implication test deprives municipalities of this important power, thus creating an all-or-nothing system in which no harmonization can take place. However, a pure head-on collision test would harmonize state and local laws, thus effectuating the historical purposes of home rule.

Applying the pure head-on collision test to *Beck Energy Corp.* is demonstrative. If a pure head-on collision test was used in that case, the court would have found that the statutes did not conflict and municipalities would have the authority to enact regulations on fracking.[120] This result makes sense. Fracking inherently effects the localities where it occurs and seems squarely within the dual powers set up by the Home Rule Amendment.[121] But using the conflict by implication test, the court needlessly removed the power that municipalities have over this issue. That is, the court could have allowed the two regulations to stand, finding no conflict under the head-on collision test, harmonizing state and local law in the way home rule was envisioned.[122] But the court continued to use a test that does not restrain state power as contemplated by the Home Rule Amendment. Instead, the court needlessly disregarded one of the main purpose of home rule; to allow municipalities some power to regulate their local needs, while also complying with state law.[123]

Ohio's approach to the conflict analysis differs from that of other states who have managed to harmonize state and local laws. For instance, Michigan,[124] Louisiana,[125]

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[120] Regarding conflict, the Court held that the municipal ordinance prohibited what the state law allowed, but in a strict sense this was not true. The municipal ordinance only regulated the licensing of fracking further, not prohibiting completely what the state allowed. Thus, the Court, if using a pure head on collision test, would easily find no conflict, seeing how the two laws could coexist without one destroying the other. *See id.* at 277.

[121] *See generally* Roxana Witter et al., *Potential Exposure-Related Human Health Effects of Oil and Gas Development* 4 (2008) COLO. SCH. OF PUB. HEALTH, https://www.nrdc.org/sites/default/files/hea_08091702a.pdf (showing the negative health risks that may be associated with fracking due to increased oil spills, air pollution, and water contamination).

[122] "There is no need for the state to act as the thousand-pound gorilla, gobbling up exclusive authority over the oil and gas industry, leaving not even a banana peel of home rule for municipalities." *Beck Energy Corp.*, 37 N.E.3d at 146 (Lanzinger, J., dissenting).

[123] The constitutional framers of the Ohio home rule amendment "sought to establish a complementary relationship between the state and the municipalities." KRANE, RIGOS & HILL, JR., *supra* note 21, at 332.

[124] *See* Detroit v. Qualls, 454 N.W.2d 374, 385 (Mich. 1990) ("[t]he mere fact that the state in the exercise of the police power has made certain regulations does not prohibit a municipality from exacting additional requirements.").

[125] *See* Savage v. Prator, 921 So. 2d 51, 58 (La. 2006) ("this Court required the existence of a specific state law" which prohibits the activity local governments are engaged in).

Kansas,[126] Connecticut,[127] Washington,[128] Colorado,[129] Illinois,[130] South Carolina,[131] and Idaho[132] have all rejected the conflict by implication test and required a direct conflict to preempt the municipal law. Ohio should follow this well-reasoned trend and first attempt to harmonize state and municipal laws before striking either down. In doing so, Ohio can fulfill the purposes of home rule and allow municipalities to have the maximum power they can as contemplated under the Home Rule Amendment.

V. V. CONCLUSION

It is time for the Ohio Supreme Court to act and defend the meaning of the Ohio Constitution. The Court has failed to create a long-term solution to the home rule issue. The current analysis is flawed because the *Canton* test strictly limits municipal power in a way that is inconsistent with the Home Rule Amendment. Further, the conflict by implication test creates judicial uncertainty and allows judges to make pure policy decisions. Accordingly, Ohio should modify the *Canton* test and use a test that balances the needs of the state with the needs of municipalities. Ohio should also reject the conflict by implication test to stabilize this area of the law and allow municipalities to use their powers under home rule as the Ohioans who voted for home rule envisioned. The Ohio judiciary has consistently been called on to change the home rule analysis to better protect its original meaning.[133] In the end, it is the courts who

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[126] *See* City of Wichita v. Hackett, 69 P.3d 621, 624 (Kan. 2003) (adopting the head on collision test and further stating that "where both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute . . . there is no conflict.").

[127] *See* Modern Cigarette, Inc. v. Town of Orange, 774 A.2d 969, 978 (Conn. 2001) (adopting a rule that harmonizes state and municipal law, avoiding declaring either unconstitutional through the rejection of a conflict by implication test).

[128] *See* Brown v. City of Yakima, 807 P.2d 353, 355 (Wash. 1991) (upholding a stricter municipal law using the conflict test described as "the ordinance must yield to the state . . . law if a conflict exists such that the two cannot be harmonized").

[129] *See* Denver v. Howard, 622 P.2d 568, 570 (Colo. 1981) (reversing appellate court which used a conflict by implication test when the correct test is whether the two statutes directly conflict such that "they cannot coexist and be effective").

[130] *See* Illinois Liquor Control Comm'n v. Joliet, 324 N.E.2d 453, 456–57 (Ill. 1975) (rejecting the argument that a restriction on municipal authority "could emanate from the statute even though there is no express restriction on home-rule powers.").

[131] *See* Charleston v. Jenkins, 133 S.E.2d 242, 245 (S.C. 1963) ("Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.").

[132] *See* Taggart v. Latah County, 298 P.2d 979, 982 (Idaho 1956) (holding that municipal restrictions on the sale of beer did not conflict with state law because it was not unreasonable, discriminatory, and was not so restrictive, but promoted a reasonable police power instead).

[133] It is left to the Ohio judiciary to "reassert [its] role as the defender of constitutional Home Rule against unnecessarily expansive invasions by legislative authority, the predatory nature of which was so evidence in pre-Home Rule days, which have never been confined fully since then and now are gaining general credence as the 'new theory' of the oncoming age." Vaubel, *supra* note 62 at 148.

can breathe back life into home rule, or let it slowly dissipate. But to let home rule die would be a great misfortune because "government is best which is closest to the people."[134]

[134] Lyndon B. Johnson, *Special Message to Congress on the Right to Vote*, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 287, 288 (1965).