Municipal Home Rule in Ohio: The New Look

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HISTORICAL DEVELOPMENT

Students of municipal government in the United States repeatedly have sought to work out a more satisfactory relationship between cities and the state. One solution proffered has been constitutional home rule. Although often lacking preciseness, the broad purpose of home rule is to confer more power of self-government upon municipalities by limiting legislative control in matters considered to be strictly local in character. The more exact delineation of home rule, in a particular state, requires the study of the court cases interpreting pertinent state constitutional clauses. Although the Ohio home-rule amendment includes sections 3 through 14 of article XVIII of the constitution, it has been primarily section 3 that has controlled the development of home rule in this state. This provision 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.¹

The key clauses are: “all powers of local self-government,” and “such local police, sanitary and similar regulations, as are not in conflict with general laws.” The Ohio expression is different from that found in most other home-rule states. In other jurisdictions, constitutional provisions clearly demonstrate that the state is to be supreme, either requiring the state legislature to pass an enabling act to authorize municipalities to draw up their own charters, or compelling the state legislature to enact laws to outline the limits of power that a municipality may exercise.²

In Arizona, Missouri, Oregon, Colorado, Washington, and Michigan, provisions of the municipal charter may not be in conflict

1. OHIO CONST. art. XVIII, § 3.
2. N.Y. CONST. art. IX, §§ 9, 11-13; UTAH CONST. art. XI, § 5; WIS. CONST. art XI, § 3. In MICH. CONST. art. VIII, § 2, MINN. CONST. art. IV, § 36, TEXAS CONST. art. XI, § 5, WASH. CONST. art. XI, §§ 10-11, and W.V. CONST. art. VI, § 39a, legislative acts supersede conflicting provisions of municipal charters and ordinances whether the matter involved be one of state or local concern.
with statutory law. Ohio, on the other hand, is unique for two reasons: first, home-rule powers are self-executing, and second, powers considered to be matters of local self-government are beyond state legislative interference.

Traditionally, the Ohio courts have decided that the constitution provides two separate grants of authority. The first clause, "all powers of local self-government," has been held to grant municipalities absolute and plenary power in local affairs or in all matters of purely local nature. State laws which conflict with matters of local self-government are held invalid. Does this rule of law mean that home-rule powers granted municipalities acted to create an imperium in imperio? Several authorities think not.

3. Mo. Const. art. VI, §§ 19-20, Okla. Const. art XVIII, §§ 2-7, and Ariz. Const. art. XIII, §§ 2-3, state that municipal charters must be consistent with the constitution and laws of the state. Municipal charters in Michigan and Washington are subject to and controlled by the general laws of the state. Oregon and Colorado constitutions indicate that municipal charters shall be subject to the constitution and criminal laws of the state.

4. Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923); cf. State ex rel. Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960), where the court held that charter municipalities had the power to enact and enforce ordinances relating to home-rule powers regardless of procedural state law on the subject but denied this same authority to non-charter municipalities. Accord, Morris v. Roseman, 162 Ohio St. 447, 123 N.E.2d 419 (1954). See also Sanzere v. City of Cincinnati, 157 Ohio St. 515, 106 N.E.2d 286 (1952), where the supreme court required non-chartered municipalities to submit their force account projects to competitive bidding but exempted chartered municipalities.


7. State ex rel. Bindas v. Andrich, 165 Ohio St. 441, 136 N.E.2d 43 (1956); State ex rel. Arey v. Sherill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); Village of Perrysberg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923); Froelich v. City of Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919). In Fitzgerald v. Cleveland, 88 Ohio St. 338, 365, 103 N.E. 512, 519 (1913), Judge Wanamaker said:

The first half relates wholly to municipal power ... [t]he first half is as unlimited as the second half is limited. The second half could not possibly relate to municipal power because the first half is as comprehensive as a grant of power could be and therefore no addition could be made ... if it be claimed that "not in conflict with the general laws" as found in the second half modifies also the first half, then it must follow that all municipalities are as absolutely under the control and domination of the state legislature today as they were before the adoption of the home rule amendment ... home rule would be but an empty egg-shell, a mere snare and ideality.

8. But state laws passed on matters decided to be of a state-wide concern have been ruled by the courts to pre-empt municipal legislation on the same affair. See Bucyrus v. State Department of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); City of Cincinnati v. American Tel. & Tel. Co., 112 Ohio St. 493, 147 N.E. 806 (1925); Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919).

that a kind of limited autonomy has been established? For example, when the courts adjudged various functions to be matters of local self-government, did they not find an area of sovereign powers in which the state cannot interfere? By recognizing the authority of a municipality to elect its own officers, to control its own public employees, and to exercise powers of eminent domain, as powers which cannot be taken away from the municipality by the state, the courts of Ohio, in effect, have said that these are building blocks upon which a limited municipal sovereign is constructed.\textsuperscript{10}

The major difficulty with home rule in Ohio, as elsewhere, has been the determination of those matters which were purely local affairs under the concept of “powers of local self-government.”\textsuperscript{11} The courts have been left with the task of resolving this problem in specific cases and have not been particularly successful with the assigned task. A statement made by the Ohio Supreme Court in \textit{State ex rel. Toledo v. Cooper},\textsuperscript{12} is illustrative of the problem. The court said:

\begin{quote}
Indisputably these provisions are hazy and ambiguous and it is unfortunate that the members of the Constitutional Convention did not more fully define the powers of local self-government committed to chartered cities. This would relieve the courts from the exercise of wide discretion and from never ending appeals for construction of this constitutional clause; and likewise, relieve the judicial department of the government from the criticism too often made that it has exercised the power of framing a constitution — a power that has been lodged solely in the people.\textsuperscript{13}
\end{quote}

This reluctance did not deter the Ohio courts from making attempts at a reasonable definition. In \textit{Toledo v. Lynch},\textsuperscript{14} the supreme court defined local self-government as “... such powers of government as, in view of their nature and the field of their operation, are local and municipal in character.”\textsuperscript{15} In \textit{Fitzgerald v. City of Cleveland},\textsuperscript{16} powers of local self-government “... are clearly such as to involve the exercise of the functions of government, and they are local in the sense

\textsuperscript{10.} See Solomon v. City of Cleveland, 26 Ohio App. 19, 21-22, 159 N.E. 121, 122 (1926), where the appellate court said that the effect of municipal home rule in Ohio was to create a "small state, and the same methods of construing laws prevail in applying constitutional prohibitions to it as prevail in the construction of laws enacted by the state legislature.” See also Village of Brook Park v. City of Cleveland, 26 Ohio Op. 536 (C.P. 1943), where the common pleas court said home rule was the creation of a system of dual sovereignties within the state of Ohio. See also \textit{State ex rel. Gulf Refining Co. v. DeFrance}, 89 Ohio App. 1, 100 N.E.2d 689 (1950), where Judge Fess mentions a type of imperium in imperio being established by home-rule chartered cities.

\textsuperscript{11.} See Fordham and Asher, note 9 \textit{supra}, at 25 where they said that “... as the expression of a broad political idea, the Ohio term carries considerable meaning, but as a legal concept it is as lacking in sharpness of meaning, after 35 years interpretation as it was at the outset.”

\textsuperscript{12.} 97 Ohio St. 86, 119 N.E. 253 (1917).

\textsuperscript{13.} \textit{Id.} at 91, 119 N.E. at 255.

\textsuperscript{14.} 88 Ohio St. 71, 102 N.E. 670 (1913).

\textsuperscript{15.} \textit{Id.} at 97, 102 N.E. at 673.

\textsuperscript{16.} 88 Ohio St. 338, 103 N.E. 512 (1913).
that they relate to municipal affairs of the particular municipality."

Again in State ex rel. Arey v. Sherrill, the court said that the expression "... all powers of local self-government as herein used means the power of self-government in all matters of a purely local nature." What are these specific powers? This information can only be determined by a process of judicial inclusion and exclusion.

The second clause of section 3, article XVIII, involves local police regulations which do not conflict with state law. This grant of power is not as complete as the first clause because municipal police authority may not conflict with the general laws of the state. In the past there was some debate as to whether the use of the police power by municipalities was part of the state police power, or an independent municipal power. The view most frequently accepted by the Ohio courts, as expressed in Greenberg v. Cleveland, is that "Section 3, Article XVIII, of the Ohio constitution clearly contemplates that both the state and the municipalities of the state may exercise the same police power; the only limitation being that the exercise of that power by a municipality shall not conflict with general laws of the state."

When does conflict between a state law and a municipal ordinance occur so that the latter will be nullified by the courts? To answer this question two terms need to be defined. The first one involves the meaning of the words "general laws" as found in section 3, article XVIII. The supreme court, in Fitzgerald v. Cleveland, said that general laws must be applied uniformly throughout the state and also must be of state-wide concern. In Leis v. Cleveland, the court similarly defined general laws to be those laws which "... apply to all parts of the state alike." The decisions in Scheiderman v. Sesanstein and in Youngstown v. Evans added that general laws not only be uniform in their operation but also apply to the people gen-

17. Id. at 344, 103 N.E. at 514.
18. 142 Ohio St. 574, 53 N.E.2d 501 (1944).
19. Id. at 578, 53 N.E.2d at 504.
20. OHIO CONST. art. XVIII, § 3. "... and such local police, sanitary and similar regulations, as are not in conflict with general laws."
22. Cleveland Tel. Co. v. City of Cleveland, 98 Ohio St. 358, 362, 121 N.E. 701, 702 (1918), where the court said, "there is no such thing as a municipal police power as distinguished from state police power."
23. Ellis v. Blakemore, 116 Ohio St. 650, 660, 157 N.E. 330, 333, (1927), where it was said that "... the police power ... is only local police power."
24. 98 Ohio St. 282, 120 N.E. 829 (1918).
25. Id. at 286, 120 N.E. at 830.
26. 88 Ohio St. 339, 103 N.E. 512 (1913).
27. 101 Ohio St. 162, 128 N.E. 73 (1920).
28. Id. at syllabus 2.
29. 121 Ohio St. 80, 167 N.E. 158 (1929).
30. 121 Ohio St. 342, 168 N.E. 844 (1929).
erally.\(^3\) In the main, therefore, it may be concluded that the courts have interpreted this expression to mean laws which operate uniformly throughout the state and apply to people of the state generally.\(^3\)

Although occasionally employing the doctrine of negative implication,\(^3\) the Ohio courts generally refer to *Village of Struthers v. Sokol*\(^4\) in deciding the matter of "conflict." In that case, the supreme court adopted the "head on clash" theory that "no real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other."\(^5\) The court further stated that a police ordinance would not be held in conflict with the general law: (1) "merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law," or (2) "because certain specific acts are omitted in the ordinance but referred to in the general law," or (3) "because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance."\(^6\) But different penalties cannot have the effect of changing state policy, such as making a felony under a state law a misdemeanor under municipal law.\(^7\) Mere inconsistency, however, is not enough. Conflict cannot occur until the legislature and the municipality have directly passed on the subject.\(^8\)

Concerning the status of a "mixed power," the Supreme Court of Ohio presently seems to favor the broad view espoused by former Judge Wanamaker.\(^9\) He felt that powers of local self-government and municipal police powers were tied together by the conjunction "and" which linked the two major clauses of section 3, article XVIII. He said that "and" does not mean less, but more; that "and" is not a word of subtraction, but "addition."\(^10\) Recently, the supreme court appeared to have affirmed this view when it held that "... the limitation [police powers shall not conflict with state law] is only such a

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\(^{33}\) See Neil House Hotel Co. v. City of Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944), where the state liquor board's administrative order, which forbade the sale and consumption of liquor between the hours of 2:30 A.M. and 5:30 A.M., was held to be a general law which had by implication precluded the municipality from prohibiting the sale of liquor before the above mentioned time.

\(^{34}\) 108 Ohio St. 263, 140 N.E. 519 (1923).

\(^{35}\) Id. at 268, 140 N.E. at 521.

\(^{36}\) Id. at syllabus 3.


\(^{38}\) City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929); City of Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917).

\(^{39}\) State ex rel. Cleveland Tel. Co. v. Court of Common Pleas, 98 Ohio St. 164, 120 N.E. 355 (1918).

\(^{40}\) Id. at 186, 120 N.E. at 340.
limited limitation . . . the mere fact that the exercise of a power of local self-government may happen to relate to the police department does not make it a police regulation within the meaning of the words 'police regulation' found in that constitutional provision. By limiting the effect of the second clause of section 3 upon the first clause of that section, the present day Ohio court seems to sustain the broader Wanamaker view of home-rule power.

Fordham and Asher, in 1948, concluded that "the experience of Ohio with Municipal Home Rule has been a rather unhappy business." Another authority, in examining the experience of the City of Cincinnati, decided that the courts in Ohio had "... straight-jacketed the full development of home rule. . . ." One year later, in his study, still another authority stated that "for practical purposes, we might forget about the sections of article XVIII and go on the theory that Ohio municipalities may exercise only such powers of local self-government as the legislature or supreme court do not take away." He blamed the judges of the supreme court for this situation.

A number of factors have hindered the development of home rule in this state. Without question, the judges of the courts have played an important role. Being of a conservative bent naturally, they have tended in the past to interpret narrowly municipal power. But they are not the exclusive culprits. To begin with, the framers of the constitution were not specific as to what they actually intended in the home-rule amendment. Secondly, in the past and today, students of home rule differ as to the very meaning of the term. One camp follows the home-rule model recommended by the National Municipal League in its Model State Constitution. This position favors the establishment of a type of local federalism which would

42. See Fordham and Asher, note 9 supra, at 70. At this time the health, police, fire, tax, education, etc. functions were held to be state-wide activities.
43. Seasongood, Cincinnati and Home Rule, 9 Ohio St. L.J. 114 (1948).
44. Alexander, Ohio Home Rule (ms. in the files of the Stephen Wilder Foundation) (1949).
46. Cohn, Municipal Revenue Powers in the Context of Constitutional Home Rule, 51 NW. U.L. Rev. 30 (1956); see Fordham, Metropolitan Regionalism: Developing Governmental Concepts, 105 U. Pa. L. Rev. 439, 442 (1957), where the writer stated that "in a sense, home rule is a recognition of state legislative weakness and an effort to escape its effects . . . ."
47. See Fordham and Asher, note 9 supra, at 27; see also PROCEEDING AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO, 1463, 1485, 1489 (1913).
49. MOTT, HOME RULE FOR AMERICA'S CITIES 31 (1949); McBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE v (1915), where he discusses what he calls "Rights of Home Rule." He states that these rights are municipal powers "conferred by the
place city-state relations on a basis similar to that existing between
the state and nation. The other major group appears to follow the
home-rule plan advanced by the American Municipal Association. 60
This scheme favors a form of legislative home rule which subjects
municipalities to legislative control.

A third factor that has contributed to the retarded growth of
municipal home rule in Ohio concerns the inherent problem of dis-
tinguishing between matters that are state-wide and those that are
local in scope. To begin with, municipal activities are generally of
a mixed nature. They are dynamic and not static. At one point in
history they may have been local in character, whereas with the pas-
sage of time they have become mixed or statewide in scope. An ex-
ample of this phenomenon is control over local streets. Once, such
control was considered to be exclusively a municipal activity. Today,
with the development of state highway systems, this activity is at
least of a mixed nature. In addition, municipal activities vary with
the size of cities. For example, in some larger metropolitan cities
like New York City, arterial highways are matters of local concern.
In smaller cities arterial highways are county, state, or mixed state-
local responsibilities. The problem of drawing the line between local
and state matters is one that has always perplexed interpreters of
home-rule powers.

Finally, the wording of the constitutional provisions in Ohio and
other states has caused some difficulty. If the constitutional phrases
used were more explicit, 61 the intent of the framers and that of the
people who ratified the proposal would become more clearly pre-

people of the state through the medium of their fundamental law . . . which may, like the
similar rights of private persons, be defended in courts against invasion by the legislative arm
of the government.” Professor Kneier also accepts this definition for he states that “constitu-
tional home rule is, in a sense, the application of the federal principle of government to the
relations between city and state.” KNEIER, CITY GOVERNMENT IN THE UNITED STATES
REV. 132 (1953). See Seegmiller, Commission on Intergovernmental Relations, Advisory

60. Fordham, Home Rule — AMA Model, 44 NAT’L MUNIC. REV. 137 (1955); Accord,
McGOLDRICK, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930, 2 (1933),
who said that home rule is “not concerned with a philosophy of local autonomy in contradis-
tinction to state control.” See Niehaus v. State ex rel. Board of Education, 111 Ohio St. 47,
53, 144 N.E. 433, 434 (1924) where the Supreme Court of Ohio said:

... the sovereignty of the state over the municipality is not divested by that pro-
vision, nor does the power of the sovereign to administer public affairs end at the
corporation line. The only feature of the sovereign power which is granted by the
so-called “home rule” provision of the Constitution is that which relates solely to
local government . . . . Such municipalities and their offices are still agencies of the
state, acting in behalf of that portion of the state in which they have jurisdiction.

51. See NATIONAL MUNICIPAL LEAGUE MODEL STATE CONSTITUTION (5th ed. 1948),
where numerous specific powers are granted to municipalities. Among them is the power to
levy and collect taxes, to borrow money, to adopt and enforce local police and sanitary regula-
tions, to provide for slum clearance, and to construct public facilities. At the same time, it is
also possible for the people of the state to indicate, for purposes of clarity, that there are cer-
tain functions such as education, the issuance of licenses, and so forth, which they want uni-
formly administered.
sent. It has been intimated that, if the original proposal as submitted by the committee on local government at the constitutional convention in 1912 had been retained, the courts in Ohio might have taken a more favorable path in interpreting home rule in Ohio. Regardless of how the responsibility for the retarded development of home rule in Ohio is assessed, it must be pointed out that the Supreme Court of Ohio has recently adopted a more sympathetic approach toward municipal home rule. This new mode can be observed more readily by examining relevant cases decided by that court since 1950.

Throughout the 1950's, the supreme court appears to have modified its former restrictive approach toward municipal home rule. In several areas, such as control of municipal policemen and firemen, eminent domain, urban renewal, disposal of municipal property, and the operation of municipal government, municipal power has been enlarged. Thus, it may be concluded that a new, more liberal outlook toward home rule has been accepted in Ohio.

**Policemen and Firemen**

A recapitulation of the cases involving municipal control over policemen and firemen will serve two functions. One purpose is to provide a panoramic view of the historical evolution of home rule in Ohio. A second aim is to demonstrate the full flowering in Ohio of the "new look."

Beginning with the early and leading case of *State ex rel. Lentz v. Edwards*, the Supreme Court of Ohio determined that municipal employees under the civil service were to be regarded as local employees controlled by local laws. It said that "the manner of regulating the civil service is peculiarly a matter of municipal concern." Later, the court in *State ex rel. Vogt v. Doneghy* applied the reasoning of the Lentz case to municipal police officials. It said that "the matter of the appointment of police officers is purely a matter of local self-government." This line of reasoning was followed sporadically throughout the 1920's and 1930's as the Ohio courts sustained municipal control over the manner in which policemen and firemen were to be promoted, disciplined, and retired.

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53. 90 Ohio St. 305, 107 N.E. 768 (1914).
54. Id. at 309, 107 N.E. at 769.
55. 108 Ohio St. 440, 140 N.E. 609 (1923).
56. Id. at 445, 140 N.E. at 611.
57. Hile v. City of Cleveland, 118 Ohio St. 99, 160 N.E. 621 (1928); *State ex rel. Jackson v. Dayton City Comm'n*, 50 Ohio L. Abs. 378 (Ct. App. 1939) (Respecting the promotion of a district fire chief).
58. Ferguson v. Collins, 16 Ohio L. Abs. 6 (Ct. App. 1933), dismissed for lack of constitutional question, 127 Ohio St. 419, 189 N.E. 4 (1933); accord, Penrod v. Woehler, 18 Ohio L. Abs. 135 (Ct. App. 1934) (dismissal of a fire chief).
During the 1930’s and 1940’s, a major change in policy took hold in Ohio courts. Throughout this period the Supreme Court of Ohio handed down a number of decisions restricting home-rule powers. Several of these cases involved the area of police and fire department administration. In *Cincinnati v. Gamble*, the question was raised whether the state statutes (Ohio General Code sections 4600 and 4616), establishing a state retirement plan for firemen and policemen, should prevail over a conflicting municipal retirement program. The City of Cincinnati claimed that under its powers of local self-government it could establish its own retirement system for police and fire officials. The court rejected this argument, saying that the activities of a municipality were of a dual nature. Some functions of the municipality are carried out under its powers of local self-government; other acts are simply performed in its capacity as an arm or agency of the state. The court said, "... police, fire, and health protection are within the sovereign power of the state, and with respect thereto, municipalities, whether governed by a charter or not, are arms or agencies of state sovereignty." The court assumed that the state had exclusive control over matters pertaining to health, fire, and police administration.

On the same day that the supreme court decided the *Gamble* case, it also rendered judgment in *State ex rel. O’Driscoll v. Cull*. The facts in this case again involved a conflict between a state statute and a municipal ordinance. The ordinance required that an applicant for the position of patrolman have a high school education; the statute prohibited educational prerequisites as a condition for taking a civil service examination. The court, following the reasoning in the *Gamble* case, sustained the statute.

Later that year the court declared invalid, in *State ex rel. Strain v. Houston*, the attempt of the City of Cincinnati to substitute its own hourly system for firemen in place of the state’s two-platoon system of hourly work. It rejected the home-rule argument of the city and rested its decision upon both the statewide theory of the *Gamble* case, sustained the statute.

60. 138 Ohio St. 220, 34 N.E.2d 226 (1941).
63. Judge Turner (in dissent at 232) stated that as long as the states did not take over actual operation of the departments, the employees of such departments are municipal employees and their employment, discharge, etc., remain matters of local self-government. He believed that municipalities should have control over the organization, personnel and administration of police and fire departments. See Fordham and Asher, supra note 9, at 32, where they pose the question, "is the power of the state in matters of police, health and fire protection exclusive, or is there a middle ground where the municipality may have some local authority over the organization, personnel, and administration of police and fire departments?" They believe that such activity is not completely state-wide but is of a mixed state and local nature. The Supreme Court of Ohio agreed in 1958.
64. 138 Ohio St. 516, 37 N.E.2d 49 (1941).
65. 138 Ohio St. 203, 34 N.E.2d 219 (1941).
case and the "conflict with general laws" clause of section 3, article XVIII. The supreme court, however, did modify the pre-emptive state-wide theory in the *Gamble* case, saying that the municipalities could pass legislation on matters involving "... public peace and the protection of persons and property ..." as long as "... the legislation ... did ... not conflict with state legislation on the same subject."  

In the succeeding few years the state-control philosophy was maintained with respect to the retirement of members of the police and fire divisions, the tenure, appointment, and removal of a fire chief, and the right of a policeman to appeal to the court of common pleas under state law.

The decision in *State ex rel. Arey v. Sherrill* further strengthened the "state-wide" concept. In this decision, the Supreme Court of Ohio held that the state statute, Ohio General Code section 4368, which granted a city director of public safety the authority to try disciplinary cases against fire and police personnel, prevailed over a charter provision that permitted the city manager to perform this duty. Judge Bell laid the final brick in the wall supporting the "state-wide" concept when he said, "it would be a bold man who would assert that the police power of the state does not include the establishment of a general control over police departments and the members thereof."  

In the 1950's the Supreme Court of Ohio returned to its earlier, more liberal interpretations. During this period, the court mainly followed the *Lentz* and *Doneghy* rulings. It did not, however, immediately reverse the preceding 1940 cases which supported the "state-wide" theory of restricted home-rule powers. It began very hesitatingly; in fact, so hesitatingly that a certain amount of inconsistency and confusion existed in the law until clarified in the mo-

66. Fordham and Asher, *supra* note 9, at 33, commented that if the state concern idea is a complete theory in and of itself, why then should the court use the weaker second clause of section 3, article XVIII?


68. *State ex rel. Daly v. Toledo*, 142 Ohio St. 123, 50 N.E.2d 338 (1943).


70. *In re Fortune*, 138 Ohio St. 385, 35 N.E.2d 442 (1941).

71. 142 Ohio St. 574, 53 N.E.2d 501 (1944). Judge Bell did not completely divorce the municipalities from exercising police administrative powers; he said, "that the police department of a city is a matter of state-wide concern does not prevent the city from adopting any regulation in reference thereto so long as such regulation does not conflict with general laws." *Id.* at 581, 53 N.E.2d at 505.


74. See *State ex rel. Lynch v. Cleveland*, 164 Ohio St. 437, 438, 132 N.E.2d 118, 120 (1956).
mentous decision of *State ex rel. Canada v. Phillips*. A survey of the important cases will illustrate the change in basic philosophy which has captured the Supreme Court of Ohio.

At issue in the *LaPolla v. Davis* case, decided in 1950, was the question of whether a police chief could be appointed to the position of deputy mayor in accordance with the municipal charter, or whether the state law on this subject governed. The Common Pleas Court of Mahoning County said that "as long as the requirements of a municipal charter comply with provisions of Article XV, Section 10... and do not conflict with any other of its provisions, they are valid..." On appeal, the supreme court dismissed the petition. The court caused some anxiety because it seemed to ignore the precedents established in Ohio.

In 1953, the supreme court added to the growing perplexity in this area when it rendered the decision in *Harsney v. Allen*. This case questioned the power given a police chief under the charter of the City of Youngstown to transfer a radio operator to a patrolman's post. The court sustained the authority of the police chief by resorting to the reasoning used in the *Lentz* and *La Polla* cases. It first cited the statutes, Ohio General Code sections 4372 and 4374, as grants of adequate authority, but then went on to state that "the organization and regulation of its police force, as well as its civil service functions, are within a municipality's power of local self-government." Of note in this case was the complete absence again of any precedent for the holding of police personnel to be employees of the state. With this decision, confusion was complete. Were municipal firemen and policemen employees of the local municipality or the state? Were the police and fire functions local or state activities?

Chief Justice Weygandt, in *State ex rel. Lynch v. Cleveland*, recognized this confusion when he said that there are many inherent difficulties confronting one who attempts to interpret home rule. For example:

... a power that clearly is one of "local" self-government to one mind is clearly contrary to another... This court has attempted to be helpful by announcing certain principles to be observed in construing and applying the constitutional language, but the decisions have been limited mainly to the intermittent consideration of a particular power as it has

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75. 168 Ohio St. 191, 151 N.E.2d 722 (1958).
76. 89 N.E.2d 706 (Ohio C.P. 1948), dismissed for lack of a constitutional question, 151 Ohio St. 550, 86 N.E.2d 615 (1950).
77. Id. at syllabus 4.
78. 160 Ohio St. 36, 113 N.E.2d 86 (1953).
79. OHIO REV. CODE §§ 737.06, 737.05.
been questioned. Hence, it is not surprising, either, that with the changing personnel of the court, during the forty-four years these provisions have been in effect, it has been no easy task to maintain something even remotely resembling consistence... 82

In this case a municipal inspector of police challenged the appointment of a chief of police of the City of Cleveland made under the authority of the city charter. The plaintiff claimed that the state law (Ohio Revised Code section 143.34), which requires that the position be filled from the civil service list, should have been followed. In its reasoning, the court attempted to read some clarity into the existing states of the law of home rule by distinguishing the rules relating to the operation of a police department and the method of selecting a chief of police. With respect to the former, the court seemed to indicate that state law prevailed, while as to the latter, the municipal charter should remain paramount authority. Therefore, the method of selecting a chief of police was considered a matter of local self-government. In a concurring opinion, Judge Taft said that "it is regrettable that this court should neglect either to overrule, distinguish, or even to notice its previous decisions and pronouncements of law made so recently and which are so difficult to reconcile with the decisions rendered in the La Polla case." 83 Thus, the basic inconsistency of the Lentz and Doneghy cases when compared with the rulings in the Gamble, Sherrill, and Cull cases, still remained to puzzle students of home rule in Ohio.

Not until the most significant case of State ex rel. Canada v. Phillips, 84 did the Ohio Supreme Court face up to its responsibilities and attempt to reconcile the inconsistent precedents it had established. In this case a mandamus action was brought to compel the safety director of the City of Columbus to retract his appointment of a new deputy inspector of police. The plaintiff argued that the safety director had not complied with the statute, Ohio Revised Code section 143.34, which required that vacancies above the rank of patrolman be filled by the recipient of the highest examination grade. The safety director relied upon the authority of the charter which permitted the safety director to appoint any of three persons who had attained the highest scores on the examination.

Justice Taft, in writing the majority decision, resorted to the precedents mentioned in the State ex rel. Vogt v. Doneghy and Harsney v. Allen cases above. First he distinguished and limited the possible effect of the second half of section 3, article XVIII ("local police, sanitary and other similar regulations as are not in conflict with the general law") upon the first half of that section ("municipalities shall have authority to exercise all powers of local self-govern-

83. Id. at 441, 132 N.E.2d at 121.
Justice Taft then went on to specifically clarify the status of police and fire department administration in Ohio:

It is undoubtedly true that the enforcement of laws by police in every part of the state is a matter of "state wide concern." Undoubtedly the state has power to provide for police in every part of the state to enforce its laws. Actually in providing for sheriffs, our state laws do provide for such police. However, where a municipality establishes and operates a police department, it may do so as an exercise of the powers of local self-government conferred upon it by sections 3 and 7 of Article 18 of the constitution. If it does, the mere interest or concern of the state, which may justify the state in providing similar police protection will not justify the state's interference with such exercise by a municipality of its powers of local self-government.

Additional insight into the "new look" philosophy is found in the statement by Justice Taft with respect to the scope of the restriction on home-rule municipalities placed in article XV, section 10. He said that the authority therein granted the state prevails only if it "... will not restrict the exercise by such cities of their powers of local self-government. Thus, such laws may be applicable, for example, where a city has failed to enact charter or legislative provisions on the subject covered by the statutes and the statutes do not conflict with any charter or municipal legislative provision or where a city has in its charter expressly adopted the state statutes." As indicated above, the presumption, henceforth, seems to sustain municipal home-rule powers against state law.

Finally, the supreme court specifically overruled: (1) paragraph 4 of the syllabus in Cincinnati v. Gamble, (2) paragraphs 4, 5, and 6 of the syllabus in State ex rel. Arey v. Sherrill, and (3) the cases of State ex rel. O'Driscoll v. Cull and State ex rel. Daly v. Toledo. It also questioned the reasoning and soundness of: (1) paragraph 3 of the syllabus in Cincinnati v. Gamble, (2) paragraphs 2 and 4 of the syllabus in State ex rel. Strain v. Houston, and (3) the decision in In re Fortune. By delineating the above, the court specifically overruled the concept that police and fire protection are state-wide activities.

**Power to Define Crimes**

Prior to the home-rule amendment, the power to enact municipal criminal ordinances was dependent upon state law, either expressed or implied. In 1912, municipalities were granted power directly in section 3, article XVIII, to enact ordinances defining crimes. These ordinances were valid as long as they: (1) conformed to legal re-

86. Id. at 200, 151 N.E.2d at 729.
87. Id. at 195, 151 N.E.2d at 726.
quirements of having a reasonable purpose, (2) avoided arbitrary means of effectuating that purpose, and (3) did not conflict with the general laws of the state.

In recent years, the liberty granted municipalities to define crimes has been considerably broadened. Several cases which illustrate a more sympathetic approach toward home rule have involved the power of a municipality to define and punish the crime of assault and battery. The City of Dayton enacted Ordinance Number 943-2, which marked out the crime of assault and battery and listed the maximum punishment that may be inflicted upon violators thereof. The maximum authorized penalty embraced a $1,000 fine or one year imprisonment or both. These provisions were at variance with two state statutes: (1) Ohio General Code section 12423, which limited the punishment that may be imposed upon those who commit the crime of assault and battery to a $200 fine or six months or both, and (2) Ohio General Code section 3628, which restricted the power of any municipality to levy penalties on any crime to a $500 fine or six months or both. The appellate court of Montgomery County, in Matthews v. Russell, followed the rules of conflict established in Struthers v. Sokol and Youngstown v. Evans. In the former case, the court decided that conflict did not occur merely because there happens to be a difference in penalties; and, in the latter, it held that conflict did not occur, because it considered the statute, Ohio General Code section 3628, not to be a general law within the meaning of the home-rule amendment. Thus, the City of Dayton was granted authority not only to define the crime of assault and battery, but also to impose penalties greater than those permitted under state law.

The Supreme Court of Ohio affirmed the position taken in the

89. Ohio municipalities have been granted by the courts the power to define: fraud perpetrated at jewelry auctions, Holsman v. Thomas, 112 Ohio St. 397, 147 N.E. 750 (1925); disturbance of the public peace and order, Village of Leipsic v. Folk, 38 Ohio App. 177, 176 N.E. 95 (1931), accord, City of Cleveland Heights v. Christie, 128 Ohio St. 297, 190 N.E. 770 (1934); the publication of racing tips in newspapers, Solomon v. City of Cleveland, 26 Ohio App. 19, 159 N.E. 121 (1926), appeal dismissed, 116 Ohio St. 739, 158 N.E. 8 (1927); horse bookmaking, City of Columbus v. Gantner, 88 Ohio App. 146, 98 N.E.2d 75 (1950); the reselling of railroad tickets, Schwartz v. Youngstown, 27 Ohio L. Abs. 229 (Ct. App. 1938); the selling of contraceptive devices, City of Toledo v. Kohlhofer, 96 Ohio App. 355, 122 N.E.2d 20 (1954); people loitering and acting suspiciously, Welch v. City of Cleveland, 97 Ohio St. 311, 120 N.E. 206 (1918), accord, City of Youngstown v. Aiello, 156 Ohio St. 32, 100 N.E.2d 62 (1951); begging, Le Fever v. City of Columbus, 23 Ohio N.P. (n.s.) 372 (1921), accord, City of Cleveland v. Gogola, 113 N.E.2d 264 (Ohio Ct. App. 1953); and pocket-picking, Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918).
90. OHIO REV. CODE § 2901.25.
91. OHIO REV. CODE § 715.67.
92. 87 Ohio App. 443, 95 N.E.2d 696 (1949); accord, In re Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949).
93. Supra, note 34.
94. Supra, note 30.
Matthews case when it decided *Dayton v. Miller.*95 The facts were essentially the same as in the Matthews case, the same question was involved, and the same conclusion rendered. The court said, "municipal corporations of this state have authority to define, by ordinance, the offense of assault and battery and prescribe punishment thereof."96

For a while, this left the scope of municipal power to define crimes in an uncertain status. Since Ohio municipalities had been given authority by the Ohio Constitution to define crimes, and since the Matthews and Miller cases permitted municipalities to impose fines and punishment beyond the limitations prescribed by state law, did it mean that a municipality in Ohio might enter the field of defining major crimes? At the time, the consensus of legal opinion indicated the contrary.97 This view appears to have been supported by the supreme court in *City of Cleveland v. Betts.*98 The facts in this decision involved a conflict between a Cleveland ordinance (Ordinance Number 11.2314), which made the carrying of concealed weapons a misdemeanor, and a statute (Ohio Revised Code section 2923.01), which defined this crime as a felony. The question to be decided was whether a municipality had the power to enact an ordinance which defined the severity of a crime differently than did the state law. The court said a municipality did not. After declaring the statute to be a law of general applicability under section 3, article XVIII, it distinguished and clarified the Sokol theory of conflict. It held that the Sokol principle was not an exclusive test and that a municipal ordinance was invalid which contravened "... the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law into a misdemeanor."99 Therefore, it seems that municipalities have extensive authority to define misdemeanors but not felonies.

Another area where broad power has been granted municipalities to define crimes is in the prohibiting of the operation of pinball machines. Under state law100 gambling is forbidden. In the past, the municipal power to forbid the operation of slot machines,101 bingo

95. 154 Ohio St. 500, 96 N.E.2d 780 (1951).
96. Id. at 501, 96 N.E.2d at 780.
97. 13 Ohio St. L.J. 111 (1952).
100. OHIO REV. CODE §§ 2915.04, 2915.15.
101. Meyers v. City of Cincinnati, 128 Ohio St. 235, 190 N.E. 569 (1934), where a slot machine which returned tokens permitting free play was considered to be a gambling device. In the decision, the court said that even if the machine were intended for a lawful use its potentiality and design were such that it could be put to unlawful use.
games,\textsuperscript{102} and lotteries,\textsuperscript{103} had been sustained by the courts. The question, in recent times, has been whether pinball devices are a form of gambling outlawed under state law.

In the past, the Supreme Court of Ohio has considered the operation of pinball games to be a form of gambling which municipalities could not license.\textsuperscript{104} Even pinball games which had the free-play device removed have been held to be gambling devices.\textsuperscript{105} In \textit{Westerhaus v. City of Cincinnati},\textsuperscript{106} the City of Cincinnati forbade the operation of pinball machines which might be used as gambling devices (Ordinance Number 731-23). The plaintiff contended, among other things, that the operation of the pinball games, which granted free play upon the achievement of certain scores, was not a gambling device but a game of skill\textsuperscript{107} and, therefore, was a legal amusement device. The supreme court, in rendering its decision, defined gambling as containing three elements — the payment of a \textit{price} for a \textit{chance} to win a \textit{prize}. The court concluded that pinball games of the type herein mentioned were gambling contrivances and subject to being banned by the municipality. The payment of five cents for the opportunity to play the game satisfied the element of \textit{price}. The factor of \textit{chance} was not eliminated because a certain amount of skill was necessary to achieve the prize of additional free play. And, finally, the court found that the amusement received, in being able to play the game, was of some \textit{value} to the player.

\textit{Benjamin v. Columbus},\textsuperscript{108} decided one year later, involved essentially the power of the City of Columbus to outlaw pinball games which required the payment of a fee or coin for their operation (Ordinance Number 1615.54). The ordinance was more complete than the one in the \textit{Westerhaus} decision, in that it prohibited the operation of all coin-operated pinball machines regardless of whether the machine permitted free play or not. The supreme court stated, in its opinion, that the court presumed that the legislative body had validly and reasonably exercised its police power when it enacted police ordinances. It said that the potentiality of pinball games to in-

\textsuperscript{102} Kraus v. City of Cleveland, 89 Ohio App. 504, 96 N.E.2d 314 (1950), \textit{dismissed for lack of a constitutional question}, 155 Ohio St. 98, 97 N.E.2d 549 (1951), where a municipality was precluded from issuing licenses to operators of bingo games who had set aside part of their profits for charitable purposes.

\textsuperscript{103} City of Columbus v. Barr, 160 Ohio St. 209, 115 N.E.2d 391 (1953).

\textsuperscript{104} Kraus v. City of Cleveland, 135 Ohio St. 43, 19 N.E.2d 159 (1939).

\textsuperscript{105} Zelles v. Matowitz, 22 Ohio Op. 261, 8 Ohio Supp. (N.E. Reporter) 66 (Munic. Ct. 1941), \textit{dismissed for lack of a constitutional question}, 139 Ohio St. 627, 41 N.E.2d 708 (1942). \textit{Cf.} Wells v. City of Norwood, 100 N.E.2d 711 (Ohio Ct. App. 1951), where pinball machines which did not return discs or tokens were held to be amusement and not gambling contrivances.

\textsuperscript{106} 165 Ohio St. 327, 135 N.E.2d 318 (1956).

\textsuperscript{107} Distinguished Kraus v. City of Cleveland, 135 Ohio St. 43, 19 N.E.2d 159 (1939), which inferred that games of skill may not be considered gambling.

\textsuperscript{108} 167 Ohio St. 103, 146 N.E.2d 854 (1957).
jure and harm the health, morals, safety and welfare of the community was sufficient to outlaw their operation. In order to allow a municipality to ban entirely this activity, the high court found it necessary to distinguish the decision of Frecker v. City of Dayton. In that case, the appellate court had decided that the word "regulations" in the second clause of section 3, article XVIII, did not authorize municipalities to prohibit, but merely to regulate, the activity of vending ice cream on city streets. The court, in the instant decision, rejected this reasoning. It declared that the police power of a municipality was not derived exclusively from the second grant of section 3, article XVIII, but was understood to be included in the term "powers of local self-government." "The words appearing in section 3 of article XVIII of the constitution after the word 'self-government' represent not a grant of legislative power but a limitation upon the legislative power granted by the words up to and including the word self-government." This conclusion had the effect of broadening the power granted municipalities under the term "powers of local self-government." The court had said that police power is included within the meaning of the term powers of "local self-government," and is not confined to the second clause of section 3, article XVIII. The court, therefore, subsequently determined that municipalities had the power to ban the operation of pinball machines.

The Election Process

If a municipality is to have genuine home rule, it must have control over the manner in which its public officials are elected. Beginning very early and continuing thereafter, the Supreme Court of Ohio has, under the first clause of section 3, article XVIII, granted municipalities extensive authority over its election process.


110. Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), at syllabus 3.

111. Ohio municipalities have been granted the power: (1) to control the qualifications, duties, and manner of election of purely municipal officers. State ex rel. Frankenstein v. Hillenbrand, 100 Ohio St. 339, 126 N.E. 309 (1919); accord, State ex rel. Schmider v. Hillenbrand, 100 Ohio St. 534, 127 N.E. 926 (1919); but this power does not authorize a municipality to prescribe the manner or method of conducting elections for county and state officials, State ex rel. Benjamin v. Brown, 164 Ohio St. 189, 129 N.E.2d 468 (1955); (2) to establish the qualifications of electors in municipal elections, State ex rel. Taylor v. French, 96 Ohio St. 172, 117 N.E. 173 (1917) (The court sustained a municipality's power to qualify electors at municipal elections despite the fact that both the state and federal constitutions restricted suffrage to males); (3) to regulate the nomination of municipal public officials, Fitzgerald v. City of Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913); see State ex rel. Haffner v. Green, 160 Ohio St. 189, 115 N.E.2d 154 (1953), which sustained the charter provisions closing the filing of nomination petitions at 12:30 p.m. as against the code provision requiring the closing of nomination petitions at 6:30 p.m.; State ex rel. Stanley v. Bernon, 127 Ohio St. 204, 187 N.E. 733 (1933) (which upheld charter provisions setting the deadline for filing nomination petitions); (4) to determine the number of councilmen. Merryman v. Gorman, 117 N.E.2d 629 (Ohio C.P. 1953); (5) to control the mode of elections. Reutener v. City
State ex rel. Bindas v. Andrish\textsuperscript{112} illustrates the "new look" taken by the court in the area of the election of municipal officials. This case involved the constitutionality of the appointment, made by the city council of Youngstown, of a public school teacher to an existing vacancy on that council. Under state law, Ohio Revised Code section 731.02, no one selected or appointed to the office of councilman could hold any other public office. In addition, the state law clearly stated that it should be followed in procedural matters, if the subject was not embraced in the charter. The city charter did not cover specifically the matter of appointments to vacancies on the council. The court decided the case by implying municipal authority to fill such vacancies from general statements in the charter. It said that the general qualifications established under the charter, that a councilman be twenty-five years of age and an elector in the ward from which he is elected, were sufficient to grant council the power to fill its own vacancies. The court decided that "... by specifying that its councilmen shall have certain specific qualifications the people of Youngstown in their charter have inferentially expressed an intention that these are to be the only qualifications required of them."\textsuperscript{113}

Recently, \textit{State ex rel. Devine v. Hoermle}\textsuperscript{114} extended further the power a municipal council has to fill its own vacancies. The circumstances concerned the power of the council of the City of Columbus to fill the vacancy left by the death of Councilman Llewelyn. Section 5 of the charter, in a general statement, authorized council to fill its own vacancies. After council was unable to appoint a successor with-
in 30 days, the mayor made an appointment under the authority of Ohio Revised Code section 731.43. This law permitted the mayor to appoint vacancies to council when that body was unable to do so within a 30 day period. Judge Taft, relying upon the principle of expressio unius est exclusio alterius used in the Bindas case, held that the charter granted the power to fill vacancies in council to the council itself and no one else. In rendering his opinion, he rejected the reasoning that a reasonable time had passed which would permit the mayor to make the appointment and said that the power of council was exclusive under the general grant of power listed in the charter.

**The Spending Power**

The power a municipality has to spend money as it sees fit is limited by the tax pre-emption doctrine,\(^\text{115}\) the ten mill property limitation,\(^\text{116}\) state law limiting municipal indebtedness,\(^\text{117}\) and by the fact that all money must be spent for a public purpose.\(^\text{118}\) Within these general limits, for what purposes can a municipality expend money?

In *State ex rel. Thomas v. Semple*,\(^\text{119}\) the question to be decided was whether the City of Cleveland could pay a membership fee of $100 in a private organization, the Conference of Ohio Municipalities. The supreme court decided it could not. It reasoned, firstly, that article XVIII did not grant municipalities power to spend money indiscriminately, secondly, that such an appropriation was not permitted by the charter, and thirdly, that no municipality could expend funds to support a private organization.

In 1951, the supreme court reversed the *Semple* case in *State ex rel. McClure v. Hagerman*.\(^\text{120}\) This time the court accepted a much broader view of the power of municipalities to spend money when it approved of the City of Dayton's making an expenditure of $486.22 for membership in the Municipal Finance Officers Association of Ohio. Despite the fact that authority for such an appropriation was not explicitly provided for in the charter, it said that appropriations by the municipal council would be presumed to be valid. The court held that determination of what was public purpose is a legislative responsibility regarding which the "courts will not assume to substi-
tute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused. 121

Today, the heavy traffic congestion found in downtown areas has presented municipalities with a difficult safety problem. A proposed partial solution to the problem has involved cities in the construction of public off-street parking facilities. For a time it was questionable whether municipalities in Ohio had the authority to own and operate such an enterprise. In 1951, however, the supreme court sustained the right of Ohio municipalities to operate off-street parking facilities in State ex rel. Gordon v. Rhodes. 122 Although an earlier decision, City of Cleveland v. Ruple, 123 had denied municipalities this power, the court in the Rhodes case distinguished that prior ruling. It said that the Cleveland case did not have a claim of necessity or public purpose as the instant case. The sole object, in that decision, was to secure revenue by operating a garage. That being the case, the city was held to be improperly engaged in a private and competitive business. The court said this was not true in the present case. 124 It pointed out that the main question to be decided was whether the project would serve a public municipal purpose. 125 It concluded that the alleviation of traffic congestion and the resultant promotion of the public health and safety fulfilled the requirements of public purpose. It added that this municipal activity was "... embraced in the field of local self-government," 126 and not dependent on state law, Ohio General Code sections 3939-2 and 3939-3. 127

Eminent Domain

An important power possessed by home-rule municipalities in Ohio is the authority to condemn land for public purposes. In the Rich decision, this power, known as eminent domain, was recog-

122. 156 Ohio St. 81, 100 N.E.2d 225 (1951), 14 Ohio St. L.J. 110 (1953).
123. 130 Ohio St. 465, 200 N.E. 507 (1936).
124. In rendering its decision, the court refused to consider the power of Ohio municipalities to own off-street parking facilities as being authorized under its power to own and operate municipal public utilities. See, generally, Ohio Const. art. XVIII, § 4. In addition, in arriving at its conclusion, it failed to recognize that public off-street parking facilities compete with private parking operations.
126. 156 Ohio St. 81, 90, 100 N.E.2d 225, 230 (1951). See also City of Columbus v. Franklin County, 167 Ohio St. 256, 147 N.E.2d 625 (1958), where it was decided that off-street parking facilities were not to be tax exempt under state law; State ex rel. Gordon v. Rhodes, 158 Ohio St. 129, 107 N.E.2d 206 (1952), where the court merged the receipts of on- and off-street parking operations to help pay the principal and interest on the mortgage revenue bonds of off-street operations.
127. Ohio Rev. Code §§ 717.05-.06.
nized as properly belonging to incorporated cities and villages.\textsuperscript{128} Prior to this case, the use of eminent domain by municipalities was restricted. Authority to use this power was limited by specific constitutional and statutory provisions.\textsuperscript{129} With the \textit{Rich} decision, complete authority to use the power of eminent domain was recognized in Ohio municipalities. The court said:

By Section 3 of Article XVIII of the Constitution, the people of Ohio conferred upon municipalities \ldots the power of eminent domain \ldots. There is no provision of the Ohio Constitution which authorizes the interference by general laws with the exercise by a municipality of its power of eminent domain \ldots.\textsuperscript{130}

In the course of its decision, the supreme court added that the taking of the land does not have to be exclusively for the public welfare or for a public purpose. It is sufficient that the primary purpose be for the public welfare, and \ldots the power may be exercised even where there may be an incidental non-public use of the property or benefit from its taking."\textsuperscript{131}

\textit{Disposal of Municipal Property}

In this "new look" period, municipalities have also been given complete power to dispose of their property unfettered by state law. \textit{Hugger v. City of Ironton,}\textsuperscript{132} concerned the purchase by the United States Department of Agriculture of a parcel of land from the City of Ironton. The land was sold to the Department of Agriculture for five dollars. Plaintiff Hugger, who bid $1,500 for the same land, contended that the sale was invalid because it conflicted with the state law, Ohio General Code section 3699,\textsuperscript{133} requiring sale to the highest bidder. The court decided that a "sale of real estate by a municipality is a proper exercise of the power of local self-government \ldots"\textsuperscript{134} and this power governed both the procedure to be fol-

\begin{itemize}
\item \textsuperscript{128} 156 Ohio St. 81, 100 N.E.2d 225 (1951), \textit{accord}, Simons v. Cleveland Heights, 81 Ohio L. Abs. 129 (C.P. 1959); \textit{State ex rel. Sun Oil Co. v. City of Euclid}, 164 Ohio St. 265, 130 N.E.2d 336 (1955), where it was held that the state law, \textit{OHIO REV. CODE} § 723.02, was to be followed when the procedure implementing the use of eminent domain was not outlined in the municipal charter.
\item \textsuperscript{129} \textit{OHIO CONST.} art. I, § 19; \textit{OHIO REV. CODE} §§ 719.01--21.
\item \textsuperscript{130} 159 Ohio St. 13, 32, 110 N.E.2d 778, 789 (1953).
\item \textsuperscript{131} \textit{Id.} at 27, 110 N.E.2d at 788. The court seems in the instant case, to permit the taking of extra land not needed for the redevelopment project contrary to the ruling in \textit{City of East Cleveland v. Nau}, 124 Ohio St. 433, 179 N.E. 187 (1931). \textit{But cf. State ex rel. Sun Oil Co. v. City of Euclid}, 164 Ohio St. 265, 272, 130 N.E.2d 336, 340 (1955), where the court cited the \textit{Vestei} case and denied municipalities the power to condemn land for some contemplated future use.
\item \textsuperscript{132} 83 Ohio App. 21, 82 N.E.2d 118 (1947), \textit{appeal dismissed for lack of a constitutional question}, 148 Ohio St. 670, 76 N.E.2d 397 (1947).
\item \textsuperscript{133} \textit{OHIO REV. CODE} § 721.03.
\item \textsuperscript{134} 83 Ohio App. at syllabus 1.
\end{itemize}
lowed in the sale of the land and the substantive power to contract for the sale itself. It reasoned that:

In this day and age, when all cities and municipalities are more or less competing in obtaining for their inhabitants various industries, institutions and civic improvements, many times it becomes necessary to convey property not needed for municipal purposes in exchange for these benefits. If ... cities are to be bound by the old statutory provisions of advertising and accepting the highest bid there will always be those willing and ready to pay more in cash than the city will be able to receive if the other benefits are to be ignored. The free and untrampled growth of a municipality, both civic and industrially, demands that a city have wide freedom of choice in matters of this kind. This the makers of the Constitution of 1912 recognized when they granted to municipalities powers of local self-government.\(^{135}\)

Is the power of home-rule municipalities to convey land so complete that it can sell property which was initially dedicated for specific uses? The supreme court, in Babin v. City of Ashland,\(^{136}\) decided that the City of Ashland had the power to convey 22 feet of land designated public ground. It said that:

"[T]he powers of local self-government vested in Ashland by Section 3 of Article XVIII of the Ohio Constitution, include the legislative power to dispose of public rights of that portion of the public represented by the inhabitants of Ashland in land located in Ashland ... . There are not constitutional limits which would prevent or limit such an exercise of that power. Neither does the constitution give the General Assembly any authority to prevent or limit such an exercise of that power.\(^{137}\)"

In State ex rel. Leach v. Redick,\(^{138}\) the Supreme Court of Ohio, following the Babin and Hugger decisions, held that a municipality had the same home-rule authority to lease its land as it had to convey municipal property. State laws, Ohio Revised Code sections 721.01 and 721.03, which required submission of proposed leasing of municipal land to competitive bidding and advertisement, were held inapplicable in the face of a municipal ordinance (Ordinance 546-58) which was passed by council in conformity with the charter of the City of Columbus.

**Miscellaneous Powers**

During the 1950's, the supreme court has also seen fit to grant municipalities the power to control and regulate a number of additional local activities. Some of these functions included the authority to control the salaries of municipal employees,\(^{139}\) to install parking

\(^{135}\) 83 Ohio App. 21, 30, 82 N.E.2d 118, 122 (1947).


\(^{137}\) Id. at 350, 116 N.E.2d at 592.


\(^{139}\) Craig v. Youngstown, 162 Ohio St. 215, 123 N.E.2d 19 (1954).
meters along municipal streets,140 to fluoridate municipal water,141 to regulate the occupancy of trailer camps,142 and to require the muzzling of dogs.143 The court also reaffirmed the power of municipalities to establish, repair, and improve municipal streets,144 and the complete power to own and operate public utilities.145

CONCLUSION

The above data indicate that the Supreme Court of Ohio is presently in the process of adopting a more favorable attitude toward municipal home rule. This change in thinking is highly important for the growth and development of cities in Ohio. Cities are distinct cultural and economic entities which have many unique problems. These needs should be satisfied. One step in this direction is to allow those closest to the situation, the people of the city, an opportunity to fulfill their wants. Broad powers of municipal home rule facilitate such action. It is hoped that the present liberal trend of granting the people living in municipalities a great amount of autonomy will continue to be maintained by the Ohio Supreme Court.