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Ohio's Ban on Municipal Residency Requirements: Can the Employee Welfare Provisions of the Ohio Constitution Protect the Ban from Home Rule Challenges

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OHIO'S BAN ON MUNICIPAL RESIDENCY REQUIREMENTS: CAN
THE EMPLOYEE WELFARE PROVISION OF THE OHIO CONSTITUTION
PROTECT THE BAN FROM HOME RULE CHALLENGES?

BRENDA A. SWEET*

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I. INTRODUCTION

In 1982, voters in Cleveland, Ohio, approved a law requiring that city employees reside in Cleveland.¹ Seeking to strip the city and every political subdivision of Ohio of their power to enforce their residency requirements, the Ohio General Assembly passed a ban on residency requirements for full-time employees, effective May 1, 2006.² Starting almost immediately upon passage of the ban, police and firefighter

¹CLEVELAND, OHIO, CITY CHARTER ch. 11, § 74(a) (1982). See also Karen Farkas, 3 *Cities Sue Taft to Keep Residency Rules*, PLAIN DEALER (Cleveland), May 2, 2006, at B3. According to the Ohio Municipal League, there are 125 cities and 13 villages that have some form of residency requirements in their Charters. Letter from John Mahoney, Deputy Dir., Ohio Mun. League to Members of the Senate State & Local Gov't & Veterans Affairs Comm., (Apr. 18, 2005) (on file with author), available at <http://www.omloho.org/PastLegSessionIssues/letteronresidencysb82126.htm>. For example, many of Ohio's major cities, such as Cleveland, Dayton and Toledo, require residency for nearly all city employees, while smaller cities tend to require the city manager or city administrator to live in the city. *Id.* Also, "[w]hen a residency requirement is described as broader than residency within the city, it is usually marked as within five, eight or fifteen miles from a designated point at the historic center of the city." *Id.*

²OHIO REV. CODE ANN. § 9.481 (LexisNexis 2008).

(A) As used in this section:

(1) "Political subdivision" has the same meaning as in section 2743.01 of the Revised Code.

(2) "Volunteer" means a person who is not paid for service or who is employed on less than a permanent full-time basis.

(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.

(2)(a) Division (B)(1) of this section does not apply to a volunteer.

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. For the purposes of this section, an initiative petition shall be filed and considered as provided in sections 731.28 and 731.31 of the Revised Code, except that the fiscal officer of the political subdivision shall take the actions prescribed for the auditor or clerk if the political subdivision has no auditor or clerk, and except that references to a municipal corporation shall be considered to be references to the applicable political subdivision.

unions began filing lawsuits seeking an immediate end to their municipality's residency requirement,³ and cities around Ohio began filing lawsuits against the state seeking a declaration that the state's prohibition of residency requirements is void under the Ohio Constitution.⁴

The constitutional argument pits a municipality's power of home rule, that is, its ability to create its own laws separate from those put forth by the state,⁵ against the Ohio General Assembly's power to enact legislation for the "health, safety and welfare of all employees"⁶ When a law, such as the ban on residency requirements, is purportedly passed for employee welfare, the first step is to determine whether the law was properly enacted under the "employee welfare provision" of the Ohio Constitution.⁷ This provision grants the Ohio General Assembly the broad power to establish minimum wages, regulate the hours of labor, and, more vaguely, to pass laws "providing for the comfort, health, safety and general welfare of all employees"⁸ The provision contains a powerful

(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire.
Id. (emphasis added).

³State *ex rel.* Beane v. City of Dayton, 862 N.E.2d 97, 100 (Ohio 2007); Am. Fed'n of State, County & Mun. Employees Local #74 v. City of Warren, No. 2006CV01489 (C.P. Trumbull Sept. 14, 2007); State *ex rel.* Cleveland Fire Fighters Ass'n Local 93 of the Int'l Ass'n of Fire Fighters v. Jackson, No. 06-CV-590463, slip op. at 2 (C.P. Cuyahoga Feb. 27, 2007).

⁴City of Toledo v. State, No. CI06-3235, slip op. at 1 (C.P. Lucas July 27, 2007), City of Dayton v. State, No. 06-3507, slip op. at 5 (C.P. Montgomery June 6, 2007); City of Akron v. State, No. CV 2006-05-2759, slip op. at 1 (C.P. Summit Mar. 30, 2007); City of Cleveland v. State, No. 06-CV-590414, slip op. at 2 (C.P. Cuyahoga Feb. 23, 2007); City of Lima v. State, No. CV2006-0518 (C.P. Allen Feb. 6, 2007).

⁵Two provisions of the Ohio Constitution confer home rule authority to municipalities. "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." OHIO CONST. art. XVIII, § 3. "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." *Id.* § 7.

⁶OHIO CONST. art. II, § 34.

⁷OHIO CONST. art. II, § 34. "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power." *Id.*

The U.S. Supreme Court and the Supreme Court of Ohio have held for the past twenty-five years that "[t]here is no constitutional right to be employed by a municipality while [residing] elsewhere." Buckley v. City of Cincinnati, 406 N.E.2d 1106, 1108 (Ohio 1980); McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976). Thus, "[a] municipal residency requirement is a 'condition of employment whose constitutionality is beyond peradventure under both federal and Ohio law as a result of the decisions in *McCarthy* and *Buckley*.'" Appellants' Brief at 10, City of Cleveland v. State, No. CA-07-89486 (Ohio Ct. App.-8th May 22, 2007) (quoting Fraternal Order of Police v. City of Dayton, No. C-3-89-367, 1990 WL 1016521 at n.9 (S.D. Ohio Apr. 23, 1990)).

⁸OHIO CONST. art. II, § 34.

supremacy clause: “[N]o other provision of the constitution shall impair or limit this power.”⁹ Due to this clause, it appears that any law entered into under another section of the Constitution, such as a residency requirement passed pursuant to the home rule provision, is likely to be struck down. Since the seminal decision in *Rocky River v. State Employment Relations Board*¹⁰ (“*Rocky River IV*”) in 1989, when the employee welfare provision competes with home rule, the employee welfare provision prevails, nullifying the local law.¹¹

When a law is not properly enacted under the employee welfare provision, or, alternatively, does not pertain to employee welfare at all, and the local and state law conflict, the courts will apply a “home rule analysis” to determine which law will prevail.¹² A city’s home rule powers are broad under the Ohio Constitution, as it confers the ability to “exercise *all* powers of local self government” and “local police, sanitary and other similar regulations, as are not in conflict with general laws.”¹³ The ability to exercise powers of local self-government is, however, limited when the issue is of statewide concern.¹⁴

Both of these issues are pertinent when it comes to analyzing the constitutionality of the state’s ban on residency requirements. This Note focuses exclusively on whether the state’s action falls within the province of the employee welfare provision, though courts analyzing the issue also address home rule.

This Note argues that the prohibition of residency requirements does not qualify as legislation for the “comfort, health, safety and welfare of all employes” since the law improperly attempts to control conditions *for* employment, rather than conditions *of* employment, and that the Supreme Court of Ohio has previously, improperly interpreted the employee welfare provision and should more narrowly construe, if not reverse, its holding in *Rocky River IV*. Part II addresses residency requirements in the city of Cleveland and describes the current litigation in which the city is involved. Part III provides a background of the four *Rocky River* cases. Finally, Part IV argues that *Rocky River IV* should be overturned because it improperly departed from precedent and the original intent of the framers of the Ohio Constitution.

II. CHALLENGES TO CLEVELAND’S RESIDENCY REQUIREMENT

In Cleveland, voters approved a City Charter provision in 1982, requiring that all city employees become “bona fide” residents of the city within six months of

⁹*Id.*

¹⁰539 N.E.2d 103 (Ohio 1989).

¹¹*Id.* at 119-20.

¹²*See Vill. of Beachwood v. Bd. of Elections*, 148 N.E.2d 921, 922-23 (Ohio 1958). Other recent state legislation has sought to usurp Ohio municipalities’ power of home rule, suggesting a trend. *See* OHIO REV. CODE ANN. § 2923.13 (LexisNexis 2008) (concealed carry); OHIO REV. CODE ANN. §§ 1349.25-37 (LexisNexis 2008) (predatory lending). *See also* Reginald Fields, *Cities See Death Knell Ringing on ‘Home Rule’; Local Laws Increasingly Wiped Out for State Rules*, PLAIN DEALER (Cleveland), Dec. 4, 2006, at B1.

¹³OHIO CONST. art. XVIII, § 7 (emphasis added).

¹⁴*Cleveland Elec. Illuminating Co. v. City of Painesville*, 239 N.E.2d 75, 78 (Ohio 1968).

employment and maintain residency for the duration of his or her employment.¹⁵ Employees that do not comply with the charter face termination.¹⁶ On January 18, 2006, approximately four months prior to enactment of the state's prohibition of residency requirements, Cleveland Mayor Frank Jackson issued a press release indicating that the city would continue to enforce its residency requirement, regardless of the pending state law.¹⁷ On May 1, 2006, the day the state law went into effect, Mayor Jackson issued another press release indicating that the city of Cleveland had filed a lawsuit against the state of Ohio regarding the state's attempt to nullify Cleveland's residency requirement.¹⁸ The case was filed in the Court of Common Pleas for Cuyahoga County and was quickly consolidated with a lawsuit filed by the state of Ohio and the Cleveland Fire Fighters' Union against the city.¹⁹

In its February 2007 decision, the court held that the employee welfare provision "is the controlling constitutional provision, and conflicting local laws passed pursuant to the city's home rule power . . . must succumb to state law."²⁰ The court

¹⁵CLEVELAND, OHIO, CITY CHARTER ch. 11, § 74(a) (2006). Residency requirements vary, however, throughout Ohio, both in their terms and how they are enacted. For example, while Cleveland requires "bona fide" residency of all city employees, *id.*, Cincinnati requires the city manager, police and fire chief, and other administrative managers to reside within the city, but permits appointed officials to "maintain their primary place of residence" within the county. CINCINNATI, OHIO, MUN. CODE ch. 308, § 308-83(a)-(b) (2008). *See also* sources cited *supra* note 1.

¹⁶CLEVELAND, OHIO, CITY CHARTER ch. 11, § 74(b) (2006).

¹⁷Press Release, City of Cleveland, An Important Notice Concerning Cleveland's Residency Requirement (Jan. 18, 2006) (on file with author). Mayor Frank Jackson continued to enforce Cleveland's residency requirement, and by August 2007, four city of Cleveland employees were fired living in suburban Cuyahoga County. Susan Vinella, *Jackson Defies New State Law, Fires Workers for Where They Live*, PLAIN DEALER (Cleveland), Aug. 9, 2007, at B1. The city law director indicated that the investigations into the employees began before the new state law went into effect. *Id.*

¹⁸Press Release, City of Cleveland, City of Cleveland Files Lawsuit to Protect Home Rule (May 1, 2006) (on file with author). The state law, sponsored by a Republican from Chester Township, Ohio, located in a county adjacent to Cuyahoga County, passed with bipartisan support. Fields, *supra* note 12.

¹⁹City of Cleveland v. State, No. 06-CV-590414, slip op. at 2 (C.P. Cuyahoga Feb. 23, 2007). Apart from its constitutional arguments, the city argued that upholding the state law would do "irreparable financial harm" to the city due to employees seeking residency in surrounding communities. *Id.* at 9. The court rejected this argument by dismissing such predictions as speculations and instead suggested that Cleveland "may employ its considerable resources to entice its employees to live in the [c]ity by any lawful incentives available in the same manner the [c]ity uses to attract businesses, tourists and other sources of revenue. Clearly, requiring residency as a qualification of employment guarantees captive employee taxpayers, but does not guarantee the efficacy of the workforce." *Id.* at 9-10.

Prospective candidates for Cleveland City Council from the city's West Park neighborhood both indicated that tax incentives, either for housing or private schooling, would probably be required to keep city workers living inside the city. Susan Vinella, *Candidates Present Ideas for West Park*, PLAIN DEALER (Cleveland), July 2, 2007, at B2.

²⁰City of Cleveland v. State, No. 06-CV-590414, slip op. at 10 (C.P. Cuyahoga Feb. 23, 2007).

found that the state law was properly enacted pursuant to the employee welfare provision,²¹ but that even if it was not, the local law could not withstand home rule analysis since the prohibition of residency requirements is a “law of statewide concern that impacts the general welfare of working people.”²² The court pointed to language within the statute itself: “The General Assembly finds, in enacting [the prohibition of residency requirements] . . . that it is a matter of statewide concern to generally allow the employees of Ohio’s political subdivisions to choose where to live”²³ The city of Cleveland appealed to the Eighth District Court of Appeals.²⁴

Results from other county trial courts have been consistent. Every Ohio trial court that heard challenges to residency requirements upheld the state law and found the employee welfare provision controlling.²⁵ However, Ohio appellate courts have been upholding local residency requirements, including Cleveland’s requirement.²⁶ In late 2008, the issue will be heard before the Supreme Court of Ohio in the case involving the city of Akron’s residency requirement.²⁷ At that time, the court will first have to address its holdings in a string of cases from the 1980s, *Rocky River v. State Employment Relations Board*.²⁸

²¹*Id.* at 7 (“[T]he law provides these employees the freedom to reside in a location that is in the best interest of their families and falls squarely within the authority granted to the General Assembly under [the employee welfare provision].”).

²²*Id.* at 6.

²³*Id.* (quoting OHIO REV. CODE ANN. § 9.481 (LexisNexis 2008)).

²⁴*City of Cleveland v. State*, 8th Dist. Nos. 89486, 89565, 2008-Ohio-2655, ¶ 4.

²⁵*Am. Fed’n of State, County & Mun. Employees Local #74 v. City of Warren*, No. 2006CV01489 (C.P. Trumbull Sept. 14, 2007), *City of Toledo v. State*, No. CI06-3235, slip op. at 2 (C.P. Lucas July 27, 2007); *City of Dayton v. State*, No. 06-3507, slip op. at 19 (C.P. Montgomery June 6, 2007); *City of Akron v. State*, No. CV 2006-05-2759, slip op. at 6 (C.P. Summit Mar. 30, 2007); *City of Cleveland v. State*, Nos. 590414, 06-CV-590463, slip op. at 10 (C.P. Cuyahoga Feb. 23, 2007); *Lima v. State*, No. CV2006-0518 (C.P. Allen Feb. 6, 2007).

²⁶*State v. City of Akron*, 9th Dist. No. 23660, 2008-Ohio-38, ¶ 34; *City of Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, ¶ 90; *City of Toledo v. State*, 6th Dist. No. L-07-1261, 2008-Ohio-1957, ¶ 23; *City of Cleveland v. State*, 8th Dist. Nos. 89486, 89565, 2008-Ohio-2655, ¶ 52. The holding of *City of Cleveland v. State* relies heavily on the decisions of the Third and Ninth District Courts of Appeal, which were decided several months earlier and are discussed *infra* Part IV.A.2.c. One appellate court did rule in favor of the statewide ban. See *City of Dayton v. State*, 2d Dist. No. 22221, 2008-Ohio-2589.

²⁷9th Dist. No. 23660, 2008-Ohio-38. The city of Cleveland, however, missed the filing deadline for submitting briefs and will not be able to argue in favor of residency requirements. Gabriel Baird, *Cleveland Missed Deadline to Join Fight on City Residency Laws*, PLAIN DEALER (Cleveland), Sept. 24, 2008, available at http://blog.cleveland.com/metro/2008/09/cleveland_missed_deadline_to_j.html.

²⁸530 N.E.2d 1 (Ohio 1988); 533 N.E.2d 270 (Ohio 1988); 535 N.E.2d 657 (Ohio 1989); 539 N.E.2d 103 (Ohio 1989).

III. *ROCKY RIVER V. STATE EMPLOYMENT RELATIONS BOARD* BACKGROUND

The four *Rocky River* cases are a group of important, politically charged decisions that broadly define what is meant by “employee welfare” and further, determine the supremacy of the employee welfare provision over home rule. This Note only argues that *Rocky River IV* merits overturning.

A. *Rocky River I*²⁹

In 1983, the Ohio General Assembly approved the Ohio Public Employees’ Collective Bargaining Act, which established the procedures for the representation of public employees by labor unions.³⁰ Among other things, the Act provided for binding arbitration for the disputes arising between the municipal employee and the municipal employer.³¹ Contrary to this law, the city of Rocky River in Ohio had enacted a city charter, which provided that the city council “shall have the power to fix the salaries of its members and all other officers and employees of the [c]ity.”³² Rocky River contested the constitutionality of the binding arbitration provision of the Collective Bargaining Act, arguing that it is “a violation of its powers of local self-government, usurping its power to set the wages of its safety forces.”³³ The State Employment Relations Board (“SERB”) argued that the Collective Bargaining Act was enacted pursuant to the employee welfare provision of the Constitution, and, “as such, is a general law applicable to municipalities, notwithstanding [home rule].”³⁴ The Court of Common Pleas for Cuyahoga County declared the Collective Bargaining Act constitutional,³⁵ and the Eighth District Court of Appeals affirmed.³⁶

The Supreme Court of Ohio first decided the case in 1988 on a motion to certify the record.³⁷ The court addressed the conflict between Rocky River’s law and the Collective Bargaining Act by conducting a home rule analysis. This analysis

²⁹*City of Rocky River v. State Employment Relations Bd. (Rocky River I)*, 530 N.E.2d 1 (Ohio 1988).

³⁰OHIO REV. CODE ANN. § 4117.14(I) (LexisNexis 2008).

³¹§ 4117.14(C)(1)(a)-(c). The Collective Bargaining Act is quite comprehensive. Among other things, it spells out what kinds of matters are subject to collective bargaining, § 4117.08, the requirements of what needs to be included in a required written agreement, § 4117.09, and defines unfair labor practice, § 4117.11.

³²*Rocky River I*, 530 N.E.2d at 6 (quoting ROCKY RIVER CHARTER art. 3, § 11 (1988)).

³³*Id.* at 3. The city also argued that this provision of the Collective Bargaining Act was an unlawful delegation of authority. *Id.* at 6. Unlawful delegation cases arise where the “delegation of power to make law . . . necessarily involves a discretion as to what it shall be.” *Id.* (citing *Cincinnati, Wilmington & Zanesville R.R. v. Comm’rs of Clinton County*, 1 Ohio St. 77, 88 (1852)). This issue is not discussed in this Note.

³⁴*Rocky River I*, 530 N.E.2d at 3.

³⁵*City of Rocky River v. State Employment Relations Bd.*, No. CV-85-086753 (C.P. Cuyahoga Nov. 12, 1985).

³⁶*City of Rocky River v. State Employment Relations Bd.*, No. CA-87-51299 (Ohio Ct. App.-8th Nov. 20, 1986).

³⁷*Rocky River I*, 530 N.E.2d at 2.

entailed looking into the two home rule provisions in the Constitution: one authorizing municipalities to “exercise all powers of local self-government[.]” among other things,³⁸ and the other permitting the adoption of a charter, under which those powers could also be exercised.³⁹ The court asserted that “powers of local self-government” are not limited if in conflict with a general law, such as the Collective Bargaining Act,⁴⁰ but a local law may otherwise be set aside if it touches a matter of statewide concern.⁴¹ Despite the fact that the Collective Bargaining Law was enacted to address a statewide concern, “promot[ing] labor peace in the public bargaining sector,” the court determined that Rocky River’s collective bargaining process does not concern residents outside of Rocky River and thus, is within the power of local self-government.⁴²

The court rejected SERB’s contention that the employee welfare provision prevents Rocky River’s charter provisions from impairing the Collective Bargaining Act.⁴³ Looking at the prior opinions of the Supreme Court of Ohio, the court determined that the employee welfare provision had generally only applied in cases involving hours and minimum wages.⁴⁴ Further, the employee welfare provision “has apparently never been argued, and certainly never been used, as a basis upon which to declare that the authority of a municipality to bargain with its employees is not an element of its home-rule powers.”⁴⁵

Most importantly, the court distinguished its ruling in *State ex rel. Board of Trustees of Pension Fund v. Board of Trustees of Relief Fund* (“*Pension Fund*”),⁴⁶ which determined that the non-charter city of Martins Ferry was required to transfer the assets of its pension fund to the state pension fund pursuant to state law enacted under the employee welfare provision.⁴⁷ While noting that the centralized, solvent

³⁸*Id.* at 3 (quoting OHIO CONST. art. XVIII, § 3). In full, this provision says, “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.” *Id.*

³⁹*Id.* (citing OHIO CONST. art. XVIII, § 7). In full, this provision says, “Any municipality may frame and adopt or amend a charter for its government and may, subject to the provision of section 3 of this article, exercise thereunder all powers of local self-government.” *Id.*

⁴⁰*Rocky River I*, 530 N.E.2d at 4 (citing *Novak v. Perk*, 413 N.E.2d 784, 786 (Ohio 1980)).

⁴¹*Id.* at 5. “If the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.” *Id.* (quoting *Cleveland Elec. Illuminating Co. v. City of Painesville*, 239 N.E.2d 75, 78 (Ohio 1968)).

⁴²*Id.* (citing *Cleveland Elec. Illuminating Co.*, 239 N.E.2d at 78).

⁴³*Id.* at 9.

⁴⁴*Id.*

⁴⁵*Id.* at 10.

⁴⁶233 N.E.2d 135 (Ohio 1967).

⁴⁷*Rocky River I*, 530 N.E.2d at 10 (citing *State ex rel. Bd. of Trs. of Pension Fund v. Bd. of Trs. of Relief Fund*, 233 N.E.2d 135 (Ohio 1967)).

pension fund system created in *Pension Fund* was clearly within the state's interest, a similar state interest, as had been discussed under home rule analysis, could not be found in *Rocky River I*.⁴⁸ The court reversed the Eighth District Court of Appeals and entered final judgment in favor of Rocky River.⁴⁹

Politically, this decision came down on November 2, 1988, with the justices split 4-3.⁵⁰ The majority consisted of Chief Justice Thomas J. Moyer and Justices Ralph S. Locher, Robert E. Holmes, and Craig Wright.⁵¹ At the time of the decision, judicial elections were six days away, and Justice Locher could not run for re-election due to imposed age limits on candidacy for the Supreme Court of Ohio.⁵² Democrat Alice Robie-Resnick won the election for Justice Locher's seat on November 8,⁵³ thus shifting the politics of the court.⁵⁴ The holding in *Rocky River I* was praised in the media for being "persuasive" and criticized for "reopen[ing] the delicate balance of strike tradeoffs."⁵⁵

B. Rocky River II⁵⁶

SERB requested both reconsideration and rehearing of the issues already raised in *Rocky River I*, as well as clarification as to whether *Rocky River I* declared unconstitutional the enforcement of grievance arbitration awards as provided for by the Collective Bargaining Act.⁵⁷ The same majority of justices as in *Rocky River I* clarified that, since the enforcement of the arbitration awards was not raised nor considered in *Rocky River I*, it was not ruled unconstitutional. The same justices, however, denied the motion for reconsideration of the other issues, since SERB

⁴⁸*Id.* at 11 ("The 'interest' that produced the statewide pension fund held to be constitutional in [*Pension Fund*] simply cannot produce a constitutional basis for replacing a city's authority to set wages and benefits with an unelected, unaccountable arbitrator.").

⁴⁹*Id.* at 12.

⁵⁰*Id.* at 1.

⁵¹*Id.* The Cleveland *Plain Dealer* reported that president of the Ohio AFL-CIO at the time, John R. Hodges, "said the [*Rocky River I*] decision was part of an assault on public workers sought by 'the big business, anti-labor forces' that, Hodges claimed unseated Celebrezze and elected Chief Justice Thomas J. Moyer, a Columbus Republican." Thomas Suddes, *High Court Upholds Most of Labor Law*, PLAIN DEALER (Cleveland), Nov. 3, 1988, at B1.

⁵² *Women Running for Locher Seat on Supreme Court*, PLAIN DEALER (Cleveland), Feb. 19, 1988, at B5. Nobody over 70 is eligible to run. OHIO CONST. art. IV, § 6.

⁵³ 1988 Ohio General Election Results, <http://www.sos.state.oh.us/sos/ElectionsVoter/results1980s.aspx?Section=452> (last visited Feb. 12, 2008).

⁵⁴ James T. O'Reilly, *More Magic with Less Smoke: A Ten Year Retrospective on Ohio's Collective Bargaining Law*, 19 U. DAYTON L. REV. 1, 8 (1993).

⁵⁵*Id.*

⁵⁶ *City of Rocky River v. State Employment Relations Bd. (Rocky River II)*, 533 N.E.2d 270 (Ohio 1988).

⁵⁷*Id.* at 271. According to the court, "That issue was not raised, was not considered, and was not decided in the majority opinion." *Id.*

“raised no germane arguments that were not considered by the court in the disposition [of *Rocky River I*].”⁵⁸

Politically, SERB’s motion for reconsideration and rehearing came six days after Justice Robie-Resnick’s election, but she was not yet on the court.⁵⁹ The same majority as in *Rocky River I* denied SERB’s motion, while the same dissenting justices, Justices A. William Sweeney, Andy Douglas and Herbert R. Brown, would have granted a rehearing of all issues.⁶⁰

C. Rocky River III⁶¹

Twelve days later, SERB moved for reconsideration of *Rocky River II*’s denial of rehearing and reconsideration.⁶² In those twelve days, Justice Ralph Locher, who sided against SERB in *Rocky River I* and *II*, retired from office and new justice, Alice Robie-Resnick, was sworn in.⁶³ Newly constituted, the court granted the motion as to “all issues in this cause” brought up in *Rocky River I* and *II*.⁶⁴ In his concurring opinion, Justice Herbert R. Brown supported the court’s decision to grant a second motion of reconsideration, though the court had denied similar motions in the past.⁶⁵ Addressing Justice Robert E. Holmes’ dissent, which accused SERB of “forum shopping” for waiting to file the motion for reconsideration “to obtain a judgment from this court as newly constituted[,]”⁶⁶ Justice Brown defended his position to allow the rehearing by listing fifteen instances where the members of the

⁵⁸*Id.* at 271-72.

⁵⁹*Id.* at 270.

⁶⁰*Rocky River II*, 533 N.E.2d at 270. Douglas said that eliminating mandatory arbitration without giving police officers the right to strike “is like having Christianity without the threat of hell. There is no day of reckoning!” Suddes, *supra* note 51.

⁶¹*City of Rocky River v. State Employment Relations Bd. (Rocky River III)*, 535 N.E.2d 657 (Ohio 1989). The justices “affectionately” dubbed the case “*Rocky III*.” Andrew Douglas, *Public Sector Employee Bargaining: Contract Negotiations and Case Law*, 55 CLEV. ST. L. REV. 1, 8 (2007).

⁶²*Rocky River III*, 535 N.E.2d at 657 (Brown, J., concurring).

⁶³Mary Beth Lane, *High Court to Rehear Rocky River Labor Case*, PLAIN DEALER (Cleveland), Feb. 11, 1989, at A1.

⁶⁴*Rocky River III*, 535 N.E.2d at 657.

⁶⁵*Id.* at 658 (Brown, J., concurring). This is part of the basis for the appearance of impropriety.

⁶⁶*Id.* at 662 (Holmes, J., dissenting).

1987 court voted to rehear decisions made by the 1986 court.⁶⁷ None of them, however, were motions to reconsider a denied motion to reconsider.⁶⁸

Politically, this motion for reconsideration of a denied motion for reconsideration came just one day after Justice Resnick took office in January 1989.⁶⁹ Upon her arrival (and Justice Locher's departure), the minority in *Rocky River I* and *II* became the majority and granted SERB a full rehearing on all of the issues already disposed of in *Rocky River I*.⁷⁰ Later that year, more fuel was added to the political fire as the 1989 court granted reconsideration of another case decided by the 1988 court.⁷¹

⁶⁷*Id.* at 658-59 (Brown, J., concurring). Of Justice Brown's examples, those with published opinions reversing on the merits include *Anilas, Inc. v. Kern*, 509 N.E.2d 1267 (Ohio 1987), *rev'g* 502 N.E.2d 1025 (Ohio 1986), *Office of Consumer's Counsel v. Public Utilities Commission of Ohio*, 513 N.E.2d 243 (Ohio 1987) and *New Energy Co. of Indiana v. Limbach*, 513 N.E.2d 258 (Ohio 1987), *rev'd*, 486 U.S. 269 (1988).

⁶⁸The dissent in *Rocky River III* distinguishes the cases cited *supra* note 67 on the grounds that none of them were motions to reconsider a denial of a motion for rehearing. *Rocky River III*, 535 N.E.2d at 659-60 (Moyer, C.J., dissenting).

⁶⁹The Supreme Court of Ohio, Former Judges and Justices of the Supreme Court of Ohio, <http://www.sconet.state.oh.us/introduction/alljustices/default.asp> (last visited Feb. 12, 2008); *Rocky River III*, 535 N.E.2d at 657.

⁷⁰*Rocky River III*, 535 N.E.2d at 657. Almost twenty years after the *Rocky River* decisions, Justice Douglas discussed the changes in the court at that time, as well as his motives in *Rocky River III* and *IV*:

Between the time *Kettering* was decided by the Court in 1986—totally upholding the collective bargaining law—and *Rocky River* arrived in 1988, there had been an election. At the 1986 election, Chief Justice Celebrezze was replaced by Chief Justice Moyer. Now (instead of me having 4 votes) Justices Locher, Holmes and Wright had their fourth vote, and after a very heated internal battle, this Court majority held that the conciliation section was unconstitutional. Clearly it was the prelude for the whole act to be found unconstitutional in the next cases to come. Notwithstanding the Court's prior law, this, many of us believed, was the beginning of the end of the Collective Bargaining Law. Then another interesting thing happened. Again it was an election. In 1988, Justice Locher retired, and Justice Resnick was elected to replace him. Through a number of procedural maneuverings, and I plead guilty to being the mover, we kept the *Rocky River* case alive so that 'Rocky River I' was then followed by 'Rocky River II' and then . . . 'Rocky [River] III.' Early in 1989, just after Justice Resnick arrived, we reconsidered or reheard *Rocky River I*, and I wrote what is now known as 'Rocky River IV.' The holding was intentionally made broad because I wanted no mistakes this time.

Douglas, *supra* note 61, at 8-9 (footnotes omitted). At the original arguments for *Rocky River I*, Douglas was described as "the most talkative of the justices." Mary Beth Lane, *Challenges to State Bargaining Law Heard*, PLAIN DEALER (Cleveland), March 9, 1988, at B2. Douglas made comments during the hearing that illustrated his labor views: "Collective-bargaining rights are essential to employees' welfare. It's hard to think of what could be more important." *Id.*

⁷¹*Johnson v. Ohio Bureau of Employment Servs.*, 549 N.E.2d 153 (Ohio 1990), *rev'g* 533 N.E.2d 757 (Ohio 1988). As noted in the dissent,

This case had [already] been determined by the prior majority of this court in the opinion and judgment issued December 30, 1988. The only change in circumstances in this case was the composition of the court. No new public policy considerations

D. Rocky River IV⁷²1. The Decision Not to Defer to *Rocky River I*

Justice Andy Douglas' opinion in *Rocky River IV* opened with a long dissertation on stare decisis,⁷³ determining that, for at least three reasons, the court should not follow precedent in *Rocky River IV*.⁷⁴ First, the court determined that, if stare decisis would be determinative at all, it should be to the extent that *Rocky River I* should have relied on *Pension Fund* and other cases that "long ago settled the home-rule amendment argument pitting Sections 3 and 7, Article XVIII versus [the employee welfare provision of the Ohio Constitution]"⁷⁵ The court concluded, "[i]f the doctrine of [stare decisis] applies [here], it should have been followed in *Rocky [River] I* it cannot apply in *Rocky [River] IV*."⁷⁶ Second, because stare decisis applies only to future cases, the court concluded that it would not consider *Rocky River I* as having any precedential weight on *Rocky River IV* since they are "the same case[.]"⁷⁷ Finally, since *Rocky River IV* involved the interpretation of the Ohio Constitution, "the doctrine of [stare decisis] is less important in the constitutional context than in cases of either pure judge-made law or statutory interpretation."⁷⁸ Therefore, each justice in *Rocky River IV* swore "to support and defend the

were presented for the majority's determination upon this matter. Consequently, there was no need to disturb our prior holding.

Id. at 156 (Holmes, J., dissenting). The similarities between this case and *Rocky River IV* are striking: both cases were originally decided after the 1988 Supreme Court of Ohio election but before the new justice took office, both 1988 cases had same four justices sitting in the majority, neither 1988 case sided with labor, motions for reconsideration were filed after the new justice took office, the new majority granted reconsideration, and subsequently ruled for labor. See *id.*; *Rocky River IV*, 539 N.E.2d 103 (Ohio 1989).

⁷²*Rocky River IV*, 539 N.E.2d at 103.

⁷³"The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

⁷⁴*Rocky River IV*, 539 N.E.2d at 106-11.

⁷⁵*Id.* at 107.

⁷⁶*Id.*

⁷⁷*Id.* In its final remark on stare decisis, the court further indicated that it would not adhere to court precedent "because *Rocky River* involves the interpretation of the Ohio Constitution by the *current* members of this court." *Id.* at 111.

⁷⁸*Rocky River IV*, 539 N.E.2d at 108. The court quoted Justice Brandeis considerably on the issue of stare decisis. He wrote, "[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Id.* at 107 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting)).

Constitution—not as someone else has interpreted it but as the judge deciding the case at bar interprets it.”⁷⁹

After determining it was not bound to follow the precedent established in *Rocky River I* or in previous cases interpreting the same provisions of the Constitution, the court emphasized that legislative enactments, such as the Collective Bargaining Act, are presumed constitutional and that “presumption can only be overcome by proof, beyond a reasonable doubt, that the legislation and the Constitution are clearly incompatible.”⁸⁰

2. The Home Rule Conflict

In addressing Rocky River’s argument that the Collective Bargaining Act violated Rocky River’s home rule authority, the court interpreted the home rule provisions of the Constitution to limit a municipality’s exercise of any home rule powers to those not in conflict with general laws.⁸¹ Though this departed significantly from prior home rule cases that found powers of local self-government were not limited even if in conflict with general laws, the court distinguished those cases from *Rocky River* as not addressing home rule in the context of the employee welfare provision.⁸²

3. The Broad Interpretation of the Employee Welfare Provision

Having already disposed of Rocky River’s case by holding that the Collective Bargaining Act constitutionally usurped its home rule authority, the court went on to interpret the employee welfare provision of the Ohio Constitution. The court held,

[The employee welfare provision] constitutes a broad grant of authority to the legislature to provide for the welfare of all working persons, including

⁷⁹*Id.* at 108. The discussion of stare decisis in *Rocky River IV* came three years before the U.S. Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992), in which the Court expressed a similar approach to precedent on constitutional issues.

⁸⁰*Rocky River IV*, 539 N.E.2d at 111 (citing *State ex rel. Dickman v. Defenbacher*, 128 N.E.2d 59 (Ohio 1955)).

⁸¹*Id.* at 113. As discussed in *Rocky River I*, the Supreme Court of Ohio had previously interpreted the home provision to allow a municipality to wield all powers of local self-government, limiting only “local police, sanitary, and other . . . regulations” to those “not in conflict with general laws.” *City of Rocky River v. State Employment Relations Bd. (Rocky River I)*, 530 N.E.2d 1, 3 (Ohio 1988). In *Rocky River IV*, however, the court examined parts of the 1912 Constitutional Convention proceedings and determined that the *Canada* court was wrong to distinguish the limits on the various types of home rule powers. *Rocky River IV*, 539 N.E.2d at 113. Though the court appeared to abolish the distinction between the limits of local self-government powers and police powers, future cases did not follow suit. See *Am. Fin. Servs. Ass’n v. Cleveland*, 858 N.E.2d 776, 781 (Ohio 2006); *City of Canton v. State*, 766 N.E.2d 963, 970 (Ohio 2002); *Springfield Command Officers Ass’n v. City Comm’rs*, 575 N.E.2d 499, 502-03 (Ohio Ct. App. 1990).

⁸²*Rocky River IV*, 539 N.E.2d at 113 (noting that *State ex rel. Canada v. Phillips*, 151 N.E.2d 722 (Ohio 1958), is not apt precedent because it was “a case involving civil service . . . [and,][i]t does not deal in any way with [the employee welfare provision], which is so central to the case before us today”).

local safety forces The provision expressly states in ‘clear, certain, and unambiguous language’ that *no other provision* of the Constitution may impair the legislature’s power under Section 34. This prohibition, of course, includes the ‘home rule’ provision contained in Section 3, Article XVIII.⁸³

The court said that the Collective Bargaining Act was “indisputably concerned with the ‘general welfare’ of employees [and therefore,] pursuant to [the employee welfare provision] *may not be affected in any way by the ‘home rule’ amendment.*”⁸⁴ Though the city of Rocky River argued that the employee welfare provision should apply only to minimum wage, the court rejected this argument.⁸⁵ Instead, the *Rocky River IV* majority said that the fact that the majority of the constitutional debate was devoted to minimum wage merely meant that it was the “*only* part of the proposed amendment to which any delegates took serious exception.”⁸⁶ The court outlined the hearings of the constitutional convention, pointing to language that suggested that more than minimum wage was contemplated.⁸⁷

After combing through the hearings, the court indicated that “[t]he language of [the employee welfare provision] is so clear and unequivocal that resort to secondary sources, such as the constitutional debates, is actually unnecessary. Where the language of a statute or constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written.”⁸⁸ If the court were to determine that the employee welfare provision only applied to minimum wage, “almost half of the forty-one words . . . must be regarded as mere surplusage”⁸⁹

⁸³*Id.* at 114 (internal citations omitted).

⁸⁴*Id.* The court made the determination without defining what “general welfare” means. *See id.*

⁸⁵*Id.* at 114.

⁸⁶*Id.*

⁸⁷*Id.* at 114-15. For example, the court noted that the employee welfare provision was originally introduced as a proposal “[r]elative to the employment of women, children and persons engaged in hazardous employment.” *Id.* at 114 (quoting 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 106 (1912)). Also, the court included a portion of Judge Dennis Dwyer’s statements, which urged, beyond simply minimum wage, that the delegates to “give your employees . . . good sanitary surroundings during hours of labor, protection as far as possible against danger, a fair working day. Make his life as pleasant for him as you can consistent with his employment.” *Id.* at 115 (quoting 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1332-33 (1912)).

⁸⁸*Rocky River IV*, 539 N.E.2d at 115 (citing *Bernardini v. Bd. of Educ.*, 387 N.E.2d 1222 (Ohio 1979)). The court added, “[I]f the provision is clear and may be read without interpretation, the discussion leading to its adoption is of no value, nor are the various statements by the members of the convention and the resolutions offered during the convention determinative of the meaning of the amendment.” *Id.* at 116 (citing *State ex rel. Harbage v. Ferguson*, 36 N.E.2d 500 (Ohio 1941), *appeal dismissed*, 37 N.E.2d 544 (Ohio 1941)).

⁸⁹*Rocky River IV*, 539 N.E.2d at 116.

Unlike the majority in *Rocky River I*, the *Rocky River IV* majority embraced and followed the *Pension Fund* case.⁹⁰ The court emphasized that *Pension Fund* was particularly applicable because the contested state law “creat[ing] a state-controlled disability and pension fund [system]” was similarly attacked for violating home rule.⁹¹ Further, the pension fund law was “considerably more intrusive on a municipality’s power of home rule than the [Collective Bargaining Act]” since it mandated that cities pledge to transfer pension funds in an amount determined by the state board into the state pension system for the next sixty years.⁹² The less-intrusive Collective Bargaining Act, on the other hand, only required binding arbitration, and therefore should face less scrutiny.⁹³ The court also took note of the city of Rocky River’s criticism of *Pension Fund*, which characterized its “rarely cited” two and one-half page opinion on the employee welfare provision and home rule as an “aberration” and “wholly unnecessary because there was no home rule issue facing the court.”⁹⁴ In response, the court compared its “knowledge of the fine legal minds” that decided *Pension Fund* with the interests of the city of Rocky River in the outcome in the case.⁹⁵ “[I]t is not difficult to determine where objectivity concerning the issues and holding of *Pension Fund* would most likely lie. In any such contest, [Rocky River] loses hands down.”⁹⁶

The court’s decision to hold the Collective Bargaining Act constitutional based on “the General Assembly’s authority to enact employee welfare legislation pursuant to [Section 34, Article II of the Ohio Constitution]” and render “[Section 3, Article XVIII of the Ohio Constitution], the home-rule provision, [unable to] be interposed to impair, limit or negate the Act[,]” vacated *Rocky River I* and *Rocky River II*, as well as another case decided in the midst of the *Rocky River* cases.⁹⁷

⁹⁰*Id.* The court further noted that *Pension Fund* was decided unanimously. *Id.* at 117.

⁹¹*Id.* at 116.

⁹²*Id.* at 116-17.

⁹³*Rocky River IV*, 539 N.E.2d at 116-17. The court delved further into the less intrusive nature of the Collective Bargaining Act:

Under the conciliation statute before us today, the municipality retains considerably more authority. With regard to wages, as well as other questions, the municipality may negotiate an appropriate settlement with safety forces employees. It is only when negotiations break down completely that the conciliator steps in, and even then the options from which the conciliator must choose are controlled to a large extent by the municipality.

Id. at 117. The holding of *Pension Fund* was considered “doubly persuasive” when applied to *Rocky River IV*. *Id.*

⁹⁴*Id.* at 117 (citing the City of Rocky River’s reply brief). The dissent in *Rocky River IV* criticizes the use of *Pension Fund* given the opinion’s “absen[ce of] rules, facts or rationale[,]” it does not go any further in its analysis of the applicability of *Pension Fund*. *Id.* at 132 (Wright, J., dissenting).

⁹⁵*Id.* at 118. The court found it persuasive that the justices of the *Pension Fund* court found unanimously that the employee welfare provision was applicable. *Id.*

⁹⁶*Rocky River IV*, 539 N.E.2d at 118.

⁹⁷*Id.* at 120. *City of Twinsburg v. State Employment Relations Board*, 530 N.E.2d 26 (Ohio 1988), which relied on *Rocky River I* in holding that the mandatory binding arbitration

4. Political Considerations

Politically, the *Rocky River IV* opinion was described as a “disappointing, poorly reasoned opinion . . . that marked the loss of value to the court’s use of precedent.”⁹⁸ In a retrospective of the Collective Bargaining Law, it was noted that, “[i]t may be too harsh to place the court on a pedestal and expect its elected members to ignore election results.”⁹⁹ However, “in [*Rocky River IV*], the core of the supreme court precedent for the future of Ohio was the election returns.”¹⁰⁰ The mayor of Rocky River at the time, Earl Martin, took the Supreme Court of Ohio to task for its reversal and deterioration of home rule. “You’ve got four people on the Supreme Court that are backed by the unions and three that are not We’ve got the best Supreme Court that money can buy.”¹⁰¹

The Collective Bargaining Act at the time of the *Rocky River* decisions was called “one of the most pro-labor public employee bargaining statutes in the nation.”¹⁰² Justice Douglas, who is now the Executive Director of the Ohio Civil Service Employees Association,¹⁰³ accused the *Rocky River I* majority, and the justices in the majority of other public employment cases, of “public-employee bashing.”¹⁰⁴ He added, “What some members of the majority [in *Jones v. Franklin County Sheriff*] have against public employees in general—and police officers and fire fighters in particular—is difficult to understand.”¹⁰⁵

provisions of the Collective Bargaining Act are unconstitutional, was also vacated. *Rocky River IV*, 539 N.E.2d at 120.

⁹⁸O’Reilly, *supra* note 54, at 8.

⁹⁹*Id.*

¹⁰⁰*Id.* at 9.

¹⁰¹*Rocky River Mayor Raps Return to Arbitration*, PLAIN DEALER (Cleveland), May 11, 1989, at A13. “[The Justices] have taken the control of the local budgets away from the councils. . . . Every councilman in the state of Ohio has lost 85% of his authority.” *Id.* (internal quotation marks omitted).

In 1991, local newspapers reported that Justices Robie-Resnick, Douglas, Sweeney and Brown, the same four justices that sided with the unions in overturning *Rocky River I*, voted to reconsider *Episcopal Retirement Homes v. The Ohio Industrial Relations Commission*, 575 N.E.2d 134 (Ohio 1991), weeks after the president of the Ohio AFL-CIO gave \$200,000 in campaign contributions and wrote a letter to the justices expressing his dismay at their original decision. Associated Press, *Justices Deny Letter Influenced Decision*, PLAIN DEALER (Cleveland), Oct. 15, 1991, at 3C. Hodges, the president of the AFL-CIO, said the letter relating to “the *Episcopal* case was one of six he wrote to the court and complained about.” *Id.* Of the six cases, three were reversed. *Id.* Hodges disclaimed the possibility that his union actually possessed that type of clout suggested by the article. *Id.*

¹⁰²Rebecca Hanner White, Robert E. Kaplan & Michael W. Hawkins, *Ohio’s Public Employee Bargaining Law: Can it Withstand Constitutional Challenge?*, 53 U. CIN. L. REV. 1, 1 (1984) (quoting J. LEWIS & S. SPIRN, OHIO COLLECTIVE BARGAINING LAW 3 (1983)).

¹⁰³Douglas, *supra* note 61, at 9.

¹⁰⁴*Jones v. Franklin County Sheriff*, 555 N.E.2d 940, 949 (Ohio 1990) (Douglas, J., dissenting).

¹⁰⁵*Id.* (citations omitted).

IV. THE HOLDING IN *ROCKY RIVER IV* SHOULD BE DISCARDED WHEN CONSIDERING THE STATE'S PROHIBITION OF RESIDENCY REQUIREMENTS

The Supreme Court of Ohio should more narrowly construe, if not overturn, *Rocky River IV*. The *Rocky River IV* decision reads the employee welfare provision too broadly in terms of what can be interpreted as a law passed for the general welfare of all employees. Additionally, to a lesser extent, the Supreme Court of Ohio should reconsider its view on the relationship between the employee welfare and home rule provisions.

A. "Employee Welfare" Warrants a Narrower Interpretation

When the Supreme Court of Ohio construed the employee welfare provision broadly in *Rocky River IV*, it did so without true consideration for the framers of the Ohio Constitution and decades of case law. A closer look at both shows that *Rocky River IV* is far too broad, and given new definition, the state's ban on residency requirements will not enjoy automatic supremacy over municipal residency requirements enacted pursuant to home rule.

1. Intent of the Framers of the Ohio Constitution

The transcript of the proceedings of the 1912 Ohio Constitutional Convention, the state's most recent, is indicative of the controversy surrounding what was then known as Proposal 122, the employee welfare provision.

Despite the words of the proposal indicating that the Ohio General Assembly could pass laws for the welfare of all employees and that it could not be impaired by any other provision of the constitution, the speakers focused their comments solely on minimum wage. After the second reading of Proposal 122, one speaker identified as Mr. Farrell said, "[s]ince this proposal has been on the calendar I have heard some little objection to it, especially with reference to the clause which would permit the legislature to pass minimum wage legislation, and to that clause I intend to direct my remarks exclusively."¹⁰⁶ Another speaker indicated that, "the kernel of this proposal is a minimum wage."¹⁰⁷

The title of Proposal 122 is indicative of the type of employee conditions the framers were trying to reach, "Relative to employment of women, children and persons engaged in hazardous employment."¹⁰⁸ One speaker indicated that women performing sweatshop work "perforce of necessity and of their situation and environment are compelled to labor for wages far below what is necessary to give them a decent living, and in many instances far below what the trades can well afford to pay."¹⁰⁹ Mr. Dwyer, a judge from Montgomery County,¹¹⁰ pleaded:

¹⁰⁶2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1328 (1912) [hereinafter PROCEEDINGS, vol. 2].

¹⁰⁷*Id.* at 1336.

¹⁰⁸*Id.* at 106.

¹⁰⁹*Id.* at 1332.

¹¹⁰*City of Rocky River v. State Employment Relations Bd. (Rocky River IV)*, 539 N.E.2d 103, 115 (Ohio 1989).

[G]ive your employees fair living wages, good sanitary surroundings *during hours of labor*, protection as far as possible against danger, a fair working day. Make his life as pleasant for him as you can *consistent with his employment*. We want no paupers among those willing to work. Their wages should be sufficient for them to live in reasonable comfort, to raise their children on nourishing food to build up their bodies, to procure sufficiently comfortable clothing for them in attending school, and to make provision for times of sickness and old age.¹¹¹

Before and after Mr. Dwyer made this broad, impassioned statement, his comments regarded minimum wage protections solely.¹¹²

Prohibiting residency requirements does not fall under Mr. Dwyer's illustration of the framer's intent. While the framers sought to promote the general welfare of "women, children and persons engaged in hazardous employment" through minimum wage, safety, and hour regulations, it only intended to do so "during hours of labor" and "consistent with his employment."¹¹³ The framers did not intend to regulate twenty-four hours of an employee's day, but rather it intended the employee welfare provision give the legislature a tool to regulate the harsh, sweatshop working conditions apparent at the time. These conditions only existed during the hours of labor. As discussed later in this section, a residency requirement, on the other hand, is merely a condition *for* employment, as opposed to a condition *of* employment, and thus falls outside of the scope of the working day and cannot be considered under the employee welfare provision.

2. Narrowing the Scope of the Employee Welfare Provision

The first two clauses of the employee welfare provision permit the Ohio General Assembly to pass laws "fixing and regulating the hours of labor" and "establishing a minimum wage."¹¹⁴ Because these clauses are not ambiguous,¹¹⁵ nor do they create any confusion as to the subject of a potential law that may be passed under them, this portion of the employee welfare provision requires no further analysis, and the

¹¹¹PROCEEDINGS, vol. 2, *supra* note 106, at 1332-33 (emphasis added).

¹¹²*See* PROCEEDINGS, vol. 2, *supra* note 106, at 1332-33. Only Mr. Dwyer addressed other ways the provision could be used to benefit employees, beyond a minimum wage and hours of employment. Though others sought to root out sweatshop work, they did not directly acknowledge the working conditions the employee welfare provision could have improved. *See id.* at 1332.

¹¹³1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 106 (1912) [hereinafter PROCEEDINGS, vol. 1].

¹¹⁴OHIO CONST. art. II, § 34.

¹¹⁵Justice Wright, the main dissenter in *Rocky River IV*, may disagree. Though he acknowledges that a minimum wage may be enacted, he believes that the authority to enact the minimum wage is the only unambiguous part of the employee welfare provision. *Rocky River IV*, 539 N.E.2d at 125 (Wright, J., dissenting). It is the only part of the provision for which he would not examine the original intent. *Id.* ("I would agree that the language on [minimum wage] is unambiguous, and resort to the debates thereon would shed no further light on the question.").

holding in *Rocky River IV*, as far as it pertains to these two clauses, should not be disturbed.

The court in *Rocky River IV*, however, misinterpreted the third clause of the employee welfare provision, which permits the Ohio General Assembly to pass laws “providing for the comfort, health, safety and general welfare of all employes”¹¹⁶ Three distinct parts of this clause merit further analysis, all of which are varyingly important when it comes to determining whether the state’s prohibition of residency requirements was properly enacted under the employee welfare provision: “general welfare,” “all,” and “employees.”

a. Prohibiting Residency Requirements Is Not for the “General Welfare”

Though the *Rocky River IV* majority determined that the entire employee welfare provision was unambiguous and no examination of the original intent of the provision was warranted, the court failed to acknowledge the ambiguity of the phrase “general welfare,” which is not defined in the Ohio Constitution or by other court cases.¹¹⁷ One of the court’s main reasons for expanding the scope of the employee welfare provision in *Rocky River IV* relies on the rejection of the city of Rocky River’s argument that the provision only applied to legislation setting a minimum wage.¹¹⁸ Regarding the scope of employee welfare, the majority took pains to examine the Proceedings of the Constitution Convention to support its position that the employee welfare provision applied to more than minimum wage, but discarded the Proceedings completely when it came to determining what was meant by “general welfare.”¹¹⁹ The majority was led to the improper conclusion that, “because a minimum wage was not the only issue included in Proposal No. 122 then *any* issue, even remotely connected with employee welfare, should be included.”¹²⁰ The court’s absent analysis on the issue leads one to believe that the majority is advocating the position that because the employee welfare provision is not limited to minimum wage, it is not limited at all.¹²¹

Not limiting the scope of the phrase “general welfare” renders superfluous most of the employee welfare provision.¹²² It negates the need for the words “minimum wage,” “hours of labor,” and “safety.” If the court interprets the employee welfare provision to cover any issues “remotely connected with employee welfare,” Justice

¹¹⁶OHIO CONST. art. II, § 34.

¹¹⁷Only where the language of a constitutional provision is unambiguous should a court look to secondary sources for guidance. *Rocky River IV*, 539 N.E.2d at 115-16 (citing *Bernardini v. Bd. of Educ.*, 387 N.E.2d 1222 (Ohio 1979)).

¹¹⁸*Id.* at 114-15.

¹¹⁹*See id.* at 114-16.

¹²⁰*Id.* at 125 (Wright, J., dissenting).

¹²¹*See id.*

¹²²*See Rocky River IV*, 539 N.E.2d at 126 n.35 (Wright, J., dissenting). Though “[t]he majority is correct in noting that if [the employee welfare provision] applied only to minimum wage legislation the balance of the provision would be ‘mere surplusage[.]’” Justice Wright wonders “whether the majority’s extremely broad interpretation of ‘general welfare’ does not have a similar effect.” *Id.*

Wright argued that the employee welfare provision has lost its meaning.¹²³ In *City of Lima v. State*, the first appellate decision to come down on the constitutionality of the state's prohibition of residency requirements, the court pointed out that if "employee welfare" is considered too broadly, no topic pertaining to employees would ever exceed the scope the provision.¹²⁴

Another appellate court hearing a residency case appropriately narrowed the scope of "general welfare." In January 2008, the Ninth District Court of Appeals in *State v. City of Akron* concluded that despite the fact that, "the term 'general welfare' is so broad and vague that it provides no ascertainable limit on the scope of the General Assembly's authority under [the employee welfare provision]"¹²⁵ and that no Supreme Court of Ohio ruling had previously limited its scope,¹²⁶ it remained proper in this instance to impose limits.¹²⁷ Indicating that the Supreme Court of Ohio had no reason in the past to limit the scope of "general welfare," the *Akron* court distinguished the Collective Bargaining Act at issue in *Rocky River IV*, the retirement program in *Pension Fund*, and the professor workload standards in *American Association of University Professors v. Central State University*¹²⁸ ("AAUP").¹²⁹

First, the court found that *Rocky River IV* was distinguishable from residency cases because unlike the ban on residency requirements, the Collective Bargaining Act was comprehensive in nature and "did not purport to create . . . rights that did not previously exist, but instead defined the scope of existing rights and obligations of public employees and employers."¹³⁰ Second, the court held that the holding in *Pension Fund* was not apt precedent because unlike residency requirements, the law at issue in *Pension Fund* was a "comprehensive scheme that included over 100 separate provisions and encompassed an entire chapter of the Ohio Revised Code."¹³¹ Finally, the Ninth District Court of Appeals pointed to the most recent Supreme Court of Ohio decision regarding the employee welfare provision, *AAUP*, which

¹²³*Id.* at 126.

¹²⁴*City of Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, ¶ 48. The crux of the *Lima* opinion, however, was whether a residency requirement is part of the work environment. *Id.*

¹²⁵*State v. City of Akron*, 9th Dist. No. 23660, 2008-Ohio-38, ¶ 17 (citing *The Legitimate Objectives of Zoning*, 91 HARV. L. REV. 1443, 1445 (1978)).

¹²⁶*Id.* ¶ 20. "Although the [Supreme Court of Ohio] has not explicitly articulated a limitation on the General Assembly's authority under [the employee welfare provision] to enact legislation for the 'general welfare' of employees, it has been unnecessary for it to do so in the prior cases before it." *Id.*

¹²⁷*Id.* ¶ 19.

¹²⁸717 N.E.2d 286 (Ohio 1999).

¹²⁹*Akron*, 2008-Ohio-38, ¶¶ 21-29.

¹³⁰*Id.* ¶ 21. "[The Collective Bargaining Act] includes comprehensive provisions that apply to public collective bargaining units throughout the state, define the scope of collective bargaining rights and obligations, and provides for uniform dispute resolution throughout the state." *Id.*

¹³¹*Id.* ¶ 22.

permitted laws that burden employees,¹³² and said it was distinguishable as well. The *Akron* court noted that the holding in *AAUP* focused on “public interest, not necessarily benefit to the employees,”¹³³ while the ban on residency requirements “does not address any significant social issues impacting the public at large[,] . . . is not part of a comprehensive legislative scheme, [only] deals with a single issue[,] and [only] applies to a relatively small segment of the population”¹³⁴

Though not at issue in *Rocky River IV*, whether a law passed for the “general welfare” of employees under the employee welfare provision must be for the “general welfare” at all should be called into question. Though the Supreme Court of Ohio had declared an employer intentional tort statute unconstitutional because, in part, it was not passed for the benefit of employees,¹³⁵ the court declined to use that same reasoning in *AAUP*. Instead, the court ruled that a state statute which ended college professors’ collective bargaining power regarding faculty workload was properly enacted under the employee welfare provision despite the fact that the law did not benefit employees.¹³⁶ Though the court correctly indicated that the employee welfare provision does not limit the legislature to only passing laws for the benefit of employees, the court improperly reached the conclusion that laws passed to the detriment of employees are protected from the effects of other constitutional provisions. In doing so, the court confused the issue of whether the provision was one of grant or limitation with the issue of whether the provision allowed great protection of legislation that hinders employees.¹³⁷

¹³² *Am. Ass’n of Univ. Professors v. Cent. State Univ. (AAUP)*, 717 N.E.2d 286 (Ohio 1999).

¹³³ *Akron*, 2008-Ohio-38, ¶ 23. For further discussion of *AAUP* and arguments why legislation passed to the detriment of employees should not fall under the employee welfare provision, see *infra* note 137 and accompanying text.

¹³⁴ *Akron*, 2008-Ohio-38, ¶ 24. Further, the residency requirement ban “does not pertain to the protection or regulation of any existing right or obligation of the affected employees. Instead, it is an attempt to circumvent municipal home rule authority and reinstate a ‘right’ that the employees voluntarily surrendered when they accepted government employment.” *Id.* The court indicates that this law only affects “those who are employed by political subdivisions, are subject to residency requirements, and would choose to live elsewhere if allowed to do so[.]” *Id.* An alternative view, however, taken by the Cleveland firefighter’s union, suggests that the reach of residency requirements extends to the families of city employees. Brief of Amicus Curiae OAPFF in Support of Appellees at 10, *City of Cleveland v. State*, Nos. 89486, 89565, 2008-Ohio-2655 (Ohio Ct. App.-8th June 20, 2007). For example, “Employees may want to live near other family members who reside outside Cleveland. Those other family members may be disabled or elderly who need care or attention. Those employees could provide that care or attention, except for the fact that the Cleveland ordinance requires they live in Cleveland.” *Id.* Further, an employee “may be deprived of the opportunity to send his/her child to a school better suited for the needs of that child.” *Id.* at 11.

¹³⁵ *Johnson v. BP Chems.*, 707 N.E.2d 1107 (Ohio 1999).

¹³⁶ *AAUP*, 717 N.E.2d at 292-93.

¹³⁷ *See id.* at 292. The proper result, however, could have been reached much more simply: State legislatures have plenary power and are only limited in the types of laws it may pass by its constitution. DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 4-6 (6th ed. 2006). Since the employee welfare provision does not indicate

The court's determination that those detrimental laws enjoy the same protection was reached without considering why this type of law should enjoy protection of the employee welfare provision's supremacy clause.¹³⁸ The *AAUP* court lists various laws to the detriment of employees, such as those requiring training programs and background checks, and indicated that "there can be no question that they constitute important legislation that the [Ohio] General Assembly has the constitutional authority to enact."¹³⁹ Although some laws, such as those listed in *AAUP*, are important regulations, the plain meaning of the provision and the intent of the Constitution's framers indicate that those "detrimental" laws may be passed. The laws cannot, however, enjoy status under the employee welfare provision and should be subject to a municipality's exercise of authority under home rule, as well as impairment by other constitutional provisions.¹⁴⁰

b. The Ban on Residency Requirements Does Not Pertain to "All" Employees

The *Rocky River IV* opinion erred when it upheld a law only directed at city employees rather than "all" employees. When considering the prevailing wage law's effect on city employees, the *Rocky River IV* court did not consider this issue at all.¹⁴¹ As the employee welfare provision is currently written, a law entered into under it should be for "all" employees¹⁴² and interpreted that way.

In examining the types of laws unambiguously entered into under the employee welfare provision (i.e., minimum wage and hours), it is apparent that it would be inappropriate to have different general welfare laws for different sectors or different groups of people. For example, imagine a minimum wage that is different among the various sectors, or a maternity leave law that distinguished between office workers and factory workers. While each sector may have its various needs and may require different legislation, each law must still apply to "all employees" to enjoy protection under the employee welfare provision's supremacy clause.

that laws to the detriment of employees shall not be passed—but rather says that beneficial laws *may* be passed—the legislature has not been divested of its power. *AAUP* should have ruled that laws benefiting employees enjoy the protection of the supremacy clause while law passed to the detriment of employees do not. However, the Third and Ninth District Courts of Appeals, in striking down the state law forbidding residency requirements, embraced *AAUP* and used the case to argue that the employee welfare provision is more about public interest than employee interest. *City of Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, ¶¶ 52-53; *Akron*, 2008-Ohio-38, ¶ 24.

¹³⁸See *AAUP*, 717 N.E.2d 286, 292 (Ohio 1999).

¹³⁹*Id.*

¹⁴⁰Though arguing that it is permissible for laws entered into under the employee welfare provision to be protection from the powers of other constitutional provisions may seem counterproductive to the arguments of this note, it is used merely to illustrate the inconsistent, overly broad manner in which Ohio courts have interpreted the meaning of "general welfare of employees."

¹⁴¹See *City of Rocky River v. State Employment Relations Bd. (Rocky River IV)*, 539 N.E.2d 103 (Ohio 1989).

¹⁴²See OHIO CONST. art. II, § 34.

The state's prohibition of residency requirements only affects full-time employees of political subdivisions, not all employees of the state of Ohio,¹⁴³ and should not be considered a proper enactment under the employee welfare provision. The Ohio General Assembly acknowledged that this might become an issue when it noted in its final analysis of S.B. 82 that "[w]ithout a court interpretation, it is difficult to say whether this section would apply to the act's prohibition, despite the General Assembly's recognition of it, where the subject of the state law is not *all* employees, but instead only *certain government* employees."¹⁴⁴ Though not acknowledged under Ohio's current case law, this should be fatal to the Ohio General Assembly's hopes of prohibiting residency requirements.

c. Residency Does Not Affect "Employees" in the Scope of Their Employment

Finally, the word "employees" is undefined in the Ohio Constitution and is ambiguous because it may simply refer to an employee acting within the scope of his or her employment, or it may broadly refer to anyone who has the status of an employee. If "employee" refers to someone within the scope of employment, this interpretation would diminish the effects of ambiguity of the term and permit a court to acknowledge that residency requirements are conditions *for* employment (i.e., outside of the scope of the working day), while wages, hours and safety are conditions *of* employment (i.e., pertaining to the employee's work environment).¹⁴⁵

Certain areas of law, such as tort law, draw a distinction between the two potential interpretations of "employee." For example, an employer is liable for torts committed by an employee, but only where that employee was acting within the scope of his or her employment when it was committed.¹⁴⁶ "Consequently," the

¹⁴³OHIO REV. CODE ANN. § 9.481 (LexisNexis 2008).

¹⁴⁴FINAL ANALYSIS, S. 82, 126th Gen. Assembly (Ohio 2006). Also, as argued by the city of Cleveland in its Merit Brief, not only does the fact that the prohibition on residency requirements applies only insofar as Cleveland's residency requirement pertains to full-time employees violate the language of the employee welfare provision, but it also violates the uniformity clause of the Ohio Constitution. Appellants' Merit Brief at 28-33, *City of Cleveland v. State*, Nos. 89486, 89565, 2008-Ohio-2655 (Ohio Ct. App.-8th May 22, 2007). The uniformity clause requires that "[a]ll laws, of a general nature, shall have a uniform operation throughout the state . . ." OHIO CONST. art II, § 26. Arguably, however, any laws entered into under the employee welfare provision, given its supremacy over other parts of the constitution, may not be subject to the uniformity clause. See discussion *infra* Part IV.B.2. If the Ohio General Assembly did not have to adhere to the uniformity clause when considering employee welfare legislation, it could enact legislation targeting certain counties or municipalities while intentionally excluding others.

¹⁴⁵See *City of Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, ¶¶ 28-31. This was the bulk of the city of Lima's argument, which was ultimately successful. *Id.* To further illustrate the distinction, the *Lima* court wrote, "[D]oes the term 'employees' refer to the status of being an employee [twenty four] hours per day, which attaches at hiring and sheds at firing . . . , or does the term have a more limited meaning, which is [intrinsicly] tied to a particular locus; here, the work environment[.]" *Id.* ¶ 28.

¹⁴⁶This is the doctrine of respondeat superior, under which "an employer or principal [is] liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." Black's Law Dictionary (8th ed. 2004). See also *Lima*, 2007-Ohio-6419, ¶ 29 (citing *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991)). The Supreme Court of Ohio recognized this distinction when it indicated that "an employer's intentional tort against his

Lima court noted, “the law recognizes that one may be an ‘employee’ in status, but not by conduct. Since other areas of the law draw this distinction, the scope of the term ‘employees’ in [the employee welfare provision] should be considered.”¹⁴⁷

The phrase “general welfare” is also ambiguous, yet, once properly interpreted, will be instructive in determining which interpretation of “employees” is appropriate. When the meaning of a word or a phrase is unclear,¹⁴⁸ various rules of statutory construction may be used to determine the proper interpretation. The doctrine of *noscitur a sociis*¹⁴⁹ instructs the court to limit the meaning of general words by the more specific words surrounding it.¹⁵⁰ The *Lima* court thoroughly applied this test. By addressing the scope of the clause “comfort, safety, health and general welfare of all employees” in relation to the other clauses, the *Lima* court determined the hours and minimum wage clauses “address working terms and conditions within the working environment context”¹⁵¹ The court distinguished those clauses by noting that “they do not address qualifications for employment nor do they address issues outside of the working environment.”¹⁵² In applying *noscitur a sociis*, the court determined that “general welfare” should, likewise, be interpreted to only address working environment conditions.¹⁵³

Next, the *Lima* court addressed the phrase “general welfare” in relation to the other terms in the clause, “comfort,” “health,” and “safety,” and indicated that “common sense dictates that [these] words . . . relate to working environment

employee is not an act which takes place within the employment relationship.” *Brady v. Safety-Kleem Corp.*, 576 N.E.2d 722, 732-33 (Ohio 1991) (Brown, J., concurring) (citing *Blankenship v. Cincinnati Milacron Chems.*, 433 N.E.3d 572, 576 (Ohio 1982)). Therefore, the employee welfare provision “does not apply to employer intentional torts because they are not part of the employment relationship.” *Id.* at 733.

¹⁴⁷*Lima*, 2007-Ohio-6419, ¶ 29.

¹⁴⁸The *Lima* court determined that the term “employees” was ambiguous after turning to dictionaries. *Id.* One dictionary defined “employee” as “[a] person who works in the service of another person (the employer) under an express or implied contract [for] hire, under which the employer has the right to control the details of work performance.” *Id.* ¶ 30 (citing BLACK’S LAW DICTIONARY 564 (8th ed. 2004)). The other defined an “employee” as “[a] person who works for another in return for financial or other compensation.” *Id.* (citing AMERICAN HERITAGE DICTIONARY 250 (2d College ed. 1985)). Though both dictionaries acknowledge the status of being an employee, the *Lima* court noted that *Black’s* “also emphasizes employer control over work performance, which generally applies when an employee is acting within the scope of his or her employment.” *Lima*, 2007-Ohio-6419, ¶ 30.

¹⁴⁹“It is known from its associates.” UNIF. STATUTE AND RULE CONST. ACT § 20 (1995), available at <http://www.law.upenn.edu/bill/archives/ulc/fnact99/1990s/usca.htm>.

¹⁵⁰*Id.*

¹⁵¹*Lima*, 2007-Ohio-6419, ¶ 34. The Eighth District closely followed the reasoning and holding of *Lima* in deciding Cleveland’s residency appeal. *City of Cleveland v. State*, 8th Dist. Nos. 89486, 89565, 2008-Ohio-2655, ¶¶ 26-29.

¹⁵²*Lima*, 2007-Ohio-6419, ¶ 34.

¹⁵³*Id.*

conditions.”¹⁵⁴ As a result, “the doctrine of *noscitur a sociis* applied to the general welfare clause as a whole and to its components supports Lima’s argument that the clause grants legislative authority for the purpose of passing laws that affect the employees’ working environment [conditions].”¹⁵⁵

If the Supreme Court of Ohio holds that a residency requirement is outside of the scope of the working environment, the court would next have to determine whether a residency requirement violates the employee’s “inalienable and fundamental right of an individual to choose where to live pursuant to Section I of Article I, Ohio Constitution.”¹⁵⁶ However, as the Ninth District Court of Appeals noted in *City of Akron v. State*, “citizens do not have a right to live where they want *and* demand employment with a particular employer,” despite Section I of Article I of the Ohio Constitution.¹⁵⁷

The employee welfare provision, as written, supports reading “general welfare,” “all,” and “employees” as strictly as suggested here, but no Ohio courts have interpreted it to require these characteristics of employee welfare laws. If the Supreme Court of Ohio adopts these suggestions and narrowly construes the employee welfare provision, the ban on residency requirements would not enjoy protection under the supremacy clause and would be impaired by a city law properly enacted pursuant to home rule. If, however, Ohio courts continue to interpret broadly the employee welfare provision, examination of the supremacy clause is warranted.

¹⁵⁴*Id.* ¶ 35. Though this argument lends favorably to, at the very least, a narrowing of the holding of *Rocky River IV*, resting the legal argument on “common sense” is difficult to attack, much less defend.

¹⁵⁵*Id.* ¶ 36 (emphasis added). The *Akron* court applied the rule of construction that the employee welfare provision “should not be interpreted in a manner that would yield an absurd result.” *State v. City of Akron*, 9th Dist. No. 23660, 2008-Ohio-38, ¶ 28 (citing *Mishr v. Poland Bd. of Zoning Appeals*, 667 N.E.2d 365, 366 (Ohio 1996)). The opinion said,

To construe the legislative authority under [the employee welfare provision] to pass laws providing for the “general welfare” of employees to be so broad as to encompass a law that reinstates a right that employees voluntarily surrendered upon accepted employment would yield an absurd result, and could potentially give limitless power to the General Assembly to undermine all home rule authority of municipalities to make decisions about their employees.

Id.

¹⁵⁶*See* *Cleveland v. State*, No. 06-CV-590414, slip op. at 4 (C.P. Cuyahoga Feb. 23, 2007). The constitutional provision indicates that “[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.” OHIO CONST. art. I, § 1.

¹⁵⁷*City of Lima v. State*, 3d Dist. No. 1-07-21, 2007-Ohio-6419, ¶ 75 (citing *Smeltzer v. Smeltzer*, No. 92-C-50, 2007 WL 424828, at *1 (7th Cir. Nov. 24, 1993)). When deciding whether to uphold a residency requirement in the city of Akron, Ohio, the Ohio Ninth District Court of Appeals noted that “Akron city employees surrendered any ‘right’ that they once had to choose where to live when they agreed to become employees of the city of Akron, just as they may have agreed to other limitations on their personal freedoms, such as their freedoms to dress, groom themselves, or behave as they choose.” *Akron*, 2008-Ohio-38, ¶ 27.

B. Limiting the Employee Welfare Provision's Supremacy Clause

The *Rocky River IV* court's ruling that laws enacted under the employee welfare provision could not be impaired by local laws enacted under home rule ignored the spirit of the framers of the Ohio Constitution and prevailing precedent. This ruling merits overturning.

1. The Threat of *Lochner* Era Challenges Has Passed

At the time the framers of the Ohio Constitution met to discuss the scope the employee welfare provision, state laws seeking to protect employees were regularly struck down as unconstitutional under the U.S. Constitution.¹⁵⁸ Pursuant to the employees' constitutional right to contract under the due process clause of the Fourteenth Amendment,¹⁵⁹ the U.S. Supreme Court struck down a state's regulation of the working hours of bakers in *Lochner v. New York*.¹⁶⁰ In *Lochner*, the state of New York argued that it should be able to pass any legislation "which may be said . . . to make people healthy." The Court, however, dismissed this argument, indicating that the law would have only been valid if there were "some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed."¹⁶¹ The ruling in *Lochner* came down in 1905, only seven years before Ohio's Constitutional Convention in 1912.¹⁶² In the so-called "*Lochner* era," various other state workplace regulations were being struck down on constitutional grounds, such as a protection of the right for unions to strike,¹⁶³ restraints on business entry,¹⁶⁴ and minimum wages for women.¹⁶⁵

There is little in the Proceedings of the 1912 Constitution that indicate why the framers decided that no other provision of the Ohio Constitution could impair the employee welfare provision, but there is little doubt that the holding in *Lochner* weighed heavily on their minds.¹⁶⁶ In the only comment in the transcript of the Convention pertaining to the supremacy clause of the employee welfare provision, Mr. Dwyer touched on the *Lochner* case and the right to contract: "[The courts] are changing very much to be in accord with public sentiment . . . and we should put a

¹⁵⁸See *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁵⁹In pertinent part, the Fourteenth Amendment says, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁶⁰198 U.S. 45, 57 (1905) ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.").

¹⁶¹*Id.* at 60, 61.

¹⁶²See *id.* at 45; PROCEEDINGS, vol. 2, *supra* note 106.

¹⁶³*Coppage v. Kansas*, 236 U.S. 1 (1915).

¹⁶⁴*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

¹⁶⁵*Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

¹⁶⁶See *City of Rocky River v. State Employment Relations Bd. (Rocky River IV)*, 539 N.E.2d 103, 125 (Ohio 1989) (Wright, J., dissenting).

clause in the constitution that will give the courts an opportunity to more liberally construe these matters than they have done in the past.”¹⁶⁷ Justice Wright, in his *Rocky IV* dissent notes that “[a] careful review of the [proceedings] reveals that the *only* purpose for the language that the majority now discovers is all powerful and completely subsumes the whole of the Constitution was to protect men, women and children from the powerful proscription against [the] interference with one’s right to contract.”¹⁶⁸

Considering that *Lochner* era cases were striking down state minimum wage, hour, and safety regulations (the only subjects directly discussed in the Proceedings), the reason for the supremacy clause becomes clear. However, the “proscription against [the] interference with one’s right to contract” disappeared in the 1930s, with the end of the *Lochner* era.¹⁶⁹ Since then, the concern over whether the employee welfare provision would be struck down on federal constitutional grounds was over and arguably rendered moot the purpose of its supremacy clause.

Despite the end of the *Lochner* era fifty years earlier, the court in *Rocky River IV* improperly continued to assert the dominance of the employee welfare provision over the home rule provision when it held that municipalities could not enact laws pursuant to home rule that impaired the Collective Bargaining Act.¹⁷⁰ Since the framers only intended the employee welfare provision to regulate minimum wages, hours, and safety, and as such, only intended to protect them from *Lochner*-era challenges, the Supreme Court of Ohio should reconsider its holding in *Rocky River IV* and the relationship between the employee welfare provision and home rule.

2. *Rocky River IV* Improperly Relied on *Pension Fund*

Beyond the scope of the framer’s intent, the *Rocky River IV* majority relied on *State ex rel. Board of Trustees of Police & Fireman’s Pension Fund v. Board of Trustees of Police Relief (Pension Fund)*,¹⁷¹ which held that the employee welfare provision could not be impaired by home rule, to justify the employee welfare provision’s supremacy.¹⁷² The use of Pension Fund as binding precedent was integral to the court’s rationale, but it was controversial since the Pension Fund decision appeared to be a legal “aberration”; it strongly departed from precedent establishing that home rule laws may impair employee welfare laws and was nearly ignored for the twenty-two years between the time it was decided and the court’s opinion in *Rocky River IV*.¹⁷³

¹⁶⁷PROCEEDINGS, vol. 2, *supra* note 106, at 1335.

¹⁶⁸*Rocky River IV*, 539 N.E.2d at 125 (Wright, J., dissenting).

¹⁶⁹*See Nebbia v. New York*, 291 U.S. 502 (1934) (upholding a state statute setting the minimum price for the sale of milk); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women).

¹⁷⁰*Rocky River IV*, 539 N.E.2d at 125 (Wright, J., dissenting).

¹⁷¹233 N.E.2d 135 (Ohio 1967).

¹⁷²*Id.*

¹⁷³Not one Supreme Court of Ohio majority opinion cited *Pension Fund* before the *Rocky River* cases. However, one concurring opinion written by Justice Douglas in *City of Kettering v. State Employment Relations Board*, 496 N.E.2d 983, 990 (Ohio 1986), cited *Pension Fund* favorably between 1967 and 1988.

Between *Pension Fund* in 1967 and *Rocky River IV* in 1989, a string of Supreme Court of Ohio cases involving both home rule and the employee welfare provisions focused on performing home rule analysis and ignored the supremacy clause in the employee welfare provision.¹⁷⁴ Justice Wright's dissent in *Rocky River IV* addressed this pattern, noting that *Rocky River IV* was "the first time a majority of [the] court ever 'discovered' the awesome scope of [the employee welfare provision], save the one solitary pronouncement in [*Pension Fund*]."¹⁷⁵

The court's reliance on *Pension Fund* for broad constitutional analysis is also problematic because of *Pension Fund's* short, yet sweeping, opinion. The opinion "contains no constitutional history, ignores the ramifications of its language, and . . . reaches its conclusion absent rules, facts or rationale."¹⁷⁶ This made the fact that the majority in *Rocky River IV* "indicated without equivocation that [the employee welfare provision] overrides all other provisions of the Ohio Constitution" all the more tenuous.¹⁷⁷ Further, "the majority has reached the incredible result that any legislation passed for the stated purpose of promoting the 'general welfare of all employees' may render any other specific provision of the Constitution null and void."¹⁷⁸

Practically speaking, it is difficult to envision that one small provision of the entire Ohio Constitution is held supreme above all others. Justice Wright, whose dissenting opinion in *Rocky River IV* is highly instructive on this issue, expressed his disbelief that "the delegates to the 1912 Constitutional Convention intended to, in effect, discard all other provisions of the Ohio Constitution, giving the General Assembly carte blanche to legislate changes in our Constitution without the bothersome process of submitting these matters to a vote of the people."¹⁷⁹ Justice Wright combed the Ohio Constitution for various provisions potentially subject to the employee welfare provision and illustrates their importance: freedom and protection of property,¹⁸⁰ abolishment of government,¹⁸¹ trial by jury,¹⁸² free speech

¹⁷⁴See *Rocky River IV*, 539 N.E.2d at 113 (citing *Cleveland ex rel. Neelon v. Locher*, 266 N.E.2d 831 (Ohio 1971) (involving the maximum hours for firefighters controlled by city charter); *State ex rel. Evans v. Moore*, 431 N.E.2d 311 (Ohio 1982) (involving a state prevailing wage law); *State Pers. Bd. of Review v. Bay Village Civil Serv. Comm'n*, 503 N.E.2d 518, 519 (Ohio 1986) (involving the "investigative and removal authority" over city civil service commissioners)).

¹⁷⁵*Rocky River IV*, 539 N.E.2d at 122 (Wright, J. dissenting). Wright concurred with the majority in *Rocky River I*, which held that the Collective Bargaining Act was "unconstitutional to the extent that it violates a municipality's right to exercise its powers of local self-government . . ." *City of Rocky River v. State Employment Relations Bd. (Rocky River I)*, 530 N.E.2d 1, 5 (Ohio 1988).

¹⁷⁶*Rocky River IV*, 539 N.E.2d at 132 (Wright, J. dissenting).

¹⁷⁷*Id.* at 122 (Wright, J., dissenting).

¹⁷⁸*Id.* at 125 (Wright, J., dissenting).

¹⁷⁹*Id.* at 122 (Wright, J., dissenting).

¹⁸⁰OHIO CONST. art. I, § 1. "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." *Id.*

and free press,¹⁸³ redress in the courts,¹⁸⁴ and reserving power to the people.¹⁸⁵ Justice Wright continued,

Some might suggest that the basic rights noted above are mere surplusage as the protections guaranteed by the United States Constitution remain intact. But, imagine our citizenry's surprise when it discovers that the legislative three-reading requirement and the rights of a public initiative and referendum are potentially inoperative. Consider the Governor's chagrin when he finds that his power of veto and the one-issue mandate for a special legislative session have been brought into question. Likewise, interested citizens may be dismayed to find that open sessions of the General Assembly as mandated by Section 13, Article II of the Ohio Constitution no longer apply when 'employee welfare' legislation is under consideration.¹⁸⁶

To interpret the supremacy clause strictly is to undermine every single provision of the Ohio Constitution when employee welfare is at hand. If the Supreme Court of Ohio adopts this interpretation when ruling on residency requirements, it will strip municipalities of their home rule powers to regulate their own communities. Instead, the court should strongly consider the framer's intent and the draconian effects of the supremacy clause and overturn *Rocky River IV*.

V. CONCLUSION

When the Supreme Court of Ohio hears the challenge to the state law prohibiting residency requirements, the court should take the opportunity to re-examine the non-textual and results-oriented reading afforded to the employee welfare provision of the Ohio Constitution and overturn *Rocky River IV*. In its place, the court should adopt a reading of the employee welfare provision that would grant great deference to minimum wage and safety legislation and scrutinize legislation for the "general welfare" of 'all' 'employees,'" ensuring that the law is for the benefit of every employee in the scope of his or her employment.

¹⁸¹OHIO CONST. art. I, § 2. In part, "Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary . . ." *Id.*

¹⁸²OHIO CONST. art. I, § 5. "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." *Id.*

¹⁸³OHIO CONST. art. I, § 11. In part, "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." *Id.*

¹⁸⁴OHIO CONST. art. I, § 16. In part, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *Id.*

¹⁸⁵OHIO CONST. art. I, § 20. "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people." *Id.*

¹⁸⁶*Rocky River IV*, 539 N.E.2d at 123-24 (Wright, J. dissenting).

This approach would force the court to remove the veil of the employee welfare provision and its accompanying supremacy clause from the state's prohibition of residency requirements. A law that attempts to regulate conditions outside of the scope of the working day, pinpoints legislation only for employees of political subdivisions, and circumvents the municipality's constitutional powers of home rule should not be permitted to point to the all-powerful employee welfare provision for protection from home rule. Without this approach, the Ohio General Assembly has a powder keg of constitutional authority to enact laws only marginally related to employee welfare that trump every other protection guaranteed by the Ohio Constitution.