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Ohio Municipal Home Rule Reexamined — The Impact of Garcia v. San Antonio Metropolitan Transit Authority

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OHIO MUNICIPAL HOME RULE RE-EXAMINED—THE IMPACT OF *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

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I. INTRODUCTION

The "home rule amendments," granting Ohio municipalities "all powers of local self-government,"[1] were adopted as article XVIII to the Ohio Constitution in 1912.[2] The issue which often arises in litigation is whether a state law which affects municipal self-government may be superseded and avoided by the municipality under its home rule powers.[3] Ohio courts often approach this issue by applying one of four broad limitations on municipal action contained in article XVIII.[4] The courts, however, have also occasionally determined that the state's intrusion into matters of municipal self-government is so unjustified that local variations are permitted.[5] The limitation which article XVIII imposes on state action is similar to the limitation which the tenth amendment to the United States Constitution[6] imposes on federal action.[7] Both constitutional provisions envision areas of local government autonomy which should be free from unjustified state or federal intrusion.

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1. OHIO CONST. art. XVIII, § 3.

2. OHIO CONST. art. XVIII. *See generally* G. VAUBEL, MUNICIPAL HOME RULE IN OHIO (1st ed. 1978) (an extensive discussion of the history of Ohio's home rule jurisprudence).

"The purpose of the Home Rule . . . was to put the conduct of municipal affairs in the hands of those who knew the needs of the community best, to-wit, the people of the city." Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma, 61 Ohio St. 2d 375, 379 n.1, 402 N.E.2d 519, 522 n.1 (1980). *See generally* O. REYNOLDS, JR., LOCAL GOVERNMENT LAW §§ 35–44 (1982) (an extensive discussion of municipal home rule).

3. *See* O. REYNOLDS, JR., *supra* note 2, at §§ 38–42.

4. OHIO CONST. art. XVIII. *See infra* notes 10–53 and accompanying text.

5. *See, e.g., City of Parma*, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980) (the amount of compensation a city pays to an employee on military leave of absence is a matter of substantive self-government). *See also infra* notes 53–71 and accompanying text.

6. U.S. CONST. amend. X. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

7. *See* Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005, 1017 (1985). In referring to the tenth amendment, the Supreme Court noted, "The States unquestionably do 'retai[n] a significant measure of sovereign authority.' " *Id.* (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983)).

The courts have, however, failed to find objective criteria for determining when the intrusion of the state or federal governments is justified.

Although the framework of home rule analysis is clear, the ad hoc application of the principles is completely unpredictable. In *Garcia v. San Antonio Metropolitan Transit Authority*,[8] the United States Supreme Court re-examined the role of the judiciary as protector of state autonomy. In so doing, the Supreme Court decided that the judiciary should grant greater deference to the legislative determinations of the United States Congress.[9] The Ohio Supreme Court should similarly re-examine its role as protector of municipal home rule and, consequently, municipal autonomy.

II. OHIO CONSTITUTIONAL HOME RULE PROVISIONS AND LIMITATIONS ON MUNICIPAL ACTION

Municipal home rule in Ohio rests upon article XVIII of the Ohio Constitution.[10] Three sections of article XVIII are key to understanding the concept of municipal home rule. Section 2, which provides for general and additional laws governing municipalities, states:

> General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall be operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.[11]

Section 3, which explains the powers that municipalities can exercise, provides:

> 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.[12]

Section 7 provides specifically for municipal home rule:

> 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.[13]

These quoted provisions of the Ohio Constitution establish four

8. 105 S. Ct. 1005 (1985).
9. *Id.* at 1020.
10. OHIO CONST. art. XVIII.
11. OHIO CONST. art. XVIII, § 2.
12. OHIO CONST. art. XVIII, § 3.
13. OHIO CONST. art. XVIII, § 7.

broad limitations on the exercise of municipal home rule powers.[14] First, pursuant to section 7, a municipality may adopt a charter for the purpose of exercising its powers of local self-government.[15] If a municipality has adopted a charter, the exercise of local self-government must not exceed the limits set forth by the charter.[16] For example, if the charter states that the municipal civil service rules must conform to the general laws of the state, then the municipality may not vary from the state civil service laws.[17]

Second, a similar limitation is placed upon non-charter municipalities. Section 2 of article XVIII requires the state to "provide for the incorporation and government of cities and villages."[18] In *Northern Ohio Patrolmen's Benevolent Association v. City of Parma*,[19] this provision was interpreted to mean that state control of chartered and non-chartered municipalities be limited to matters of governmental organization and procedure.[20] Thus, procedures for the operation of municipal government are set by the state. Variations, however, may be authorized by the municipal charter.[21] Municipalities which have not adopted a charter must, when enacting legislation, " 'follow the *procedure* prescribed by statutes enacted pursuant to the mandate of Section 2, Article XVIII of the Constitution.' "[22] This limitation on non-charter municipalities applies only to procedural rather than substantive matters of local self-government.[23]

A clear formula for determining which state laws governing municipalities are procedural and which are substantive has never been developed by Ohio courts. In *City of Parma*, however, the Ohio Supreme Court stated that *State ex rel. Petit v. Wagner*[24] and *Leavers v. City of Canton*[25] represented "aberrations" in the application of the principle that municipalities without charters are bound by procedures set by the state, but may vary from state law on substantive matters to the same degree that charter municipalities are permitted.[26] The ma-

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14. For an in-depth case analysis of these limitations, see *infra* notes 15–53 and accompanying text.

15. *See* OHIO CONST. art. XVIII, § 7. *See also* text accompanying note 13.

16. *See* State *ex rel.* Krieger v. City of Broadview Heights, 11 Ohio St. 3d 139, 464 N.E.2d 152 (1984).

17. *See id.* at 140, 464 N.E.2d at 153.

18. OHIO CONST. art. XVIII, § 2. *See supra* text accompanying note 11.

19. 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980).

20. *Id.* at 381, 402 N.E.2d at 524.

21. *Id.* at 382, 402 N.E.2d at 524.

22. *Id.* (quoting Morris v. Roseman, 162 Ohio St. 447, 447, 123 N.E.2d 419, 420 (1954)).

23. *City of Parma*, 61 Ohio St. 2d at 381–83, 402 N.E.2d at 424–25.

24. 170 Ohio St. 297, 164 N.E.2d 574 (1960).

25. 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964).

26. *City of Parma*, 61 Ohio St. 2d at 382, 402 N.E.2d at 524.

jority in *City of Parma* apparently felt that the manner in which a municipality selects a chief of police,[27] and the age at which a police officer must retire,[28] are matters of substantive rather than procedural self-government; accordingly, non-charter municipalities may vary from state law in these matters.[29] The line between matters of "substance" and matters of "procedure" is not clearly defined in the context of self-government. As Justice Frankfurter observed in *Guaranty Trust Co. v. York*,[30] the terms "substance" and "procedure" are used to analyze a wide variety of different legal problems.[31] As the Justice noted, "Each implies different variables depending upon the particular problem for which it is used."[32] Under Ohio jurisprudence, it is still unclear what variables are important in differentiating between issues of substantive municipal self-government and procedural municipal self-government.

A third limitation on municipal home rule powers is apparent from the first clause of section 3 of article XVIII, which has been interpreted to apply to both charter and non-charter municipalities.[33] The first clause of section 3 provides: "Municipalities shall have authority to exercise all powers of local self-government."[34] The limitation implied in this clause is that, in exercising this grant of power, the municipality may not exceed the scope of local self-government. The scope of local self-government was established in *Village of Beachwood v. Board of Elections*,[35] which focused on whether the *results* of local action produce extraterritorial effects.[36] The Ohio Supreme Court stated that "[i]f the result affects only the municipality itself, with no extra-territorial 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

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27. *See, e.g., Wagner*, 170 Ohio St. 297, 164 N.E.2d 574 (1960). "[A] noncharter municipality is without authority under the provisions of Section 3, Article XVIII of the Constitution, to prescribe less restrictive qualifications for civil-service-examination applicants than are prescribed by statute, since such municipal action would be at variance with the general law." *Id.* at 303–04, 164 N.E.2d at 578.

28. *See, e.g., Leavers*, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964). "An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at variance with a state statute." *Id.* at 37, 203 N.E.2d at 356–57 (citing *Wagner*, 170 Ohio St. 297, 164 N.E.2d 574 (1960)).

29. *City of Parma*, 61 Ohio St. 2d at 382, 402 N.E.2d at 524.

30. 326 U.S. 99 (1945).

31. *Id.* at 108.

32. *Id.*

33. *City of Parma*, 61 Ohio St. 2d at 382, 402 N.E.2d at 524.

34. OHIO CONST. art. XVIII, § 3.

35. 167 Ohio St. 369, 148 N.E.2d 921 (1958).

36. *Id.* at 372, 148 N.E.2d at 923.

General Assembly."[37]

If this test were strictly applied, courts could easily find that nearly all action taken by a municipality has some "extraterritorial effects." For example, in *Wickard v. Filburn*,[38] the United States Supreme Court determined that even a farmer who grows wheat for home consumption produces an effect on interstate commerce.[39] If interstate commerce is affected by Filburn's consumption of wheat produced by his own farm, then it is not difficult to imagine the extraterritorial effects caused by most municipal actions.

The Ohio Supreme Court has not strictly applied the *Village of Beachwood* test for determining the scope of matters of local self-government. Instead, the court has melded the "extraterritorial effects" test into a balancing test which compares the relative merits of state and local concerns.[40] This is evident from the supreme court's holding in *Cleveland Electric Illuminating Co. v. City of Painesville*,[41] wherein the court quoted the *Village of Beachwood* test, but then stated:

> Thus, even if there is a matter of local concern involved, if the regulation of the subject matter *affects the general public of the state as a whole more than it does the local inhabitants* the matter passes from what was a matter for local government to a matter of general state interest.[42]

A fourth limitation which article XVIII places upon municipal action is found in the second clause of section 3 which provides: "Municipalities shall have authority to . . . adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."[43] A long line of cases holds that this provision makes state law supreme in all matters arising under the police power of the state. For example, in *State ex rel. Evans v. Moore*,[44] the Ohio Supreme Court held that a city cannot avoid state directives set forth in the prevailing wage law.[45] The supreme court construed section 3 of article XVIII to grant supremacy to the state in the exercise of its police power,[46] stating:

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37. *Id.*

38. 317 U.S. 111 (1942).

39. *Id.* at 127–28. *See also* Katzenbach v. McClung, 379 U.S. 294 (1964) (interstate commerce was substantially affected by Ollie's Barbecue).

40. *See* Cleveland Elec. Illuminating Co. v. City of Painesville, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

41. *Id.*

42. *Id.* at 129, 239 N.E.2d at 78 (emphasis added).

43. OHIO CONST. art. XVIII, § 3.

44. 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982).

45. *Id.* at 92, 431 N.E.2d at 314.

46. *Id.* at 90, 431 N.E.2d at 313.

> The city may exercise the police power within its borders, but the general laws of the state are supreme in the exercise of the police power, regardless of whether the matter is one which might also properly be a subject of municipal legislation. Where there is a direct conflict, the state regulation prevails.[47]

The Ohio Supreme Court has also applied this supremacy limitation to require a city to follow state directives regarding fluoridation of water,[48] termination of public utilities,[49] licensing of watercraft,[50] and installation of sewage disposal systems.[51] In each instance, the supreme court determined that the relevant state law was a valid exercise of the state's police power in furtherance of the health, safety, morals, and welfare of the people of the state.[52] Under this rule, municipal home rule powers are always subordinate to the state's general exercise of its police power.

In summary, sections 2, 3, and 7 of article XVIII impose four limitations upon municipal exercise of home rule powers. First, the municipality must not violate its municipal charter. Second, if there is not a charter, the municipality must not violate state-prescribed "procedures" for municipal government. Third, the municipality must not exceed the scope of self-government. Finally, the municipality must not violate a state law which is based upon a valid exercise of state police powers.

III. THE ARTICLE XVIII LIMITATION ON STATE POWER—THE *City of Parma* RULE

Besides limiting the exercise of power by municipalities, article XVIII also imposes a limitation upon state action. This limitation is best described in Justice Locher's majority opinion in *Northern Ohio*

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47. *Id.* (quoting City of Canton v. Whitman, 44 Ohio St. 2d 62, 66, 337 N.E.2d 766, 770 (1975), *appeal dismissed*, 425 U.S. 956 (1976)).

48. City of Canton v. Whitman, 44 Ohio St. 2d 62, 71, 337 N.E.2d 766, 770 (1975) (a city cannot avoid state directives regarding fluoridation of the city's water supply), *appeal dismissed*, 425 U.S. 956 (1976).

49. State *ex rel.* Klapp v. Dayton Power & Light Co., 10 Ohio St. 2d 14, 17, 225 N.E.2d 230, 233 (1967) (a city cannot avoid state directives regarding termination of public utilities).

50. State *ex rel.* McElroy v. City of Akron, 173 Ohio St. 189, 194, 181 N.E.2d 26, 30 (1962) (a city cannot avoid state directives prohibiting local licensing of watercraft on waters owned by the city).

51. City of Bucyrus v. Department of Health, 120 Ohio St. 426, 430, 166 N.E. 370, 371 (1929) (municipality's sewage disposal system must be approved by the state health agency).

52. *See Moore*, 69 Ohio St. 2d at 92, 431 N.E.2d at 314; *City of Canton*, 44 Ohio St. 2d at 71, 337 N.E.2d at 772; *Dayton Power & Light Co.*, 10 Ohio St. 2d at 17, 225 N.E.2d at 233; *City of Akron*, 173 Ohio St. at 193, 181 N.E.2d at 29; *City of Bucyrus*, 120 Ohio St. at 430, 166 N.E. at 370.

Patrolmen's Benevolent Association v. City of Parma,[53] and in his dissenting opinion in *State ex rel. Evans v. Moore*.[54] *City of Parma* involved a conflict between a state law that required employers to pay employees their full salary during short military leaves of absence, and a city ordinance that allowed employees to be paid less than their full salary during such military leaves of absence.[55] Justice Locher, in his majority opinion, held that the ability to determine the salary of city employees is a fundamental power of local self-government.[56] The rule espoused in *City of Parma* was that a state law can be superseded by local law whenever the state law is too intrusive into matters of fundamental local self-government.[57] Justice Locher observed: "The state has many other viable alternatives to induce enlistment and maintenance of the armed reserves rather than further saddling the municipalities with an additional expense. The state's concern in this matter is not sufficient to interfere with the municipalities' fiscal decision as to wages paid to its employees."[58] Thus, in *City of Parma*, the supreme court recognized a legitimate state interest in providing for a strong military reserve, but held that the municipality could avoid the law because there were other methods available to the state in achieving its goal, which presumably would intrude less into matters of fundamental local self-government.[59]

Similarly, Justice Locher argued in his dissent in *Moore* that the interest of the state in enacting the prevailing wage law did not justify an interference with a central power of local self-government—that is, the power of the purse.[60] He argued that even the police power of the state could not legitimize an unwarranted intrusion into fundamental matters of municipal autonomy, such as fiscal policy.[61]

The approach of the court in *City of Parma* finds support in earlier decisions of the Ohio Supreme Court. In *State ex rel. Lynch v. City of Cleveland*,[62] the supreme court held that municipalities should have paramount power in matters of fundamental local self-govern-

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53. 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980).

54. 69 Ohio St. 2d 88, 95, 431 N.E.2d 311, 316 (1982) (Locher, J., dissenting).

55. *City of Parma*, 61 Ohio St. 2d at 375–76, 402 N.E.2d at 520.

56. *Id.* at 383, 402 N.E.2d at 525 (citing State *ex rel.* Mullin v. Mansfield, 26 Ohio St. 2d 129, 269 N.E.2d 602 (1971)).

57. *Id.* A state law, under the *City of Parma* rule, is considered too intrusive if it cannot withstand a heightened standard of judicial scrutiny. *See infra* note 87.

58. *City of Parma*, 61 Ohio St. 2d at 383, 402 N.E.2d at 525.

59. *See id.*

60. *Moore*, 69 Ohio St. 2d at 96, 431 N.E.2d at 316 (Locher, J., dissenting).

61. *Id.*

62. 164 Ohio St. 437, 132 N.E.2d 118 (1956).

ment, such as the selection of a police chief.[63] The court stated that "[i]t would seem that if a municipality is to possess such powers [of local self-government], one of them should be the authority to determine the method of selection that probably would be most effective and desirable in meeting the needs of that particular community."[64] The *City of Cleveland* decision avoided a line of cases which had consistently held that all matters pertaining to the police and fire protection of a municipality were of statewide concern and subject to regulation by the Ohio General Assembly.[65] In so reasoning, the *City of Cleveland* court shifted the focus from the general interest of the state to the overriding interest of the municipality.

The *City of Cleveland* decision was developed further in *State ex rel. Canada v. Phillips*,[66] which held that a municipality may vary from state law in selecting and promoting police officers as well as the police chief.[67] In *Phillips* the Ohio Supreme Court recognized that the state had a legitimate interest in the "enforcement of laws by police in every part of the state";[68] however, "the mere interest or concern of the state, which may justify the state in providing similar police protection, will not justify the state's interference with such exercise by a municipality of its powers of local self-government."[69] This is essentially a balancing test: The degree of state interest must justify the degree of state interference in the exercise of local self-government.

The balancing test used in *Phillips* was further developed by Justice Locher in *City of Parma*.[70] The resulting rule is that state law may be avoided under the article XVIII home rule powers when the state law infringes upon a matter of fundamental local self-government to an extent that is not justified by the degree of statewide concern.[71]

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63. *Id.* at 440, 132 N.E.2d at 121.

64. *Id.*

65. *See, e.g.*, State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); State *ex rel.* Daly v. City of Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943); State *ex rel.* Giovanello v. Village of Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942); State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941).

66. 168 Ohio St. 191, 151 N.E.2d 722 (1958).

67. *Id.* at 200, 151 N.E.2d at 729.

68. *Id.*

69. *Id.*

70. 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980).

71. *See supra* notes 53–59 and accompanying text. Justice Locher has played a central role in the development of this rule of Ohio constitutional law. Not only did Justice Locher write the court's decision in *City of Parma*, and the strong dissent in *Moore* but, as the Director of Law for the city of Cleveland, he also convinced the Ohio Supreme Court in *City of Cleveland* that fundamental matters of local self-government should be protected from unnecessary state intrusion. *See City of Cleveland*, 164 Ohio St. at 437, 132 N.E.2d at 118.

IV. THE RULE IN *City of Parma* COMPARED WITH *National League of Cities v. Usery*

The approach espoused by Justice Locher in *Northern Ohio Patrolmen's Benevolent Association v. City of Parma*[72] is very similar to the approach formerly adopted by the United States Supreme Court in *National League of Cities v. Usery*.[73] In that case, the Court held that the tenth amendment to the United States Constitution[74] imposed an affirmative limit upon the power of Congress under the commerce clause.[75] The Supreme Court has observed that *National League of Cities* established a four-step test for determining whether an act of Congress violates the tenth amendment rights of state governments.[76] First, the claimant must establish that the "challenged statute regulates the 'States as States.' "[77] Second, "the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' "[78] Third, "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' "[79] Finally, the relationship between state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission."[80]

The *City of Parma* test articulated by the Ohio Supreme Court for determining whether a state law violates article XVIII home rule powers incorporates all but the first element of the *National League of Cities* test. Pursuant to the *City of Parma* test, the state statute must first impinge upon fundamental powers of local self-government.[81] Second, municipal compliance with the state law must be shown to interfere with the exercise of a central power of municipal self-govern-

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72. 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980).

73. 426 U.S. 833 (1976), *rev'd*, Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985). *National League of Cities* involved a challenge by various states and municipalities against congressional action which extended the minimum wage and maximum hours provisions of the Fair Labor Standards Act to public employees employed by the various states and municipalities. *Id.* at 836–37. The United States Supreme Court held that the extension of the Fair Labor Standards Act in this manner was an unconstitutional exercise by Congress of its commerce clause powers. *Id.* at 852. *See infra* notes 74–75 and accompanying text. *See also infra* note 87.

74. U.S. CONST. amend X. The language of the tenth amendment is reproduced in the footnotes. *See supra* note 6.

75. *National League of Cities*, 426 U.S. at 842–43 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

76. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 287–88 (1981) (quoting *National League of Cities*, 426 U.S. at 845, 854). *See also Garcia*, 105 S. Ct. at 1011.

77. *Hodel*, 452 U.S. at 287 (quoting *National League of Cities*, 426 U.S. at 854).

78. *Id.* at 287–88 (quoting *National League of Cities*, 426 U.S. at 845).

79. *Id.* at 288 (quoting *National League of Cities*, 426 U.S. at 852).

80. *Garcia*, 105 S. Ct. at 1011 (quoting *Hodel*, 452 U.S. at 288 n. 29).

81. *City of Parma*, 61 Ohio St. at 383, 402 N.E.2d at 525.

ment,[82] such as the promotion of municipal employees[83] or the determination of their salaries.[84] Finally, the extent of the state's concern must not "*justify* the state's interference with such exercise by a municipality of its powers of local self-government,"[85] or be "*sufficient* to interfere with the [municipality's] fiscal decision as to wages paid to its employees."[86]

Thus, a comparison of the *City of Parma* test and the now-repudiated *National League of Cities* test indicates that both focus upon the same issues in an attempt to determine which laws of the state or federal governments, respectively, are destructive of the fundamental powers of local governments. Furthermore, both tests require courts to scrutinize government action under a heightened standard of scrutiny in order to determine whether such action is a justified intrusion into matters of local autonomy.[87]

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82. *Id.*

83. *See* State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 199–200, 151 N.E.2d 722, 728–29 (1958).

84. *See City of Parma*, 61 Ohio St. 2d at 383, 402 N.E.2d at 525.

85. *Phillips*, 168 Ohio St. at 200, 151 N.E.2d at 729 (emphasis added). *See supra* note 69 and accompanying text.

86. *City of Parma*, 61 Ohio St. 2d at 383, 402 N.E.2d at 525 (emphasis added). *See supra* note 58 and accompanying text.

87. While not specifically stated in *City of Parma* and *National League of Cities*, it is apparent that both courts used a form of heightened scrutiny in determining that the government action was unjustified. In *National League of Cities*, the United States Supreme Court indicated that, in some instances, federal intervention into areas of state autonomy would be found constitutional. *See National League of Cities*, 426 U.S. at 852–53. Specifically, while holding the application of the Fair Labor Standards Act to public employees unconstitutional, the majority was able to reconcile *National League of Cities* with the Court's earlier decision in Fry v. United States, 421 U.S. 542 (1975). *See National League of Cities*, 426 U.S. at 852–53. In *Fry*, the Supreme Court was faced with the question of whether the Economic Stabilization Act of 1970, which authorized the President to "freeze" wages and salaries at certain levels, was constitutional as applied to state employees. *Fry*, 421 U.S. at 543–45. The Court, in upholding this action of Congress under the commerce clause, held that "the State must yield to the federal mandate" in this instance. *Id.* at 548. While there was no question that the Act was an infringement on the states' sovereignty, the infringement was constitutional because of the emergency situation that was threatening the national economy. *Id.* Moreover, as noted in *National League of Cities*, the wage and price freeze—the means by which Congress attacked the national economic problem—was "carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." *National League of Cities*, 426 U.S. at 853. The Supreme Court, in upholding this congressional "invasion" into an area of state sovereignty—state employee salaries—indicated that such an "invasion" would be constitutional, if it was premised upon an important governmental interest and that the means chosen were such that the autonomy of a state was impeded upon to the least extent possible. *See Hodel*, 452 U.S. at 288 n.29 ("There are situations in which the nature of the federal interest advanced may be such that it justifies state submission.").

The Supreme Court apparently reaffirmed this approach when it reconciled the *Fry* decision with its holding in *National League of Cities*. If the Secretary of Labor had been able to advance an important governmental interest to support the congressional application of the Fair Labor Standards Act to state employment decisions and if the Act was the least restrictive means for effectuating the governmental interest, it is likely that the Supreme Court in *National League of*

V. *Garcia v. San Antonio Metropolitan Transit Authority*: THE NEED FOR DEFERENCE TO THE POLITICAL PROCESS

The problem with the Ohio Supreme Court's approach in *Northern Ohio Patrolman's Benevolent Association v. City of Parma*,[88] and the United States Supreme Court's approach in *National League of Cities v. Usery*, [89] is that both decisions require courts to scrutinize the political decisions of the legislative branch in order to determine whether the legislators correctly decided that the interests of the larger democracy justify a degree of intrusion into the fundamental functions of the smaller government.[90] The courts have, however, been unable to find a workable formula for resolving this "federalism" issue.

In *Garcia v. San Antonio Metropolitan Transit Authority*,[91] the United States Supreme Court analyzed the reasons why a workable formula has been so elusive. Specifically, the Court observed that it was extremely difficult to formulate constitutional limitations on Congress' broad commerce powers, and that " 'fundamental' elements of state sovereignty" as well as " 'traditional' governmental functions" were concepts incapable of precise definition and principled application.[92] Accordingly, the *Garcia* court concluded that the judiciary should defer to the judgment of the legislature:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position.

Cities would have upheld, as constitutional, the intrusion of the Federal Government into the realm of state employment decision-making.

That the Ohio Supreme Court has utilized a form of heightened scrutiny in analyzing state action that infringes upon a municipality's exercise of its home rule powers is evident from the court's decision in *City of Parma*. As indicated in the opinion authored by Justice Locher, the state may interfere with the decision making of a municipality, if the state's interest is sufficient to warrant the intrusion, and if the method by which the state's interest is pursued is such that it impacts the municipality to the least extent possible. *City of Parma*, 61 Ohio St. 2d at 383. Thus, in analyzing the means chosen by the state to achieve the "sufficient" goal which justifies state intrusion into matters of municipal self-government, it is apparent that the Ohio Supreme Court has judged the state's action by a heightened degree of scrutiny. *See supra* notes 53–59 and accompanying text. For an analysis of Ohio decisions that are in agreement with *City of Parma*, see *supra* notes 62–71 and accompanying text.

88. 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980).

89. 426 U.S. 833 (1976), *rev'd*, Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985).

90. *See City of Parma*, 61 Ohio St. 2d at 383, 402 N.E.2d at 525; *National League of Cities*, 426 U.S. at 854–55.

91. 105 S. Ct. 1005 (1985). In *Garcia*, the Supreme Court overruled *National League of Cities* and specifically held that the tenth amendment of the United States Constitution does not prevent Congress from bringing state and local government employees under the coverage of the Fair Labor Standards Act. *Id.* at 1016–21. *See* 29 U.S.C. §§ 203(d), (x) (1982).

92. *Garcia*, 105 S. Ct. at 1016.

> But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.[93]

Thus, the *Garcia* decision recognizes the need for judicial deference to the political process, especially when effective state participation is present. The Ohio rule espoused in *City of Parma*, which demonstrates a lack of judicial deference to state legislative determinations,[94] should now be re-examined in light of the reasoning of the *Garcia* decision.

The need for such a re-examination is apparent after considering the Ohio cases in which the Ohio Supreme Court allowed municipalities to avoid compliance with state law on Ohio constitutional grounds, specifically article XVIII.[95] In both *State ex rel. Lynch v. City of Cleveland*,[96] and *State ex rel. Canada v. Phillips*,[97] the respective municipalities were allowed to avoid a state law governing municipal civil service promotions.[98] Moreover, in *City of Parma*, the municipality was allowed to avoid a state law governing employee military leave.[99] In each of the aforementioned cases the litigation was between a city and its employees. The state was never more than a nominal party and did not even file briefs to justify the state's interest. These cases seemingly place the burden on city employees to justify the state's intrusion into municipal self-government. Under this approach, the employees not only have to prove that the state law represents a genuine statewide concern, but also that the law is not unnecessarily intrusive into fundamental matters of local self-government.

In both *City of Cleveland* and *Phillips*, the employees failed to show that the state law governing police promotions was founded on important statewide concerns. In *City of Cleveland*, the employee failed to argue that a state law requiring competitive examinations for promotion to the position of police chief was justified by article XV, section 10, of the Ohio Constitution, which specifically authorizes the Ohio General Assembly to enact laws providing for "[a]ppointments

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93. *Id.* at 1020.

94. *See supra* notes 53–59 and accompanying text.

95. *See* OHIO CONST. art. XVIII, §§ 2, 3, 7. *See also supra* text accompanying notes 11–13.

96. 164 Ohio St. 437, 132 N.E.2d 118 (1956).

97. 168 Ohio St. 191, 151 N.E.2d 722 (1958).

98. *Id.* at 200, 151 N.E.2d at 729; *City of Cleveland*, 164 Ohio St. at 440, 132 N.E.2d at 121. *See supra* notes 62–69 and accompanying text.

99. *City of Parma*, 61 Ohio St. 2d at 383, 402 N.E.2d at 525. *See supra* notes 55–59 and accompanying text.

and promotions in the civil service of . . . cities . . . ."[100] Similarly, in *Phillips* the civil servant failed to argue that article II, section 34, of the Ohio Constitution authorized the state to exercise paramount control over the "general welfare of all employees" of state and local governments, including municipal police and firefighters.[101] Because the State was not actually a party to either the *City of Cleveland* or *Phillips* litigation, it is understandable that the supreme court was not apprised of the full extent of the state's interest and power over police and fire department promotions.

In *City of Parma*, the civil servants argued that the Ohio legislature had sufficient interest and power to provide leaves of absence for military reservists; however, they failed to convince the supreme court that the law was not too intrusive into fundamental matters of local self-government.[102] The court concluded that the legislature had other viable alternatives available whereby the state could properly maintain its armed reserves and enhance its recruiting activities.[103]

This is a rather extraordinary rule of law which requires the private beneficiary of a state law to justify the decision of the state legislature as being the most narrowly-tailored approach possible. Even if the private litigant were able to bring before a court all of the matters that the legislature considered in enacting the law, a court could, nevertheless, conclude that the legislature failed to give appropriate weight to a particular option which was less intrusive upon municipal self-government. The Ohio Supreme Court has in these cases substituted its opinion for that of the Ohio General Assembly, a coordinate and co-equal branch of government. This is suspect because legislation usually obtains a presumption of constitutionality.[104] The general rule for judicial review of legislation is to defer to the judgment of the legislators unless

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100. OHIO CONST. art. XV, § 10. The Ohio Supreme Court has recognized the failure of the employee to raise this constitutional issue in *City of Cleveland* but has nevertheless reaffirmed that decision. *See Phillips*, 168 Ohio St. at 194–95, 151 N.E.2d at 725–26.

101. *See Phillips*, 168 Ohio St. 191, 151 N.E.2d 729 (1958). The constitutional provision in question states: "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." OHIO CONST. art. II, § 34. Two cases have construed this constitutional provision as superseding home rule powers. *See* State *ex rel.* Board of Trustees of Police & Firemen's Pension Fund v. Board of Trustees of Police Relief, 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967) (municipal pension trustee must turn over funds pursuant to state law creating statewide pension fund for municipal safety forces); Wray v. City of Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (1982) (municipality may not avoid the Ohio Minimum Fair Wage Standards Act).

102. *City of Parma*, 61 Ohio St. 2d at 383, 402 N.E.2d at 525.

103. *Id. See supra* text accompanying note 58.

104. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152, 152 n.4 (1938).

there is no apparent rational basis for the law.[105] As the late Chief Justice Stone suggested in his now-famous footnote 4 in *United States v. Carolene Products Co.*,[106] the political processes in our democracy "can ordinarily be expected to bring about repeal of undesirable legislation . . . ."[107]

Nevertheless, the Chief Justice recognized that certain legislation tends to restrict those political processes and, accordingly, that such legislation may "be subjected to more exacting judicial scrutiny . . . than are most other types of legislation."[108] For example, the right to vote, the right to disseminate information, the right to associate in political organizations, and the right to engage in peaceable assembly are so important to our democratic political processes that legislation which interferes with such "fundamental" rights should receive heightened judicial scrutiny.[109]

Similarly, in *National League of Cities*, the United States Supreme Court arguably deemed the concept of "state sovereignty" as a "fundamental" right that was derived from the tenth amendment.[110] Accordingly, the Federal Government's attempted interference with attributes of state sovereignty through extension of a mandatory wage law to the states was apparently subjected to heightened judicial scru-

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105. *See, e.g., id. See also* Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 489 (1977); Pack v. City of Cleveland, 1 Ohio St. 3d 129, 133, 438 N.E.2d 434, 438 (1982).

106. 304 U.S. 144, 152 n.4 (1938).

107. *Id.*

108. *Id.*

109. *See id.* at 152–53 n.4. Besides "fundamental" rights, the Chief Justice also suggested that laws directed against particular religious, national, or racial minorities and prejudice directed against "discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ." *Id.* at 153 n.4. Such laws directed against groups that have been denied the normal processes of democracy "may call for a correspondingly more searching judicial inquiry." *Id.*

The concept of "heightened" or "strict" scrutiny of legislation impinging on fundamental rights or laws creating suspect classifications is now firmly established as an exception to the general rule of rational basis analysis and, accordingly, judicial deference to legislative decisions. *See* Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J. concurring) (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)). *See also Pack*, 1 Ohio St. 3d at 133, 438 N.E.2d at 438. Thus, when courts engage in "heightened" or "strict" scrutiny, it forces the government to persuasively justify its legislative intrusion into fundamental personal rights or its creation of legislative classifications. The courts intervene with such scrutiny only because the "operation of those political processes" which can "ordinarily be expected to bring about repeal of undesirable legislation" has been curtailed. *See Carolene Products Co.*, 304 U.S. at 152 n.4. It must be conceded, however, that certain fundamental rights, such as the right to privacy, have received the protection of strict scrutiny even though the political processes have not been curtailed, improperly functioning, or endangered. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

110. *National League of Cities*, 426 U.S. at 842–43 (quoting Fry v. United States, 421 U.S. 541, 547 n.7 (1975)).

tiny.[111] In *City of Parma*, the Ohio Supreme Court also decided that state legislation impinging on Ohio constitutionally-provided municipal home rule powers was subject to heightened judicial scrutiny because of the legislation's interference with the "fundamental" right of municipal self-government.[112] Thus, in both cases, an analogy to "heightened" judicial scrutiny in the individual rights area can be made because the higher government laws at issue impinged upon the "fundamental" rights of smaller governments to engage in self-government or home rule. However, the question raised is whether governmental entities, as compared to individuals, need the protection of heightened judicial scrutiny in such "federalism" battles. In *Garcia*, the United States Supreme Court answered in the negative.[113]

The *Garcia* decision rests upon the majority's recognition that the political processes in our democracy sufficiently protect the sovereignty of the states from unnecessary federal intrusion.[114] "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[115] Thus, heightened judicial scrutiny is neither necessary nor appropriate when the operation of the protective political processes has not been curtailed.[116]

VI. An Application of the *Garcia* Principles

The issues raised in *Garcia v. San Antonio Metropolitan Transit Authority*,[117] will almost certainly be before the Ohio Supreme Court in an analogous form in the near future. Chapter 4117 of the Ohio Revised Code,[118] a comprehensive state law which requires municipalities to bargain collectively with their employees regarding wages,

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111. *See supra* note 87.

112. *City of Parma*, 61 Ohio St. 2d at 383, 402 N.E.2d at 525.

113. *Garcia*, 105 S. Ct. at 1020–21.

114. *Id.*

115. *Id.* at 1018.

116. The *Garcia* majority provided some examples of the effectiveness of the political process:

> [T]he States . . . have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Insurance Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions. The fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the extent to which the political position of the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause.

Id. at 1019.

117. 105 S. Ct. 1005 (1985). *See supra* notes 91–93 and accompanying text.

118. Ohio Rev. Code Ann. §§ 4117.01–.23 (Page Supp. 1984).

hours, and other terms and conditions of employment,[119] is currently being challenged.[120] It is asserted that the home rule provisions of the Ohio Constitution[121] grant local governments power to avoid chapter 4117.[122] If these cases reach the Ohio Supreme Court, the court will have an opportunity to clarify its position with regard to municipal home rule in Ohio. Although the supreme court recognizes that article XVIII imposes limitations on the state as well as municipalities,[123] the court should analyze its role in enforcing the state's limitations in light of the *Garcia* decision rendered by the United States Supreme Court.

It is possible that the Ohio Supreme Court could dispose of these cases by simply focusing on the four broad limitations on municipal action, which are established by article XVIII, sections 2, 3, and 7.[124] First, existing municipal charters may be construed as requiring compliance with chapter 4117.[125] Second, if the municipality has no charter, the court might determine that chapter 4117 prescribes "procedural" rather than "substantive" matters of local self-government, in which case non-charter municipalities would be bound by mandated procedures.[126] Third, the court may determine that it is beyond the scope of local self-government to avoid chapter 4117 because of the degree of statewide concern implicated in public employee bargaining as well as the extraterritorial effects of a municipality's labor policies.[127] Finally, perhaps the supreme court will simply decide that chapter 4117 is based upon the state's police powers or upon article II, section 34, of the Ohio Consitution,[128] both of which have been held to be superior to a municipality's home rule powers.[129]

On the other hand, it is equally likely that the Ohio Supreme

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119. *See id.* § 4117.08.

120. *See, e.g.*, East Cleveland Fire Fighters v. City of E. Cleveland, No. 85472 (Ohio C.P. Ct., Cuyahoga County filed Jan. 9, 1985). Although *East Cleveland Fire Fighters* has not yet been decided, it is likely that chapter 4117 will be upheld as a valid exercise of state power. The Cuyahoga County Court of Common Pleas, in a recent decision, granted the defendant's motion for summary judgment, thereby upholding the constitutionality of chapter 4117. *See* City of Rocky River v. State Employment Relations Bd., No. 86753 (Ohio C.P. Ct., Cuyahoga County Nov. 13, 1985) (order granting defendant's motion for summary judgment). For a discussion of the scope of chapter 4117, and the home rule challenges it faces, see White, Kaplan & Hawkins, *Ohio's Public Employee Bargaining Law: Can It Withstand Constitutional Challenge?*, 53 U. CIN L. REV. 1, 1–2, 31–46 (1984).

121. OHIO CONST. art. XVIII. *See supra* text accompanying notes 11–13.

122. *See supra* note 120.

123. *See supra* notes 10–53 and accompanying text.

124. OHIO CONST. art. XVIII, §§ 2, 3, 7. *See supra* notes 10–53 and accompanying text.

125. *See supra* notes 15–17 and accompanying text.

126. *See supra* notes 18–23 and accompanying text.

127. *See supra* notes 33–37 and accompanying text.

128. OHIO CONST. art. II, § 34. *See also supra* note 101.

129. *See supra* notes 43–53 and accompanying text.

Court will dispose of these cases by simply focusing on the one broad limitation on state action against municipalities—the *City of Parma* rule.[130] According to this judicially-created rule, state law may be avoided under article XVIII home rule powers when the state law infringes upon a matter of fundamental local self-government to an extent that is not justified by the degree of statewide concern.[131] Because chapter 4117 of the Ohio Revised Code provides for public employee collective bargaining,[132] the law essentially divests the municipalities of the power to unilaterally set the wages of their employees. Under the *City of Parma* rule, chapter 4117 should theoretically fall because the ability to determine the salary of city employees is such a fundamental power of local self-government that a state intrusion thereon would trigger heightened judicial scrutiny.[133] Under heightened judicial scrutiny, the proponent of the state law would have to prove that the degree of statewide concern justified the degree of intrusion and that less intrusive alternatives were not available.[134]

It is nearly impossible to predict how the Ohio Supreme Court will rule on any given home rule case. Although the framework of home rule analysis is now well-settled, the application of these principles is completely unpredictable—even after seventy years of jurisprudence. Two recent cases, *Dies Electric Co. v. City of Akron*[135] and *State ex rel. Evans v. Moore*,[136] are indicative of the inconsistent application of the home rule analysis.

In *Dies Electric*, the supreme court permitted a charter municipality to avoid a state statute governing the amount of funds a municipality may retain in escrow to ensure performance of a municipal contract.[137] Pursuant to a contract for municipal improvements, the city of Akron withheld more contract funds than was statutorily permissible.[138] The court simply held that the city was not bound by state law in this matter of local self-government,[139] stating:

> [T]he powers of local self-government which are granted under Section 3 of Article XVIII are essentially those powers of government which, "[i]n

130. *See* Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980). *See also supra* notes 53–71 and accompanying text.

131. *See supra* notes 57–58 & 71 and accompanying text.

132. *See* OHIO REV. CODE ANN. §§ 4117.01–.23 (Page Supp. 1984).

133. *See supra* note 56 and accompanying text.

134. *See supra* notes 81–86 and accompanying text.

135. 62 Ohio St. 2d 322, 405 N.E.2d 1026 (1980).

136. 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982).

137. *Dies Elec.*, 62 Ohio St. 2d at 328, 405 N.E.2d at 1030.

138. *Id.* at 322–23, 405 N.E.2d at 1027. *See* OHIO REV. CODE ANN. § 153.13 (Page 1978) (amended 1982).

139. *Dies Elec.*, 62 Ohio St. 2d at 328, 405 N.E.2d at 1030.

> view of their nature and their field of operation, are local and municipal in character." Similarly, . . . "it is sufficient to say here that the powers referred to are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular [municipality]."
>
> It is our conclusion that the retainage of funds to guarantee work executed on a contract for the improvement of municipal property is a matter embraced within the field of local self-government. . . . Therefore, a charter municipality, in the exercise of its powers of local self-government under Section 3 of Article XVIII of the Constitution of Ohio, may, pursuant to its charter, enact retainage provisions for a contract for improvements to municipal property which differ from the retainage provisions of R.C. 153.13.[140]

In *Dies Electric,* the Ohio Supreme Court concluded as follows: first, the municipal charter did not require the city to comply with state law in this matter;[141] second, the municipal action was not a police power action;[142] third, the local nature of the issue gave the municipality power to avoid the state law;[143] and finally, the court's decision implied that the state's interest in enacting the law governing retainage of contract funds was not sufficient justification for the state's intrusion into this matter of local self-government.[144]

In *Moore*, the Ohio Supreme Court reached the opposite conclusion regarding an attempt by the city of Upper Arlington to avoid Ohio's prevailing wage law.[145] The majority opinion held that the pre-

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140. *Id.* at 326–27, 405 N.E.2d at 1029 (citations and footnotes omitted) (quoting respectively State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 97, 102 N.E. 670, 673 (1913); Fitzgerald v. Cleveland, 88 Ohio St. 338, 344, 103 N.E. 512, 513–14 (1913)).

141. *Dies Elec.*, 62 Ohio St. 2d at 326–27 n.4, 405 N.E.2d at 1029 n.4.

142. *Id.* at 326, 405 N.E.2d at 1028.

143. *Id.* at 326, 405 N.E.2d at 1029. The *Dies Electric* decision did not specifically follow the *City of Parma* rule for home rule powers. The *Dies Electric* court failed to address whether the right to retain contract funds was a "fundamental" power of local self-government. The court also failed to identify the state's interest in enacting a limitation on the escrow of contract funds. Furthermore, the court failed to state that Ohio's interest was "insufficient." For a discussion on the *City of Parma* rule, see *supra* notes 81–86 and accompanying text. The *Dies Electric* court merely concluded "that the retainage of funds to guarantee work executed is a matter embraced within the field of local self-government." *Dies Elec.*, 62 Ohio St. 2d at 326, 405 N.E.2d at 1029.

Under the *Dies Electric* test, if the "nature and field of operation" of an ordinance is "local and municipal in character," the ordinance need not conform to state law. *See id.* This test was completely ignored by the Ohio Supreme Court in *Moore*, the next home rule case to reach the court. Therefore, it is unclear whether the *Dies Electric* test was a conscious departure from the *City of Parma* rule, or simply an application of *City of Parma* in a case where the statewide concern was not significant enough to mention.

144. *See Dies Elec.*, 62 Ohio St. 2d at 326–28, 405 N.E.2d at 1029–30. *See also supra* note 143.

145. *Moore*, 69 Ohio St. 2d at 92, 431 N.E.2d at 314. The prevailing wage law requires that all contractors and subcontractors for public improvements pay wages not less than the prevailing wage paid to local laborers and construction workers pursuant to collective bargaining

vailing wage law "clearly transcended local boundaries"[146] and thus was not within the scope of local self-government.[147] The court also held that the prevailing wage law arose under the state's police power, therefore preempting and superseding any conflicting local action.[148] In a concurring opinion, Justice William B. Brown argued that the prevailing wage law was also within the paramount power of the state pursuant to article II, section 34, of the Ohio Constitution.[149]

In the *Moore* dissent, Justice Locher pointed out that the majority's decision was inconsistent with *Dies Electric*.[150] In addition, Justice Locher noted that under several previous holdings of the Ohio Supreme Court, "municipalities *can* control the compensation of their employees."[151] As the dissenting justice observed, "[s]ection 3 of Article XVIII guarantees the right of municipalities 'to exercise all powers of local self-government.' Nothing is more germane to effective self-government than the power to determine the nature, kind and extent of municipal expenditures."[152]

Although Justice Locher did not state that municipalities may avoid every state law which would cost them money, it is not clear when, under the *City of Parma* rule, the power of the municipality "to determine the nature, kind and extent of municipal expenditures" must give way to state law. Apparently, this depends upon whether the state's concern is of the requisite "sufficiency" to allow an interference with the municipality's fiscal decisions. Justice Locher, however, has never given an explanation of his criteria for determining when a statewide concern is "sufficient."[153]

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agreements. *See* OHIO REV. CODE ANN. §§ 4115.03–.15 (Page 1980).

146. *Moore*, 69 Ohio St. 2d at 91, 431 N.E.2d at 313 (Celebrezze, C.J.).

147. *Id.*

148. *Id.* The two concurring opinions in *Moore* treat the prevailing wage law as a police power statute. *See id.* at 92, 431 N.E.2d at 314 (W. Brown, J., concurring); *id.* at 93, 431 N.E.2d at 314 (C. Brown, J., concurring). Chief Justice Celebrezze, writing for the majority, also recognized the supremacy of the state's police power. *See id.* at 89–91, 431 N.E.2d at 312–14 (quoting Cleveland Elec. Illuminating Co. v. City of Painesville, 15 Ohio St. 2d 125, 129, 239 N.E.2d 75, 78 (1968); City of Canton v. Whitman, 44 Ohio St. 2d 62, 65–66, 337 N.E.2d 766, 769 (1975)). The majority concluded that the matter was beyond the scope of municipal home rule because of the extraterritorial effects and issues of statewide concern. *Moore*, 69 Ohio St. 2d at 91, 431 N.E.2d at 313. This opinion illustrates the interconnection between these two limitations on municipal home rule powers: police power statutes often have extraterritorial effects.

149. *Moore*, 69 Ohio St. 2d at 92, 431 N.E.2d at 314 (W. Brown, J., concurring). For a discussion of this Ohio constitutional provision, see *supra* note 101. *See also infra* note 153.

150. *Moore*, 69 Ohio St. 2d at 96, 431 N.E.2d at 316 (Locher, J., dissenting).

151. *Id.* at 96, 96 n.7, 431 N.E.2d at 316, 316 n.7 (citing Teamsters Local Union No. 377 v. City of Youngstown, 64 Ohio St. 2d 158, 413 N.E.2d 837 (1980); *City of Parma*, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980); State *ex rel.* Mullin v. City of Mansfield, 26 Ohio St. 2d 129, 269 N.E.2d 602 (1971), *cert. denied*, 404 U.S. 985 (1971)).

152. *Id.* at 97, 431 N.E.2d at 316 (quoting OHIO CONST. art. XVIII, § 3).

153. The dissent in *Moore* also failed to address Justice William Brown's contention that

The majority's approach in *Moore* is as ambiguous as the dissent's. The *Moore* majority held that the prevailing wage law is a valid exercise of the state's police power[154] and "has a significant extraterritorial effect."[155] The majority failed, however, to distinguish *Dies Electric*, where the supreme court held that the state law governing retainage of contract funds is not a police power action but is within the scope of local self-government because of the local nature of the matter.[156] There is a rather obscure line between the *local nature* of the retainage of contract funds and the *significant extraterritorial effects* of the prevailing wage law. An even more obscure distinction exists between the determination that the prevailing wage law is a valid police power action,[157] but that the retainage-of-contract-funds law is not a valid police power action.[158] Further confusion arises from the fact that the *Dies Electric* court focused on whether the *municipality* had exercised its police power,[159] but the majority in *Moore* focused on whether the *state* had exercised its police power.[160] It is unclear from the cases which approach is correct.

The Ohio Supreme Court has simply failed to explain the basic principles upon which it weighs the relative merits of state law that intrudes upon matters of local self-government. In all these cases, the state legislature has decided that the municipalities should be controlled in a particular way; the municipality, of course, wishes to avoid the control. Although the court may make some easy generalizations based upon broadly framed criteria, such as "police power," "statewide

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article II, § 34, which authorizes the regulation of labor, grants the state paramount authority to provide for the general welfare of all state and local governmental employees. *Moore*, 62 Ohio St. 2d at 92, 431 N.E.2d at 314 (citing OHIO CONST. art. II, § 34). If the dissenters in *Moore* hold that a municipality making local fiscal decisions may even avoid state laws providing for the general welfare of employees under article II, § 34, then it is not clear how the dissenters construe the last clause of § 34, which states that "no other provision of the constitution shall impair or limit this power [of the state to provide for the comfort, health, safety, and general welfare of all employees]." OHIO CONST. art. II, § 34.

The discussions on article II, § 34, in *Moore* shed very little light on the relationship between § 34 and the home rule powers. *See also* State *ex rel.* Bd. of Trustees v. Board of Trustees, 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967); Craig v. City of Youngstown, 162 Ohio St. 215, 123 N.E.2d 19 (1954). *But cf.* Wray v. City of Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (1982) (municipality may not avoid Ohio's Minimum Fair Wage Standards Act).

154. *Moore*, 69 Ohio St. 2d at 91, 431 N.E.2d at 313.

155. *Id.* at 91, 431 N.E.2d at 313.

156. *Dies Elec.*, 62 Ohio St. 2d at 326, 405 N.E.2d at 1028–29. *See supra* notes 137–44 and accompanying text.

157. *See supra* note 148 and accompanying text.

158. *See supra* note 142 and accompanying text.

159. *Dies Elec.*, 62 Ohio St. 2d at 326, 405 N.E.2d at 1029.

160. *Moore*, 69 Ohio St. 2d at 90, 431 N.E.2d at 313 (" '[T]he general laws of the state are supreme in the exercise of the police power, regardless of whether the matter is one which might also properly be a subject of municipal legislation.' ").

concern," "extraterritorial effects," or "fundamental local self-government," the basic principles involved are not explained. The court balances the degree of statewide concern against the intrusion into local self-government on an ad hoc basis. Through the political process, however, the state legislature has already struck the balance in the manner determined appropriate by the larger state democracy. What justification is there for the supreme court to substitute its judgment for the decision of the state's political process? What justification is there for allowing the municipality to avoid the decision of the larger state democracy, of which it is a part?

This leads to the same issue that was addressed by the United States Supreme Court in *Garcia*:[161] Whether heightened *judicial* scrutiny is necessary or appropriate to protect local self-government from undue intrusion by the larger democracy? The Ohio Supreme Court has never explained why municipalities should not use the political processes, instead of the courts, to protect municipal home rule. The supreme court should address this issue in the cases which are currently challenging chapter 4117, the public employee collective bargaining law.[162]

To weigh the provisions of chapter 4117 under heightened judicial scrutiny is to invite the court to substitute its political judgment for that of the state legislature. The democratic processes which led to the enactment of chapter 4117 were completely open to the political interests of the municipalities of the state. Those same political processes provide avenues to challenge those provisions of chapter 4117 which can be more narrowly tailored to protect matters of fundamental municipal self-government. So long as those avenues of democracy are clearly available, the Ohio Supreme Court should not substitute its judgment for that of the legislature, especially in matters as important as municipal home rule.

VII. CONCLUSION

Article XVIII of the Ohio Constitution authorizes municipalities to exercise all powers of local self-government. Municipal home rule powers, however, must be exercised within the limits set by charter or by state-prescribed procedures, and they must not exceed the scope of local self-government. In addition, they must not conflict with state law in matters arising under the police powers.

The Ohio Supreme Court has occasionally permitted municipalities to exercise their home rule powers, within these limits, to avoid

161. *See supra* notes 93 & 114–16 and accompanying text.

See supra note 120.

state laws which the court considers unnecessarily intrusive into matters of local self-government. In these cases the state law has been subjected to a heightened judicial scrutiny to determine whether the degree of statewide concern justifies the degree of intrusion into matters of local self-government. The Ohio Supreme Court, in these decisions, has substituted its opinion for the opinion of the Ohio General Assembly regarding the degree of statewide concern and the need for uniform regulation.

The state judiciary should not apply a heightened scrutiny standard when reviewing decisions of a coordinate branch of government unless the protective political processes of the state democracy have been curtailed. Municipalities have sufficient access to the political processes to ensure that their interests are considered by the state legislators. Heightened judicial scrutiny is not necessary to protect municipal home rule from an unjustified state intrusion where avenues of democracy remain open. The judicial tool of heightened scrutiny is best used only when necessary to protect and further the unfettered exercise of democracy. The court must be careful to ensure that heightened scrutiny does not become a tool to frustrate the exercise of democracy.