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# Rocky River v. SERB: Second-Guessing the State Legislature

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## **ROCKY RIVER v. SERB: SECOND-GUESSING THE STATE LEGISLATURE**

### **INTRODUCTION**

In *Rocky River v. State Employment Relations Board*,<sup>1</sup> a divided Ohio Supreme Court held that the binding arbitration provision in Ohio's Public Employees' Collective Bargaining Act of 1983<sup>2</sup> (Act) violated the state constitution.<sup>3</sup> The state legislature, per the Act, required binding arbitration when an impasse developed in contract negotiations between a city and its safety forces.<sup>4</sup> The Act granted most of Ohio's public employees the right to strike,<sup>5</sup> but withheld that right from members of police forces and firefighting units in exchange for binding arbitration of their bargaining disputes.<sup>6</sup>

A bare majority of the court, however, found binding arbitration violated a charter-city's home-rule powers and constituted an unlawful delegation of municipal legislative authority to an outside arbitrator.<sup>7</sup>

Because the majority revised its opinion three times,<sup>8</sup> the court spent eight months writing its 4-3 ruling.<sup>9</sup> Just three months later, after a new justice took office,<sup>10</sup> the court took the unusual step of reopening the case.<sup>11</sup> While technically a reconsideration, the court is not going to hear further oral arguments or accept any more briefs from the parties.<sup>12</sup> November's narrow 4-3 decision most likely will be replaced by another 4-3 decision finding the procedure constitutional.<sup>13</sup>

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<sup>1</sup> 39 Ohio St. 3d 196, 530 N.E.2d 1 (1988).

<sup>2</sup> OHIO REV. CODE ANN. §§ 4117.01-4117.23 (Anderson Supp. 1988).

<sup>3</sup> *Rocky River*, 39 Ohio St. 3d at 197, 530 N.E.2d at 2.

<sup>4</sup> OHIO REV. CODE ANN. § 4117.14(D)(1) (Anderson Supp. 1988).

<sup>5</sup> *Id.* § 4117.14(D)(2) (Anderson Supp. 1988).

<sup>6</sup> *Id.* §§ 4117.14(D)(1), 4117.15(A) (Anderson Supp. 1988).

<sup>7</sup> *Rocky River*, 39 Ohio St. 3d at 201, 203, 205, 530 N.E.2d at 5, 8, 9.

<sup>8</sup> *Id.* at 219 n.12, 530 N.E.2d at 21 n.12 (Douglas, J., dissenting).

<sup>9</sup> *Id.* at 196, 530 N.E.2d at 1.

<sup>10</sup> Cleveland Plain Dealer, Feb. 11, 1989, at 1-A, col. 1, 10-A, cols. 3-4. Alice Robie Resnick of Toledo replaced retiring Justice Ralph Locher as a result of her victory in the November 1988 elections.

<sup>11</sup> *Rocky River v. SERB*, 41 Ohio St. 3d 602, 535 N.E.2d 657 (1989) (granting motion for reconsideration of denial of motion for rehearing).

<sup>12</sup> *Id.* For further discussion of the procedural issues involved in the Ohio Supreme Court's reconsideration of their November 1988 decision also see *Rocky River v. SERB*, 40 Ohio St. 3d 606, 533 N.E.2d 270 (1988) (4-3) (denial of motion for rehearing); *Rocky River v. SERB*, 43 Ohio St. 3d 1, 3-4, 539 N.E.2d 103, 105-06 (1989) (reversing November 1988 decision and upholding constitutionality of binding arbitration); *id.* at 21-22, 539 N.E.2d at 120-21 (Holmes, J., dissenting).

<sup>13</sup> *Rocky River*, 43 Ohio St. 3d at 1-2, 20, 539 N.E.2d at 104, 119-20. See Postscript.

Such a ruling would undoubtedly be a victory for labor and for the powers of the state legislature over municipal powers. But the city of Rocky River will not be the only loser. This rapid turnabout on the state's highest court can only mean a loss of prestige to the judiciary and the apparent compromise of their judicial integrity.

This note discusses why *Rocky River* was wrongly decided as a matter of constitutional adjudication and why it is likely to be overruled, irrespective of a personnel change on the court. The note concludes that the decision, written by Chief Justice Thomas Moyer, was weak and based on questionable policy. The majority misapplied recent precedent on local government's home-rule powers, ignored another provision of the state constitution granting the state legislature unlimited authority in the field of public employee welfare, and ignored the stare decisis effect of its recent decisions which found the Act was a general law of statewide concern. Instead of presuming the Act's constitutionality,<sup>14</sup> the majority second-guessed the wisdom of the legislature. The justices also struck down a crucial section of the Act because it did not fit their subjective notions of democracy and public accountability.

### BACKGROUND

Ohio became the fortieth state to recognize public sector collective bargaining when the state adopted the Act in 1983.<sup>15</sup> Democrats in the state legislature introduced and passed the legislation in a little over three months.<sup>16</sup> The newly-elected Democratic Governor, Richard Celeste, signed the bill (S.B. 133) on July 6, 1983.<sup>17</sup> The state legislature actually began drafting similar legislation in the 1970s.<sup>18</sup> However, Republican Governor James Rhodes vetoed bills on the subject in 1975<sup>19</sup> and 1978.<sup>20</sup>

The state legislature repealed the Ferguson Act<sup>21</sup> when it adopted S.B. 133.<sup>22</sup> The Ferguson Act legally prevented Ohio public employees from

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<sup>14</sup> State v. Dorso, 4 Ohio St. 3d 60, 61, 446 N.E.2d 449, 450 (1983);

"In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended."

OHIO REV. CODE ANN. § 1.47 (Anderson 1984).

<sup>15</sup> Comment, *Public Sector Collective Bargaining in Ohio: Before and After Senate Bill No. 133*, 17 AKRON L. REV. 229, 229 (1983).

<sup>16</sup> O'Reilly, Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891, 894 (1983).

<sup>17</sup> *Id.* at 895.

<sup>18</sup> *Id.* at 893.

<sup>19</sup> *Id.* at 894.

<sup>20</sup> Comment, *supra* note 15, at 229.

<sup>21</sup> OHIO REV. CODE ANN. §§ 4117.01-4117.05 (Anderson 1980).

<sup>22</sup> OHIO LEGISLATIVE SERVICE COMMISSION, SUMMARY OF ENACTMENTS: January, 1983-August, 1983, 115th General Assembly, at 174 (1983).

striking between 1947 and 1984.<sup>23</sup> The government employer could fine or fire striking employees<sup>24</sup> and prevent them from receiving a raise during the following year.<sup>25</sup> The Ferguson Act required the employer to notify the employee that the work stoppage was considered a strike before the employer took any disciplinary actions permitted by the Act.<sup>26</sup> While this provided the employer with some discretion, public employers rarely, if ever, invoked the Ferguson Act in the years immediately preceding its repeal.<sup>27</sup>

Though the Ferguson Act legally prohibited strikes, it did not prevent them. Various sources estimated public employees in Ohio engaged in more than 400 strikes in the decade prior to repeal of the Ferguson Act.<sup>28</sup> Since that repeal, there has reportedly been only one illegal job action undertaken by police officers in Ohio.<sup>29</sup>

The Act explicitly grants Ohio's public employees the right to strike.<sup>30</sup> The Act covers state employees and employees of political subdivisions, such as cities, townships and counties.<sup>31</sup> Employees can strike only after submitting to the Act's clearly delineated impasse resolution procedures, such as mediation and fact-finding.<sup>32</sup> The Act sets out a comprehensive scheme to regulate all public sector collective bargaining. It imposes fixed time schedules for each stage of the impasse,<sup>33</sup> authorizes injunctive relief for the employer, and prohibits certain conduct.<sup>34</sup> The Act also established a State Employment Relations Board (SERB) to administer the Act, to assist in resolving negotiation impasses and to conduct certain studies.<sup>35</sup>

Safety forces (e.g., fire and police officers) are among a select group of public employees to whom the legislature did not grant a right to strike.<sup>36</sup> Their duties involve the community's health, safety and welfare.

<sup>23</sup> *Id.*; O'Reilly, *supra* note 16, at 892-93.

<sup>24</sup> OHIO REV. CODE ANN. § 4117.05 (Anderson 1980).

<sup>25</sup> *Id.* § 4117.03 (Anderson 1980).

<sup>26</sup> *Id.* § 4117.04 (Anderson 1980).

<sup>27</sup> Comment, *supra* note 15, at 235.

<sup>28</sup> State, *ex rel.* Dayton Fraternal Order of Police Lodge No. 44 v. SERB, 22 Ohio St. 3d 1, 5, 488 N.E.2d 181, 185 (1986) (there were 428 public work stoppages in Ohio from 1973-1980); O'Reilly, *supra* note 16, at 894 n.37 (Sen. Eugene Branstool, sponsor of S.B. 133, said in press release there were 434 public strikes in Ohio from 1971-1981); Brief for Appellee AFSCME Ohio Council 8 at A-26, Rocky River v. SERB, 39 Ohio St. 3d 196 (1988) (No. 87-157) (U.S. Dept. of Labor ranked Ohio third among the states with 458 public employee strikes for the time period 1972-1980).

<sup>29</sup> Brief for Defendant-Appellee SERB at 7, Rocky River v. SERB, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>30</sup> OHIO REV. CODE ANN. § 4117.14(D)(2) (Anderson Supp. 1988).

<sup>31</sup> *Id.* § 4117.01(C) (Anderson Supp. 1988).

<sup>32</sup> *Id.* § 4117.14 (Anderson Supp. 1988).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* §§ 4117.15, 4117.16, 4117.18(C), 4117.23 (Anderson Supp. 1988).

<sup>35</sup> *Id.* § 4117.02 (Anderson Supp. 1988).

<sup>36</sup> *Id.* § 4117.14(DX1) (Anderson Supp. 1988).

An impasse in those bargaining sessions is resolved through final offer settlement proceedings.<sup>37</sup> Such proceedings are not used until a current collective bargaining agreement has lapsed or a week has passed since SERB published the fact-finder's recommendations.<sup>38</sup> The latter only occurs if one of the parties expressly rejects the fact-finder's recommendations.<sup>39</sup> Unless three-fifths of the union's total membership or three-fifths of the public employer's legislative body reject the fact-finding report, it is considered accepted.<sup>40</sup> If either party rejects the fact-finder's report, the parties and SERB select a "conciliator."<sup>41</sup> The "conciliator" is essentially an arbitrator.<sup>42</sup> The arbitrator must pick and choose between the parties' final offers on an issue-by-issue basis.<sup>43</sup> The parties submit written offers and the arbitrator holds a hearing.<sup>44</sup> Section 4117.14(I) of the Act requires both parties to treat the arbitrator's decision as a "binding mandate" and to implement that decision.<sup>45</sup> Section 4117.14(I) was the focus of the constitutional challenge in *Rocky River*.<sup>46</sup>

### FACTS

The city of Rocky River recognized Local 695 of the International Association of Firefighters as the exclusive bargaining agent for the city's firefighters after the Act took effect in April 1984.<sup>47</sup> Both the city and the union attempted to negotiate a contract during the remainder of the year.<sup>48</sup> They were unable to resolve a number of issues and utilized the Act's mediation and fact-finding procedures.<sup>49</sup> After mediation, the parties disagreed on seven issues.<sup>50</sup> The fact-finder, after a two-day hearing, recommended the union's wage offer and agreed with the city on the other

<sup>37</sup> *Id.* §§ 4117.14(D)(1), 4117.14(G) (Anderson Supp. 1988).

<sup>38</sup> *Id.* § 4117.14(D) (Anderson Supp. 1988).

<sup>39</sup> *Id.* § 4117.14(C)(6) (Anderson Supp. 1988).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 4117.14(D)(1) (Anderson Supp. 1988).

<sup>42</sup> *Id.* § 4117.02(E) (Anderson Supp. 1988) ("The board (SERB) shall appoint . . . arbitrators.").

This Note will use the terms "conciliator" and "arbitrator" interchangeably.

<sup>43</sup> *Id.* § 4117.14(G)(7) (Anderson Supp. 1988).

<sup>44</sup> *Id.* § 4117.14(G)(3) (Anderson Supp. 1988).

<sup>45</sup> *Id.* § 4117.14(I) (Anderson Supp. 1988).

<sup>46</sup> "The issuance of a final offer settlement award constitutes a binding mandate to the public employer and the exclusive representative to take whatever actions are necessary to implement the award." *Id.*

<sup>47</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 196, 530 N.E.2d at 2. Rocky River is a Cleveland suburb in western Cuyahoga County.

<sup>48</sup> *Id.*

<sup>49</sup> Brief for Defendant-Appellee State Employment Relations Board at 7, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>50</sup> *Rocky River v. SERB*, No. 51299, slip op. at 2 (Ohio Ct. App. 8th Dist. Dec. 1, 1986), *rev'd*, 39 Ohio St. 3d 196, 530 N.E.2d 1 (1988) [hereinafter *Rocky River* (Ct. App.)]. The city and union disagreed on salary, hours, seniority raises, sick leave, laid off employees' insurance, employer's insurance contributions, and outside fire protection contracts. *Id.*

outstanding issues.<sup>51</sup> The union accepted the fact-finder's report, but Rocky River's city council rejected it on December 11, 1984.<sup>52</sup> The city's rejection led to binding arbitration. Rocky River agreed to proceed with the process, but notified SERB and the union it would not be bound by the arbitrator's decision. The city maintained that binding arbitration was unconstitutional.<sup>53</sup>

The arbitrator decided in favor of the union after a hearing.<sup>54</sup> He accepted the union's last best offer in a 22-page conciliation award.<sup>55</sup> The difference in wage proposals was approximately \$27,000 per year or \$500 per firefighter.<sup>56</sup>

Rocky River filed suit to test the constitutionality of the Act's binding arbitration process prior to the arbitrator's decision.<sup>57</sup> Rocky River filed a declaratory judgment action in Cuyahoga County Common Pleas Court on February 6, 1985, naming the union and SERB as defendants.<sup>58</sup> The arbitrator released his decision on February 21, 1985.<sup>59</sup>

The trial court granted the defendants' motions for summary judgment and denied the city's cross-motion for summary judgment.<sup>60</sup> The trial court held that binding arbitration between a municipality and its safety forces prevailed over provisions of a city charter and was not an unlawful delegation of legislative power.<sup>61</sup>

The Court of Appeals for Cuyahoga County affirmed.<sup>62</sup> Judge Richard Markus, writing for himself and two other justices, held section 4117.14(I)

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<sup>51</sup> Brief for Defendant-Appellee SERB at 7, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>52</sup> *Rocky River* (Ct. App.), *supra* note 50, at 2.

<sup>53</sup> Brief for Appellant at 6, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>54</sup> Brief for Defendant-Appellee SERB at 8, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>55</sup> Brief for Appellee AFSCME Ohio Council 8 at A-1-A-23, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>56</sup> Brief for Appellee Rocky River Firefighters Association, Local 695 at 6, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157). The city's budget for employee salaries was approximately \$7 million. *Id.* The difference between the city's and union's wage proposals represented less than one-half of one percent of Rocky River's projected annual expenditures. Brief for Defendant-Appellee SERB at 8, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>57</sup> *Rocky River*, 39 Ohio St. 3d at 196-97, 530 N.E.2d at 2.

<sup>58</sup> *Id.* at 197, 530 N.E.2d at 2.

<sup>59</sup> *Id.* at 196, 530 N.E.2d at 2.

<sup>60</sup> *Id.* at 197, 530 N.E.2d at 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Rocky River* (Ct. App.), *supra* note 50.

of the Act did not violate Rocky River's home rule powers.<sup>63</sup> The court said the Act was "a statewide response to statewide problems surrounding labor disputes with public employers."<sup>64</sup> The court followed the "statewide concern" doctrine of the Ohio Supreme Court's decision in *Kettering v. SERB*,<sup>65</sup> which upheld another provision of the Act as not violating a city's home rule powers.<sup>66</sup> The court also noted that resolving municipal labor disputes *does* lead to wage-setting, but setting wages was merely a "secondary consequence" of the binding arbitration provisions.<sup>67</sup> The court also ruled binding arbitration of selected disputes was not an unconstitutional delegation of municipal legislative authority to a private individual.<sup>68</sup> The court relied on its previous decision in *Cleveland Police Patrolmen's Ass'n v. Cleveland*<sup>69</sup> where it upheld arbitration of police salaries that was required under the terms of a contract.<sup>70</sup> Rocky River appealed this decision to the state supreme court.<sup>71</sup>

### ANALYSIS

#### *The Court's Use of Home Rule Doctrine was Irrelevant*

The legislature enacted the Act, including its binding arbitration procedure for resolving negotiation impasses between cities and their safety forces, as an exercise of its police power. The primary objective was to promote the general safety and welfare of all the state's citizens.<sup>72</sup>

Rocky River relied on sections 3 and 7 of article XVIII of the Ohio Constitution to invalidate binding arbitration required under section 4117.14(I) of the Act. Section 3 states:

Municipalities shall have authority to exercise all powers of local 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.<sup>73</sup>

<sup>63</sup> *Rocky River* (Ct. App.), *supra* note 50, at 12. See discussion of home rule in following section of this note, especially nn.74 & 101, and *Rocky River v. SERB*, 43 Ohio St. 3d at 22-23 n.18, 38-42 & n.51, 539 N.E.2d at 122 n.18, 133-37 & n.51 (Wright, J., dissenting).

<sup>64</sup> *Id.*

<sup>65</sup> 26 Ohio St. 3d 50, 496 N.E.2d 983 (1986).

<sup>66</sup> *Id.* at 51, 496 N.E.2d at 985.

<sup>67</sup> *Rocky River* (Ct. App.), *supra* note 50, at 10.

<sup>68</sup> *Id.* at 9-10.

<sup>69</sup> 24 Ohio App. 3d 16, 492 N.E.2d 861 (1985).

<sup>70</sup> *Rocky River* (Ct. App.), *supra* note 50, at 9-10.

<sup>71</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 197, 530 N.E.2d at 2.

<sup>72</sup> *Kettering v. SERB*, 26 Ohio St. 3d 50, 55, 496 N.E.2d 983, 987-88 (1986).

<sup>73</sup> OHIO CONST. art. XVIII, § 3. Section 7 states:

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.

OHIO CONST. art. XVIII, § 7.

Commentators predicted the binding arbitration provision would trigger a constitutional attack based on the home rule argument.<sup>74</sup> Rocky River's charter specifically granted the city council power to set salaries for all city employees.<sup>75</sup>

The Ohio Supreme Court has long held a municipality's setting of wages is a right of local self-government and *not* an exercise of police power.<sup>76</sup> This distinction was critical to Rocky River.<sup>77</sup> In *State, ex rel. Canada v. Phillips*<sup>78</sup> the court held that the phrase "as are not in conflict with general laws" modifies a municipality's police powers, but not its powers of local self-government.<sup>79</sup> However, the *Canada* court noted in dictum that it was "conceivable" the state's exercise of its police power "may properly affect the exercise of powers of local self-government by a municipality."<sup>80</sup>

The court has never construed article XVIII, section 3 as granting municipalities unlimited power of local self-government.<sup>81</sup> The court's test for deciding whether the subject matter in a dispute between a city and the state involves the city's power of local self-government is based on the "extraterritorial effects" of the city's action.<sup>82</sup>

In *Village of Beachwood v. Board of Elections*<sup>83</sup> the court held that state law prevailed over provisions of a city charter.<sup>84</sup> Beachwood officials

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<sup>74</sup> White, Kaplan, Hawkins, *Ohio's Public Employee Bargaining Law: Can It Withstand Constitutional Challenge?*, 53 U. Cin. L. Rev. 1, 37 (1984). The authors explain that Ohio cities, whether or not they have enacted a city charter, have home rule powers under article XVIII, section 3. Home rule powers encompass the authority to enact legislation on "local self-government" questions. Local legislation must bow to state law only if the local law involves police power regulations in conflict with state law. The effect of article XVIII, section 7 is procedural. A non-chartered city must follow state laws regarding proper procedures for enacting substantive ordinances. *Id.* at 34-36.

<sup>75</sup> The Council shall have the power to fix the salaries of its members and of all other officers and employees of the City, whether elected, appointed or chosen, and to establish such bonds as in the opinion of the Council are necessary for the faithful discharge of the duties. The premium of any bond required by the Council shall be paid by the City. The salary of an elected officer shall not be increased during his term of office nor decreased during such term except with the consent of the officer involved. If the office is elective the salary shall be set at least forty-five (45) days prior to the last date for filing of nominating petitions. The Council may authorize the payment to any officer or employee for travel for any municipal purpose.

ROCKY RIVER, OHIO, CHARTER art. III, § 11.

<sup>76</sup> White, *supra* note 74, at 38.

<sup>77</sup> Rocky River v. SERB, 39 Ohio St. 3d at 200, 530 N.E.2d at 5.

<sup>78</sup> 168 Ohio St. 191 (1958).

<sup>79</sup> *Id.* at 197.

<sup>80</sup> *Id.* at 200.

<sup>81</sup> Weir v. Rimmelin, 15 Ohio St. 3d 55, 56, 472 N.E.2d 341, 343 (1984).

<sup>82</sup> Village of Beachwood v. Board of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958); Cleveland Elec. Illuminating Co. v. Painesville, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

<sup>83</sup> *Beachwood*, 167 Ohio St. 369, 148 N.E.2d 921 (1958).

<sup>84</sup> *Id.* at 372, 148 N.E.2d at 923.



attempted to prevent a state-required election on the detachment of a portion of the village to form a new township. The court noted that the constitutional grant of local self-government may only involve the internal affairs of the municipality:

If 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 General Assembly.<sup>85</sup>

In *Cleveland Elec Illuminating Co v. Painesville*,<sup>86</sup> the court clarified the test: "[I]f 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."<sup>87</sup>

The majority in *Rocky River* said firefighters' salaries only affected residents in Rocky River.<sup>88</sup> The majority took a narrow view of statewide concern and measured direct effects.<sup>89</sup> The court did not discuss the effect that safety force salaries in one community can have on other nearby communities even though the arbitrator's decision involved such comparisons.<sup>90</sup> The court also ignored the possible effects a police or fire strike might have on the resources of surrounding communities. The court also failed to mention the possible salutary effect an arbitration award may have on parties in other political subdivisions to reach settlements in their negotiations.<sup>91</sup>

Furthermore, two court decisions decided only two years before *Rocky River* took a much broader view of extraterritorial effects. In *State, ex. rel. Dayton Fraternal Order of Police Lodge No. 44 v. SERB*,<sup>92</sup> the court's syllabus found that the Act was a general law.<sup>93</sup> The court also noted that the Act was a law of statewide concern.<sup>94</sup>

<sup>85</sup> *Id.* at 371, 148 N.E.2d at 923.

<sup>86</sup> 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

<sup>87</sup> *Id.* at 129, 239 N.E.2d at 78.

<sup>88</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 200, 530 N.E.2d at 5.

<sup>89</sup> *Id.*

<sup>90</sup> Brief for Appellee AFSCME Ohio Council 8 at A-1-A-23, *Rocky River v. SERB*, 39 Ohio St. 3d 196 (1988) (No. 87-157).

<sup>91</sup> Anderson, *The Ohio Bargaining Impasse Procedures: An Outsider's View*, 35 CASE W. RES. L. REV. 374, 379 (1985).

<sup>92</sup> 22 Ohio St. 3d 1, 488 N.E.2d 181 (1986).

<sup>93</sup> *Id.* at 1, 488 N.E.2d at 182.

<sup>94</sup> *Id.* at 4-5, 488 N.E.2d at 184-85.

Later that year in *Kettering*,<sup>95</sup> a 4-3 majority found that another provision of the Act was constitutional and did not violate a city's right to exercise its powers of local self-government.<sup>96</sup> Then Chief Justice Frank Celebrezze, writing for the majority, noted the Act explicitly preserved a city's local self-government management powers.<sup>97</sup> Celebrezze noted that a state's exercise of its police powers in matters of statewide concern may supersede municipal powers.<sup>98</sup> He found Kettering's ordinance, which excluded all supervisory employees from bargaining units, conflicted with the Act's definition of public employees.<sup>99</sup> Celebrezze relied on *Dayton* to find the legislature was exercising its police power to promote the general safety and welfare of public employees when it passed the Act,<sup>100</sup> thus the doctrine of statewide concern applied.<sup>101</sup>

On the same day the court decided *Rocky River*, it unanimously decided, in *Twinsburg v. SERB*,<sup>102</sup> that the Act did not violate a charter-city's home rule powers.<sup>103</sup> Twinsburg sought a declaratory judgment establishing that it was not required to bargain with the union seeking to represent its police force.<sup>104</sup> The opinion for the court said there was no "irreconcilable conflict" between the Act and a city's right to determine employee wages.<sup>105</sup> The court made a distinction between the city's right to determine employee compensation and "the method or process" of determining that compensation.<sup>106</sup> The court said the Act, minus the binding arbitration provision struck down in *Rocky River*, deals with the latter, but does not interfere with the former.<sup>107</sup>

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<sup>95</sup> *Kettering v. SERB*, 26 Ohio St. 3d 50, 496 N.E.2d 983 (1986).

<sup>96</sup> *Id.* at 56, 496 N.E.2d at 988.

<sup>97</sup> *Id.* at 53, 496 N.E.2d at 986; OHIO REV. CODE ANN. § 4117.08(C) (Anderson Supp. 1988).

<sup>98</sup> *Kettering*, 26 Ohio St. 3d at 53, 496 N.E.2d at 986.

<sup>99</sup> *Id.* at 51, 496 N.E.2d at 985.

<sup>100</sup> *Id.* at 55, 496 N.E.2d at 987-88.

<sup>101</sup> *Id.* J. Locher's dissent emphasized that state laws traditionally have prevailed over local laws only when the local law was characterized as a police, sanitary, or other regulation and not when the local subdivision was exercising powers of self-government. *Id.* at 60-63, 496 N.E.2d at 991-94 (Locher, J., dissenting).

<sup>102</sup> 39 Ohio St. 3d 226, 530 N.E.2d 26 (1988).

<sup>103</sup> *Id.* at 228-29, 530 N.E.2d at 29.

<sup>104</sup> *Id.* at 226, 530 N.E.2d at 27.

<sup>105</sup> *Id.* at 228, 530 N.E.2d at 29.

<sup>106</sup> *Id.* Two of the concurring opinions faulted the principal opinion for limiting the decision to presuming the Act's constitutionality and ignoring the statewide concern doctrine and the state legislature's power to provide for the general welfare of public employees under article II, section 34. *Id.* at 230-35, 530 N.E.2d at 30-34 (Sweeney, J., Douglas, J., concurring in part and dissenting in part).

<sup>107</sup> *Id.* at 228, 530 N.E.2d at 29. In the court's May 1989 decision, "inconsistent" language in *Twinsburg* regarding binding arbitration was specifically overruled. *Rocky River*, 43 Ohio St. 3d at 20, 539 N.E.2d at 120.

*Rocky River* applied a mechanical home-rule test to void the binding arbitration provision. The majority reiterated that setting wages was a power of local self-government and found Rocky River's contract impasse had no extraterritorial effects.<sup>108</sup> The court misapplied recent home rule precedent. The court also ignored recent decisions upholding the Act as a state law of general nature that should prevail over city charters or ordinances.<sup>109</sup>

If allowed to stand, the *Rocky River* opinion could cause great confusion in the relationship between local governments and the state. The legislature may be limited in "solving" sensitive and controversial issues of public importance if any municipality can easily resort to invoking home rule to thwart progressive legislation.

### *Rocky River Ignored the Explicit Language of Article II, Section 34*

Ohio Constitution, article II, section 34, 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 employees; and no other provision of the Constitution shall impair or limit this power.<sup>110</sup>

The majority said this section had limited effect.<sup>111</sup> The court found that the 1912 state constitutional convention adopted the provision so the state could legally set minimum wages and the hours of its employees.<sup>112</sup> Furthermore, the majority stated that no one had ever argued the provision could supersede a city's power to set employee wages.<sup>113</sup> Chief Justice Moyer felt such a holding would "overrule years of well-established law in Ohio" and "strip all incorporated municipalities in Ohio of one of their most important responsibilities."<sup>114</sup>

The majority and dissent disagreed about distinguishing a 1967 case that relied on article II, section 34. In *State, ex rel. Board of Trustees of Pension Fund v. Board of Trustees of Relief Fund*,<sup>115</sup> a unanimous court

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<sup>108</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 200, 530 N.E.2d at 5.

<sup>109</sup> *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. SERB*, 22 Ohio St. 3d at 8, 488 N.E.2d at 187; *Kettering v. SERB*, 26 Ohio St. 3d at 54 n.4, 496 N.E.2d at 987 n.4.

<sup>110</sup> OHIO CONST. art. II, § 34.

<sup>111</sup> *Rocky River*, 39 Ohio St. 3d at 205, 530 N.E.2d at 9.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 205-06, 530 N.E.2d at 9-10.

<sup>114</sup> *Id.* at 207, 530 N.E.2d at 11.

<sup>115</sup> 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967).

held a non-chartered city had to transfer assets of its police pension fund to a state fund.<sup>116</sup> The local board said the transfer violated the city's home rule powers.<sup>117</sup> The court said the ratifiers of the 1912 provision intended the section to apply to local governments and state employees.<sup>118</sup> The court recognized that the state's political subdivisions "en masse" were one of the largest employers in the state.<sup>119</sup> The court also held local police and firefighters were employees "within the scope of this provision."<sup>120</sup>

*Rocky River* attempted to distinguish *Pension Fund* in a curious manner. In *Pension Fund* the court stated article II, section 34 applied because of a statewide concern.<sup>121</sup> The majority found the state legislature bailed out local pension funds to reform an existing program.<sup>122</sup> Justice Douglas' dissent in *Rocky River* noted that *Pension Fund*'s invocation of article II, section 34 did not involve the narrow scope of minimum wages or the hours of labor, but a pension fund.<sup>123</sup> Justice Douglas held that if article II, section 34 only applied to minimum wages, then about half of the language would be "mere surplusage."<sup>124</sup> Douglas also felt the result in *Pension Fund* intruded more on powers of local self-government than the challenged arbitrator's award in *Rocky River*.<sup>125</sup> In *Pension Fund*, the state required the cities transferring assets to the state fund to pay for 55 years an amount a state board would determine.<sup>126</sup> Since the Act involves the general welfare of employees, Douglas argued the home rule argument did not apply to challenging binding arbitration.<sup>127</sup>

Justices Sweeney and Brown also agreed that article II, section 34 authorized binding arbitration.<sup>128</sup> Both Douglas<sup>129</sup> and Sweeney<sup>130</sup> asserted that article II, section 34 was another ground for upholding the Act's constitutionality in *Twinsburg*'s home rule challenge.<sup>131</sup> Justice Locher,<sup>132</sup>

<sup>116</sup> *Id.* at 107, 233 N.E.2d at 137.

<sup>117</sup> *Id.* at 106, 233 N.E.2d at 137. The local board also argued the state statute in question violated article XII, section 2; article II, section 28; and article II, section 4 of the Ohio Constitution. The court said article II, section 34 was "dispositive" of all issues. *Id.*

<sup>118</sup> *Id.* at 107, 233 N.E.2d at 137.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 207, 530 N.E.2d at 11.

<sup>122</sup> *Id.* at 206-07, 530 N.E.2d at 10-11.

<sup>123</sup> *Id.* at 216, 530 N.E.2d at 18 (Douglas, J., dissenting).

<sup>124</sup> *Id.* at 217, 530 N.E.2d at 19.

<sup>125</sup> *Id.* at 219, 530 N.E.2d at 20-21.

<sup>126</sup> *Id.* at 218, 530 N.E.2d at 20.

<sup>127</sup> *Id.* at 215-16, 530 N.E.2d at 18.

<sup>128</sup> *Id.* at 208, 225, 530 N.E.2d at 12, 26 (Sweeney, J., Brown, J., dissenting).

<sup>129</sup> *Twinsburg v. SERB*, 39 Ohio St. 3d at 234-35, 530 N.E.2d at 34 (Douglas, J., concurring and dissenting).

<sup>130</sup> *Id.* at 233, 530 N.E.2d at 32-33 (Sweeney, J., concurring and dissenting).

<sup>131</sup> *Id.* at 226, 530 N.E.2d at 26.

<sup>132</sup> *Id.* at 227-29, 530 N.E.2d at 28-29.

who wrote the majority opinion in *Twinsburg*, and Justice Wright,<sup>133</sup> who wrote a concurring opinion, did not cite article II, section 34. Locher and Wright comprised half of the majority for *Rocky River*.<sup>134</sup>

One can only speculate why several justices take exception to the clear and unambiguous language of article II, section 34. One possible reason may be a desire to limit some controversial pro-labor decisions the court rendered prior to Chief Justice Moyer's election to the court.<sup>135</sup> Whatever the justices' concern, Chief Justice Moyer's majority opinion does not adequately explain why article II, section 34 does not cover the Act's comprehensive statutory scheme for preventing safety forces from striking.

### *The Rationale for Rocky River was a Policy Preference for Public Accountability in Local Government*

The majority held that the conciliator's binding arbitration of collective bargaining disputes in the field of city safety employee wages and benefits was an unconstitutional delegation of legislative power.<sup>136</sup> Case law, rather than any specific provision of the state constitution, governs the delegation doctrine in Ohio. In *Blue Cross v. Ratchford*,<sup>137</sup> the court defined the essentials of valid delegation-policy standards, and a procedure for effective review.<sup>138</sup> The *Ratchford* court backed away from the modern trend of focusing on "safeguards" rather than requiring specific "standards."<sup>139</sup>

<sup>133</sup> *Id.* at 229-30, 530 N.E.2d at 29-30 (Wright, J., concurring).

<sup>134</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 208, 530 N.E.2d at 12.

<sup>135</sup> *Blankenship v. Cincinnati Milacron Chemicals*, 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982) (employee not barred by article II, section 35 of Ohio Constitution or the worker's compensation act from suing employer for intentional torts); *State, ex rel. Ramirez v. Industrial Commission*, 69 Ohio St. 2d 630, 433 N.E.2d 586 (1982) (temporary total disability defined as preventing worker from returning to his or her former position of employment); *Littlefield v. Pillsbury Co.*, 6 Ohio St. 3d 389, 453 N.E.2d 570 (1983) (court adopts special hazard rule allowing worker's compensation awards for injuries occurring off work premises, before or after work, if injury occurs because of hazard created by the employment). See Justice Wright's dissent in the subsequent reversal of *Rocky River* in which he argued for a limited view of article II, section 34 based on the Framers' intent that minimum wage and maximum hours legislation might pass constitutional muster at a time when federal and state courts were striking down such legislation on substantive due process grounds. *Rocky River*, 43 Ohio St. 3d at 26-33, 539 N.E.2d at 124-30 (Wright, J., dissenting).

<sup>136</sup> *Rocky River*, 39 Ohio St. 3d at 205, 530 N.E.2d at 9.

<sup>137</sup> 64 Ohio St. 2d 256, 416 N.E.2d 614 (1980).

<sup>138</sup> *Id.* at 256, 416 N.E.2d at 615.

A statute does not unconstitutionally delegate legislative power if it establishes, through legislative policy and such standards as are practical, an intelligible principle to which the administrative officer or body must conform and further establishes a procedure whereby exercise of the discretion can be reviewed effectively. *Id.*

<sup>139</sup> *Id.* at 260, 416 N.E.2d at 618; White, *supra* note 74, at 13.

The purpose or policy of the Act is found in section 4117.22: "promoting orderly and constructive relationships between all public employers and their employees."<sup>140</sup> The chairman of the New York City Office of Collective Bargaining stated that one of the major purposes of Ohio's Act "is to resolve impasses and avoid strikes."<sup>141</sup> The legislature could reasonably have considered the rights of striking or going to arbitration as "stimuli"<sup>142</sup> or "ultimate sanctions"<sup>143</sup> for realistic collective bargaining.

*Rocky River* found the Act's standards for an arbitrator still allowed the arbitrator "considerable discretion."<sup>144</sup> The Act provides that the arbitrator shall consider such matters as past contracts between the parties, the public interest and welfare, and the ability of the public employer to finance and administer the proposed contract.<sup>145</sup> The principal dissent maintained these were "detailed guidelines."<sup>146</sup>

The majority also found the Act only permitted limited judicial review of the arbitrator's decision.<sup>147</sup> The Act allows local courts of common pleas to review arbitrator awards under the state's arbitration statute.<sup>148</sup> The majority noted that case law under that statute only permits limited judicial review of private arbitrations.<sup>149</sup>

The Act clearly sets forth a policy, standards and judicial review. The lack of public accountability is the root of the court's concern. Instead of focusing on binding arbitration as a mechanism for resolving labor disputes, the majority focused on such procedural facts as a city council must enact ordinances to fix salaries, set budgets and fund appropriations.<sup>150</sup> An arbitrator's "binding mandate" interfered with these legislative functions.<sup>151</sup> The majority cited approving language from those few jurisdictions which have invalidated arbitration in public sector collective bargaining because of improper delegation of legislative authority.<sup>152</sup>

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<sup>140</sup> OHIO REV. CODE ANN. § 4117.22 (Anderson Supp. 1988).

<sup>141</sup> Anderson, *supra* note 91, at 377.

<sup>142</sup> *Id.* at 382.

<sup>143</sup> Bumpass, Ashmus, *Public Sector Bargaining in a Democracy—An Assessment of the Ohio Public Employee Collective Bargaining Law*, 33 CLEV. ST. L. REV. 593, 640 (1984-85).

<sup>144</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 204, 530 N.E.2d at 8.

<sup>145</sup> OHIO REV. CODE ANN. § 4117.14(G)(7) (Anderson Supp. 1988).

<sup>146</sup> *Rocky River*, 39 Ohio St. 3d at 215, 530 N.E.2d at 17 (Douglas, J., dissenting).

<sup>147</sup> *Id.* at 204, 530 N.E.2d at 8.

<sup>148</sup> OHIO REV. CODE ANN. § 4117.14(H) (Anderson Supp. 1988), referring to review as governed by OHIO REV. CODE ANN. Chapter 2711.

<sup>149</sup> *Rocky River*, 39 Ohio St. 3d at 204, 530 N.E.2d at 8.

<sup>150</sup> *Id.* at 201, 530 N.E.2d at 6.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 201-03, 530 N.E.2d at 6-7.

However, most state supreme courts that have considered the constitutionality of binding arbitration for public employees have upheld the statutes.<sup>153</sup>

The *Rocky River* court apparently sided with those commentators who maintain that setting wages is a political decision and a power of local self-government.<sup>154</sup> That analysis ignores the fact that a city council still sets wages, adopts a budget and appropriates monies. An arbitrator cannot perform these functions. The arbitrator merely carries out the provisions of the Act. True, an arbitrator's decisions can affect the budget. However, the city is still free to make policy choices in the city budget in accordance with a conciliator's award.<sup>155</sup>

The Act's "binding mandate" is hardly coercive. Collective bargaining is a series of compromises between both parties. The Act allows the parties to agree to other forms of impasse resolution<sup>156</sup> instead of following the binding arbitration route.<sup>157</sup> Otherwise, binding arbitration is the last resort under the Act for a limited group of employees who are denied the right to strike. The arbitrator *must* consider the city's ability to pay as one factor in making the award.<sup>158</sup> Thus, opponents who claim arbitration can "bust" city budgets and force tax hikes fail to make a persuasive argument.<sup>159</sup>

### *Rocky River Ignored the Doctrine of Stare Decisis*

*Rocky River*, in effect, usurped the power of the state legislature. The dissents correctly pointed out that the majority was substituting its view of the wisdom of the legislation instead of presuming the constitutionality of the statute.<sup>160</sup> Since the constitutional questions could have been decided in favor of upholding the binding arbitration provision, the decision seems to rest on the court's notion of public accountability.

The court also ignored two recent cases, decided only two years prior, which had stamped the Act as a general law and, consequently, as mani-

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<sup>153</sup> Staudohar, *Constitutionality of Compulsory Arbitration Statutes in Public Employment*, 27 LAB. L.J. 670, 675 (1976); White, *supra* note 74, at 14, 18.

<sup>154</sup> *Rocky River*, 39 Ohio St. 3d at 203, 530 N.E.2d at 7-8; White, *supra* note 74, at 21.

<sup>155</sup> Staudohar, *supra* note 153, at 675.

<sup>156</sup> OHIO REV. CODE ANN. §§ 4117.14(C)(1), 4117.14(E) (Anderson Supp. 1988).

<sup>157</sup> *Id.* § 4117.14(D)(1) (Anderson Supp. 1988).

<sup>158</sup> *Id.* § 4117.14(G)(7)(c) (Anderson Supp. 1988).

<sup>159</sup> Comment, *supra* note 15, at 247.

<sup>160</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 208-09, and 210-11, 530 N.E.2d at 12, 14 (Sweeney, J., and Douglas, J., dissenting).

festing the legislature's exercise of its police powers.<sup>161</sup> Those precedents, particularly *Kettering*,<sup>162</sup> could have conceivably led the court to presume the Act's binding arbitration mandate prevailed over a city's charter. Unexplainably, the court also ignored a unanimous decision released the same day which upheld the constitutionality of the Act in the face of another home-rule challenge.<sup>163</sup>

The court was indifferent to the clear language of article II, section 34 which provides a foundation for presuming the constitutionality of the Act and its binding arbitration provision. Binding arbitration of any political subdivision's bargaining impasses with safety forces was a state decision to improve the general welfare of public employees. The court made an unpersuasive effort to sidestep the *Pension Fund*<sup>164</sup> case, arguably the strongest precedent in favor of applying article II, section 34 to state statutes covering the general welfare of public employees.

The majority never directly mentioned the *Ratchford* test in discussing the delegation of legislative authority.<sup>165</sup> The court did address the issues of standards and judicial review.<sup>166</sup> While those findings were arguable, the majority did not even mention the legislature's policy in enacting the provision in discussing their delegation holding.<sup>167</sup> The court concluded that state-required final offer settlement arbitration offended the court's notions of public accountability.

By deciding all three challenged constitutional claims against binding arbitration, the court ended up with a weak policy decision. From a policy standpoint, the notion that state-paid private arbitrators lack the necessary public accountability to issue binding decisions for a municipality may have been the court's best argument. Lack of public

<sup>161</sup> *State, ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. SERB*, 22 Ohio St. 3d 1, 488 N.E.2d 181 (1986); *Kettering v. SERB*, 26 Ohio St. 3d 50, 496 N.E.2d 983 (1986).

<sup>162</sup> The vote in *Kettering* was 4-3, which commanded greater authority. 26 Ohio St. 3d at 56, 496 N.E.2d at 988. In *Dayton*, three justices concurred only in the syllabus and judgment and three others concurred separately. 22 Ohio St. 3d at 9, 488 N.E.2d at 187.

<sup>163</sup> *Twinsburg v. SERB*, 39 Ohio St. 3d 226, 530 N.E.2d 26 (1988).

<sup>164</sup> *State ex rel. Bd. of Trustees of Pension Fund v. Bd. of Trustees of Relief Fund*, 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967). The court in its November 1988 decision tried to distinguish *Pension Fund* as involving some type of statewide concern that made article II, section 34 uniquely applicable. *Rocky River*, 39 Ohio St. 3d at 206-07, 530 N.E.2d at 10-11. But see Justice Wright's dissent in the court's May 1989 decision where he concedes *Pension Fund* does support the new majority's position, but claims it was wrongly decided and "contains no constitutional history, ignores the ramifications of its language, and like the majority reaches its conclusion absent rules, facts or rationale." *Rocky River*, 43 Ohio St. 3d at 36, 539 N.E.2d at 132 (Wright, J., dissenting).

<sup>165</sup> *Rocky River v. SERB*, 39 Ohio St. 3d at 204, 530 N.E.2d at 8. The majority only mentioned *Ratchford* in discussing judicial review of arbitration awards. *Id.*

<sup>166</sup> *Id.* at 204-05, 530 N.E.2d at 8-9.

<sup>167</sup> *Id.* at 201-05, 530 N.E.2d at 6-9.



accountability may be unwise. The state legislature decided otherwise as part of an effort to fashion a comprehensive scheme. Public accountability may have been the rationale behind the court's treatment of the issues in the case. This notion of local democratic control inherently gives added support to home rule concepts and avoids a broad interpretation of article II, section 34 at the expense of local governments. The court makes plain it focused on public accountability, and not the *Ratchford* test, when it decided the question of unlawful delegation of legislative authority.<sup>168</sup> While the Ohio Supreme Court's opinion in *Rocky River* may be laudable from the standpoint of a public accountability policy, it appears unprincipled as a matter of constitutional adjudication. Precedent, constitutional provisions and the power of the state legislature were all ignored or given lesser weight in a balancing contest with local democratic accountability. Such a holding leaves the court open to a charge that *Rocky River* was essentially a political decision.

A court cannot hamper its judicial function through slavish adherence to precedent. Society's values, the circumstances of ordinary life and notions of right and wrong do change over time. But these concerns are more appropriate to court decisions on common law questions.<sup>169</sup> It is another matter to place constitutional adjudication of state statutes on the same indefinite basis.<sup>170</sup>

## CONCLUSION

*Rocky River* is likely to be overruled when the Ohio Supreme Court reconsiders the case. A personnel change on the court almost certainly led to reopening the case and the views of the other justices are well known. The merits of the court's November decision, or the lack thereof, make the case ripe for reversal.

A majority of the justices failed to presume the constitutionality of a critical provision of the state legislature's comprehensive scheme for

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<sup>168</sup> *Id.*

<sup>169</sup> See the Ohio Supreme Court's treatment of parental and interspousal tort immunities in the 1980s. The court abolished both in *Shearer v. Shearer*, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985) (this case overruled three cases decided since 1965).

<sup>170</sup> On reconsideration, Justice Douglas, who authored the majority opinion, set out a theory of stare decisis. *Rocky River v. SERB*, 43 Ohio St. 3d at 4-10, 539 N.E.2d at 106-11. Douglas argued, quoting former U.S. Supreme Court Justice Felix Frankfurter, that stare decisis "is a principle of policy and not a mechanical formula." *Id.* at 10, 539 N.E.2d at 111 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (Frankfurter, J.)). Justice Wright, in dissent, welcomed Douglas' "articulate dissertation" and noted the public would be "well-served" if the court followed Douglas' suggestions. *Id.* at 22, 539 N.E.2d at 121 (Wright, J., dissenting). See Postscript.

recognizing and regulating public employee collective bargaining in Ohio. The court sustained a home rule challenge to section 4117.14(I). A bare majority held that binding arbitration of a contract impasse between a home rule charter city and its unionized safety forces interfered with the power of local self-government to set wages for its employees. The court held that setting the wages of Rocky River's firefighters did not have any "extraterritorial effects" beyond the municipal boundaries. The court misapplied recent developments in home rule doctrine. State law can prevail over local ordinances when the state's police power is implicated. There was case authority for the proposition the state legislature passed the Act as an exercise of its police power to promote the general welfare of Ohio citizens. The statewide concern doctrine also showed a path towards upholding binding arbitration.

The majority also found section 4117.14(I) constitutionally infirm because it constituted an unlawful delegation of municipal legislative authority to an outside arbitrator. The court's reasoning is suspect. It never mentioned directly the three-prong *Ratchford* test — purpose, standards and adequate judicial review. Instead, the court found the Act's guidelines for arbitrators allowed them too much discretion and indicated any judicial review would be limited. The court did not speak to the legislature's purpose in enacting the Act, but instead focused its attention on the undesirability of unelected outsiders making political judgments about policy matters for local governments. The majority rebutted the presumption of section 4117.14(I)'s constitutionality with an appeal to public accountability and democratic principles. Such views are laudable, but hardly controlling. The Act requires an arbitrator to consider a city's ability to finance wage increases. Arbitration is not coercive, but a final step in a long process in which both city and union participate.

The glaring weakness of the court's decision is found in its treatment of article II, section 34. This labor provision of the state constitution includes clear and apparently unambiguous language that the state can pass general welfare legislation for employees "and no other provision of the Constitution shall impair or limit this power." The court said article II, section 34 was limited to the ability of the state to set wage and hour standards for its employees. The court declined to give article II, section 34 a broader interpretation though there was case precedent for doing so.

*Rocky River* appears problematic as an exercise in constitutional adjudication. The court ignored the precedential value of recent cases as they related to the issues in *Rocky River*. A decision on the very same

day *Rocky River* was released upheld another provision of the Act in the face of another home-rule challenge.

Binding arbitration of labor disputes between a municipality and its employees is a controversial issue. This note argued the infirmities in the court's constitutional adjudication of that issue. Requiring binding arbitration of negotiation impasses between a city and its safety forces may not be a particularly wise idea, but the state legislature determined otherwise in place of granting such employees the right to strike. The court's treatment of the constitutional claims, particularly in its handling of the delegation issue and article II, section 34, and its failure to defer to legislative policy judgments leaves the court open to the charge it made an essentially political decision. Section 4117.14(I) passes constitutional muster.

### POSTSCRIPT

Six months after the Ohio Supreme Court decided *Rocky River*,<sup>171</sup> the court (with the substitution of one new member) reversed itself.<sup>172</sup> Binding arbitration of contract disputes between home-rule cities and their safety forces was held permissible and section 4117.14(I) of the Act, and the Act itself, were held constitutional.<sup>173</sup>

Justice Douglas, the author of last year's principal dissent, wrote the new majority opinion. The decision was grounded on article II, section 34 of the Ohio Constitution.<sup>174</sup> Douglas broadly interpreted this labor provision of the state constitution based on a textual analysis<sup>175</sup> and the court's broad interpretation of the same provision in the *Pension Fund* case.<sup>176</sup> Justice Wright, dissenting, said the new majority misconstrued the intent of the delegates to the 1912 state constitutional convention.<sup>177</sup> Delegates adopted the provision in an effort to thwart federal and state courts which were striking down wage and hour labor legislation on substantive due process grounds.<sup>178</sup> Wright said the court's interpretation of the phrase "and no other provision of the Constitution shall impair or limit this power"<sup>179</sup> now gives the state legislature unlimited power to ignore other sections of the state constitution.<sup>180</sup>

<sup>171</sup> 39 Ohio St. 3d 196, 530 N.E.2d 1 (Nov. 2, 1988).

<sup>172</sup> *Rocky River*, 43 Ohio St. 3d 1, 539 N.E.2d 103 (May 10, 1989).

<sup>173</sup> *Id.* at 1-2, 539 N.E.2d at 104.

<sup>174</sup> See the second paragraph of the court's syllabus. *Id.*

<sup>175</sup> *Id.* at 13-16, 539 N.E.2d at 114-16.

<sup>176</sup> *Id.* at 16-18, 539 N.E.2d at 116-18.

<sup>177</sup> *Id.* at 23, 26-34, 539 N.E.2d at 122, 124-30 (Wright, J., dissenting).

<sup>178</sup> *Id.* at 26-34, 539 N.E.2d at 124-30 (Wright, J., dissenting).

<sup>179</sup> OHIO CONST. art. II, § 34.

<sup>180</sup> *Rocky River*, 43 Ohio St. 3d at 23-26, 539 N.E.2d at 122-24 (Wright, J., dissenting).

The dissent also noted the court's "inconsistency" in grounding its decision on article II, section 34 while, at the same time, finding no unlawful delegation of municipal legislative authority to an outside arbitrator.<sup>181</sup> Wright pointed to 70 years of court precedent on home rule doctrine<sup>182</sup> and said the court was "effectively reading" home rule out of the state constitution.<sup>183</sup> The majority held article XVIII, section 3 (the home rule amendment) was irrelevant to the case.<sup>184</sup>

The court's about-face is clearly controversial. The court reversed itself on a major question in the span of six months. Justice Douglas went a long way to restore some sense of integrity to the court and its decision-making process.<sup>185</sup> He began his opinion with an analytical discussion of the role of stare decisis in constitutional adjudication.<sup>186</sup> He said courts should follow precedent in common law matters and statutory interpretation, but should be "more flexible" when deciding constitutional issues.<sup>187</sup> The difference in approach depends on the ability of the legislature to overrule judicial interpretations.<sup>188</sup> The need to amend a constitution to overrule a court decision is much more unlikely and more difficult than the ability of the legislature to amend statutes or codify common-law doctrines.<sup>189</sup>

Chief Justice Moyer limited himself to a 59-word dissent.<sup>190</sup> He adopted by reference his majority opinion of the previous November and noted its reversal would affect home rule in Ohio.<sup>191</sup>

The effects of *Rocky River* are difficult to discern. While the future of binding arbitration seems secure, other questions now arise. Is home rule in Ohio an emasculated concept because of the statewide concern doctrine<sup>192</sup> or is home rule only limited to a degree when the state legislature has specific constitutional authority to enact certain types of legislation? Will the court continue to broadly interpret article II, section 34 in favor of labor or will the court construe the provision more narrowly when it is pitted against constitutional provisions other than

<sup>181</sup> *Id.* at 37, 539 N.E.2d at 133 (Wright, J., dissenting).

<sup>182</sup> *Id.* at 22 n.18, 539 N.E.2d at 122 n.18 (Wright, J., dissenting).

<sup>183</sup> *Id.* at 42, 539 N.E.2d at 137 (Wright, J., dissenting).

<sup>184</sup> *Id.* at 12-13, 539 N.E.2d at 113.

<sup>185</sup> See remarks of dissenting Justice Wright accepting Justice Douglas' approach to stare decisis. *Id.* at 22, 539 N.E.2d at 121 (Wright, J., dissenting).

<sup>186</sup> *Id.* at 4-10, 539 N.E.2d at 106-11.

<sup>187</sup> *Id.* at 5, 6, 10, 539 N.E.2d at 106-08, 111.

<sup>188</sup> *Id.* at 6, 539 N.E.2d at 107-08.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 20-21, 539 N.E.2d at 120 (Moyer, C.J., dissenting).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 42, 539 N.E.2d at 137 (Wright, J., dissenting).

home rule?<sup>193</sup> Will the court recover its prestige or does Justice Douglas' approach to stare decisis in *Rocky River* portend constitutional adjudication in Ohio will resemble judges as crap shooters?

At the very least, judicial deference to the constitutional validity of legislative enactments in Ohio is settled as a matter of presumption.<sup>194</sup>

TIMOTHY D. RUDY

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<sup>193</sup> *Id.* at 23-26, 43-44, 539 N.E.2d at 122-24, 138 (Wright, J., dissenting).

<sup>194</sup> *Id.* at 10, 539 N.E.2d at 111; *id.* at 22, 539 N.E.2d at 121 (Wright, J., dissenting).