1984

Ohio's Public Employee Bargaining Law: Can It Withstand Constitutional Challenge?

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CINCINNATI LAW REVIEW

PUBLISHED QUARTERLY BY THE BOARD OF EDITORS

VOLUME 53 1984 NO. 1

OHIO'S PUBLIC EMPLOYEE BARGAINING LAW: CAN IT WITHSTAND CONSTITUTIONAL CHALLENGE?

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I. INTRODUCTION

Public employees in Ohio are now statutorily entitled to bargain collectively with their government employers. This controversial right was obtained on July 6, 1983, when Ohio Governor Richard Celeste fulfilled a major campaign promise by signing into law Senate Bill 133. This bill, which took effect April 1, 1984, has been labeled "one of the most pro-labor public employee bargaining statutes in the nation."[1]

As with any legislation that provides sweeping social and economic changes, challenges to the bill's legitimacy can be expected. Experience in other states teaches that constitutional attacks on the statute will be mounted swiftly, attacks that undoubtedly will allege the bill contains an unconstitutional delegation of legislative authority, does not comply with the requisites of procedural due process, and is a violation of the home rule provisions of the state constitution.[2]

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1. J. LEWIS & S. SPIRN, OHIO COLLECTIVE BARGAINING LAW 3 (1983). This label undeniably is correct. For a discussion of the bill's provisions, see *infra* text accompanying notes 15-52.

2. A challenge to the bill on "home rule" grounds may presently be in the works. Several Ohio mayors have hinted publicly of their intent to attack the statute as violative

This Article analyzes the ways these issues have been handled by out-of-state courts and suggests their proper resolution by the courts of Ohio. It begins by tracing the development of public employee bargaining and by detailing the checkered history such bargaining efforts have had in Ohio. It next provides an overview of Senate Bill 133, focusing on those provisions likely to come under constitutional attack. It then examines out-of-state authority for guidelines on how Ohio can and should deal with these constitutional questions. On an issue-by-issue basis, a framework for resolving these questions is supplied.

II. Historical Background

Unlike those persons employed by private employers, public employees only somewhat recently are securing collective bargaining rights. The National Labor Relations Act (NLRA), which protects concerted activities of private workers, does not extend to public employees.[3] And while various attempts have been made to amend the NLRA to cover state and local governments, those efforts have not succeeded.[4] Collective bargaining rights for state and local government employees thus remain in the hands of the individual states.

Wisconsin, in 1959, became the first state to recognize collective bargaining rights for its public employees.[5] But it was President Kennedy's executive order, acknowledging federal employees' right to unionize and the corresponding right of their employers to recognize unions, that stimulated the growth of public sector bargaining.[6] A public employer, however, has no duty to bargain with its

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of the home rule provisions of the Ohio Constitution. *See* 21 Gov't Empl. Rel. Rep. (BNA) at 1465 (July 18, 1983).

3. Under the National Labor Relations Act (NLRA), the term "employer" does not include a state or political subdivision thereof. 29 U.S.C. § 152(2) (1976).

4. H.R. 1987, 95th Cong., 1st Sess., 123 Cong. Rec. 1335 (1977); H.R. 9730, 93d Cong., 1st Sess., 119 Cong. Rec. 27,062 (1973). Additionally, in 1976, the Democratic platform endorsed a public employee bargaining law. *See* National Journal, Jan. 8, 1977, Vol 9, No. 2, at 69.

Any serious effort to extend the NLRA to the states, of course, would confront the potential roadblock of National League of Cities v. Usery, 426 U.S. 833 (1976) (extension of Fair Labor Standards Act to state and local government employees held to violate tenth amendment).

5. 1959 Wis. Laws ch. 509, § 1 (codified at Wis. Stat. Ann. §§ 111.70-.71 (West 1974)).

6. Exec. Order No. 10,988, 3 C.F.R. 521 (1962). The courts soon thereafter added impetus to the movement by holding protected by the first amendment a public employee's right to join a union. *See* McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).

employees.[7] Thus, despite the workers' right to unionize, bargaining rights for state and local employees exist only if the governmental unit so decrees.

During the late 1960's and the 1970's, numerous states decided in favor of granting their workers the right to bargain collectively. By 1977, eighteen states had provided comprehensive bargaining rights to their employees,[8] and by 1983, approximately one half of the states had passed comprehensive public employee bargaining statutes.[9] A total of thirty-seven states, moreover, had in place bargaining laws for at least some of their employees at the time Senate Bill 133 was passed.[10] Ohio, in 1983, was thus relatively late in recognizing public employee bargaining. Until the bill's passage, Ohio had not provided employees with any statutory bargaining rights, and its Ferguson Act expressly forbade strikes by public employees.[11]

The state's late entry into the foray was not from lack of effort. Three previous attempts to enact such legislation had failed, two by vetoes of then-Governor James A. Rhodes.[12] Thus, when Governor Celeste took office with the promise of a public bargaining bill,

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7. *See* Arkansas State Highway Employees Local 1315 v. Smith, 441 U.S. 463 (1979) (per curiam).

8. Associated Press, Feb. 20, 1977. A "comprehensive" bargaining law is one that applies to most, if not all, public employees.

9. Drachman & Dohrman, *Labor and Employment Law*, 1983 A.B.A. COMMITTEE REPORTS 398.

10. *See* 21 GOV'T EMPL. REL. REP. (BNA) at 1464 (July 18, 1983). Illinois, moreover, enacted a comprehensive public employee bargaining law subsequent to Ohio. 4 LAB. REL. REP. (BNA) SLL 23:215 (1983) (discussing Illinois Labor Relations Act P.A. 1012, §§ 1-27) (effective July 1, 1984)). Thus, 39 states now provide bargaining rights to at least some employees.

It has been asserted that comprehensive bargaining laws are more likely to be found in those states having (1) relatively higher per capita expenditures by state government, (2) relatively larger changes in per capita income and (3) relatively more innovative state legislatures. R. ALLEN & T. KEAVENY, CONTEMPORARY LABOR RELATIONS 587 (1983).

11. OHIO REV. CODE ANN. §§ 4117.01-.05 (Page 1980) (repealed 1983). The absence of a statute, however, did not prevent collective bargaining by some employees. In Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975), the Supreme Court of Ohio held that school boards, *if they wish*, may bargain collectively, overruling the long-standing precedent of Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947), which had disapproved public sector bargaining. Indeed, over one-half of Ohio's public employees reportedly are already union members, and many have engaged in collective bargaining. *See* 21 GOV'T EMPL. REL. REP. (BNA) at 1464 (July 18, 1983).

12. 21 GOV'T EMPL. REL. REP. (BNA) at 1464 (July 18, 1983). Moreover, the legislation proposed in 1977, S. 222, 112th Ohio Gen. Ass., Reg. Sess. (1977-78), was strikingly similar to the present bill. For a discussion of the provisions of Senate Bill 222, see Note, *Collective Bargaining in Ohio's Public Sector: The Blueprint of Senate Bill 222 for Constructive Labor Relations*, 7 CAP. U.L. REV. 295 (1977).

it was a promise that public employees and their unions had long waited to see realized.[13]

Their wait was not a long one. Senate Bill 133, sponsored by Democrat Eugene Branstool, was approved by the State Senate on April 21, 1983, and passed the House on June 29, 1983, with various amendments. The following day, the Senate concurred with the House amendments, and the bill was signed into law by Governor Celeste on July 6, 1983.[14] Ohio thus became the thirty-eighth state to offer bargaining rights to public employees. And it did so with a flourish, enacting an extremely liberal, far-reaching piece of legislation, indisputably destined to change the nature of the public employer-public employee relationship throughout the state.

III. An Overview of Senate Bill 133

In Senate Bill 133 (Act), Ohio has gained one of the strongest public employee bargaining bills in the country.[15] The Act extends to virtually every public employer in the state,[16] as well as to almost every public employee.[17] It gives to public employees the right to unionize and to bargain collectively, and, for most public employees, it gives a limited right to strike.

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13. The wisdom of such a bill in the 1980's is, of course, debatable. A BNA survey found that in 1981, layoffs of state workers had occurred in 43 states, and in 1982, 44 states had laid off workers by mid-year. Hiring freezes and/or hiring restrictions, moreover, went into effect in all 50 states in 1982. Special Survey, *RIFS, Layoffs and EEO in State Governments*, 2 Gov't Empl. Rel. Rep. (BNA) at 948, *reported in* Drachman & Dohrman, *Labor and Employment Law*, 1983 A.B.A. Committee Reports 453. Arguably, the impact of such trends will be increased by a securing of collective bargaining rights by state workers. Ohio's bill, moreover, is expected to cost the state $3.3 million to implement. *See* 21 Gov't Empl. Rel. Rep. (BNA) at 1464 (July 18, 1983).

But despite these costs and the potential economic threat posed by the collective bargaining process, public employee unionism undeniably has been sought aggressively by many workers. Economic issues aside, public employees, like their private counterparts, want input into the decisionmaking process and a measure of control over the workplace. *See* Hagler, *The Regional Transportation District Strikes and the Colorado Labor Peace Act: A Study in Public Sector Collective Bargaining*, 54 Colo. L. Rev. 203, 231 (1983) and the studies cited therein.

14. The vote on the bill in both houses split strictly along party lines, with not one Republican voting for its passage. 21 Gov't Empl. Rel. Rep. (BNA) at 1464 (July 18, 1983).

15. 1983 Ohio Legis. Serv. 5-238 to 5-246 (Baldwin) (to be codified at Ohio Rev. Code §§ 4117.01-.23) [hereinafter referred to as the "Act"].

16. Federal government employees, of course, are not covered, nor are municipalities or townships with populations of less than 5,000. *Id.* at 5-238 (to be codified at Ohio Rev. Code § 4117.01(B)).

17. Among those persons excluded are persons holding elective office, members of the Governor's staff, employees of the General Assembly and of the newly-created State Employment Relations Board (SERB), court employees, confidential employees, managers and supervisors. *Id.* (to be codified at Ohio Rev. Code § 4117.01(C)).

The Act also creates the State Employment Relations Board (SERB or Board),[18] which is responsible for implementing, administering and enforcing the new legislation. This three-member panel's[19] powers are sweeping,[20] providing the Board with unlimited discretion in many areas in administering the Act. Additionally, the state personnel board of review, which hears civil service appeals, is placed under the Board's jurisdiction, making the SERB the dominant regulatory and hearing agency for personnel matters in Ohio.[21]

In many respects, the Act parallels the NLRA, and it is probable the federal body of law construing that statute will be used to interpret the often ambiguous provisions of the Ohio law.[22] The Act's ambiguity makes an analysis of its requirements difficult at this early stage; thus, this overview must not be read as a definitive guideline of the Act's requirements.

A. Representation and Organization Rights under the Act

The Act does not require a public employee to join a union, but it recognizes his right to do so.[23] It also guarantees a public employee

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18. *Id.* at 5-239 (to be codified at OHIO REV. CODE § 4117.02).

19. Membership on the SERB is by gubernatorial appointment. *Id.* (to be codified at OHIO REV. CODE § 4117.02(A)). Governor Celeste appointed Theodore Dyke, Helen Fix and William Sheehan as the first SERB. Chairman Dyke Resigned May 9, 1984.

20. *See* 1983 Ohio Legis. Serv. 5-239 (Baldwin) (to be codified at OHIO REV. CODE § 4117.02(C)-(N)). For example, the SERB has authority over hiring, unit determinations, representation questions, unfair labor practices, and promulgation of rules and regulations.

21. *Id.* (to be codified at OHIO REV. CODE § 4117.02(N)).

22. But compare the remarks of Representative Clifton Skeen, Chairman of the Ohio House Subcommittee on Commerce and Labor, who stated "I'm fairly familiar with the National Labor Relations Act. There may be some similarities, but I don't think this bill is in any way modeled after that." United Press International, June 2, 1983.

The authors beg to differ with Representative Skeen, as the Ohio Act is unmistakably modeled in many significant respects after the NLRA. *Compare* 1983 Ohio Legis. Serv. 5-238 to 5-246 (Baldwin) (to be codified at OHIO REVISED CODE §§ 4117.01-.23) *with* 29 U.S.C. §§ 151-69 (1976). Nonetheless, application of NLRA precedent to situations arising under the Ohio law should not occur blindly. The issues of public sector bargaining will differ from those arising in the private sector, and sensitivity to these differences is needed. For a similar viewpoint, see Decker, *Pennsylvania's Public Employee Relations Act (Act 195) and Impasse—The Public Employer's Right to Make Unilateral Changes in Employment Conditions*, 86 DICK. L. REV. 1 (1981).

23. 1983 Ohio Legis. Serv. 5-239 to 5-240 (Baldwin) (to be codified at OHIO REV. CODE § 4117.03). The Act specifically forbids a union shop—that is, a situation in which an employee must join the union as a condition of his employment. *Id.* at 5-241 (to be codified at OHIO REV. CODE § 4117.09). It provides, however, for the nonmember's payment of fees to the union if the collective bargaining agreement so requires. The constitu-

the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid and protection."[24] What constitutes "concerted activity" is currently a hot topic in the federal area,[25] and because the term is not defined in the Ohio statute, this evolving federal law presumably will be used to delineate the parameters of this right under the Act.

The Act also permits public employees to be represented by an "employee organization"—that is, a union.[26] When a union has been recognized or certified as an "exclusive representative of the employees," the employer has a duty to bargain with that union.[27] A union becomes the exclusive representative by demonstrating majority support, and this showing most often will occur through a formal election.[28] The SERB is responsible for overseeing the election process.

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tional implications of such a provision are explored in Robinson v. New Jersey, 547 F. Supp. 1297, 1298 (D.N.J. 1982), in which the court held unconstitutional a similar provision in New Jersey's bargaining statute. This issue is presently before the Supreme Court of the United States for resolution. *See* Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 685 F.2d 1065 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1767 (1983).

24. 1983 Ohio Legis. Serv. 5-239 (Baldwin) (to be codified at OHIO REV. CODE § 4117.03(A)(2)).

25. See NLRB v. City Disposal Systems, Inc., 52 U.S.L.W. 4360 (U.S. Mar. 21, 1984) (No. 82-960), which defined "concerted activities" as including the assertion by an individual employee of a right grounded in a collective bargaining agreement. See also Meyer Indus., Inc., 268 N.L.R.B. No. 73 (1984), in which the Board reversed its long-standing precedent of Alleluia Cushion Co., 221 N.L.R.B. 999 (1974), and held that group activity, necessary for protection under the statute, will not be presumed.

26. 1983 Ohio Legis. Serv. 5-238 (Baldwin) (to be codified at OHIO REV. CODE § 4117.01(D) defines "employee organization" as "any labor or bona fide organization in which public employees participate and which exists for the purpose, in whole or in part, of dealing with public employers concerning grievances, labor disputes, wages, hours, terms and other conditions of employment." The Act offers no guidance as to what constitutes a "bona fide" organization.

27. *Id.* at 5-240 (to be codified at OHIO REV. CODE § 4117.04(B)). An employer has no obligation to bargain with a union that has not been certified by the SERB as the "exclusive representative."

28. An employer is free to recognize voluntarily a union that has submitted "substantial evidence" of majority support. *Id.* (to be codified at OHIO REV. CODE § 4117.05(A)(2)). As a practical matter, though, employers can be expected to require employee organizations to demonstrate through a formal election that a majority of employees desires to be represented by a particular organization. See *id.* at 5-240 to 5-241 (to be codified at OHIO REV. CODE § 4117.07) for election procedures. Additionally, when an employer is guilty of committing unfair labor practices that prevent a "free and untrammelled election" *and* if a union at one time had majority support, the SERB can order a union certified. *Id.* at 5-240 (to be codified at OHIO REV. CODE § 4117.07(A)(2)).

The National Labor Relations Board (NLRB) similarly may require an employer to bargain if the employer's unfair labor practices preclude a fair election, but the NLRB's authority to do so arises from case law, not by statute. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). *Gissel* has prompted controversy over whether the NLRB could order

One of the critical issues to be resolved in any representation proceeding is the appropriateness of the petitioned-for bargaining unit. In making this determination, the SERB is directed by the Act to consider a number of factors, factors the National Labor Relations Board (NLRB) traditionally has assessed in making unit determinations under federal law.[29] Like the NLRA, the Ohio Act requires that the determination specify *an* appropriate unit, not the *most* appropriate one.[30]

B. The Scope of Collective Bargaining

The Act imposes on a public employer and the certified union the duty to bargain collectively with each other. While bargaining is required, neither party is compelled to agree to a proposal or to make a concession.[31] Bargaining sessions are not open to the public.[32]

The scope of this bargaining duty is markedly unclear. Termed "one of the more frustrating sections of the Act,"[33] the Ohio law mandates bargaining with respect to "wages, hours, or terms and

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an election in the absence of a showing of majority support. The NLRB believes it can, but the Court of Appeals for the District of Columbia Circuit recently disagreed and refused to enforce the Board's bargaining order. *See* Conair Corp. v. NLRB, 751 F.2d 1335 (D.C. Cir. 1983). The Ohio Act makes clear that such "*Gissel*-like" bargaining orders can occur *only* if the union once had the support of a majority of employers.

29. For example, the SERB must consider the employees' community of interests as reflected by their wages, hours, type of work and other working conditions. It also must take into account the employees' desires and the employer's efficiency of operations and administrative structure. Other factors not listed in the Act may be considered in the SERB's discretion. 1983 Ohio Legis. Serv. 5-240 (Baldwin) (to be codified at OHIO REV. CODE § 4117.06(B)). However, certain limitations are placed on the SERB's unit determination authority. *See id.* (to be codified at OHIO REV. CODE § 4117.06(D)).

30. *Id.* (to be codified at OHIO REV. CODE § 4117.06(C)). The Ohio Act expressly states that the SERB's unit determinations are "final and conclusive and not appealable to the court." *Id.* (to be codified at OHIO REV. CODE § 4117.06(A)). If this provision is interpreted to prohibit not only direct appeals of unit determinations, but also collateral appeals in the context of unfair labor practice proceedings, serious constitutional questions arise. See *infra* notes 119-36 for a more thorough discussion of this issue.

Under the NLRA, NLRB unit determinations are not appealable immediately to court; rather, an employer must wait until after the union has been certified and then refuse to bargain. The employer may then appeal the bargaining order to the courts and raise the inappropriateness of the unit as a defense to the refusal to bargain charge. *See* American Fed. of Labor v. NLRB, 308 U.S. 401 (1940) and discussion *infra* at notes 129-35.

31. 1983 Ohio Legis. Serv. 5-238, 5-240 (Baldwin) (to be codified at OHIO REV. CODE §§ 4117.01(G), 4117.04(B)).

32. *Id.* at 5-241 (to be codified at OHIO REV. CODE § 4117.09(A)). This provision compares favorably to Florida law, which requires "goldfish bowl" bargaining, negotiations open to the public and the press. In at least one case, a radio station broadcast from the bargaining table. *See* National Journal, Jan. 8, 1977, Vol 9, No. 2, at 69.

33. J. LEWIS & S. SPIRN, *supra* note 1, at 59.

other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.''[34]

The Act also sets forth certain subjects that are not bargainable[35] and then lists certain subjects over which a public employer may bargain if it so chooses.[36] These ''permissive'' subjects for bargaining are the so-called ''management rights.'' Because it is often difficult to distinguish between the pure exercise of a ''management right'' and ''terms and other conditions of employment,'' questions will arise over whether a management action is a required, or merely a permissive, subject of bargaining.

The Act, moreover, specifically states that an employer ''is not required to bargain on subjects reserved to the management and direction of the governmental unit *except as affect wages, hours, terms and conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement*.''[37] This provision concerning existing agreements is highly unusual. Any reserved management right that has been included in any prior agreement thereafter theoretically could become a *compulsory* topic for bargaining. If a public employer includes in an agreement a provision simply restating its statutorily recognized management rights, the employer arguably becomes obligated to bargain at the next negotiations over such subjects. In addition, when the exercise of a management right would affect the employees' wages, hours, or terms and conditions of employment, and it is hard to contemplate an exercise that would not, the exercise of that management right ostensibly becomes a mandatory subject for bargaining. Such a construction of the Act renders the statute's constitutionality doubtful.[38]

The Act requires that every collective bargaining agreement contain a grievance procedure which may, but need not, culminate in final and binding arbitration.[39] It also requires each collective bargaining agreement to contain a check-off provision authorizing the deduction of union dues upon presentation of a written authorization by the employee, and payment of fees *can* be made a condition

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34. 1983 Ohio Legis. Serv. 5-241 (Baldwin) (to be codified at OHIO REV. CODE § 4117.08(A)).

35. *Id.* (to be codified at OHIO REV. CODE § 4117.08(B)). These topics relate to civil service examinations and appointments.

36. *Id.* (to be codified at OHIO REV. CODE § 4117.08(C)).

37. *Id.* (to be codified at OHIO REV. CODE § 4117.08(C)) (emphasis added).

38. *See infra* notes 106-10.

39. 1983 Ohio Legis. Serv. 5-241 (Baldwin) (to be codified at OHIO REV. CODE § 4117.09(B)(1)).

of employment.[40] Under the Act, the terms of the collective bargaining agreement govern the wages, hours, and terms and conditions of employment and generally prevail over conflicting provisions of law.[41]

Once the parties agree on a contract, the public employer, within fourteen days, must submit it, along with a request for implementing funds, to the appropriate legislative body for approval. The legislative body has thirty days in which to approve or to reject the submission as a whole. If it rejects the submission, either party may reopen all or part of the entire agreement.[42]

C. Dispute Resolution Procedures

The Act contains an elaborate and complex system for resolving negotiation disputes. Taking advantage of its status as a latecomer to the public employee bargaining process, Ohio has drawn from virtually every procedure used in other states to compile its complicated dispute resolution procedure. The result is perhaps the most regulated and precisely timed procedure in the nation.

Ohio's step-by-step procedure involves mediation, fact-finding and conciliation. For some employees, it provides a right to strike. For others, it mandates binding arbitration. An outline of the entire dispute resolution process is beyond the scope of this Article, but several provisions bear noting.[43]

At any time prior to forty-five days before the expiration of an agreement, the parties may agree upon any procedure to settle unresolved issues, including binding arbitration. If they do not arrive at a voluntary method for settling disputes, the Act's highly regimented procedures will apply.[44] Under these procedures, the SERB will appoint a mediator, and later, a fact-finding panel, to resolve the disputes. The fact-finding panel makes final recommendations on all unresolved issues. Unless either the union or the legislative body of the public employer rejects the recommendations by a three-fifths vote of its total membership, these recommenda-

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40. *Id.* (to be codified at OHIO REV. CODE § 4117.09(B)(2)).

41. *Id.* (to be codified at OHIO REV. CODE § 4117.10(A)). Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, retirement, residency requirements and minimal educational requirements under state law pertaining to public education, however, prevail over conflicting provisions of collective bargaining agreements. *Id.* (to be codified at OHIO REV. CODE § 4117.10(A)).

42. *Id.* (to be codified at OHIO REV. CODE § 4117.10(B)).

43. See *id.* at 5-243 to 5-244 (to be codified at OHIO REV. CODE § 4117.14) for the dispute resolution procedures.

44. *Id.* at 5-243 (to be codified at OHIO REV. CODE § 4117.14(C)(1)).

tions are deemed accepted. If rejected by either side, the SERB publicizes the panel's recommendations.[45]

After rejection and publication of the panel's recommendations, public employees, except for a specified list of public health and safety employees, may strike after giving ten days' notice.[46] Such strikes may be enjoined only if they create a "clear and present danger to the health or safety of the public."[47] Moreover, no strike may be enjoined for more than sixty days.[48]

Those employees denied the right to strike are subject to binding interest arbitration of their disputes. A conciliator holds a hearing and considers each party's final offer.[49] The dispute is resolved by a conciliator selecting, on an issue-by-issue basis, the last best offer of one of the parties. In making his decision, the conciliator is bound to consider a list of statutorily supplied factors, as well as other factors "normally" or "traditionally" considered by arbitrators.[50] The conciliator's final report must be in writing and is appealable to the court of common pleas.[51]

The above is by no means an exhaustive detailing of the Act's provisions.[52] The rights, duties and procedures previously described, however, will be the focus of the expected constitutional challenges to the Act's validity.

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45. *Id.* (to be codified at OHIO REV. CODE § 4117.14(C)(6)).

46. *Id.* (to be codified at OHIO REV. CODE § 4117.14(D)(2)). By granting to public employees the right to strike, Ohio has joined the ranks of a distinct minority of states. Other than Ohio, eight states (Alaska, Hawaii, Illinois, Minnesota, Montana, Oregon, Pennsylvania and Vermont) permit strikes by public employees. *See* 1 Pub. Bargaining Cas. (CCH) ¶ 200.35 (1983); *see also* B. TAYLOR & F. WITNEY, LABOR RELATIONS LAW 648-49 (4th ed. 1983) ("there is no more explosive issue in the public sector than the right of public employees to strike"). For a debate of the strike issue in the public employment context, see Burton & Krider, *The Role & Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970) and Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

Ohio forbids public employee strikes during the life of any collective bargaining agreement. Unlike federal law, moreover, an unfair labor practice is not a defense to a strike when a collective bargaining agreement is in place. *See* 1983 Ohio Legis. Serv. 5-242, 5-244 (Baldwin) (to be codified at OHIO REV. CODE §§ 4117.11, 4117.18(C)).

47. 1983 Ohio Legis. Serv. 5-242, 5-244 (Baldwin) (to be codified at OHIO REV. CODE § 4117.16(A)).

48. *Id.* (to be codified at OHIO REV. CODE § 4117.16 (A)).

49. Using the alternate strike method, the conciliator is selected from a SERB-supplied list of five conciliators. If the parties cannot agree, the SERB appoints the conciliator. *Id.* at 5-243 (to be codified at OHIO REV. CODE § 4117.14(D)(1)).

50. *See id.* at 5-244 (to be codified at OHIO REV. CODE § 4117.14(G)(7)).

51. *Id.* (to be codified at OHIO REV. CODE § 4117.14(H)).

52. For example, the Act sets forth a list of unfair labor practices and the procedure for resolving such charges. *See id.* at 5-242 to 5-243 (to be codified at OHIO REV. CODE §§ 4117.11-.13).

IV. Senate Bill 133: An Unconstitutional Delegation of Legislative Authority?

Ohio is one of a minority of states providing for compulsory binding arbitration of certain bargaining disputes.[53] Public health and safety employees, as a quid pro quo for the prohibition against strikes, have been extended the right to submit contract formation disputes to a conciliator for resolution.[54] This provision for binding interest arbitration is certain to spark a constitutional challenge to the Act.

To understand this concern, it is necessary to distinguish interest arbitration from the more traditional grievance arbitration frequently engaged in by the private sector. Unlike grievance arbitration, which involves the interpretation and application of the terms of an existing contract, interest arbitration asks the arbitrator to engage in formation of the contract itself. Rather than merely interpreting contract provisions, the arbitrator is responsible for actually creating the contract.

This process raises questions of constitutional magnitude when the employer is a governmental entity. The decisions made across the bargaining table often can be deemed political,[55] and for this

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53. Those states providing for binding arbitration include Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania and Rhode Island. *See* 1 Pub. Bargaining Cas. (CCH) ¶ 200j.20 (1983) (summary of impasse resolution provisions of the various states with public employee bargaining legislation); *see also* 37 Ohio St. L.J. 670, 672 (1976).

54. These workers are:

> [M]embers of a police or fire department, members of the state highways patrol, deputy sheriffs, dispatchers employed by a police, fire or sheriff's department or the state highway patrol or civilian dispatchers, employed by a public employer other than a police, fire, or sheriff's department to dispatch police, fire, sheriff's department, or emergency medical or rescue personnel and units, an exclusive nurse's unit, employees of the state school for the deaf or the state school for the blind, employees of any public employee retirement system, corrections officers, guards at penal or mental institutions, special policemen or policewomen appointed in accordance with Sections 5119.14 and 5123.13 of the Revised Code, psychiatric attendants employed at mental health forensic facilities, or youth leaders employed at juvenile correctional . . . facilities.

1983 Ohio Legis. Serv. 5-243 (Baldwin) (to be codified at Ohio Rev. Code § 4117.14(D)(1)).

All other public employees may submit *voluntarily* to binding arbitration, but they are not required to do so. *See id.* (to be codified at Ohio Rev. Code § 4117.14(C)).

55. Professor Clyde Summers, in his discussion of the issue, went so far as to term all major decisions in public employee bargaining "inescapably political" ones, involving "critical policy choices." Summers, *Public Sector Bargaining: Problems of Governmental Decision-making*, 44 U. Cin. L. Rev. 669, 672 (1975); *see also* Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 Calif. L. Rev. 678 (1976).

reason, attempts to place such decisionmaking power in the hands of an arbitrator almost uniformly raise cries that an unconstitutional delegation of legislative authority has occurred.[56]

A. The Delegation Doctrine

It is the general rule, in Ohio as elsewhere, that delegation of purely legislative power to another entity is prohibited.[57] But while delegation of the authority to make laws is an unconstitutional abdication of legislative power, administrative authority to execute laws can be delegated validly.[58]

The difficulty lies in distinguishing between "legislative" and "administrative" authority. In an influential decision, the Supreme Court of Ohio phrased the difference as follows:

> The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[59]

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56. In their oft-cited article, Professors Harry H. Wellington and Ralph K. Winter, Jr. noted that the illegal delegation of authority concept had been "reduced to a whisper" as a restraint against bargaining. *See* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1108 (1969); *see, e.g.*, Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ., 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975). The delegation doctrine, however, has become the primary vehicle for challenging the validity of compulsory binding arbitration laws. In virtually every state with such a statute, suits have been brought to void the law on the ground that an impermissible delegation of legislative authority has occurred. *See infra* notes 66-100 and accompanying text.

57. *See* Peachtree Dev. Co. v. Paul, 67 Ohio St. 2d 345, 423 N.E.2d 1087 (1981); *see also* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 149-223 (2d ed. 1978).

The delegation doctrine decidedly lacks vitality in the federal courts, with numerous broad delegations being sustained in the years since *Schechter* and *Panama Refining*. *See* 1 K. DAVIS, *supra*, at 149-77. Federal courts nonetheless continue, at least on paper, to recognize the doctrine, keeping in mind the so-called "Schechter spector."

State courts, however, remain much more vigorous in their policing of delegation. *See, e.g.*, Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976); Blue Cross v. Ratchford, 64 Ohio St. 2d 256, 260, 416 N.E.2d 614, 618 (1980). This difference probably is based on the inescapable fact that state governments are smaller than the federal government, making delegation less of a necessity in the context of state government.

58. *See* Green v. State Civil Serv. Comm'n, 90 Ohio St. 252, 107 N.E. 531 (1914); State v. Messenger, 63 Ohio St. 398, 59 N.E. 105 (1900); Cincinnati, W. & Z. R.R. v. Commissioners of Clinton County, 1 Ohio St. 77 (1852).

59. Cincinnati, W. & Z. R.R. v. Commissioners of Clinton County, 1 Ohio St. 77, 88-89 (1852). For a recent discussion of the legislative versus administrative distinction, see City of Covington v. Covington Lodge No. 1, Fraternal Order of Police, 622 S.W.2d 221 (Ky. 1981). In a unanimous opinion, the Kentucky court held unconstitutional a com-

In other words, it is the legislature that must determine the policies of the state, but the rules and regulations necessary to effect those policies may be devised by other than elected officials.

Over the years, the concept of legislative "standards" has evolved to refine this distinction. If the legislature has developed sufficient standards to guide the recipient in the exercise of its delegated power, then generally no unconstitutional delegation of legislative power is deemed to have occurred.[60] These "standards" need not be precise, particularly when the legislation relates to the general public welfare; rather, it is enough if "intelligible principles" are supplied in the statute to guide the delegatee's discretion.[61]

Some states have gone so far as to abandon the need for "standards," focusing instead on whether sufficient "safeguards" are present to prevent capricious action by the administrative agency or other delegatee.[62] Ohio, however, has rejected this modern trend, insisting on the presence of standards before a delegation of authority will pass constitutional muster.[63]

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pulsory binding arbitration provision in a collective bargaining agreement between the city of Covington and its police department. It stated: "[I]f the power to be exercised prescribes a new policy or plan, it is legislative, and may not be delegated. If it pursues a plan already adopted by the legislative body, it is administrative and may be delegated." *Id.* at 222.

60. Akron & B. Belt R.R. v. Public Utilities Comm'n, 148 Ohio St. 282, 287-89, 74 N.E.2d 256, 259 (1947) (no unconstitutional delegation of legislative power if administrative agency must operate within fixed standards); State v. Abdulla, 37 Ohio App. 2d 82, 90, 307 N.E.2d 28, 33 (1973) ("Of course, standards for the guidance of the executive or administrative body must be given in the legislative enactment.").

61.

> [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. Ordinarily, the establishment of standards can be left to the administrative body or officer if it is reasonable for the General Assembly to defer to the officer's or body's expertise.

Blue Cross v. Ratchford, 64 Ohio St. 2d 256, 260, 416 N.E.2d 614, 618 (1980).

62. *See, e.g.*, Medford Firefighters Ass'n Local 1431 v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979); *see also* 1 K. DAVIS, *supra* note 57, at 206-16.

63.

> We are not prepared at this point to rely totally upon procedural safeguards. Our past requirement of standards, although perhaps too rigidly stated, has protected private rights both in the clarity with which it defined the boundaries of discretion and in the notice which it has given private parties of what is required of them. As a consequence, standards, where practical, should be established by the General Assembly.

Blue Cross v. Ratchford, 64 Ohio St. 2d 256, 260, 416 N.E.2d 614, 618 (1980); *see also* Livingston v. Clawson, 2 Ohio App. 3d 173, 440 N.E.2d 1383 (1982). The presence of adequate safeguards, however, is taken into account by almost all courts, including

This standards and/or safeguards analysis has been invoked by courts determining the constitutionality of compulsory binding arbitration statutes.[64] An additional element, moreover, has been injected in many of these cases: the "political accountability," or lack thereof, of the arbitrator.[65] The varied results of these applications of the delegation doctrine to binding arbitration laws, and their portent for Ohio, are analyzed below.

B. Standards and Safeguards for Binding Arbitration

It has been said that "state courts generally uphold the constitutionality of compulsory arbitration statutes."[66] In the main, this is true. A majority of states have upheld the constitutionality of binding interest arbitration for public employees.[67] But others have not, and these differing results, in large measure, have been based on the standards or safeguards supplied by the particular statute.[68]

The existence of sufficient standards has been the initial inquiry of most courts. Those legislatures more recently enacting bargaining laws, perhaps profiting from the experience of other states, have prescribed a list of factors to be considered by the arbitrator in

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Ohio's, when deciding the validity of a challenged delegation. See, for example, *Blue Cross*, 64 Ohio St. 2d at 260, 416 N.E.2d at 618, in which the court noted the existence of a procedure for review of agency discretion to be an important "safeguard."

64. For a discussion of these cases, see *infra* notes 66-72 and accompanying text.

65. *See* Greely Police Union v. City Council, 191 Colo. 419, 553 P.2d 790 (1976); City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980), *appeal dismissed*, 450 U.S. 903 (1981); City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); Salt Lake City v. International Ass'n of Firefighters Locals 1645, 593, 1654 & 2064, 563 P.2d 786 (Utah 1977).

66. B. TAYLOR & F. WITNEY, *supra* note 46, at 653; *see also* Annot., 68 A.L.R.3d 885 (1976).

67. *See* Superintending School Comm. v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981); Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980), *appeal dismissed*, 450 U.S. 903 (1981); City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979); Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); Medford Firefighters Ass'n Local 1431 v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979); Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969); City of Spokane v. Police Guild, 87 Wash. 2d 457, 553 P.2d 1316 (1976).

68. *See* Greely Police Union v. City Council, 191 Colo. 419, 553 P.2d 790 (1976); City of Sioux Falls v. Firefighters, 85 L.R.R.M. 2066 (S.D. Cir. Ct. 1973); Salt Lake City v. International Ass'n of Firefighters Locals 1645, 593, 1654 & 2064, 563 P.2d 786 (Utah 1977); *see also* Town of Berlin v. Santaguida, 98 L.R.R.M. 3259 (Conn. Super. Ct. 1978), *unenforced on other grounds*, 181 Conn. 421, 435 A.2d 980 (1980).

reaching his decision.[69] The listing of such criteria usually is deemed, without much discussion, to satisfy the standards requirement, particularly when the statute recites a purpose, such as promoting industrial peace.[70] Some courts even have found that a policy statement alone can provide guidance sufficient to validate the delegation.[71]

Even when the statute does set forth specific criteria to guide the arbitrator, to be of use the criteria must be reasonably specific. For example, an arbitrator directed to consider "prevailing wages" is left to speculate as to *whose* wages he should be contemplating.[72] To

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69. See, for example, 1983 Ohio Legis. Serv. 5-244 (Baldwin) (to be codified at OHIO REV. CODE § 4117.14(G)(7)), which supplies the following factors to be considered by the arbitrator:

> (a) Past collectively bargained agreements, if any, between the parties;
>
> (b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
>
> (c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
>
> (d) The lawful authority of the public employer;
>
> (e) The stipulations of the parties;
>
> (f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, mediation, fact-finding, or other impasse resolution procedures in the public service or in private employment.

70. *See, e.g.*, Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980), *appeal dismissed*, 450 U.S. 903 (1981); Medford Firefighters Ass'n Local 1431 v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979).

71. *See, e.g.*, Superintending School Comm. v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981); City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979).

Such a broad "standard," of course, is, in reality, no standard at all. In practical terms, a direction to "promote industrial peace" gives no guidance to an arbitrator. For instance, does promoting industrial peace envision peace at any price? As the arbitrator has not been directed to consider the government employer's ability to pay, it could be so assumed. Such an open-ended directive provides no protection against arbitrary and capricious acts.

Additionally, standards "inherent" in the arbitration process have been cited. It has been said that acting within the scope of authority, considering the public interest and welfare, and acting to stabilize and promote industrial peace are part and parcel of the arbitral process and can thus be read into an arbitration provision, thereby serving as standards. *See* Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978). Under New Jersey's statute, however, some explicit standards existed, and thus the court was not forced to rely on merely "inherent" standards in upholding the law. *But see* Superintending School Comm. v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981).

72. *See* Town of Berlin v. Santaguida, 98 L.R.R.M. 3259 (Conn. Super. Ct. 1978),

be meaningful, more concrete guidance should be, and under recent statutes usually is, supplied.

Admittedly, precise directives cannot be given when delegating contract formation authority. In fashioning a contract, the arbitrator needs some flexibility, which rigid guidelines would inhibit.

Ohio's "standards" attempt to achieve this balance. The conciliator is given five identified factors to weigh.[73] He is instructed, for instance, to consider the employer's ability to pay and is directed to contrast the unit's wages and working conditions with those of comparable workers in the public and private sectors, taking into account any "peculiarities" of the area. While hardly black and white directives, such factors do attempt to counsel the arbitrator's decisionmaking process. Furthermore, the arbitrator may not propose his own solutions; rather, he is bound to select, on an issue-by-issue basis, the last best offer submitted by the parties.[74]

But such guidelines, standing alone, cannot sustain the delegation.[75] Because the subject matter of binding arbitration

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unenforced on other grounds, 181 Conn. 421, 435 A.2d 980 (1980); Firefighters Local 2390 v. City of Kingsville, 98 L.R.R.M. 2512 (Tex. Civ. App. 1978).

In *City of Kingsville*, the arbitrator, considered to be the judiciary under Texas law, was directed to institute wages and conditions of employment "substantially the same" as those prevailing in the private section "labor market area." The court found such "standards" insufficient guards against arbitrary and unequal application, noting that deciding what conditions were "substantially the same" and what constitutes the "labor market area" were policy decisions. Taking a rather strict approach to the delegation doctrine, the court stated: "A delegation of a legislative power is valid if it is so complete in all its terms and provisions when it leaves the legislative branch that nothing is left to the judgment of the recipient of a delegated power." 98 L.R.R.M. at 2515. The court found the delegation at issue, with is imprecise guidelines, fell short of this mark.

73. The sixth factor, defined as those factors "normally" and "traditionally" considered in interest arbitration, 1983 Ohio Legis. Serv. 5-244 (Baldwin) (to be codified at OHIO REV. CODE § 4117.14(G)(1)(7)(f)), cannot be termed "reasonably specific." This factor appears to be an attempt to place the "inherent standards" recognized by the courts in *Bangor Educ. Ass'n* and *Amalgamated Transit* explicitly into the statute. *See supra* note 71.

74. *See* 1983 Ohio Legis. Serv. 5-244 (Baldwin) (to be codified at OHIO REV. CODE § 4117.14(G)(7)). *But see* City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 514-15, 294 N.W.2d 68, 111 (1980) (Levin, J., dissenting), *appeal dismissed*, 450 U.S. 903 (1981). In his dissent, Justice Levin found such "last best offer" arbitration of little help, stating this approach would simply exacerbate problems because the arbitrator would be prohibited from fashioning the best over-all award. He also deemed the eight specific factors, similar to Ohio's, as "sufficiently amorphous" to allow any result. For example, while the arbitrator is directed to consider the "public welfare," he must decide what *constitutes* the public welfare before he can determine how best it can be served. 408 Mich. at 515, 294 N.W.2d at 111.

75. Whether these traditional standards are even useful in the compulsory arbitration context has been questioned. The usual delegation of authority cases involve delegations to a public officer or to an administrative agency that will have continuing responsibility for administering the particular law. In such a context, a consistent response to and inter-

statutes permits only reasonably, as opposed to explicitly, specific directives, other safeguards are needed.[76] Timetables for rendering decisions, requirements for written opinions and, perhaps most important, judicial review, have been deemed essential protections against arbitrary acts.[77]

These safeguards are but imperfectly included in Ohio's act. Under the statute, the conciliator must hold a hearing within thirty days of the SERB's arbitration order only when "practicable" to do so.[78] Even though the conciliator must make written findings of fact and must issue a written opinion, no timetable for rendering the decision is supplied.[79] And the judicial review specified is of the most limited sort. A party can seek to modify or to vacate the award, yet there exist serious statutory strictures on a court's power to disturb an arbitration award.[80] Such limited review is tantamount to virtually no review, as the case law teaches that courts have taken a "hands off" approach to arbitration awards.[81] While such deference

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pretation of the standards can be expected. But when authority has been delegated to numerous private arbitrators, even specific and precise "standards" may provide little protection against unbridled discretion. *See* City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 514, 294 N.W.2d 68, 111 (1980) (Levin, J., dissenting), *appeal dismissed*, 450 U.S. 903 (1981).

76. See Superintending School Comm. v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981), in which the court noted the necessity of procedural safeguards when precise standards feasibly cannot be supplied. *See also* Caso v. Coffey, 41 N.Y.2d 153, 359 N.E.2d 683, 391 N.Y.S.2d 88 (1976).

77. In Town of Berlin v. Santaguida, 98 L.R.R.M. 3259 (Conn. Super. Ct. 1978), *unenforced on other grounds*, 181 Conn. 421, 435 A.2d 980 (1980), that it contained no procedure for judicial review and did not require written opinions were cited as reasons for invalidating the statute. The court in Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978) took a different approach, reading judicial review into the law in order to sustain the statute. In doing so, the court adopted a "substantial evidence" standard, observing the need for broader judicial review than that accorded voluntary arbitration. *See supra* note 71.

Whether judicial review actually constitutes a safeguard has been questioned, however, on the basis that whether the award is arbitrary, capricious or unreasonable cannot be determined from the written award. A study of police and firefighters interest arbitration in New York purports to show that rationales for awards "bear little relationship to the actual factors shaping the awards." Wollet, *Revenue Sharing, Whipsawing and the Domino Effect of Arbitration*, PUBLIC SECTOR LABOR RELATIONS AT THE CROSSROADS 88 (1977).

78. 1983 Ohio Legis. Serv. 5-244 (Baldwin) (to be codified at OHIO REV. CODE § 4117.14(G)(2)).

79. *Id.* (to be codified at OHIO REV. CODE § 4117.14(G)(10)).

80. An award may be vacated only upon a showing of fraud, partiality, corruption, prejudicial misconduct or a showing that the arbitrator exceeded his authority or imperfectly executed his powers. OHIO REV. CODE ANN. § 2711.10 (Page 1981).

81. *See* Goodyear Tire & Rubber Co. v. Local 200, United Rubber, Cork, Linoleum & Plastic Workers, 42 Ohio St. 2d 516, 330 N.E.2d 703 (1975); Pfleger v. Renner, 13 Ohio App. 96 (1920).

perhaps is warranted in the context of *voluntary* arbitration, it has no place in the compulsory arbitration area.[82] Indeed, this limited review, of itself, places the Act's constitutionality in question.[83]

C. *Political Accountability*

An additional issue focused on by courts deciding challenges to compulsory binding arbitration laws has been the political accountability, or lack thereof, of the arbitrator. This issue is somewhat unusual, in that the vast majority of legislative delegations are to public officials or administrative agencies. In contrast, delegations arising from compulsory arbitration laws generally are to independent, ad hoc arbitrators. Many courts thus have considered whether a delegation of authority to an individual not directly answerable to the electorate—a "hit-and-run" arbitrator—can be constitutionally sustained. By and large, the courts have found it can be.

Instructive is the Supreme Court of Michigan's comprehensive opinion in *City of Detroit v. Detroit Police Officers Association*, in which the court, in a three-one-three decision, upheld the challenged delegation.[84] In sustaining the law, the plurality opinion found the arbitrators to be sufficiently accountable. Under Michigan's law, the impartial arbitrator must be a member of a permanent arbitration panel, whose members are selected by the Michigan Employment Relations Commission (MERC).[85] The plurality opinion found

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82. *See* Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978); *see also* Grodin, *supra* note 55, at 698. In *Amalgamated Transit*, no method of judicial review was specified, and the court read into the law the mode of review necessary to sustain the statute, the "substantial evidence" standard of review. Under Ohio's law, however, the judicial review deemed inadequate by the New Jersey court (a motion to vacate) is specified statutorily and denies an Ohio court the power to fashion a stronger form of review.

83. *See* Town of Berlin v. Santaguida, 98 L.R.R.M. 3259 (Conn. Super. Ct. 1978), *unenforced on other grounds*, 181 Conn. 421, 435 A.2d 980 (1980) (motion to vacate or to modify arbitration award was no "meaningful substitute for judicial reivew"; binding arbitration law deemed unconstitutional).

84. 408 Mich. 410, 294 N.W.2d 68 (1980), *appeal dismissed*, 450 U.S. 903 (1981). In *City of Detroit*, three justices upheld the statute by finding the arbitrators politically accountable, while the three dissenters found such accountability lacking and the statute accordingly constitutionally deficient. In his concurrence, Justice Fitzgerald rejected the majority opinion's finding of accountability but determined such accountability was unnecessary to uphold the statute.

85. *Id.* at 434-35, 294 N.W.2d at 71-72. Additionally, an arbitrator must be a citizen of Michigan, must take an oath of office, and enjoys an indeterminate term of office on the arbitration panel. *Id.*, 294 N.W.2d at 72. These requirements were amended into Michigan law after an earlier court decision had questioned, on accountability grounds, the constitutionality of the statute. *See* Dearborn Fire Fighters Union Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.E.2d 226 (1975).

this procedure ensured continuity in decisionmaking and noted the arbitrators are chosen by the MERC, whose members in turn are selected by the governor and confirmed by the state senate. These factors, said the plurality justices, made the arbitrators politically accountable.[86]

Four justices disagreed. In his concurrence, Justice Fitzgerald observed that it "stretches credulity" to find the arbitrators politically accountable to the electorate. But Fitzgerald deemed accountability of delegatees not constitutionally required.[87] The three other justices likewise found accountability lacking but judged this omission a fatal flaw. Because the statute "insulate[d] the decision-making process from accountability within the political process" and because a structure for development of principles and policies was missing, they considered the delegation to be invalid.[88]

The three opinions in *City of Detroit* are prototypes for the three

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86. 408 Mich. at 433, 294 N.W.2d at 71. "Considered collectively, the aforementioned factors tend to eradicate the image of 'hit-and-run arbitrators' and act as a catalyst to the establishment of a class of arbitrators possessing both the aspects of tenure and responsibility which are certainly compatible with the notion of political or public accountability." *Id.* at 470, 294 N.W.2d at 90.

The plurality rejected the argument that political accountability requires accountability to the specific community or other governmental entity involved. The city had argued that because the arbitrators, and the MERC members, were not directly accountable to the people of Detroit, political accountability was lacking and the statute was thus unconstitutional. The plurality found this argument went to the wisdom, but not to the constitutionality, of enacting a statewide policy for resolving "inherently local public-sector labor disputes." *Id.* at 475-77, 294 N.W.2d at 93-94. The court stated:

> This argument blinks the reality that the role of both the Act 312 arbitrators and the MERC appointing authority is to effectuate a *state* labor policy as formulated by the *state* Legislature serving the *state* electorate. Work stoppages by municipal police and fire departments, although primarily local in situs, were legislatively deemed to pose a threat to the state's public health, safety and welfare. Should the people be dissatisfied with the accountability aspect of the engineered scheme which must necessarily transcend local boundaries, the onus is upon the state's electorate, including the locally affected voting population, to exercise its political will.

Id. at 477, 294 N.W.2d at 94.

87. *Id.* at 505-07, 294 N.W.2d at 107.

88. The lack of a controlling body to administer the law, reasoned the dissent, inevitably would lead to differing results in like situations, violating the premise that a law constitutionally cannot treat similar situations differently. The dissent would have approved the delegation to an administrative agency, reasoning that were a controlling body responsible for developing arbitration principles, accountability would exist. *Id.* at 522, 294 N.W.2d at 114.

Permanent arbitration tribunals have been advocated by others. "Equity of results and the public interest require a high level of consistency in decisions that statutory criteria alone may not provide." Staudohar, *Constitutionality of Compulsory Arbitration Statutes in Public Employment*, 27 LABOR L.J. 670, 676 (1976). Nebraska has adopted such a system. *See* NEB. REV. STAT. § 48-801 to -838 (1978).

approaches courts considering the question have taken to the accountability issue. Courts either have "stretched credulity" by suggesting that accountability exists,[89] have deemed the law unconstitutional for lack of accountability[90] or have found accountability not constitutionally required.[91]

Plainly, one of the latter two positions is correct. To hold, as does the first approach, that a private arbitrator is accountable to the electorate because he is appointed by a state board, itself appointed by the governor, who is elected by the people, or that he is publicly answerable because he exercises public power is to indulge in judicial fantasy. Appointment of private individuals on an ad hoc basis clearly supplies no degree of responsibility to the electorate. Neither consistency of decisions, nor rules for decisionmaking, is guaranteed. Quite simply, if public accountability is constitutionally necessary, then binding arbitration laws generally, including Ohio's, are suspect.[92]

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89. In City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969), for example, the court held that by arbitrating a public employer-public employee bargaining dispute, the arbitrator becomes a public officer and that these "public officers" together comprise an "administrative agency." In effect, the uncontrolled exercise of sovereign power transforms the private individual into a public officer, the Rhode Island court reasoned. *See also* Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976).

Such reasoning rightly has been criticized as "tautological." *See* Town of Berlin v. Santaguida, 98 L.R.R.M. 3259 (Conn. Super. Ct. 1978), *unenforced on other grounds*, 181 Conn. 421, 435 A.2d 980 (1980). To hold that by exercising public power one automatically becomes a public official accountable to the electorate is simply to restate the issue the court is purporting to resolve. For other decisions finding arbitrators politically accountable, see City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979) (statutory requirements of training and experience along with statutorily required consideration of financial impact and promotion of "harmonious relationships" ensure accountability); Medford Firefighters Ass'n Local 1431 v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979) (arbitrators appointed by state employment relations board act in a public capacity).

90. *See* Greeley Police Union v. City Council, 191 Colo. 419, 422, 553 P.2d 790, 792 (1976) ("officials engaged in governmental decision-making . . . must be accountable to the citizens they represent"); Town of Berlin v. Santaguida, 98 L.R.R.M. 3259 (Conn. Super. Ct. 1978), *unenforced on other grounds*, 181 Conn. 421, 435 A.2d 980 (1980) (appointment on hit-and-run basis makes connection between arbitrator and board too attenuated to guarantee arbitrator's political accountability); Salt Lake City v. International Ass'n of Firefighters Locals 1645, 593, 1654 & 2064, 563 P.2d 786 (Utah 1977) (private ad hoc panel of arbitrators not politically accountable).

91. *See* Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976) (political accountability not a constitutional argument); Milwaukee County v. Milwaukee Dist. Council 48, 109 Wis. 2d 14, 325 N.W.2d 350 (Ct. App. 1982) (political accountability argument relates to wisdom of legislation, not to its constitutionality). *See also* Grodin, *supra* note 55.

92. Under the Ohio Act, the arbitrator is chosen by the parties from a SERB-supplied list of five persons. If the parties cannot agree on an arbitrator, the SERB will appoint

The question thus becomes whether political accountability is required to sustain a delegation of arbitral authority. It is submitted that the answer to this question depends upon the scope of the arbitrator's power.

The basis of the political accountability requirement is that policy-making powers must be placed in the hands of a politically responsive person or group.[93] Thus, to the extent the arbitrator is not deciding ultimate governmental policy, the need for accountability diminishes. Examination of the scope of the arbitrator's authority in those states finding accountability either present or unnecessary supports this theory to a degree, as some of those states decree that certain critical policy decisions are outside the arbitrator's power to decide.[94]

The decisions cannot all be so reconciled, however. In some states in which accountability was not deemed a constitutional requirement, the independent arbitrator was delegated authority to decide questions that may fairly be labeled governmental policy decisions.[95] Setting wage levels, for example, must be considered an ultimate governmental policy-making power.[96] When such authority is

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an arbitrator from its own list *or* from a list prepared by the American Arbitration Association, an arbitral service frequently used by private sector parties in grievance arbitrations. 1983 Ohio Legis. Serv. 5-243 (Baldwin) (to be codified at OHIO REV. CODE § 4117.14(D)(1)). The only statutory requirement for selection is that the arbitrator be an Ohio resident. *Id.* at 5-244 (to be codified at OHIO REV. CODE § 4117.14(G)(13)). No permanent panel of arbitrators is established, nor is there any oath-taking requirement. Thus, the Ohio Act's "accountability" provisions are even less extensive than are Michigan's. Indeed, it is unlikely the Michigan court would have upheld the Ohio law. *See* Dearborn Fire Fighters Union Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975).

93. *See* City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980), *appeal dismissed*, 450 U.S. 903 (1981); Salt Lake City v. International Ass'n of Firefighters Locals 1645, 593, 1654 & 2064, 563 P.2d 786 (Utah 1977).

94. *See* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973) (arbitrator may not make binding decisions on economic proposals); City of Detroit v. Detroit Police Officers Ass'n, 408 Mich. 410, 294 N.W.2d 68 (1980) (arbitrator may decide only disputes involving wage rates or other conditions of employment, inherent managerial matter presumably not subject to arbitration), *appeal dismissed*, 450 U.S. 903 (1981); City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979) (inherently managerial matters not subject to negotiation or arbitration).

95. *See, e.g.*, Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); Milwaukee County v. Milwaukee Dist. Council 48, 109 Wis. 2d 14, 325 N.W.3d 350 (Ct. App. 1982). Massachusetts, however, explicitly excluded "inherent managerial matters," such as promotions and transfers, from binding arbitration. *See* 2 PUB. EMPLOYEE BARGAINING REP. (CCH) ¶ 19,705 (1977). And in 1980, binding arbitration for firefighters and police officers was repealed by voter passage of Proposition 2 1/2. 4 LAB. REL. REP. (BNA) SLL 31:263 (1981).

96.

> The size of the budget, the taxes to be levied, the purposes for which tax money is to be used, the kinds and levels of governmental services to be enjoyed, and

reposed outside the legislature, only political accountability of the delegatee can ensure protection against capricious exercise of discretionary power.

Under the theory that they are purely legislative in nature, such powers arguably are not subject to delegation.[97] Yet the better view suggests that when the delegatee determines only wages, hours, and other terms and conditions of employment[98] and when the exercise of his power is confined narrowly by consideration of reasonably

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> the level of indebtedness are issues that should be decided by officials who are politically responsible to those who pay the taxes and seek the services.

Summers, *supra* note 55, at 672. Justice Levin, writing in dissent in *City of Detroit v. Detroit Police Officers Ass'n*, agreed, "[Whether other budgeted items are of a higher or lower priority than police and fire salaries is] the prototype of a decision which should be entrusted only to a politically accountable official or body." 408 Mich. 410, 437, 294 N.W.2d 68, 121 (1980) (Levin, J., dissenting), *appeal dismissed*, 450 U.S. 903 (1981). In a pre-Act case, an Ohio court concurred. In City of Tiffin v. International Ass'n of Firefighters, 1 Pub. Bargaining Cas. (CCH) ¶ 37,470 (Ohio Ct. Com. Pls. 1981), the court found binding arbitration of wages illegal. "To allow an arbitrator to have binding authority to set salary levels would be tantamount to the council surrendering its nondelegable power in this area."

Other courts and commentators think differently. Because it is the legislative body that must supply the monies to fund the award, these authorities find that the arbitrators are not exercising governmental power. *See* Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976). See also York, Anderson, MacDonald & O'Reilly, *Impasse Resolution in Public Sector Collective Bargaining—An Examination of Compulsory Interest Arbitration in New York*, 51 ST. JOHN'S L. REV. 453 (1977), in which the authors stated:

> [N]either arbitration awards nor collective bargaining agreements in the public sector are self-implementing. If legislative authorization to finance a contract or an arbitration award does not already exist, the executive must secure such funding from the legislature, reduce services, decline to fill vacancies, or take other management action to implement the agreement. The important point is that either before or after contract negotiations, the legislature must decide the appropriate level for government operations and provide the required funding.

Id. at 468. This argument, however, overlooks the fundamental point that it is an arbitrator who has determined that wages and/or fringe benefits for a particular group are of a higher priority than other services, leaving the "politically accountable" body to scramble to find the funds, from whatever source, to implement the award. While the governmental body indeed does decide *where* to cut back, it has not made the crucial decision that a cut back should be made.

97. *See* City of Covington v. Covington Lodge No. 1, Fraternal Order of Police, 622 S.W.2d 221 (Ky. 1981); City of Tiffin v. International Ass'n of Firefighters, 1 Pub. Bargaining Cas. (CCH) ¶ 37,470 (Ohio Ct. Com. Pls. 1981). Pennsylvania, for example, amended its constitution specifically to permit binding arbitration. *See* Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969).

98. "Terms and conditions of employment" must be narrowly construed because virtually any management decision may have an impact on these. But when a government employer is involved, the scope of mandatory bargaining, and of the concomitant duty to submit to binding arbitration, *must* be construed in a manner that will preserve to the employer its discretionary power over fundamental policy decisions. Otherwise, an impermissible delegation will have occurred. *See infra* notes 103-10 and accompanying text.

specific factors and by meaningful judicial review, political accountability can save the delegation. Thus, if the delegation were to a politically responsive official or agency, assuming sufficient standards and safeguards exist, the delegation should be sustained.

Should the delegation go further, however, and distribute authority to determine issues involving inherent managerial rights, then a delegation of purely legislative power would result.[99] Government must retain the right to make its *fundamental* policy determinations.[100] Delegation of such powers, regardless of standards, safeguards or accountability, unquestionably is constitutionally prohibited.

D. Senate Bill 133: An Unconstitutional Delegation of Legislative Authority

The above analysis directs a finding that the Ohio Act contains an unconstitutional delegation of authority. Of course, the lack of meaningful judicial review and the absence of specific guidelines for exercise of the delegated power pose considerable hurdles for sustaining the delegation.[101] More dispositive, however, the breadth of authority delegated requires not only political accountability, notably missing, but also a finding that an impermissible delegation of purely legislative power has occurred.

The Act provides a hit-and-run arbitrator with perhaps the broadest scope of authority of any public employee bargaining bill in the nation. First, the arbitrator, on impasse, undeniably has power to resolve disputes concerning wages, hours, and other terms and conditions of employment.[102] Even assuming a narrow construction is given to "terms and conditions of employment," as it must be to sustain even the bargaining delegation,[103] political accountability

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99. *See* City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979) (upholds statute, noting that city need not, by statute, negotiate inherently managerial matters); Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 251, 386 A.2d 1290, 1293 (1978) (arbitration process may not encompass governmental policy determinations involving exercise of delegated police power); *see also* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 624 P.2d 1215, 172 Cal. Rptr. 487 (1981) (en banc).

100. *See* Peachtree Dev. Co. v. Paul, 67 Ohio St. 2d 345, 423 N.E.2d 1087 (1981); Cincinnati, W. & Z. R.R. v. Commissioners of Clinton County, 1 Ohio St. 77, 88 (1852).

101. *See supra* notes 60-83 and accompanying text.

102. These are mandatory subjects of bargaining under the Act. 1983 Ohio Legis. Serv. 5-241 (Baldwin) (to be codified at OHIO REV. CODE § 4117.08).

103. *See* Paterson Police PBA Local 1 v. City of Paterson, 87 N.J. 78, 432 A.2d 847 (1981); State v. Local 195, IFPTE, 179 N.J. Super. 146, 430 A.2d 966 (1981). Professor Grodin states that the scope of interest arbitration arguably should be narrower than the scope of bargaining when public sector arbitration is involved. He posits, however, that

of the arbitrator is still necessary. Ohio's Act fails to supply this answerability, as the arbitrators are private individuals, selected on an ad hoc basis, who are not members of any politically responsive, permanent tribunal, panel or board.[104] The only "accountability" provided by the statute is a requirement that the arbitrators be Ohio residents.[105] Thus, even if the arbitrator could determine only disputes involving wages, hours, and narrowly defined terms and conditions of employment, the necessary degree of political accountability would be lacking.

But the scope of the arbitrator's authority under the Act arguably is even broader. Not only does the arbitrator have full authority to resolve disputes concerning wages, hours, and other terms and conditions of employment, he may also, if the Act is so construed, override statutes and decide questions of inherent managerial policy. It is this aspect of arbitral authority in which the Ohio Act differs from other states' bargaining laws. And it is this aspect that must be viewed as an impermissible delegation of purely legislative power.

The Act specifies that an employer "is not required to bargain on subjects reserved to the management and direction of the governmental unit *except as affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.*"[106] This italicized phrase grants the arbitrator open-ended authority.

The exercise of a purely managerial right that merely would *affect* the wages, hours, and terms and conditions of employment of public employees theoretically becomes a mandatory subject of bargaining and, correspondingly, in the context of public health and safety agreements, an issue for interest arbitration as well. Because virtually every exercise of a managerial right necessarily will *affect*, to a degree, "terms and conditions of employment," this provision

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the arbitrator should have power to resolve all disputes involving mandatory subjects of bargaining. Grodin, *supra* note 55, at 695. Professor Grodin limited his remarks to the "policies" rather than the "constitutionality" of binding interest arbitration.

104. *See* 1983 Ohio Legis. Serv. 5-244 (Baldwin) (to be codified at OHIO REV. CODE § 4117.14(D)(1)); *see also supra* note 90.

105. 1983 Ohio Legis. Serv. 5-244 (Baldwin) (to be codified at OHIO REV. CODE § 4117.14(G)(13)).

106. *Id.* at 5-241 (to be codified at OHIO REV. CODE § 4117.08) (emphasis added). Otherwise, managerial rights are *permissive* subjects for bargaining under the Act. At least one court has held, however, that management rights *never* can be bargained away, even voluntarily, because to do so is an unconstitutional delegation of authority. Paterson Police PBA Local 1 v. City of Paterson, 87 N.J. 78, 432 A.2d 847 (1981).

in essence entrusts inherently managerial decisions to a politically unaccountable arbitrator.

If the parties, moreover, have included a clause or provision in their contract, then that topic becomes an issue for mandatory bargaining. Inherent managerial rights may, if the Act is so construed, fall within this provision. Most, if not all, collective bargaining agreements in the private sector, and undoubtedly those in existence in the public sector as well, contain a management rights provision. Such a provision simply may recite the employer's retained and inherent managerial rights.[107] Once included in the contract, however, these rights arguably have become mandatory subjects for bargaining, and, as such, are questions the arbitrator has full authority to determine upon impasse.[108]

It is this delegation that makes the Act more constitutionally suspect than the laws of Ohio's sister states. In no other state, to the authors' knowledge, are inherent managerial rights even arguably within the province of an arbitrator. While courts in some states have upheld the constitutionality of compulsory arbitration statutes challenged as illegal delegations, they often have done so by acknowledging that inherent governmental authority has not been surrendered.[109] Plainly Ohio has delegated purely legislative power; in so doing, it has crossed the outermost limits of permissible delegation established by the Ohio courts.[110]

Should the Ohio courts determine that an unconstitutional delegation of legislative authority has occurred, they will need to decide whether the binding arbitration provisions of the Act are severable.[111] The Act contains no severability clause, but, in Ohio,

> [i]t is a general rule that if an unconstitutional part of an Act is

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107. See Ohio Legis. Serv. 5-241 (Baldwin) (to be codified at OHIO REV. CODE § 4117.08(C)) for a partial list of such rights.

108. Another example of the expansive delegation of legislative authority under the Act exists. *See id.* (to be codified at OHIO REV. CODE § 4117.10). Under this provision, a collective bargaining agreement prevails over all statutes, except certain enumerated ones, such as civil rights provisions.

109. *See, e.g.*, City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979); Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 251, 386 A.2d 1290, 1293 (1978).

110. See *supra* notes 57-65 and accompanying text for a discussion of the delegation doctrine in Ohio.

111. *Compare* Salt Lake City v. International Ass'n of Fire Fighters Locals 1654, 593, 1654 & 2064, 563 P.2d 786 (Utah 1977) (holding entire state law unconstitutional because arbitration provisions were an "integral part" of act) *with* Greeley Police Union v. City Council, 191 Colo. 419, 553 P.2d 790 (1976) (severed arbitration provision from statute using act's severability clause).

> stricken, and if that which remains is complete in and of itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the remaining part must be sustained.[112]

A three-part test has been developed to aid a court in making this determination. First, it must be decided whether the constitutional and the unconstitutional portions of the Act can stand alone. Second, whether the legislative intent can be effected without the stricken part or whether the Act is instead inextricably intertwined must be resolved. Finally, the court must consider if language would need to be added to the remaining provision(s) if the unconstitutional section(s) were deleted.[113]

Under this test, the entire Act must fail. Focusing on the second prong, it is clear the binding arbitration provisions are so interconnected with the remainder of the statute as to prevent a severance. The Act's intent is to "promote orderly and constructive relationships" in public employment.[114] To this end, public health and safety employees have been refused the right to strike while being granted the right to submit bargaining disputes to binding arbitration. Removing the arbitration provisions would leave this group of employees without any method for resolving their bargaining conflicts. Such a result would not effect the purpose of promoting orderly relationships with this crucial segment of employees. Thus, the entire Act, if successfully challenged under the impermissible delegation theory, cannot stand.

V. Unit Determinations

Another challenge undoubtedly forthcoming to the constitutionality of the Act arises from the SERB's authority to make final bargaining unit determinations. But unlike a delegation-of-authority challenge, this assault should fail.

The group of job classifications that will participate in a union representation election is known, in labor parlance, as the bargaining unit. Just as the NLRB is given power under the NLRA to make this critical determination,[115] the SERB is to determine an appropriate unit for bargaining under the Ohio Act.[116]

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112. Livingston v. Clawson, 2 Ohio App. 3d 173, 177, 440 N.E.2d 1383, 1388 (1982).

113. Geiger v. Geiger, 117 Ohio St. 451, 160 N.E. 28 (1927).

114. *See* 1983 Ohio Legis. Serv. 5-245 (Baldwin) (to be codified at Ohio Rev. Code § 4117.22).

115. 29 U.S.C. § 159(b) (1976).

116. *See* Ohio Legis. Serv. 5-240 (Baldwin) (to be codified at Ohio Rev. Code § 4117.06(A)).

In making this determination, the SERB is directed to consider a variety of factors, some of which traditionally have been assessed by the NLRB in making unit determinations.[117] The Act, moreover, contains certain specific prohibitions against including particular employees within certain units, thus limiting, to a degree, the SERB's unit determination authority.[118]

Under Ohio law, however, the SERB's unit determinations are "final and conclusive and not appealable to the Court."[119] This unusual provision appeared in the public employee bargaining law of one other state, and its presence led that state's supreme court to invalidate the entire bargaining bill.[120] Thus, a similar challenge to Ohio's Act is all but certain.

In *Indiana Education Employment Relations Board v. Benton Community School Corp.*, the Supreme Court of Indiana found Indiana's bargaining law unconstitutional because the law prohibited judicial review of an administrative agency decision.[121] Like the Ohio Act, Indiana's law expressly excluded from court review the board's unit determination decisions.[122] The Indiana high court held judicial review of administrative decisions required by the due process pro-

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117. *Id.* (to be codified at OHIO REV. CODE § 4117.06(B)). The SERB is directed to consider, "among other relevant factors," any bargaining history and the employees' community of interest as reflected by their wages, hours and working conditions, factors historically considered by the NLRB. The SERB additionally is to take into account the effect of over-fragmentation, the employer's efficiency of operations and adminstrative structure, and the desires of the employees.

118. For example, professional and nonprofessional employees cannot be included in the same unit unless a majority of each group votes for inclusion in the unit. *Id.* (to be codified at OHIO REV. CODE § 4117.06(D)(1)). Under federal law, only the professional employees must approve inclusion. *See* 29 U.S.C. § 159(b) (1976).

Under the Ohio Act, guards, correction officers, specially appointed police officers and certain employees of mental health and juvenile correction facilities cannot be included in a unit with other employees. 1983 Ohio Legis. Serv. 5-240 (Baldwin) (to be codified at OHIO REV. CODE § 4117.06(D)(2)). Police and fire department members, as well as members of the state highway patrol, cannot be included in units with other classifications of employees in their departments. *Id.* (to be codified at OHIO REV. CODE § 4117.06(D)(3)). Police department units are subject to a further limitation: rank and file officers must be in a unit separate from members who are at the rank of sergeant or above. *Id.* (to be codified at OHIO REV. CODE § 4117.06(D)(6)). Units are limited to one institution of higher education and are subject to accreditation standards of such institutions. *Id.* (to be codified at OHIO REV. CODE § 4117.06(D)(4)). Last, restrictions have been placed on units composed of employees of elected county officials. *Id.* (to be codified at OHIO REV. CODE § 4117.06(D)(5)).

119. 1983 Ohio Legis. Serv. 5-240 (Baldwin) (to be codified at OHIO REV. CODE § 4117.06(A)).

120. *See* Indiana Educ. Employment Relations Bd. v. Benton Community School Corp., 266 Ind. 491, 507-10, 365 N.E.2d 752, 760-61 (1977).

121. *Id.* at 510, 365 N.E.2d at 761.

122. With the exception of its prohibition against judicial review, the Indiana act, in large part, mimicked the NLRA. *Id.* at 500-04, 365 N.E.2d at 756-58.

visions of the state constitution.[123] Because the Indiana law unequivocally denied judicial review, it was unconstitutional. And because the unconstitutional provisions were "so unique and shape[d] the fundamental character of Indiana's public employee bargaining statute," they were not severable.[124] Thus, the entire act was voided.

Despite the similarity of provisions, a like result is not mandated by the Ohio law. While Ohio, too, declares unit determinations not appealable, crucial distinctions can be made between the Ohio and Indiana laws, and these distinctions should serve to save the Ohio Act.

In voiding the statute, the Indiana court recognized that under Indiana law *collateral*, as well as direct, judicial review was foreclosed. In contrast, the Ohio law can and should be construed to preclude only *direct* review of unit determinations. A public employer in Ohio should be able to obtain review of the SERB's unit determination by refusing to bargain and thereafter raising the issue in its challenge to the resulting bargaining order.

It is this procedure that is followed under the NLRA, a law strikingly similar to Ohio's.[125] Under both federal and Ohio law, once a proper unit has been determined, an election is ordered. If the union wins, the union is certified as the exclusive representative of the employees. At this time, the employer's duty to bargain arises.[126] Under the NLRA and the Ohio Act, it is an unfair labor practice for an employer to refuse to bargain with the certified union, and the Ohio Act sets forth a procedure for resolution of unfair labor practices.[127] Once a complaint is filed, the SERB will hold a hear-

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123. *Id.* at 506, 365 N.E.2d at 760.

> "Strictly speaking, there is no such thing as an appeal from an administrative agency. It is correct to say that the orders of an administrative body are subject to judicial review; and that they must be so to meet the requirements of due process. Such review is necessary to the end that there may be an adjudication by a court of competent jurisdiction that the agency has acted within the scope of its powers; that substantial evidence supports the factual conclusions; and that its determination comports with the law applicable to the facts found."

Id. at 507, 365 N.E.2d at 760 (quoting Warren v. Indiana Tel. Co., 217 Ind. 93, 104-05, 26 N.E.2d 399, 404 (1940)).

124. *Id.* at 510; 365 N.E.2d at 761.

125. *Compare* 1983 Ohio Legis. Serv. 5-238 to 5-246 (Baldwin) (to be codified at OHIO REV. CODE §§ 4117.01-.23) *with* 29 U.S.C. §§ 151-69 (1976).

126. *See* 29 U.S.C. §§ 159(a), 158(d) (1976); 1983 Ohio Legis. Serv. 5-240 (Baldwin) (to be codified at OHIO REV. CODE §§ 4117.05, 4117.04(B)).

127. *See* 29 U.S.C. § 158(a)(5) (1976); 1983 Ohio Legis. Serv. 5-242 (Baldwin) (to be codified at OHIO REV. CODE § 4117.11(A)(5)).

ing and can issue a cease and desist order, requiring the employer to bargain. The employer may then appeal the SERB's order to the court of common pleas.[128]

Thus, under this scheme, an employer ultimately may obtain review of the unit determination, notwithstanding the "final and conclusive and not appealable" language of the Act.[129] Once an election has been ordered, an employer need only refuse to bargain with the union. On court appeal of a subsequent bargaining order, the unit determination may be raised as a defense to the SERB's unfair labor practice decision.[130]

The Indiana statute, unlike Ohio law, could not have been so interpreted. Its prohibitions against judicial review were found in its unfair labor practice provision.[131] That law, moreover, specifically excluded from the record to be filed in court, on review of unfair

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128. 1983 Ohio Legis. Serv. 5-242 to 5-243 (Baldwin) (to be codified at OHIO REV. CODE §§ 4117.12, 4117.13. These procedures are similar to those in the NLRA. *See* 29 U.S.C. §§ 159, 160 (1976).

129. *See* 1983 Ohio Legis. Serv. 5-240 (Baldwin) (to be codified at OHIO REV. CODE § 4117.06(A)).

130. Such was the construction given to the NLRA. In *American Fed. of Labor v. NLRB*, the Supreme Court of the United States stated:

> "[I]f subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board."

308 U.S. 401, 410 n.3 (1940) (quoting S. REP. No. 573, 74th Cong., 1st Sess. 14). *See also* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 154 (1941) (no direct review of NLRB's unit determination, but indirect challenge is permitted by contesting unfair labor practice determination).

131. This prohibition was stated not once, but three times, in § 8 of the Indiana statute, which included the following provisions:

> "(d) * * * Provided, however, that the determination by the board that an employee organization has been chosen by a majority of the employees in an appropriate unit may not be subject to review by the court.
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> . . . .
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> (g) . . . the certification by the board that an employees' organization is the exclusive representative shall not be subject to review by the court.
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> . . . .
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> (i) In any proceeding for enforcement or review of a board order held pursuant to section 8(d) or (g) of this chapter, evidence introduced during the representation proceeding pursuant to section 7 of this chapter [on representation and collective bargaining units] shall not be included in the transcript of the record required to be filed under subsection 8(d) or (g); nor shall the court consider the record of such proceeding."

Indiana Educ. Employment Relations Bd. v. Benton Community School Corp., 266 Ind. 491, 501-02, 365 N.E.2d 752, 757 (1977).

labor practice proceedings, any evidence on unit determinations.[132] This provision was in contrast to the NLRA, which specifically provides that such evidence shall be included in the record for review of unfair labor practice decisions.[133]

Ohio's prohibition against judicial review is placed in the Act's bargaining unit determination section. No such language appears in the provisions governing unfair labor practice proceedings. And while the Act specifically does not order inclusion of unit determination evidence in the transcript, as does the NLRA, neither does it specifically exclude it, as did the Indiana statute. The absence of a specific exclusion facilitates inclusion of the evidence as part of the record on appeal. The Act provides that, upon appeal of an order by a party or a petition by the SERB for enforcement, the SERB shall certify and file with the court "a transcript of the *entire record* in the proceeding, including the pleadings and evidence upon which the order was entered and the findings and order of the Board."[134]

Under the Ohio statute, then, collateral appeal of unit determinations appears available. By refusing to bargain, an aggrieved party assures itself of an unfair labor practice charge and of a resulting bargaining order on conclusion of the unfair labor practice proceedings. This order will then be subject to court review as would any other unfair labor practice determination. This availability of collateral review satisfies the requirements of procedural due process.[135]

This analysis, which is based on an analogy to the federal procedure for collateral review, is problematical in that the Ohio Act unequivocally characterizes the SERB's unit determinations as "final and conclusive." Under the NLRA, however, unit determinations are not considered "final" agency actions and thus are not reviewable

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132. See *supra* note 131 for the text of the statute.

133. 29 U.S.C. § 159(d) (1976) states:

> Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

134. 1983 Ohio Legis. Serv. 5-242 (Baldwin) (to be codified at OHIO REV. CODE § 4117.13(A)).

135. *See* American Fed. of Labor v. NLRB, 308 U.S. 401, 411-12 (1940).

until after a bargaining order has been issued. One could argue that the Ohio General Assembly, with full knowledge of the NLRA and the interpretation thereof, sought to make a change from federal law by labeling SERB unit determinations as "final" instead of interlocutory.

Any such attribution to the legislature should be rejected. A more plausible interpretation of the law is that the drafters, by labeling determinations final and not reviewable, meant only to guard against piecemeal attacks of bargaining proceedings. Permitting a party to challenge a unit determination, or other order, before an election undeniably would impede the quest for industrial peace, as pre-NLRA federal experience demonstrates.[136] Thus, that a prohibition against direct judicial review was all that was intended is a reasonable construction of the law. Moreover, had the General Assembly intended to prohibit collateral review, it presumably would have said so. Such a prohibition, if intended, easily could have been inserted into the unfair labor practice sections. Instead, the Act contains no exception to court review of the *entire* record of unfair labor practice determinations, including bargaining orders.

Given that the Act can be construed to prohibit only direct, while permitting collateral, judicial review, no constitutional problem exists. Therefore, an attack based on the SERB's authority to make final bargaining unit determinations should fail.

VI. Home Rule

The establishment of wages, hours, and other terms and conditions of employment and decisions pertaining to hiring, promotion, retention, discipline and dismissal of employees are fundamental aspects of local government.[137] Because the Act contemplates broad state regulation of these processes, challenges based on the home rule provisions of the Ohio Constitution are likely.[138]

A. The Parameters of Home Rule in Ohio

Prior to 1912, municipal corporations[139] in Ohio looked exclusively

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136. *See id.* at 410 (quoting S. Rep. No. 573, 74th Cong., 1st Sess. 5-6).

137. *See infra* notes 170, 172-85 and accompanying text.

138. *See supra* note 2.

139. The Ohio Constitution classifies all municipal corporations as either "cities" (municipal corporations "having a population of five thousand or more") or "villages" ("all other . . . municipal corporations"). Ohio Const. art. XVIII, § 1. In Ohio, "home rule powers are granted to all municipalities alike, regardless of size." Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 Ohio St. L.J. 18, 19 (1948). Therefore, this discussion

to the state legislature for their powers.[140] The General Assembly historically had been miserly in dispensing authority to municipalities,[141] and the resulting political pressures led to a "cry for a constitutional change."[142] With the adoption of the home rule amendment in 1912, municipalities acquired substantial autonomy over their own affairs.[143]

Section 3 of the amendment, which provides the focus of any home rule-based attack on the public employee bargaining statute, directs: "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."[144] The drafters of this provision sought to define clearly the boundaries of municipal home rule.[145] They carefully chose the term "local self-government" rather than "municipal affairs," believing it would demarcate better the parameters of home rule.[146] Regrettably, "as a legal concept, 'local

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of home rule does not distinguish between cities and villages. Possible conflicts between the public bargaining law and the home rule provisions will not concern villages, however, because they are excluded from the Act's coverage. *See* Ohio Legis. Serv. 5-238 (Baldwin) (to be codified at OHIO REV. CODE § 4117.01(B)).

140. "Municipalities [before 1912] were . . . largely a political football for each succeeding Legislature, and there was neither stability of law, touching municipal power, nor sufficient elasticity of law to meet changed and changing municipal conditions." Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 255, 140 N.E. 595, 598 (1923). *See generally* G. VAUBEL, MUNICIPAL HOME RULE IN OHIO (1st ed. 1978) (exhaustively discussing historical evolution and modern application of home rule in the state).

141. *See generally* Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L. J. 1, 2-13 (1948) (describing the slow progression of local government growth in Ohio).

142. G. VAUBEL, *supra* note 140, at 13.

143. *See* OHIO CONST. art. XVIII.

144. OHIO CONST. art. XVIII, § 3. Ohio does not provide a similar grant of home rule for its counties. Article X, section 1 of the Ohio Constitution, however, does permit municipalities and townships, "with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power." OHIO CONST. art. X, § 1. *See also* Fordham & Asher, *supra* note 139, at 21 n.12 ("[C]ounty home rule is a dead letter in Ohio.").

145. The objective was

> to draw as sharply and as clearly as possible the line that separates general affairs from the business which is peculiar to each separate municipality . . . to draw . . . a line between those two things and to leave the power of the state as broad hereafter with reference to general affairs as it has ever been, and to have the power of the municipalities on the other hand as complete as they can be made with reference to those things which concern the municipalities alone, always keeping in mind the avoidance of conflict between the two as far as possible.

2 OHIO CONSTITUTIONAL COVENTION, PROCEEDINGS AND DEBATES 1433 (1913) [hereinafter cited as OHIO CONSTITUTIONAL CONVENTION]; *see also* G. VAUBEL, *supra* note 140, at 13-15.

146. 2 OHIO CONSTITUTIONAL CONVENTION, *supra* note 145, at 1485, 1488; *see also* Fordham & Asher, *supra* note 139, at 25.

self-government' is as lacking in sharpness of meaning after . . . years of interpretation as it was at the outset."[147]

Notwithstanding the imprecise distinction between the state's "general affairs" and "business . . . peculiar to each separate municipality"[148] or, alternatively, between "local self-government" and "municipal affairs," the scope of home rule is not completely uncertain. Section 3 of the home rule amendment concludes with the words "as are not in conflict with general laws."[149] *State ex rel. Canada v. Phillips* addressed whether this limiting language applies to all or only a portion of the powers conferred on municipalities by section 3.[150] The court decided that municipalities' "authority to exercise all powers of local self-government" is not subject to the limiting language; rather, only the power "to adopt and enforce . . . local police, sanitary and other similar regulations"[151] is subordinate to conflicting state laws.[152]

In so finding, the court reaffirmed its observations, made a decade after passage of the home rule amendment, that in the amendment

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147. Fordham & Asher, *supra* note 139, at 25; *see infra* note 165.

148. *See supra* note 145.

149. OHIO CONST. art. XVIII, § 3. "General" laws involve:

> [T]he concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions—such as those which regulate the morals of people, the purity of their food, the protection of the streams, the safety of buildings and similar matters.

Fitzgerald v. City of Cleveland, 88 Ohio St. 338, 359, 103 N.E. 512, 518 (1913). *See generally* G. VAUBEL, *supra* note 140, at 50-52 (advancing theory that constitutional convention debates regarding meaning of "general law" are susceptible to several interpretations).

150. 168 Ohio St. 191, 151 N.E.2d 722 (1958).

151. OHIO CONST. art. XVIII, § 3.

152. 168 Ohio St. at 197, 151 N.E.2d at 727. In *State ex rel. Petit v. Wagner*, the Supreme Court of Ohio elaborated on its holding in *Canada*:

> The controversy concerns whether the . . . phrase . . . "as are not in conflict with general laws" . . . modifies all that has gone before it in Section 3, or only the portion dealing with the adoption and enforcement within the municipality's limits of "local police, sanitary and other similar regulations." It is argued that the modifying phrase applies not to this portion alone but to the opening phrase (dealing with "all powers of local self-government") as well because the framers of the Constitution knowingly refused to separate the phrases designating the two classifications of functions by a comma (2 Ohio Constitutional Convention, Proceedings and Debates [1912], 1860 to 1861). While the insertion of the comma would have been proof positive of an intent to have the modifier apply to the second phrase only, the converse does not necessarily follow, and this court has chosen to read the section as it would have had a comma been inserted after the word, "self-government."

170 Ohio St. 297, 300-01, 164 N.E.2d 574, 577 (1960). Various commentators have urged that this construction of section 3 finds, at best, scant support in the legislative history. G. VAUBEL, *supra* note 140, at 49-50; Fordham & Asher, *supra* note 139, at 22-25.

"the sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state *full and complete political power in all matters of 'local self-government.'* "[153] Furthermore, *Canada* recognized that a municipal enactment truly must implicate the state's police, health and welfare powers before the limiting language will come into play: "Of course, the mere fact that the exercise of a power of local self-government may happen to relate to the police department does not make it a police regulation within the meaning of the words 'police . . . regulations' found in [section 3]."[154] Clearly, then, if a substantive matter pertains to "local self-government" and is not limited by "other constitutional provisions,"[155] municipalities reign supreme.

A second tenet of Ohio home rule is that the grant of substantive home rule power is not dependent upon the exercise of a municipality's option under the Ohio Constitution to adopt a charter.[156] Both

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153. Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 255, 140 N.E. 595, 598 (1923) (emphasis added).

154. 168 Ohio St. at 197, 151 N.E.2d at 727-28. *Canada* of course, does not, stand for the proposition that municipalities are precluded from legislating in the areas of police powers or public health and welfare, nor have later decisions so held. To the contrary:

> [Section 3 of article XVIII], adopted in 1912, preserved the supremacy of the state in matters of "police, sanitary and other similar regulations," while granting municipalities sovereignty in matters of local self-government, limited only by other constitutional provisions. Municipalities may enact police and similar regulations under their powers of local self-government, but such regulations "must yield to general laws of statewide scope and application, and statutory enactments representing the general exercise of police power by the state prevail over police and similar regulations [adopted] in the exercise by a municipality of the powers of local self-government."

City of Canton v. Whitman, 44 Ohio St. 2d 62, 65, 337 N.E.2d 766, 769 (1975) (quoting State *ex rel.* Klapp v. Dayton Power & Light Co., 10 Ohio St. 2d 14, 17, 225 N.E.2d 230, 233 (1967)), *appeal dismissed*, 425 U.S. 956 (1976).

Although in their exercise of "powers of local self-government" municipalities need not be concerned with conflicting "general laws," the above-quoted language from *City of Canton* instructs that municipal sovereignty in matters of local self-government *is* subject to "other constitutional provisions." 44 Ohio St. 2d at 65, 337 N.E.2d at 769. One such provision is article II, section 34: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." OHIO CONST. art. II, § 34. *See* Wray v. City or Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (1982) (Ohio's Minimum Fair Wage Standards Act applies to municipal employees, despite conflicting local ordinance).

155. *See supra* note 154; *see also* Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 314 (1960) ("[w]hile local police regulations were subject to statutory control under the conflict clause, the non-police powers were superior to conflicting state statutes unless state power was found in a specific constitutional provision").

156. OHIO CONST. art. XVIII, § 7 reads: "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."

chartered and non-chartered municipalities enjoy the full range of substantive home rule authority.[157] Municipal power emanates, courts have theorized, from article XVIII, section 3 and not from a charter, the function of the latter being merely to distribute power conferred by section 3 rather than to provide an additional source of authority.[158]

Although a municipality's authority to enact *substantive* legislation is unaffected by the presence or absence of a charter, its *procedural* home rule power is affected. The Ohio Constitution offers two means for the exercise of section 3 home rule power to enact substantive measures. The first is to "frame and adopt . . . a charter."[159] The second, applicable to non-chartered municipalities,

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157. "It is axiomatic that an ordinance [involving local self-government], if enacted by a chartered municipality, would prevail over . . . state law irrespective of any conflict. . . . A non-chartered municipality [also] may enact an ordinance which is at variance with state law in matters of substantive local self-government." Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma, 61 Ohio St. 2d 375, 378, 402 N.E.2d 519, 521-22 (1980). This principle has not been always beyond doubt. In a decision immediately following the passage of the home rule amendment, the Supreme Court of Ohio declared that the adoption of a charter was a prerequisite for upholding an ordinance at variance with a state statute. State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 93-95, 102 N.E. 670, 672-73 (1913). Scarcely ten years later, in *Village of Perrysburg v. Ridgway*, the court rejected *Lynch*, holding that "[t]he grant of power in Section 3, Article XVIII, [applies] equally to municipalities that do adopt a charter as well as those that do not adopt a charter." 108 Ohio St. 245, 245, 140 N.E. 595, 595 (1923) (syllabus ¶ 5). Despite this unequivocal pronouncement, the court, in its own charitable description of its vacillation, subsequently "los[t] the perspective of the *Perrysburg* decision and resort[ed] to the analysis of the discredited *Lynch* . . . decision." *City of Parma*, 61 Ohio St. 2d at 382, 402 N.E.2d at 524 (referring to State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960), and Leavers v. Canton, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964)).

158.

> But what is a city charter but a city constitution, and a city constitution can in no wise enlarge the municipal power granted in the state Constitution. After all, it only distributes that power to the different agencies of government, and in that distribution may place such limitation, but not enlargement, upon that power, as the people of the municipality may see fit in such charter or constitution. The city charter in no wise affecting the degree of municipal power of the state Constitution, its optional adoption under the language of [Section 7 of] the Constitution should in no wise affect the operation of Section 3, Article XVIII . . . . Moreover, the language of Section 7 is merely "may" adopt a charter.

Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 253, 140 N.E. 595, 597 (1923); *accord* Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma, 61 Ohio St. 2d 375, 380-81, 402 N.E.2d 519, 523 (1980); *see also* Duffey, *supra* note 155, at 314 ("[s]ince municipal power [is] derived directly from Section 3, the only significance of a charter [is] . . . the ability to establish a form of government and . . . the ability to place limitations on section 3 powers by charter provision").

159. OHIO CONST. art. XVIII, § 7. See *supra* note 156 for the text of the section. OHIO REV. CODE ANN. § 701.05 (Page 1976) gives chartered municipal corporations the option of passing legislation either in conformance with the charter procedures or according to methods prescribed by state statute.

is to conform to laws passed by the General Assembly "for the incorporation and government of cities and villages."[160] In instituting legislation, therefore, non-chartered municipalities must adhere to state laws, promulgated pursuant to article XVIII, section 2, prescribing procedures for enacting particular substantive ordinances.[161] Apparently there are no statutes specifying procedures for enacting ordinances governing wages, hours, and other terms and conditions of employment for public employees. Ohio Revised Code sections 731.17 through 731.27, however, do establish procedures of general application "to the passage of ordinances and resolutions of a municipal corporation."[162] These general procedures presumably would apply to the enactment of ordinances governing collective bargaining for municipal employees.[163]

In sum, municipal corporations—chartered and non-chartered alike—enjoy unfettered home rule authority to enact substantive legislation on matters of "local self-government." Only is substantive enactments involve "police, sanitary, and other similar regulations" must they not "conflict with general laws." And state procedural requirements for enacting substantive legislation prevail over municipal procedures only where non-chartered municipal corporations are concerned. With these guidelines in mind, the task of assessing the constitutionality on home rule grounds of Ohio's public employee bargaining law remains. It is this inquiry to which the following two sections are directed.

B. Employee Relations and Home Rule in Ohio

As *State ex rel. Canada v. Phillips* demonstrates, whether Ohio's

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160. *See* OHIO CONST. art. XVIII, § 2, which provides: "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."

161. *See, e.g.*, Village of Wintersville v. Argo Sales Co., 35 Ohio St. 2d 148, 299 N.E.2d 269 (1973); Morris v. Roseman, 162 Ohio St. 447, 123 N.E.2d 419 (1954) (both holding that non-chartered municipalities cannot enact "emergency" zoning ordinances without complying with OHIO REV. CODE § 713.12, which requires public notice and hearing prior to passage of zoning ordinances); *cf.* Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma, 61 Ohio St. 2d 375, 383, 402 N.E.2d 519, 524-25 (1980) (ability to determine salaries for municipal employees of non-chartered community is matter of substantive, not procedural, local self-government; *Wintersville* and *Morris* therefore are inapposite).

162. OHIO REV. CODE ANN. § 731.17(A) (Page 1976).

163. The procedure-substance distinction for non-chartered municipalities is consistent with judicial pronouncements that municipalities are sovereign in matters of local self-government "limited only by other constitutional provisions." City of Canton v. Whitman, 44 Ohio St. 2d 62, 337 N.E.2d 766, 769 (1975), *appeal dismissed*, 425 U.S. 956 (1976). Article XVIII, sections 2 and 7 are "other constitutional provisions" that limit municipalities in exercising procedural home rule power conferred by article XVIII, section 3.

public employee bargaining law will prevail over conflicting municipal ordinances will depend on whether the legislation is deemed to encroach on powers of local self-government.[164] While generalizations in this area are difficult to make,[165] the Ohio courts have characterized most aspects of employee relations as purely local in nature, and state laws seeking to regulate these employment related matters thus have been held in conflict with the home rule amendment.[166] Because the Act attempts to govern fundamental areas of employment relations, a similar fate is foreshadowed, to a degree, by the pertinent Ohio case law.

The aspect of the Act most likely to provoke a constitutional challenge on home rule grounds is, again, the binding arbitration provision of the statute.[167] These provisions empower an ad hoc arbitrator, rather than a municipality, to set wages, hours, and other terms and conditions of employment for certain public health and safety employees.[168] Because the municipality's funding powers, as well as its power to govern employment conditions, are impinged by this section, serious home rule concerns are implicated.[169]

Indeed, these concerns may prove sufficient to void the statute

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164. See *infra* note 192 for a discussion of whether home rule concerns exist in the absence of a conflicting municipal ordinance.

165. That the law in Ohio on home rule historically has been less than clear is illustrated by the decision in State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958). In *Canada*, the court overruled an entire line of home rule cases, noting " 'it is not surprising . . . that, with the changing personnel of the court during the 44 years these provisions [sections 3 and 7 of Article XVIII] have been in effect, it has been no easy task to maintain something even remotely resembling consistency.' " *Id.* at 198, 151 N.E.2d at 728 (quoting State *ex rel.* Lynch v. City of Cleveland, 164 Ohio St. 437, 132 N.E.2d 118 (1956)).

166. An exception has been carved out for state laws dealing with hours of work and minimum wages, an exception mandated by article II, section 34 of the Ohio Constitution. See *supra* note 154 for the text of this constitutional provision. *See also* Wray v. City of Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (1982) (Ohio's Minimum Fair Wage Standards Act, enacted pursuant to section 34, was found to prevail over local ordinance despite home rule provision).

167. Home rule challenges to public employee bargaining laws in other states have focused on binding arbitration provisions. *See infra* notes 196-206 and accompanying text.

168. See *supra* notes 49-51 and accompanying text for a discussion of the binding arbitration provisions. The scope of an arbitrator's power, moreover, theoretically ranges beyond wages, hours, and other terms and conditions of employment. *See supra* notes 106-08 and accompanying text.

169. The binding arbitration sections are by no means the only provisions subject to attack on home rule grounds. *See, e.g.*, City of Hermiston v. Employment Relations Bd., 27 Or. App. 755, 557 P.2d 681 (1976), *rev'd on other grounds*, 280 Or. 291, 570 P.2d 663 (1977), in which the entire bargaining statute was alleged to infringe on home rule. But while other provisions of the Ohio Act also may be challenged as violative of home rule, it is binding arbitration that presents the greatest threat to municipal autonomy.

in the face of a conflicting local law. The right to set wages and the right to determine the qualifications for and conditions of employment repeatedly have been held to be matters of substantive local self-government.[170] As such, the courts have held, they are immune from regulation by the state.

In so holding, the Ohio courts have been forced to decide whether the particular ordinance at issue and the corresponding aspects of employment it seeks to regulate involve a power of purely local self-government, as opposed to a power of general, or statewide, concern.[171] The two, of necessity, are mutually exclusive. While both municipal and state interests may overlap in many areas, only one interest may be deemed predominant in the face of a conflict. And it is the municipality's interest that has been held superior in the context of employee wages. As was recently stated in *Northern Ohio Patrolmen's Benevolent Association v. City of Parma*, "it has been firmly established that the ability to determine the salaries paid to city employees is a fundamental power of local self-government."[172] That

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170. *See, e.g.*, Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980); State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958); Craig v. City of Youngstown, 162 Ohio St. 215, 123 N.E.2d 19 (1954); Harsney v. Allen, 160 Ohio St. 36, 113 N.E.2d 86 (1953); Mullen v. Akron, 116 Ohio App. 417, 188 N.E.2d 607 (1962); City of Cleveland *ex rel.* Kay v. Riebe, 46 Ohio Misc. 47, 348 N.E.2d 156 (1975); *see also* Harbarger v. Ballard, 53 Ohio App. 2d 281, 373 N.E.2d 390 (1977). *But see* Wray v. City of Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (1982) (state minimum wage and overtime law prevails over conflicting ordinance).

171. See *supra* note 149 for the constitutional description of "general laws."

172. 61 Ohio St. 2d 375, 383, 402 N.E.2d 519, 525 (1980). In *City of Parma*, a state statute mandating full pay for employees on a military leave of absence was held inapplicable to Parma, in view of a conflicting city ordinance. Parma had enacted a law that required the city to pay an employee on military leave only the difference between his salary and his military pay, rather than his full salary. The court rejected the police officers' contention that the state law should prevail. *Id.* at 377, 402 N.E.2d at 521.

In so doing, the court found the wages to be paid to employees to be a matter of substantive local self-government and further reasoned that salaries paid to city employees in the armed forces was not a statewide concern. *Id.* at 383, 402 N.E.2d at 524-25. The court also noted that " '[t]he mere fact that the exercise of a power of local self-government may happen to relate to the police department does not make it a police regulation within the meaning of the words "police regulations" found in Section 3 of Article XVIII of the Constitution.' " *Id.* at 383, 402 N.E.2d at 525 (quoting State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958)); *see also* Mullen v. Akron, 116 Ohio App. 417, 188 N.E.2d 607 (1962) (city ordinance prevails over state military pay law).

Troublesome is the *City of Parma* court's further statement that the state's concern was "not sufficient" to interfere with municipalities' wage decisions. 61 Ohio St. 2d at 383, 402 N.E.2d at 525. This remark suggests that a state interest *could* be sufficiently great as to override this local concern, a notion in conflict with the court's holding that municipal wages involve a "fundamental power of local self government." It is hard to conceive that an issue "fundamentally local" could so affect the general public as to render it a matter of statewide interest.

the fiscal decision centers around the municipality's own employees makes it perhaps more "purely local" than other city expenditures.

Comparison of the Supreme Court of Ohio's ruling in *State ex rel. Evans v. Moore*,[173] with its decision in *Craig v. City of Youngstown*,[174] demonstrates this conclusion. In *Moore*, the court held Ohio's prevailing wage law preempted a conflicting local ordinance, finding the state law to be an exercise of the state's police power on a matter of statewide concern.[175] At issue in *Moore* was the city's conflicting ordinance providing that city contracts would not be required to comply with the prevailing wage law. This ordinance was struck down.[176]

In *Moore*, however, the employees involved were those of private contractors rather than city employees.[177] The importance of this factor is evidenced by the court's contrasting holding in *Craig*, in which the prevailing wage law was held inapplicable to the municipality in view of a conflicting city ordinance. Importantly, though, the employees considered in *Craig* were the municipality's *own* employees. In upholding the ordinance under the home rule amendment, the court stated that "[t]o sustain the plaintiff's contention . . . would be to substitute a determination of the rates of pay by negotiation between labor unions and other employers for a determination by the council of the municipality."[178] Constitutionally, such a result could not be tolerated.

As correctly noted by the dissent in *Moore*, the only distinguishing factor between the majority and *Craig* was the municipal employee status of the workers.[179] The three dissenting justices in *Moore* would have extended *Craig* to nonemployees, on the basis that *any* fiscal decision "involves a central power of self-goverment—the power of the purse."[180] Recognizing that section 3 of article XVIII guarantees to municipalities all powers of local self-government, they found that "[n]othing is more germane to effective self-government than the power to determine the nature, kind, and extent of municipal expenditures."[181]

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173. 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982).

174. 162 Ohio St. 215, 123 N.E.2d 19 (1954).

175. 69 Ohio St. 2d at 91-92, 431 N.E.2d at 313-14. The prevailing wage law requires that all contractors and subcontractors for public improvements pay wages not less than those paid, pursuant to collective bargaining agreements, to laborers and construction workers in the locality. *See* OHIO REV. CODE ANN. §§ 4115.03-.15 (Page 1980).

176. 69 Ohio St. 2d at 91-92, 431 N.E.2d at 313-14.

177. *Id.* at 96, 431 N.E.2d at 316 (Locher, J., dissenting).

178. 162 Ohio St. at 220, 123 N.E.2d at 22.

179. 69 Ohio St. 2d at 96, 431 N.E.2d at 316 (Locher, J., dissenting).

180. *Id.*, 431 N.E.2d at 316 (Locher, J., dissenting).

181. *Id.*, 431 N.E.2d at 316 (Locher, J., dissenting).

Notwithstanding the logic of this reasoning, *Craig* and *Moore* clearly establish that when the fiscal decision involves *employee* wages, it is of such fundamental local concern as to brook no state interference.[182] The municipal ordinance will be upheld over a conflicting state law, as a purely local power is involved.

Other employment related concerns apart from wages similarly have been held purely local. Decisions including the transfer of employees,[183] the qualifications for municipal employment[184] and the appointment or hiring of employees[185] all have been deemed powers of local self-government.

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182. *See also* State *ex rel.* Mullin v. Mansfield, 26 Ohio St. 2d 129, 132, 269 N.E.2d 602, 604 ("The powers of the city council of a noncharter city to establish the number of employees to be employed in any city department and the pay scale classification of such employees is a basic and fundamental power of local government."), *cert. denied*, 404 U.S. 985 (1971).

Wray v. City of Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (1982), is not to the contrary. While *Wray* held the state's Minimum Fair Wage Standards Act preempted a conflicting local ordinance, it did so in reliance, at least in part, on article II, section 34, of the Ohio Constitution. This provision explicitly gives the state predominance in minimum wage and hour laws. *See supra* note 154. The *Wray* court noted that "the power to determine wages paid city employees is a power of local self government." 2 Ohio App. 3d at 172, 440 N.E.2d at 1383. But because the particular wage statute fell squarely within article II, section 34, it superseded any local law, despite the home rule amendment. *Id.*, 440 N.E.2d at 1383.

183. *See, e.g.*, Harsney v. Allen, 160 Ohio St. 36, 113 N.E.2d 86 (1953) (chief of police's right under local ordinance to transfer officer prevailed over conflicting state law). "The organization and regulation of its police force, as well as its civil service functions, are within a municipality's powers of local self-government." *Id.* at 41, 113 N.E.2d at 88.

184. *See, e.g.*, City of Cleveland *ex rel.* Kay v. Riebe, 46 Ohio Misc. 47, 348 N.E.2d 156 (1975) (city ordinance not requiring residency upheld over purportedly conflicting state law). "[T]he city of Cleveland [has] exclusive control over establishing the qualifications of its officers and employees. Any statute which is not in accord with the constitutional provisions and the charter is not applicable." *Id.* at 49, 348 N.E.2d at 159; *see also* State *ex rel.* Frankenstein v. Hillenbrand, 100 Ohio St. 339, 126 N.E. 309 (1919) (municipal charter provisions concerning selection of municipal officers prevails over conflicting state law). "[T]he manner of selecting purely municipal officers is a subject of 'local self-government,' as distinguished from 'local police, sanitary and other similar regulations.' " *Id.* at 345, 126 N.E. at 310.

185. State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958) (state civil service laws inapplicable to city with conflicting ordinance); *see also* State *ex rel.* Lynch v. City of Cleveland, 164 Ohio St. 437, 132 N.E.2d 118 (1956) (municipality's procedure for promoting police officers prevailed over state's civil service law); State *ex rel.* Lentz v. Edwards, 90 Ohio St. 305, 107 N.E. 768 (1914) (regulating civil service of city is matter of municipal concern).

In *Canada*, involving the appointment of a police officer, the court recognized the state interest in effective police protection but noted that it did not justify state interference with the municipality's employment practices.

> It is undoubtedly true that the enforcement of laws by police in every part of the state is a matter of "state-wide concern." Undoubtedly the state has power to provide for police in every part of the state to enforce its laws. . . . However,

While the above illustrates that many employment related issues have been held fundamentally local, not *all* aspects of employment have been characterized as such. It has been suggested that *State ex rel. Canada v. Phillips* separates employment powers into two groups: those involving position and tenure are local, while those involving employee welfare are police powers and thus are of general or statewide interest.[186]

Moreover, if a power implicates employee welfare, it not only will fall within the "police power" language of section 3 of article XVIII, which permits municipalities to legislate only so long as no conflict with the general laws exist,[187] but it also will fall within section 34 of article II, which allows the state to legislate for the "general welfare of all employees."[188] But to tag a law with the "general welfare" label, the court must consider the subject matter of sufficient statewide concern as to prevail over any competing local interest.

This it rarely has done.[189] Keeping in mind that most wage issues and many "terms and conditions" of employment issues have been regarded as purely local by the Ohio courts, it is apparent that "general welfare" has been and will be construed narrowly. This

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> where a municipality establishes and operates a police department, it may do so as an exercise of the powers of local self-government conferred upon it by Sections 3 and 7 of Article XVIII of the Constitution. If it does, the mere interest or concern of the state, which may justify the state in providing similar police protection, will not justify the state's interference with such exercise by municipality of its powers of local self-government.

168 Ohio St. at 200, 151 N.E.2d at 729. This language strongly suggests that the state's interest in effective law enforcement, of itself, will be insufficient to impose an employment relations law—binding arbitration for public safety forces—on municipalities. Some greater interest will need to be shown. See *infra* notes 196-207 and accompanying text for a discussion of the balancing of interests in the public employee bargaining context.

186. *See* G. VAUBEL, *supra* note 140, at 462. Professor Vaubel points to Markowski v. Backstrom, 10 Ohio Misc. 139, 226 N.E.2d 825 (1967), which held the Ferguson Act applicable to municipal employees in spite of a conflicting local law, as an example of state power to override local power in the employment relations area. G. VAUBEL, *supra* note 140, at 561-62. In *Markowski*, however, no "issue of constitutionality" was raised and the court expressly refrained from ruling on any constitutional questions. 10 Ohio Misc. at 144, 226 N.E.2d at 828. Thus, home rule implications were neither considered nor decided by the court.

187. *See supra* notes 153-58 and accompanying text.

188. *See supra* note 153; *see also* G. VAUBEL, *supra* note 140, at 462-63. For example, in *State ex rel. Bd. of Trustees v. Board of Trustees of Police Relief*, a municipality was ordered to transfer the assets of its police relief and pension fund to the state pension fund. The state pension fund legislation was deemed, without much discussion, to be a general welfare law and thus within article II, section 34. 12 Ohio St. 2d 105, 106-07, 233 N.E.2d 135, 137 (1967).

189. *See* G. VAUBEL, *supra* note 140, at 462-63.

restricted interpretation bodes ill for the Act, for its application to a municipality will be upheld *only* if the law is found to be a general welfare law of predominantly state, rather than local, concern.

C. *Home Rule-Based Challenges to Public Bargaining Laws in Other Jurisdictions*

As the foregoing establishes, municipal corporations in Ohio can enact substantive legislation involving matters of "local self-government" despite conflicting state laws.[190] Ohio courts, with near uniformity, have treated a variety of terms and conditions of public employment as concerns of "local self-government" and not as "police, sanitary and other similar regulations" that may not conflict with state law.[191] It is submitted that Ohio courts, when faced with home rule-based attacks on the Act, will extend this deference to local power and declare the Act to be an unconstitutional infringement on home rule authority.[192]

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190. *See supra* notes 148-53 and accompanying text.

191. *See supra* notes 177-90 and accompanying text.

192. Whether a municipality will be subject to the Act if it does not already have in place, or subsequently enact, a public bargaining ordinance that conflicts with the state law is unsettled. The Supreme Court of Ohio, in *State ex rel. Canada v. Phillips*, after holding that laws for appointments and promotions in municipal police departments promulgated by the General Assembly under article XV, section 10 of the Ohio Constitution do not supplant conflicting local legislation, remarked in dictum:

> [S]uch laws *may* be applicable . . . *where a city has failed to enact charter or legislative provisions on the subject covered by the statutes and the statutes do not conflict with any charter or municipal legislative provisions* or where a city has in its charter expressly adopted the state statutes.

168 Ohio St. 191, 195, 151 N.E.2d 722, 726 (1958) (emphasis added). The only out-of-state decision expressly to acknowledge this issue is inconclusive. In City of Roseburg v. Roseburg City Firefighters Local 1489, 639 P.2d 90 (Or. 1981), a conflicting ordinance had been enacted. The court, citing the "plenary authority" shared by both the city and state to enact public bargaining legislation, noted with approval the city's concession that, absent the local legislation, it would have had to comply with the state bargaining statute because the latter, "standing alone, would be constitutional . . . under the home rule amendments." 639 P.2d at 95. One of the concurring justices, however, urged the issue should not be conceded so readily; "Arguably any given city's constitutional immunity from a state law should not depend on its formal political decision to enact a conflicting law, although a contrary argument also is possible." 639 P.2d at 104 (Linde, J., concurring).

By entertaining home rule-based challenges where no conflicting local legislation apparently existed, other out-of-state cases involving home rule-based disputes implicitly have adopted the suggestions of *Canada* and the *Roseburg* majority. *See, e.g.*, Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); Dearborn Fire Fighters Union Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); City of Everett v. Fire Fighters Local 350, 87 Wash. 2d 572, 555 P.2d 418 (1976).

Nothwithstanding the above-quoted dictum from *State ex rel. Canada v. Phillips*, this

Decisions from other jurisdictions frequently have involved unsuccessful challenges to binding arbitration provisions in the state statute and, for the most part, are not instructive because the respective home rule provisions are narrower than Ohio's.[193] Some cases have presented challenges to the entire state bargaining law but either have used a distinguishable home rule test[194] or have employed a discredited and impractical analysis.[195]

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assumption may not be viable given the language in Ohio's home rule amendment. If the decision to bargain collectively or not to bargain collectively is exclusively a matter of local self-government, it arguably remains so whether or not a municipality legislates on the subject. If, on the other hand, municipalities share their powers of local self-government with the state until they take substantive affirmative legislative action that conflicts with state law, then the dictum in *Canada* is accurate.

In any event, it is beyond dispute that the absence of conflicting local legislation will not deprive municipalities of standing to mount a constitutional challenge to the state public bargaining law. Municipalities may institute proceedings to obtain a declaratory judgment that the law is unconstitutional. *See, e.g.*, City of Reno v. Reno Police Protection Ass'n, 653 P.2d 156 (Nev. 1982); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); City of Everett v. Fire Fighters Local 350, 87 Wash. 2d 572, 555 P.2d 418 (1976). Injunctive relief also may be sought. *See, e.g.*, City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969).

193. *See* Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 773, 352 N.E.2d 914, 918 (1976) (home rule amendment limits *all* municipal power to acts "not inconsistent with" general laws; unlike Ohio, municipalities have no sovereignty over matters of local self-government); Dearborn Fire Fighters Union Local 412 v. City of Dearborn, 394 Mich. 229, 244, 231 N.W.2d 226, 229-30 (1975) (home rule amendment subject to constitutional provision expressly empowering legislature to "enact laws providing for the resolution of disputes concerning public employees"); City of Amsterdam v. Helsby, 37 N.Y.2d 19, 26, 332 N.E.2d 290, 295-96, 371 N.Y.S.2d 404, 411 (1975) (local government can adopt local laws only to extent "not inconsistent with . . . any general law"); City of Everett v. Fire Fighters Local 350, 87 Wash. 2d 572, 594, 555 P.2d 418, 419 (1976) (home rule amendment insulates municipalities only against "special laws" and subjects them to "general laws").

194. *See, e.g.*, City of Roseburg v. Roseburg City Firefighters Local 1489, 292 Or. 266, 639 P.2d 90 (1981) (home rule amendment granted preeminence to municipal governments only in procedural matters, such as local political structure and organization, but not in matters of substantive law, such as collective bargaining). By contrast, Ohio municipalities are sovereign over all substantive matters of local self-government and, if chartered, over all procedural matters of local self-government as well. *See supra* notes 150-63 and accompanying text.

195. *See* City of Beaverton v. International Ass'n of Fire Fighters Local 1660, 20 Or. App. 293, 531 P.2d 730 (1975), *overruled by* City of Hermiston v. Employment Relations Bd., 27 Or. App. 755, 557 P.2d 681 (1976), *rev'd on other grounds*, 280 Or. 291, 570 P.2d 663 (1977). *City of Beaverton* held the Oregon legislature violated principles of home rule by statutorily declaring the state bargaining law to be preeminent per se over any conflicting charter or ordinance. Home rule, the court reasoned, required that local legislation be examined section-by-section and that only those provisions governing matters of predominantly statewide concern which conflict with the state bargaining statute be invalidated. 20 Or. at 307-08, 531 P.2d at 736-77. In *Hermiston*, the court found the *City of Beaverton* approach ill-advised because both the state statute and the local ordinance

One case is helpful, however, in predicting Ohio judicial response to a charge that the Act violates the home rule amendment. In *City of Hermiston v. Employment Relations Board*, the city claimed Oregon's home rule amendment mandated that a local public employee relations ordinance prevail over a conflicting state law.[196] Just as the test in Ohio is whether a matter is one of "local self-government," in which case the municipality is sovereign, or involves "police, sanitary or other regulations," in which case municipal enactments must not conflict with state law, the test applied in *Hermiston* was whether local or state interests "predominated" in the area of public employee bargaining.[197]

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were "comprehensive, integrated whole[s] creating very different employer-employe[e] relations schemes. It now appears impossible to consider logically specific provisions from either the statute or ordinance without regard to the whole. Moreover, the end product of such an effort would probably be an unworkable ordinance/statute hybrid." 27 Or. App. at 761, 557 P.2d at 684.

196. 27 Or. App. 755, 762-63, 557 P.2d 681, 684-85 (1976), *rev'd on other grounds*, 280 Or. 291, 570 P.2d 663 (1977). The ordinance and the statute contained significant differences. The Hermiston ordinance required that a representation petition be supported by a 50% showing of interest; the state statute required only 30%. *Id.* at 757 n.2, 758 n.5, 557 P.2d at 681 n.2, 682 n.5. Questions concerning the appropriateness of a unit were decided by the city manager and city council under the ordinance and by the state board under the statute. *Id.* at 757-59, 557 P.2d at 682. Following the election of an employee organization, the ordinance permitted "consultation" between city and employee representatives about "wages and related economic benefits;" the parties had a duty to bargain in good faith about all terms and conditions of employment in the post-election procedures established by the statute. Such consultation could lead to a non-binding "memorandum of understanding" or, if no agreement, to "impasse procedures." Under the state-mandated plan, bargaining either culminated in a binding agreement to be monitored by an impartial tribunal or precipitated mediation, factfinding and binding arbitration. 27 Or. App. at 758-59, 557 P.2d at 682-83.

197. *Id.* at 761, 557 P.2d at 684. At the time *Hermiston* was decided. Oregon used a "predominant interest" test set forth by the court in *State ex rel. Heinig v. City of Milwaukie:*

> [T]he legislative assembly does not have the authority to enact a law relating to city government even though it is of general applicability to all cities in the state unless the subject matter of the enactment is of general concern to the state as a whole, that is to say that it is a matter of more than local concern to each of the municipalities purported to be regulated by the enactment.

231 Or. 473, 479, 373 P.2d 680, 683-84 (1962). Shortly after *Hermiston*, the Supreme Court of Oregon substituted a new home rule analysis for the *Heinig* rationale:

> When a statute is addressed to a concern of the state with the *structure and procedures* of local agencies, the statute impinges on the powers reserved by the [home rule] amendments to the citizens of local communities. . . . Conversely, a general law addressed primarily to *substantive social, economic, or other regulatory objectives* of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconciliable with the local community's freedom to choose its own political form.

City of La Grande v. Public Employes Retirement Bd., 281 Or. 137, 156, 576 P.2d 1204, 1215 (1978) (footnote omitted) (emphasis added), *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978). It was this procedure-substance distinction the court used to uphold a home

Public employee bargaining was primarily a local concern, the *Hermiston* court concluded; therefore, imposing the state statute on municipalities having conflicting legislation violated home rule. As the entity that determined staffing needs, fixed compensation, and authorized hiring, transfers and terminations, the city had an interest "to have control over the formation, performance and termination of employment contracts, free from interference from outside sources, such as [the state board], who may not know of, for example, the city's peculiar fiscal situation."[198]

The court found the state's purported interest "virtually non-existent."[199] While state control over public employment relationships might boost employee morale and efficiency, this interest did not, the court urged, predominate over local interests.[200] Certainly, the court's summary dismissal of this asserted state interest is unsatisfactory. But the conclusion nevertheless seems sound, because, presumably, state employment-related legislation always seeks to promote employee morale and efficiency. Yet Ohio courts have upheld home rule-based attacks on a variety of statutes which sought to confer what the General Assembly evidently deemed benefits on public employees.[201]

A state interest in uniformity likewise failed to persuade the *Hermiston* court. Calls for uniformity, the court opined, merely camouflaged claims that the state scheme was "wiser or better than the local scheme," and such policy considerations are irrelevant to a home rule analysis which, necessarily, must focus on the constitution, not policy.[202] Ohio courts similarly have dismissed uniformity as a basis for depriving communities of their home rule powers.[203]

With similar dispatch *Hermiston* rejected the argument that the state's interest in public employment prevails over the local interest because of the interdependence of neighboring municipalities and because municipal employees may be called on to work outside their own employing community. The court described as "too remote"

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rule-based challenge to the Oregon public bargaining law in City of Roseburg v. Roseburg City Firefighters Local 1489, 292 Or. 266, 639 P.2d 90 (1981).

198. 27 Or. App. at 762, 557 P.2d at 684.

199. *Id.* at 763, 557 P.2d at 685.

200. *Id.* at 763, 557 P.2d at 684.

201. *See, e.g.*, Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980); Craig v. City of Youngstown, 162 Ohio St. 215, 123 N.E.2d 19 (1954).

202. 27 Or. App. at 763, 557 P.2d at 685.

203. *See, e.g.*, State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958). *But see* State *ex rel.* Evans v. Moore, 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982).

the possibility that non-public health and safety employees would be summoned from one municipality to another.[204] In any event, the court added, "the interdependency point . . . could rapidly be carried to an extreme that would leave nothing within the exclusive control of the home rule cities and counties."[205]

Thus, to the extent the statute regulated relations between a community and non-public health and safety employees, the court found it unconstitutional in its entirety. As to public health and safety employees, the court reiterated its finding of unconstitutionality but noted in dictum that the state may be able constitutionally to prohibit strikes by these employees. The court, however, declined to reach that question.[206]

Section 3 of Ohio's home rule amendment and the cases decided thereunder[207] require that municipalities be free of state interference in substantive matters of local self-government. These same sources direct that the state is preeminent only in the narrowly-defined sphere of police, sanitary and other similar general welfare concerns. Of the home rule challenges to other states' public bargaining laws, *Hermiston* most closely resembles the approach Ohio courts can be expected to follow. If they use such an analysis, a declaration that the Act violates home rule seems likely.

VII. Conclusion

Public employee bargaining has been a protracted controversy in Ohio. With the enactment of Senate Bill 133, however, the conflict is far from over. The arena will simply shift from the floors of the statehouse to the confines of the courts, where a successful attack on the statute's validity is anticipated. Because the Act attempts to delegate to an ad hoc arbitrator authority to decide inherently political questions, it has crossed the boundaries of permissible delegation established by the Ohio courts. And because it removes from municipalities their substantive power to decide

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204. 27 Or. App. at 763, 557 P.2d at 685.

205. *Id.*, 557 P.2d at 685.

206. *Id.*, 557 P.2d at 685. This possible exception for strikes by public health and safety employees seems, as a practical matter, to be irrelevant. Municipal legislation is unlikely to permit strikes by such employees. But even if an Ohio municipality enacted an ordinance permitting these strikes, that portion of the ordinance seemingly would not be insulated by the Ohio Constitution. Arguably, the prohibition against strikes by health and safety employees, designed to promote the security and welfare of the public, is the type of state "police, sanitary, and other similar regulations" with which local laws must not conflict under the home rule amendment.

207. *See supra* notes 164-89 and accompanying text.

employment issues purely local in nature, it violates the home rule provisions of the state constitution.

Advocation of the Act's invalidity, however, should by no means be read as a denial of the well-intentioned motives prompting its enactment. Few can quarrel with the desires of public employees for a voice in the decisions that affect their working lives. Certainly whether these desires should be recognized is a policy decision well within the legislature's discretion. There is no doubt the General Assembly can promulgate a bargaining bill that would pass constitutional muster. But Senate Bill 133, in its eagerness to embrace the concept of public sector bargaining, has infringed impermissibly on constitutional guarantees, safeguards that policy choices must not be permitted to devitalize.