

Municipal Law and the Ohio Constitution

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by

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Municipal Law is one of the most misunderstood components of our legal and political systems. The misunderstanding reflects a typical American disdain of history, philosophy and theory. However, these need not be ethereal abstractions, thoughts unconnected to the "real world." In fact, as the founding fathers so ably demonstrated over two (2) centuries ago, history, philosophy and theory are the only sure companions to political success. They are indispensable guides to effective and just action in an imperfect world.

The history and philosophy of *Municipal Law* will be briefly examined. Theory will be used to place the history and philosophy into its social and political context. This background should help to illuminate why *Municipal Law* developed in the manner in which it did. An appreciation of its development should render current law more understandable.

Rome and Cities

In a relatively short period, Rome conquered most of the Mediterranean world. Originally only one among many tribes, Rome was now faced with governing a complex system. In order to govern, Rome developed several political innovations that are the historical cornerstones of modern society and its governance. For example, Roman citizenship was extended to those with no Roman blood. The Bible records Paul halting the judicial process in Judea by claiming his rights as a Roman citizen to a Roman court. Nowhere was innovation more necessary than in governing the highly diverse cities that Rome conquered.

Roman leaders clearly perceived the impossibility of making all of the citizens of their empire homogenous.¹ Furthermore, they shrewdly noted that local policies could vary without effecting their ultimate control over the empire. Thus, they conceived of a city as a separate legal entity, what eventually became a municipal corporation in American law. These legally independent entities were called *municipalities* and were granted the authority to direct their own local affairs. *Municipal* is the root word and means all policies except foreign affairs. Thus, Rome controlled the external affairs and cities were able to direct their own governing within their boundaries. It is no accident that all of our concepts for government have Latin roots. In spite of Athens being the home of democracy, we have almost no Greek terms in our governing language. Rome was the first complex western political system which paved the way for the later development of the nation state.

American Cities -- Law and Government

Cities developed in the United States during what I call the First Urban Revolution. For the most part, the cities developed after the Civil War. They were based on large scale industrialism and were characterized as densely populated and rapidly growing. This Revolution occurred primarily between 1880 and 1920, located mainly in the Northeast/Midwest states. The cities in these regions grew quickly, with New York City adding a million residents each decade and Cleveland going from a city of 50,000 in 1880 to 720,000 in 1920.² The national and state

governments were quite small at the time and the demands for public regulation and services were focused in the burgeoning cities. To provide these services efficiently, cities needed independence from the often corrupt state politics and reform of their own corrupt political machines. The reformers at the time thus focused on cleaning up local politics and creating a legal status for cities that protected them from state politics. The Roman concept of *municipality* was ideal for these purposes and was soon embedded in the law of most states.

The basic legal demand of the reformers was for *home rule*. Under this system, cities were *municipal corporations*, separate legal entities, with the ability to draft and adopt their own **Charter**. The reformers often amended state **Constitutions** to achieve this empowerment of the city. Reformers in Ohio, led by Clevelanders such as Newton Baker, Mayor and later a member of President Woodrow Wilson's Cabinet, amended the **Ohio Constitution** and provided, arguably, the most legally empowered municipalities in all the states. We will review the specific provisions of the **Ohio Constitution** shortly; however, we need to outline the philosophy of American government to understand more fully what these provisions mean legally and politically.

American Government -- The Most Complex System ever Devised

The founding fathers were greatly discouraged by the state of government in the decade following the successful Revolutionary War. The national government created under the **Articles of Confederation** proved inadequate for the task of creating a national community. James Madison spearheaded the calling of a Constitutional Convention to develop an effective national government.³ The Convention met in complete secrecy for nine (9) months and the resulting **Constitution** was narrowly adopted; in some states such as New York, by only one (1) vote in the ratifying convention.

Philosophically, the **Constitution** created a Federal system. Under a Federal system, there is more than one constitutional government. **Constitutions** for the founding fathers were derived from the people -- not necessarily the electorate or what we usually think of as the people. Rather it was the collective community in which sovereignty resided and that community delegated some of its authority to national and state governments in writing.⁴ For our purposes, the most important fact is that cities and other local governments are not part of legal Federalism. These local entities are not constitutional and derive all of their authority from state governments. Local governments are, in the classic and ringing words of Judge Dillon of Iowa, the leading legal authority during the First Urban Revolution, "creatures of state government." This fact compelled the reformers in Ohio to amend the **Ohio Constitution** and explicitly empower Ohio cities.

Madison's Genius: Institutional Spaces

One could argue that Madison's genius as the moving force behind the design of the federal system was creating what some have called "institutional spaces." These are not geographical locations; rather they are provisions that facilitate processes that promote personal and community development⁵. These are often not named in the **Constitution**, with some scholars arguing they were not named because they were as accepted as oxygen⁶. Local government is certainly one such feature. In essence, the **U. S. Constitution** provides a protective shell for local government. For example, the Commerce Clause of the **Constitution** limits the ability of state and local governments to engage in destructive commercial activities. Thus, one state cannot tax the goods imported from another state; nor can a state abridge the "rights and privileges" of U. S. citizens which may be a temptation in giving "locals" advantages in the job market.

More significantly, the protective shell facilitates a diversity of political arrangements. Thus, local government in Ohio is greatly different than local government in Massachusetts or even Indiana⁷. This permits local government to be creative and thus requires local officials to be knowledgeable about Philosophy, History and Law. Without such knowledge, local officials will underestimate the extent to which they are empowered, especially the officials of the municipal corporation, the most empowered unit of local government. The state of Ohio has empowered municipal corporations probably to the limit and we shall review that History and Law next.

Cities and the Ohio Constitution

As noted previously, government reformers in Ohio concentrated on empowering Ohio cities. The empowerment was necessary to cope with the explosive growth of the industrial city, especially in the Northeast and Midwest. The more complex a system the more necessary an effective government. The reformers added **Article XVIII**, "known as the 'Home Rule Amendment,'" to the **Ohio Constitution** in 1912. (Quote is from the **Baldwin Ohio Code Annotated; Article XVIII** is reproduced in the *Appendix*) The *fourteen (14) sections* to the **Article** covered a variety of topics. For example, *Section 1* classified *municipalities* into cities and villages based on population. (Any *municipality* with less than five thousand (5,000) people is a village and as soon as a village exceeds five thousand (5,000) it is automatically classified as a city. The distinction is significant as villages lack some of the authority granted to cities.) The most important *sections* for our purposes are *3* and *7*. The first granted *municipalities* powers of local self-government and the latter empowered local **Charter Commissions**.

Section 3 granted cities the "authority to exercise all powers of local self-government." The *section* states:

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.

What is a general law and the extent to which it supersedes a local ordinance or **Charter** has been the origins of a steady if not consistent stream of case law. The decisions of Ohio courts have been inconsistent, reflecting a lack of an understanding of the origins of *municipal law* and the partisan method by which judges are selected. On the whole, in spite of the inconsistent court decisions, cities in Ohio enjoy considerable latitude to conduct their business in their own fashion.

This empowerment is exercised through a **Charter Commission**. *Section 7* of the **Ohio Constitution** notes that cities may exercise the authority granted in *Section 3* by framing and adopting a **Charter**. Specifically, the *section* states:

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Section 8 establishes the process for framing and adopting a **Charter**. Under this *section* candidates run in an at-large, non-partisan election for the fifteen (15) seats on a **Charter Commission**. At the same election, voters determine if there is to be a **Charter Commission**. If a majority of the voters voting on the issue of establishing a **Charter Commission** vote yes, the top fifteen (15) vote getters are elected as a **Charter Commission**. (Obviously, if a majority vote "no," the votes for members of the **Commission** are ignored.) If one is established, it must draft a **Charter** in time for the next election in November. In reality, this means **Charter Commissions** must complete their work by mid-August or miss the deadline for placing the issue of adopting the **Charters** they drafted on the ballot.

Section 9 requires amendments to a **Charter** adopted under this article be submitted to the voters in a referendum. A **Charter** may add ways in which amendments can be proposed but they cannot take effect unless adopted by a majority of those voting in an election. Note that if conflicting amendments are adopted, the one with the most votes prevails. Conflicting amendments are possible because amendments may be proposed by a petition process, specifically the initiative.

If a city does not opt for a **Charter** process, it is governed by the statutes of Ohio. *Section 2* of **Article XVIII** of the **Ohio Constitution** requires the legislature to adopt a comprehensive statutory system, including options for different forms of government. Currently, Ohio statutes provide for three forms of government -- Council-Mayor (called the Federal Plan in the statutes); Council-Manager; and Commission. A city must hold a referendum to adopt an optional feature rather than the default Council-Mayor system, such as the Council-Manager Plan.

Surprisingly, several large cities are statutory cities, that is, have not adopted a **Charter**. The list of statutory cities includes Parma, Canton and Lorain.

In sum, Ohio has provided a most liberal *home rule* system with a locally drafted and adopted **Charter** offering the ultimate local empowerment.

Local Government and Empowerment -- Often Not

Not all units of local government are empowered. Counties in Ohio are traditional units and lack policy authority to any significant degree. Furthermore, they are the "home" of the political parties and are often dominated by patronage and other party *rituals*. This limits their utility for general government. In some states, including Ohio, counties may adopt a **Charter**. A county can become a municipal corporation through adoption of a **Charter** stating that is the intent. The county under such a **Charter** may or may not supersede some or all of the municipal authority granted to cities.

Townships have received a limited form of *home rule* by statute. However, they were created as Jeffersonian embodiments of rural self-governing and have very limited jurisdiction. They are geographically "standardized" sections of a county. Furthermore, a township disappears if a municipal corporation is created in the same area or if it is annexed. If the resulting municipality covers only a portion of the township, the township is reduced by that portion. Brunswick, for example, surrounds several township "islands" within its boundaries. It is not clear that township *home rule* can resist annexation pressures from neighboring municipalities. All townships in Cuyahoga County have been annexed.

The fastest growing unit of local government is the *special district*. They greatly outnumber *municipalities* and thousands are created nationally each decade. The original special district was the School District. The nature and origins of these units are covered in a separate handout on **Units of Local Government**. They tend to be quite powerful but typically operate only one policy and/or program function. They are indeed "creatures of state government," that is, the legislature, and thus their authority and structure varies greatly even within a region of a state.

Conclusion and Some Future Issues

In sum, cities are a special unit of local government and *municipal law* recognizes this fact. However, the law varies greatly across the states with Ohio empowering its *municipalities* more than any other state. The empowerment is based in the **Ohio Constitution** and is therefore unlikely to change significantly. For any one city, the empowerment enables the leaders to develop their own policies. For metropolitan areas, the empowerment has created a tangled web of inter-dependencies that confuses the voter and has high political and economic costs. Since **Charters** were aimed at the city for which they were created, they

have not dealt with the metropolitan reality very well. However, most cities are located in metropolitan areas and their viability in the future may depend upon how empowerment is integrated into a region. If the future of municipal government is to be as successful as its past, home rule must begin to recognize and handle the regional demands of governance, that is, sustaining a policy direction for long term political and economic vitality of a region of the state.

Appendix

Article XVIII Ohio Constitution

Section 1. Classification of Cities and Villages; transition

Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 2. General laws for incorporation and government of municipalities; additional laws; referendum

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

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 3. Municipal powers of local self-government

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.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 4. Municipality may acquire public utility or contract for utility services

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or services of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or produce of any such utility.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 5. Referendum on acquiring or operating municipal utility

Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this Article as to the submission of the question of choosing a Charter Commission. (1912 Constitutional Convention, adopted effective 15 November 1912)

Section 6. Sale of surplus product of municipal utility; limitation

Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water or sewage services. (1912 Constitutional Convention, adopted effective 15 November 1912)

Section 7. Municipal Charter

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. (1912 Constitutional Convention, adopted effective 15 November 1912)

Section 8. Referenda on whether to frame Charter and on adoption of proposed Charter

The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a Charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of

fifteen electors who shall constitute a Commission to frame a Charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any Charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the Charter Commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed Charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed Charter is approved by a majority of the electors voting thereon it shall become the Charter of such municipality at the time fixed therein.
(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 9. Amendment of Charter; referendum

Amendments to any Charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of Section 8 as to the submission of the question of choosing a Charter Commission; and copies of proposed amendments may be mailed to the electors as hereinbefore provided for copies of a proposed Charter, or, pursuant to laws passed by the General Assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the Charter of the municipality. A copy of said Charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 10. Acquiring property exceeding public needs

A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 11. Assessment of benefitted property to pay for improvements

Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefitted property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefitted, shall in no case be levied for more than fifty per centum of the cost of such appropriation.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 12. Mortgage bonds to finance municipal utilities

Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise upon foreclosure.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 13. Law limiting municipal power to tax and incur debts; financial reports; audits

Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Section 14. Municipal Elections

All elections and submissions of questions provided for in this Article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election.

(1912 Constitutional Convention, adopted effective 15 November 1912)

Endnotes

- ¹ Perceived in this sense does not mean they consciously planned all of this from the beginning. Rather, the system developed as leaders coped with problems. The development was helped by the mature Roman Law.
- ² Over a one hundred year period sixty-eight million (68,000,000) people left Europe. Over two-thirds settled in the United States. This immigrant stream fed the growth of American cities until immigration was restricted in 1924.
- ³ James Madison spent nearly three (3) years preparing for the Convention. Half of that time he researched the history of republics, attempting to ascertain why they failed and what could be done to protect an American Republic from those failures. His library was one of the largest in the World and thus he could research quite effectively. Secondly, he then lobbied leaders from a variety of states to get them to commit to a national convention and to be delegates. Madison wanted the "best" people in the Convention, meaning those who cared about more than their personal interests and who could devote considerable time to the effort. Madison deserved his recognition as the Father of the Constitution.
- ⁴ Sovereignty is the basis of public authority. In most European countries at the time of the founding of the American Republic, sovereignty was derived from the monarchy, hence the use of the term "sovereign" in describing a monarch. The Americans contributed to political theory by stating that the sovereignty in a Republic resided in the people as a political community and thus legitimate republican government derived their authority from the people. (See Edmund Morgan, **Inventing the People**.) It is useful to distinguish authority and power. The first is a grant of power to an Office in a Constitution or a law enacted under a Constitution. Power is the ability to effect others even if it is unconstitutional.
- ⁵ See the intriguing book by Harry C. Boyte and Sara M. Evans, **Free Spaces: The Sources of Democratic Change in America**, Chicago: University of Chicago Press, 1992.
- ⁶ The quote is from John Rohr. He argues in his awarding winning book, **To Run a Constitution**, that Public Administration is one such feature. It is mentioned numerous times in the **Federalist Papers**, written primarily by Madison and Alexander Hamilton, which were newspaper articles articulating the particular features of the Constitution.
- ⁷ Both of these states more closely control local governments, with the former prescribing most Charter provisions and the latter prohibiting some forms of government.

Bibliography

Edmund S. Morgan, **Inventing the People: The Rise of Popular Sovereignty in England and America**, New York: W. W. Norton, 1988.