

155 Ohio St. 607  
Supreme Court of Ohio.

STATE ex rel. SHERRILL  
v.  
BROWN, Secy. of State, et al.

No. 32612.  
|  
June 20, 1951.

and that only manner of voting authorized is by indicating his vote for each candidate separately from indication of his vote for any other candidate, indication by preference number in accordance with Hare system of preferential voting is indication by separate preference number of vote for such candidate separately from an indication by different preference number of vote for any other candidate. Const. art. 5, § 2a.

### Synopsis

Petition in mandamus by the State on relation of Sherrill against Brown, Secretary of State, and others, to determine and prescribe form of ballot to be used at councilmanic election in City of Cincinnati. The Supreme Court, Per Curiam, held that an indication by preference number in accordance with Hare system of preferential voting was an indication for each candidate separately from indication of elector's preferential vote for any other candidate in accordance with constitution.

Writ denied.

West Headnotes (3)

[1] **Municipal, County, and Local Government** 🔑 Manner and mode of selection

**Public Employment** 🔑 Election or appointment

Under provisions of Constitution vesting in municipalities authority to exercise all powers of local self-government and to frame and adopt charter under which such powers might be exercised, municipality may adopt, for municipal elections, method of selecting municipal officers which is different from method of elections otherwise provided for. Const. art. 18, §§ 3, 7.

[4 Cases that cite this headnote](#)

[2] **Election Law** 🔑 Mode of voting

Under constitutional provision providing in substance that elector may vote for candidates

[3] **Election Law** 🔑 Mode of voting

Under constitutional provision that elector may vote for candidate and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate, right to vote is not conferred, but there is merely a restriction in manner in which elector may vote, and provision of municipal charter which restricted right to vote so that vote of elector would count for only one councilman according to preference when there were nine offices to be filled was not in violation of such constitutional provision. Const. art. 5, §§ 1, 2a.

\*608 \*\*780 Relator's petition in mandamus seeks to compel the Secretary of State to determine and prescribe that the form of ballot to be used at the November 1951 Cincinnati councilmanic election shall be in accordance with Section 2a of Article V of the Constitution and not in the form prescribed by the Cincinnati charter.

### Attorneys and Law Firms

Wm. Jerome Kuertz, Dunham Matthews, Alphonse G. Riesenber, Alfred B. Katz and Edwin T. Heilker, all of Cincinnati, for relator.

C. William O'Neill, Atty. Gen. and Hugh A. Sherer, Columbus, for respondent Secretary of State.

Henry M. Bruestle, City Sol., Ed F. Alexander, Morrison R. Waite, Robert P. Goldman and George E. Fee, all of Cincinnati, for respondent City of Cincinnati.

C. Watson Hover, Pros. Atty. and William J. Schmid, Cincinnati, for respondent Board of Elections.

### Opinion

PER CURIAM.

[1] This court has consistently held that, under the home-rule provisions of Article XVIII of the Constitution, a municipality may adopt for municipal elections a method of selecting municipal officers different from the method of elections otherwise provided for. [Fitzerald et al., Bd. of Duputy State Supervisors, v. City of Cleveland](#), 88 Ohio St. 338, 103 N.E. 512, Ann.Cas.1915B, 106; [State ex rel. Taylor v. French](#), 97 Ohio St. 172, 117 N.E. 173; [Reutener v. City of Cleveland](#), 107 Ohio St. 117, 141 N.E. 27; [State ex rel. Hackley v. Edmonds, Clerk](#), 150 Ohio St. 203, 80 N.E.2d 769; [State ex rel. Frankenstein v. Hillenbrand](#), 100 Ohio St. 339, 126 N.E. 309.

This court has also previously held that provisions for voting at municipal elections, similar to those contained \*609 in the charter of Cincinnati, are valid. [Reutener v. City of Cleveland](#), supra. The provisions for such voting are outlined in the report of that case and will not be described herein. There might be considerable force to an argument that provisions of the Cincinnati charter for transfer of excess or surplus votes, dependent as they are on selection by chance of the votes to be transferred, involve features of a lottery and are, therefore, inconsistent with the basic concept of any election. However, that argument was made and rejected in the [Reutener](#) case and this court has not been asked in the instant case to reconsider the decision which it made in rejecting that argument.

Assuming, without deciding, that the provisions of the Cincinnati charter relative to the election of municipal officers cannot be inconsistent with or on conflict with any provisions of the Constitution relative to elections but see [Fitzgerald v. City of Cleveland](#), supra; [State ex rel. Taylor v. French](#), supra; \*\*781 [Reutener v. City of Cleveland](#), supra, then the only question involved in this case is whether those provisions for election of municipal officers are in conflict with the provisions of Section 2a of Article V of the Constitution, which became effective in 1949.

The first sentence of that section provides:

‘The names of all candidates for an office at any general election shall be arranged in a group under the title of that

office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.’

The form of ballot provided for by the Cincinnati charter conforms with the provisions of that sentence. Names of all candidates for council are arranged in a group under the title ‘Candidates for Council,’ and the names are rotated.

\*610 By its express provisions, the second sentence of Section 2a of Article V of the Constitution is to be applicable ‘Except \* \* \* in a non-partisan election’. Admittedly, the election of councilmen, provided for by the Cincinnati charter, is a nonpartisan election.

The third sentence of Section 2a of Article V of the Constitution reads:

‘An elector *may vote* for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by *indicating* his vote for each candidate separately from the indication of his vote for any other candidate.’ (Emphasis ours.)

[2] This third sentence does not require that the vote be indicated by a cross, by a checkmark or by any particular mark or symbol. The word ‘vote’ has been defined as ‘the formal expression of a wish, will, or choice, in regard to any measure proposed, esp. where the person voting has an interest in common with others, either in electing a person to office or in passing laws, rules, regulations, etc.’ Webster's New International Dictionary (2 Ed.) See, also, [State ex rel. Shinnich, Jr. v. Green](#), 37 Ohio St. 227, 229. An indication by a preference number is clearly a formal expression of a preference and thus is an indication of a vote. Certainly, an indication by a separate preference number for each candidate is an indication of a vote for such candidate separately from an indication by a different preference number of a vote for any other candidate.

It is pointed out that, under the provisions of the Cincinnati charter, the indicated preferred choices of a voter can count for the election of only one councilman although there are nine offices of councilman to be filled at the election. This court did hold an [State v. Constantine](#), 42 Ohio St. 437, \*611 51 Am. Rep. 833, that, by reason of the provisions in Section 1 of Article V of the Constitution that an elector shall ‘be *entitled to vote* at all elections’, a voter must be permitted to cast as many votes for candidates as there are candidates to be

elected. It is argued that, since there are nine councilmen to be elected, that case requires a holding that a voter is entitled to cast nine effective votes for councilman.

[3] The same argument was made in *Reutener v. City of Cleveland*, supra, but was rejected by this court. The majority opinion, while questioning the soundness of the decision in the *Constantine* case, stated that it was inapplicable to municipal elections by reason of the home-rule provisions of Sections 3 and 7 of Article XVIII of the Constitution. The concurring opinion of Judge Jones stated that the manner of elections of municipal officials is a feature of 'local self-government' committed to charter municipalities.

Even if, as was held in the *Constantine* case, Section 1 of Article V of the Constitution does provide for a *right to vote*, it is apparent that Section 2a of Article V of the Constitution does not do so. The third sentence of that section, upon which relator relies, deals solely with the subject as to the 'way' in which a voter 'may vote for candidates,' that is, with the subject of *how* an elector *may* vote. Nothing in the language of that sentence or the other portions of the section purports to confer upon anyone a *right to vote*. Unlike in Section 1 of Article V of the Constitution, \*\*782 there are no words such as 'entitled to vote'. It follows that nothing in Section 2a of Article V of the Constitution confers upon a voter a right to cast an effective vote for more than one candidate for councilman where more than one are to be elected.

Our conclusion is that the provisions of the Cincinnati charter, relative to the election of municipal officers, \*612 are neither inconsistent with nor in conflict with Section 2a of Article V of the Constitution.

Writ denied.

WEYGANDT, C. J., and ZIMMERMAN, MIDDLETON, TAFT, MATTHIAS and HART, JJ., concur.

STEWART, Judge (concurring).

In the case of [State ex rel. Hackley v. Edmonds, Clerk, 150 Ohio St. 203, 80 N.E.2d 769](#), in which I wrote the opinion, this court held in the first two paragraphs of the syllabus as follows:

'1. Section 7 of Article XVIII of the Constitution of Ohio vests in a municipality adopting a charter pursuant thereto the power to prescribe the manner of selecting the members of its council, to fix the terms of such members, and to so restrict the tenure of office of such members as to make such tenure dependent upon the will of the electors.

'2. The wisdom or desirability of the provisions of a municipal charter, adopted pursuant to Section 7, Article XVIII of the Constitution, so far as such provisions are of a strictly local nature and are not in conflict with the general laws of the state, is not a subject for judicial inquiry.'

It seems to me that the legal principles enunciated in that case are applicable to the present one.

Under the proportional representation system of voting in Cincinnati, I was for seven successive terms a successful candidate for city council. Nevertheless I was always opposed to such system of voting and campaigned in two elections when there were attempts to amend the Cincinnati charter by providing a different system for the election of its councilmen.

\*613 As said in the *Hackley Hackley* case, the wisdom or desirability of the provisions of a municipal charter is not a subject for judicial inquiry, and where one is sitting as a judge he cannot, in the discharge of his duties, allow his personal views as to the wisdom or desirability of the provisions of a charter, a law or a constitution to in any way guide or influence him in interpreting the meaning thereof. He would be false to his oath of office if he did so.

In 1924 the proportional representation provision was put into the charter of Cincinnati by a majority vote of the people of that city and under the home-rule provision of the Ohio Constitution the voice of the people of the city is paramount in matters respecting purely local affairs.

Whenever the people desire to change the method of voting for councilmen they have the power and authority to do so by voting for whatever alternate system appeals to them as wise or desirable.

#### All Citations

155 Ohio St. 607, 99 N.E.2d 779, 45 O.O. 16

## Citing References (9)

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	<p><b>1. State ex rel. Williamson v. Cuyahoga County Bd. of Elections</b> 464 N.E.2d 138, 141 , Ohio</p> <p>Mandamus action was brought against board of elections and Secretary of State seeking issuance of writ to compel respondents to count only those votes cast for relator and to...</p>	June 07, 1984	Case		<p><a href="#">1</a></p> <p>N.E.2d</p>
Cited by	<p><b>2. State ex rel. Haffey v. Miller</b> 211 N.E.2d 830, 830 , Ohio</p> <p>Mandamus action. The Supreme Court held that the provisions of city charter that nominating petition for candidates for city council shall state the name of 'each person', that...</p>	Nov. 17, 1965	Case		<p><a href="#">1</a></p> <p>N.E.2d</p>
Cited by	<p><b>3. City of Dayton v. Horstman</b> 143 N.E.2d 879, 881 , Ohio Com.Pl.</p> <p>Mandamus proceeding to compel Dayton Board of Elections to hold a primary election for selecting candidates for city commission. The Court of Common Pleas, McBride, J., held,...</p>	July 22, 1957	Case		<p><a href="#">1</a></p> <p>N.E.2d</p>
Cited by	<p><b>4. The Honorable Brigham M. Anderson</b> 2015 Ohio Op. Atty. Gen. No. 2015-028, 2015-028</p> <p>1. Section 3.03 of the Ironton City Charter, rather than R.C. 3501.01(D), governs the date on which a runoff special election shall be held for the office of mayor in the event...</p>	Sep. 16, 2015	Administrative Decision		<p><a href="#">1</a></p> <p>N.E.2d</p>
Mentioned by	<p><b>5. State ex rel. Rose v. Ryan</b> 200 N.E.2d 668, 674 , Ohio App. 10 Dist.</p> <p>Proceeding on petition for mandamus to require county election board members to provide paper ballot for general municipal election in accordance with city charter provisions. The...</p>	Sep. 25, 1963	Case		<p><a href="#">1</a></p> <p>N.E.2d</p>
—	<p><b>6. Constitutionality and construction of statutes providing for proportional representation or other system of preferential voting in public elections</b> 123 A.L.R. 252</p> <p>The reported case for this annotation is Opinion to the Governor, 62 R.I. 316, 6 A.2d 147, 123 A.L.R. 235 (1939).</p>	1939	ALR	—	<p><a href="#">2</a></p> <p><a href="#">3</a></p> <p>N.E.2d</p>
—	<p><b>7. OH Jur. 3d Elections s 9, § 9. Municipal election laws; home-rule charter provisions</b> OH Jur. 3d Elections</p> <p>While elections in Ohio are generally governed by the provisions of the Ohio Constitution and the Election Code, elections in municipal corporations may also be governed by the...</p>	2026	Other Secondary Source	—	<p><a href="#">1</a></p> <p>N.E.2d</p>
—	<p><b>8. THE LEGALITY OF RANKED-CHOICE VOTING</b> 109 Calif. L. Rev. 1773 , 1834</p> <p>With the rise of extreme polarization, intense political divisiveness, and gridlocked government, many Americans are turning to reforms of the democratic processes that create...</p>	2021	Law Review	—	<p><a href="#">2</a></p> <p><a href="#">3</a></p> <p>N.E.2d</p>

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<p><b>9. EVERYTHING THAT CAN BE COUNTED DOES NOT NECESSARILY COUNT: THE RIGHT TO VOTE AND THE CHOICE OF A VOTING SYSTEM</b></p> <p>2006 Mich. St. L. Rev 327 , 376+</p> <p>2006 Mich. St. L. Rev. 327 Introduction 328 I. Glossary of Voting Systems. 332 A. Single-Member Districts. 333 B. Multi-Member Districts. 336 II. Theory of Voting. 337 A. The...</p>	2006	Law Review	—	<p>2</p> <p>3</p> <p>N.E.2d</p>

## Table of Authorities (7)

Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	<p><b>1. <a href="#">Fitzgerald v. City of Cleveland</a></b> 103 N.E. 512, Ohio, 1913</p> <p>Error to Court of Common Pleas, Cuyahoga County. Action by the City of Cleveland against one Fitzgerald and others, Board of Deputy State Supervisors, etc., to enjoin the holding...</p>	Case			780+
Discussed	<p> <b>2. <a href="#">Reutener v. City of Cleveland</a></b> 141 N.E. 27, Ohio, 1923</p> <p>Error to Court of Appeals, Cuyahoga County. Suit by one Reutener against the City of Cleveland and its Mayor to restrain them from putting into effect an amendment to the charter...</p>	Case			780+
Mentioned	<p> <b>3. <a href="#">State ex rel. Frankenstein v. Hillenbrand</a></b> 126 N.E. 309, Ohio, 1919</p> <p>Mandamus by Eli G. Frankenstein against one Hillenbrand and others, members of the Board of Deputy State Supervisors and Inspectors of Elections, to have his name placed on the...</p>	Case			780
Cited	<p><b>4. <a href="#">State ex rel. Hackley v. Edmonds</a></b> 80 N.E.2d 769, Ohio, 1948</p> <p>Original mandamus proceeding by the State, on relation of K. Lewis Hackley, against one Edmonds, Clerk to compel respondent to issue recall petition forms as provided by charter of...</p>	Case			780+
Cited	<p> <b>5. <a href="#">State ex rel. Shinnich v. Green</a></b> 1881 WL 90, Ohio, 1881</p> <p>The council of the city of Z., a city of the second class, consisted of eighteen members, duly qualified, who with the mayor were legally assembled to organize, as required by...</p>	Case			781
Mentioned	<p><b>6. <a href="#">State ex rel. Taylor v. French</a></b> 117 N.E. 173, Ohio, 1917</p> <p>Mandamus by the State, on the relation of one Taylor, against one French and others, Deputy State Supervisors and Inspectors of Elections in and for the County of Cuyahoga, etc.,...</p>	Case			780+
Discussed	<p><b>7. <a href="#">State ex rel. v. Constantine</a></b> 1884 WL 257, Ohio, 1884</p> <p>1. The election and the appointment of an officer, as authorized by section 27, article 2 of the constitution, are different and distinct modes of filling an office. 2. Where an...</p>	Case		”	781+

### **Negative Treatment**

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### **History**

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### **Filings**

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