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## ARTICLES

### SYMPOSIUM: PROBLEMS IN CONSTITUTIONAL LAW

#### MUNICIPAL HOME RULE IN THE UNITED STATES\*

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Although long governed by what is generally known as "Dillon's Rule," American municipalities have always desired at least some measure of local autonomy. They are regarded legally as occupying a subordinate status within the state; and, as a rule, they derive their existence and all their powers from the state constitution and state legislative enactments. In the absence of state constitutional provisions to the contrary, they are subject wholly to state legislative control.<sup>1</sup> The principal legal device employed by them to obtain some measure of freedom from state control is generally known as "home rule."<sup>2</sup>

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\* Much information in this article is derived from questionnaires sent during the fall of 1965 to directors of state municipal leagues, and from correspondence since that time with several of these officials, with directors of state legislative councils and reference bureaus, and university professors of political science. The author wishes to thank all those who cooperated by supplying information, both published and unpublished. Responsibility, however, for all conclusions drawn, and for all errors are his own.

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1. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911); *City of Clinton v. Cedar Rapids and Missouri River R.R.*, 24 Iowa 455 (1868).

2. Although for a long period, the term "home rule" was not specifically mentioned in constitutional provisions, it is now expressly stated in the provisions of Florida, Louisiana, Minnesota, North Dakota, Pennsylvania, South Dakota, and Tennessee. For various definitions of home rule, see p. 279 *infra*, *The Meaning of Home Rule*. Along with significant articles which appear from time to time in legal and political journals, some of the principal studies of home rule include: GOODNOW, MUNICIPAL HOME RULE (1895); McBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE (1916); MCGOLDRICK, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE, 1916-1930 (1933); MOTT, HOME RULE FOR AMERICA'S CITIES (1949); CHICAGO HOME RULE COMM'N, MODERNIZING A CITY GOVERNMENT (1954); RUSCO, MUNICIPAL HOME RULE: GUIDELINES FOR IDAHO (1960).

Home rule, which was first constitutionally authorized by Missouri in 1875,<sup>3</sup> has been said to be the logical outgrowth of constitutional prohibitions on special legislation for cities,<sup>4</sup> the most prevalent form of state legislative treatment of many of them until late in the nineteenth century.<sup>5</sup> Sometimes it is justified because of the impracticality, save in certain necessary instances, of general legislation, and because of the general failure of legislative classification.<sup>6</sup>

### HOME RULE CONSIDERED

#### *Arguments For*

Although no concrete evidence can be produced to measure precisely the value of home rule, various theoretical arguments can be advanced in its favor.<sup>7</sup> First, to the extent that municipalities will adopt and exercise home rule powers, the state legislature and governor will have more time to devote to matters of state-wide importance. Following World War II, Maryland adopted home rule because local requests for legislation placed too great a burden on its state legislature.<sup>8</sup> Second, home rule not only should decrease state meddling and interference in the internal affairs of cities, but also should lessen log-rolling or legislative trading common in the enactment of much local legislation. Third, it should allow municipalities to initiate immediate action to resolve their peculiarly local problems without waiting for state legislative authorization. This advantage possesses greatest significance in states with biennial legislative sessions.<sup>9</sup> Fourth, it is sometimes believed that home rule cities possess more potential powers than non-home rule cities. The

3. Mo. CONST. art. IX, § 20 (1875).

4. KNEIER, *CITY GOVERNMENT IN THE UNITED STATES* 86 (3rd ed. 1957).

5. Except for Texas (1912), constitutional home rule came late to the South and to New England, areas where special legislation has remained most prevalent. Louisiana (City and Parish of Baton Rouge, 1946) and Rhode Island (1951) were the first states in these regions to adopt it. Under certain circumstances, special legislation is still permitted in some home rule states. See, e.g., N.Y. CONST. art. IX, § 2b(2); MINN. CONST. art. XI, § 2; TENN. CONST. art. XI, § 9.

6. Concerning municipal experience with classification, see ADRIAN & PRESS, *GOVERNING URBAN AMERICA* 168-169 (3rd ed. 1968); A. MACDONALD, *American City Government and Administration* 54-56 (6th ed. 1955).

7. Cf. MACDONALD, *supra* note 6, at 67-69; Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145-1146 (1966).

8. Letter from George M. Dyer III, Field Representative, Maryland Municipal League, to Kenneth E. Vanlandingham, Oct. 11, 1965.

9. As of 1966, twenty state legislatures met in the annual session. COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 41 (1966-67).

Supreme Court of Alaska, for instance, has commented that Juneau "acquired greater legislative power upon becoming a home rule city."<sup>10</sup> Actually, however, there is reason to doubt whether the Alaska court's assertion is valid for most home rule cities. McBain's observation that non-home rule cities do not suffer from any lack of powers, but suffer rather from restrictions on the manner in which powers granted may be exercised probably remains correct.<sup>11</sup>

Moreover, in the realm of local taxation, an area some students of state and local government consider vital to the existence of home rule, only in California,<sup>12</sup> and to some extent in Kansas,<sup>13</sup> do home rule cities enjoy wide authority.<sup>14</sup> In most states, constitutional restrictions on local taxation preceded adoption of home rule provisions, and authors of such provisions have been reluctant to include in them the power of taxation. In some instances, evidently to allay voter resistance due to fear of increased taxation, constitutional home rule provisions have expressly restricted or prohibited enlargement of local taxing authority. The recent Massachusetts provision states: "Nothing in this article shall be deemed to grant any city or town the power . . . to levy, assess, and collect taxes. . . ." <sup>15</sup> One reason for voter rejection in 1966 of the draft Kentucky Constitution was the rather widespread belief that, if adopted, this constitution would enlarge the taxing powers of units of local government. Fifth, home rule may possess some psychological advantage in that it can foster a sense of civic responsibility in local citizenry. Last, inasmuch as municipalities usually acquire the legislation they consider necessary, it may be worthwhile in the first instance to grant them home rule. Home rule is in accordance with American tradition, since historically Americans have strongly believed, and still

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10. *Juneau v. Hixon*, 373 P. 2d 743, 749 (Alaska 1962).

11. *McBain*, *supra* note 2, at 111.

12. For California home rule cities, taxation repeatedly has been held a municipal affair, and such cities, save as limited by the state constitution and their charters, possess broad taxing authority. *E.g.*, *City of Glendale v. Trondsen*, 48 Cal. 2d 93, 308 P. 2d 1 (1957); *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 212 P. 2d 894 (1949).

13. The Kansas provision [art. XII, § 5(b)] empowers cities to levy taxes, excises, fees, charges, and other exactions subject to the right of the state legislature to impose limitations and prohibitions. Following adoption of this provision, the legislature acted. *See*, *KAN. STAT. ANN.* §§ 79-1948-1953 (Supp. 1965).

14. In the absence of constitutional and statutory restrictions, home rule taxing powers under some *imperio in imperium* provisions sometimes are judicially upheld. *See, e.g.*, *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E. 2d 250 (1950); *Barrett v. State*, 44 Ariz. 270, 36 P. 2d 260 (1934).

15. *MASS. CONST.* art. II, § 7 (Supp. 1966).

believe, in the idea of local self-government.<sup>16</sup> Although its fruits sometimes may be difficult to assess, in general, it has had a salutary influence on municipal government.<sup>17</sup>

### *Arguments Against*

Although arguments in favor of home rule appear very persuasive, certain facts concerning its desirability and feasibility should be noted.<sup>18</sup> First, due to the complexity of modern civilization, state government has a primary interest in most governmental functions and very little home rule may be possible. On the other hand, some facets of municipal government, such as its administrative organization and related matters in the procedural area, and public planning and municipal ownership of utilities in the substantive area, remain local.<sup>19</sup> Moreover, municipal government retains, along with state government, a concurrent interest in most governmental functions, including such major functions as highways, health and welfare, and education.<sup>20</sup> Although the scope of home rule has undoubtedly narrowed, some home rule does remain possible, and some home rule, however little, is preferable to none.

Although the "dogma of local self-government" strongly persists, few, if any, municipal governments are fully capable of financing performance of their current governmental operations.<sup>21</sup> Still, the fact should be recalled that no unit of government in the United States, save the national government, which itself is heavily indebted, is wholly self-

16. Perhaps the case for the inherent right of local self-government has been most strongly stated judicially, by Judge Cooley in *People v. Hurlburt*, 24 Mich. 44 (1871). Although the Cooley doctrine has been followed in isolated instances by the courts of Indiana, Kentucky, Iowa, and Florida, it has never enjoyed wide acceptance. See ALDERFER, *AMERICAN LOCAL GOVERNMENT AND ADMINISTRATION*, 143-144 (1956).

17. "Home rule has not meant unfettered local self-government, but it has given the city [New York] a little more freedom from state influence than the city might otherwise enjoy." SAYRE AND KAUFMAN, *GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS* 586 (1965).

18. Cf. Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1146 (1966); KNEIER, *supra* note 4, at 83-86; MACDONALD, *supra* note 6, at 69-72.

19. Concerning classification of state and municipal functions, see 2 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS*, §§ 4.85-4.100 (3rd ed., Supp. 1967); REED, *MUNICIPAL GOVERNMENT IN THE UNITED STATES* 148-149 (Rev. ed. 1934); ALDERFER, *supra* note 16, at 138-140; MACDONALD, *supra* note 6, at 71.

20. Legal recognition of municipal interest in these latter functions constitutes a very challenging aspect of state-municipal relations. See p. 304 *infra*, *The Old NML Model Considered: Suggested Changes*.

21. Egger, *Nature over Act: No More Local Finance*, 47 AMER. POL. SCI. REV. 461-477 (1953).

supporting financially. As already noted, in most states home rule ordinarily does not confer taxing authority, and the view does exist that granting of home rule without at the same time delegating adequate home rule taxing powers represents an empty and futile gesture.<sup>22</sup> Such taxing authority can, of course, be conferred, but since taxation involves vast and serious economic consequences, the grant should, it seems, be accompanied by stringent state regulation and supervision. Finally, it is sometimes believed that home rule will be abused and eventually will lead to "home ruin." Although the collective wisdom of many city councils is probably inferior to that of most state legislatures, there exists no evidence to support the view that inhabitants of modern cities are incapable of self-government, or that city governments are havens of corruption and inefficiency. Save for Chicago, home rule presently exists in most heavily populated American cities, and the governments of these cities with all of their tremendous problems are, on the whole, generally well-administered and free of major corruption.<sup>23</sup> Corrupt government can occur in any city, whether home rule or non-home rule, and the only sufficient guarantee against its occurrence is an alert citizenry possessing considerable political intelligence.

#### LEGISLATIVE HOME RULE

Home rule can be, and sometimes is, conferred by legislation, but most authorities when referring to it intend the constitutional variety, which is the kind primarily considered in this article. Although difficult to define, legislative home rule may be said to exist when the state legislature, in the absence of constitutional provision, empowers municipalities to adopt and exercise home rule powers.<sup>24</sup> Presently, it is authorized in Virginia,<sup>25</sup> New Jersey,<sup>26</sup> Mississippi,<sup>27</sup> Florida,<sup>28</sup> North Carolina,<sup>29</sup>

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22. Cf. CHICAGO HOME RULE COMM'N, *supra* note 2, at 315.

23. See BANFIELD, *BIG CITY POLITICS* 11 (1965).

24. This definition may very properly be questioned. In Virginia, which is widely regarded as a legislative home rule state, charters drafted locally are enacted by the state legislature, and in Vermont and Delaware charters and charter amendments initiated locally become effective unless disapproved by the state legislature. In New Jersey, on the other hand, exercise of home rule powers is subject to judicial review.

25. VA. CONST. art. VIII, § 117; VA. CODE ANN. §§ 15.1-833-837; 15.1-910-915 (Supp. 1966).

26. N.J. STAT. ANN., §§ 40: 69A-29-30 (Supp. 1966).

27. MISS. CODE ANN., §§ 3374-109-111 (1942). Mississippi is now a general law state, but it has twenty-three municipalities functioning under special charters granted prior to adoption of general law. Letter from C.N. Fortenberry, Department of Political Science, University of Mississippi, to Kenneth E. Vanlandingham, May 18, 1967.

Wisconsin (except Milwaukee),<sup>30</sup> Delaware,<sup>31</sup> Vermont,<sup>32</sup> New Mexico,<sup>33</sup> and Kentucky (Louisville);<sup>34</sup> but only in Virginia, New Jersey, Delaware, and perhaps to some extent in Wisconsin, where constitutional home rule is also authorized, does it really have practical significance.

Acting under a 1920 constitutional amendment,<sup>35</sup> which empowers it to grant any city or town, upon request, special form of organization and government, the Virginia legislature has authorized local drafting of municipal charters or charter amendments which in turn require state legislative approval. Approval comes by way of legislative enactment of the local proposal for legislation which the state legislature may amend.<sup>36</sup> The uniqueness of the Virginia system lies in the fact that it permits the legislature to grant, by special act, charters tailored to fit the peculiar needs of individual cities.<sup>37</sup> As of January, 1968, thirty-seven Virginia cities were reported as having special charters granted or approved by the state legislature.<sup>38</sup>

Although the New Jersey Constitution contains no home rule provision as such, it does authorize a form of "negative home rule," since it empowers municipalities or counties to request state legislative enactment of special legislation, which becomes effective only upon local approval.<sup>39</sup> In 1950, the New Jersey legislature enacted the "Optional Municipal Charter Law," popularly known as the Faulkner Act, under which a municipality may select an optional form of government. Any

28. FLA. STAT. ANN. §§ 166.01-166.15 (1965).

29. GEN. STAT. OF N.C. ch. 160, §§ 353-363 (1964).

30. WIS. STAT. ANN. §§ 61.34 (1), 62.11 (5) (Supp. 1967). In Wisconsin, legislative home rule is in practice apparently as successful or more successful than constitutional home rule. See Hagensick, *Wisconsin Home Rule*, 50 NAT. MUN. REV. 349, 351-353 (1961).

31. DEL. CODE ANN. tit. 22, §§ 801-836 (Supp. 1966).

32. VT. STAT. ANN. tit. 24, § 702 (a) (1967). In Vermont, municipal home rule may have only limited significance, inasmuch as the town, governed by general law, is the principal unit of local government. Only three or four towns have charters. ABA, LOCAL GOVERNMENT LAW SERVICE LETTER 54 (Supp. Dec. 1963).

33. N.M. STAT. ANN. §§ 14-14-1-14 (Supp. 1967).

34. KY. REV. STAT. §§ 83.011-83.012 (1966).

35. VA. CONST. art. VIII, § 117.

36. VA. CODE ANN. §§ 15.1-833-837; 15.1-910-915 (Supp. 1966).

37. Concerning legislative consideration and enactment of municipal charters in Virginia, see Bohannon, *Local Bills—Some Observations*, 42 VA. L. REV. 845 (1956).

38. Letter from Harold Baumes, Executive Secretary, Va. Municipal League, to Kenneth E. Vanlandingham, Jan. 23, 1968.

39. N.J. CONST. art. IV, § 7, ¶ 10.

municipality which exercises this option thereby acquires the right to exercise what appears to be rather extensive home rule powers, which, by terms of the state constitution and state law, are to be accorded liberal judicial interpretation.<sup>40</sup> As of 1964, thirty-six municipalities had elected to adopt an optional form of government and to exercise home rule powers.<sup>41</sup> In 1961, Delaware enacted legislation which included the stipulation that any city desiring to adopt home rule should adopt it within the following two years; and eleven cities elected to do so.<sup>42</sup> In 1963, by empowering all cities to amend their charters, Vermont also authorized legislative home rule.<sup>43</sup>

Although older than constitutional home rule, legislative home rule is frequently viewed, sometimes unjustly, with considerable prejudice and skepticism.<sup>44</sup> Professor Bromage, for instance, has said that "legislative home rule is at best a slender reed for municipal charter-making and local self-government."<sup>45</sup> There are several reasons for this antipathy. In some instances, it has been held unconstitutional as an unlawful delegation to cities of the state legislative power,<sup>46</sup> but in other instances its constitutionality has been upheld.<sup>47</sup> In any event, it rests upon a

40. N.J. CONST. art. IV, § 7, ¶ 11; N.J. STAT. ANN. §§ 40:69A-29-30.

41. NEW JERSEY TAXPAYER'S ASSOCIATION, NEW JERSEY'S OPTIONAL MUNICIPAL CHARTER LAW 3 (1964).

42. See DEL. STAT. ANN. tit. 22, § 836 (Supp. 1966). As of 1967, two cities had adopted completely revised charters, while others had made minor charter revisions. No charter amendments submitted for state legislative approval have been disapproved. Letter from Maurice Hartnett III, Exec. Director, Delaware Legislative Reference Bureau, to Kenneth E. Vanlandingham, June 12, 1967.

43. *Supra* note 32.

44. Iowa adopted legislative home rule in 1851, IOWA CODE OF 1851, ch. 42.

45. Bromage, *The Home Rule Puzzle*, 46 NAT. MUN. REV. 118, 119 (1957).

46. See *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E. 2d 723 (1953); *Elliott v. City of Detroit*, 121 Mich. 611, 84 N.W. 820 (1899); *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N.W. 20 (1912). The New York Court of Appeals has stated that, prior to adoption of the 1923 home rule amendment, legislative home rule would have been unconstitutional in New York State because it would have usurped legislative authority vested in the state legislature by the state constitution. See *Matter of Mooney v. Cohen*, 272 N.Y. 33, 4 N.E. 2d 73 (1936).

47. See *State ex rel. Brown v. Emerson*, 126 Fla. 576, 171 So. 663 (1935); *Yazoo City v. Lightcap*, 82 Miss. 148, 33 So. 949 (1903); *Bucino v. Malone*, 12 N.J. 330, 96 A. 2d 669 (1953). Following adoption of constitutional home rule, legislative home rule was judicially upheld in Wisconsin. *Hack v. City of Mineral Point*, 203 Wis. 215, 233 N.W. 82 (1930). The author believes that a broad general grant of legislative home rule accompanied by an enumeration of specific powers and functions falling within the grant might be judicially upheld. At least it can be argued that, by refining the grant in some measure, the enumeration would narrow the scope of legislative authority delegated.



precarious basis until its constitutionality has been finally determined. In 1957, Connecticut adopted legislative home rule, but later adopted constitutional home rule (1965), fearing that legislative home rule might be held unconstitutional.<sup>48</sup> The Delaware home rule provision requires state legislative approval of municipal charters and charter amendments. Local home rule action is considered legally effective unless disapproved within the first thirty calendar days of a legislative session by a two-thirds vote of all the members elected to each house of the state legislature.<sup>49</sup> In Vermont, legislative home rule functions are very similar to those of Delaware. There, municipal charter amendments, if submitted to the state legislature within sixty days preceding adjournment, become effective at the end of the legislative session unless disapproved or amended.<sup>50</sup> Since in Delaware and Vermont legislative home rule is contingent upon state legislative approval, the question of constitutionality of legislative delegation of power is perhaps satisfied.<sup>51</sup>

In addition to the question of constitutionality, other objections are sometimes voiced against legislative home rule. Since the home rule grant rests solely upon a legislative basis, it may be retracted by subsequent legislation. Moreover, where legislative home rule exists, the state legislature has a tendency to ignore it by continuing to legislate in local affairs. But these same objections can be brought against constitutional home rule when the home rule provision authorizes the state legislature, as it often does, to determine or define the home rule grant of powers.<sup>52</sup> Indeed, it has been said that "[t]o the extent that the legislature retains unlimited or virtually unlimited authority to supersede an exercise of municipal initiative conferred by the constitution, there is only a seman-

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48. See CONN. PUBLIC ACT, No. 465 (1957); CONN. CONST. art. X, § 1. See also MASS. LEGISLATIVE RESEARCH COUNCIL, REPORT RELATIVE TO HOME RULE 80-81 (Sen. Doc. No. 950, March, 1965).

49. DEL. STAT. ANN. tit. 22, § 813 (c) (Supp. 1966). Doubt has been expressed to the author whether members of the General Assembly or their staffs even read charter amendments submitted. Letter from Maurice Hartnett III, Executive Director, Delaware Legislative Reference Bureau, to Kenneth E. Vanlandingham, June 12, 1967.

50. VT. STAT. ANN. tit. 24, § 702(a). Since authorization of home rule, Vermont municipalities are reported as having made charter changes each year, none of which have been disapproved by the state legislature. Letter from George M. Blaesi, Executive Director, Vermont Legislative Council, to Kenneth E. Vanlandingham, Jan. 18, 1968.

51. Although the constitutionality of Delaware home rule has not been directly challenged, it has apparently been upheld by implication. *Dunn v. Mayor and Council of City of Wilmington*, 219 A. 2d 153 (Del. 1966).

52. Concerning constitutional provisions based on legislative supremacy, see p. 293 *infra*, *Home Rule in Operation: Under Legislative Supremacy Provisions*.

tic difference between constitutional and legislative home rule, at least when the latter is defined in broad terms."<sup>53</sup> Further, it is sometimes urged that since the legislature can revoke a legislative home rule grant at any time, cities will hesitate to adopt it. Sometimes this belief is not borne out by actual experience. Cities in the legislative home rule states of New Jersey, Virginia, and Delaware apparently possess more home rule than cities in such constitutional home rule states as Utah, Pennsylvania, Nevada, Hawaii, and Wisconsin.<sup>54</sup> But due to the prejudice against it, and due also to fact that most states already have adopted constitutional home rule, very few states are likely to adopt legislative home rule in the future. Moreover, the argument seems valid that if home rule is to be adopted, the desire of cities for it should be sufficiently strong to warrant writing it into the state constitution. This is not to say, however, that constitutional home rule will prove under all circumstances more successful in practice than the legislative variety.

#### CONSTITUTIONAL HOME RULE ADOPTION

Although the scope of possible home rule powers has narrowed because of the increasing complexity of modern civilization,<sup>55</sup> states and municipalities have manifested a continuing interest in constitutional home rule. Since the end of World War II, it has been adopted by fourteen states, including the new states of Alaska and Hawaii. This number exceeds by three the number of states which authorized it during what might be called its formative period (1875-1912).<sup>56</sup> In 1966, Massachusetts, New Hampshire, and North Dakota adopted amendments bringing to thirty-three the number of states whose constitutions contain home rule provisions of some sort.<sup>57</sup> Most state constitutions au-

53. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 669, n. 102 (1964).

54. See p. 281 *infra*, *Extent of Home Rule Adoption*.

55. The thesis has been advanced that the more populous a city becomes, the greater the likelihood its problems will become state in character. See David, *Is Municipal Home Rule a Dead Duck?* TAX DIGEST 141, 151 (1959).

56. This number includes Florida (Dade County and municipalities therein), New Mexico (combined city-counties with more than 50,000 population), and Maryland (Baltimore was granted home rule in 1915).

57. ALASKA CONST. art. X, §§ 1, 9-11; ARIZ. CONST. art. XIII, §§ 2-3; CAL. CONST. art. XI, § 6 *et seq.*; COLO. CONST. art. XX, §§ 1-6; CONN. CONST. art. X, § 1; FLA. CONST. art. VIII, § 11; GA. CONST. art. XV; HAWAII CONST. art. VII, §§ 1-5; KAN. CONST. art. XII, § 5; LA. CONST. art. XIV, §§ 3a, 22, 40; MD. CONST. art. XI-A (Baltimore), art. XI-E; MASS. CONST. art. of amend. II; MICH. CONST. art. IV, § 29, art. VII; MINN. CONST. art. XI, §§ 3-5; MO. CONST. art. VI, §§ 19-20; NEB. CONST. art. XI, §§ 2-5; NEV. CONST. art.

thorize adoption of home rule by all cities, but some limit adoption to cities with certain populations. Colorado, Oklahoma, and West Virginia limit adoption to cities above 2,000 population; California and Arizona to cities above 3,500 population; Nebraska and Texas to cities above 5,000 population; Missouri, Washington, and Pennsylvania to cities above 10,000 population; Alaska to first class cities (400 permanent residents); New Mexico to combined city-counties above 50,000 population; and Florida to Dade County (Miami) only.

The fact that a state constitution contains a home rule provision does not necessarily mean that home rule is available for immediate adoption, inasmuch as adoption authorization itself usually depends on the nature or wording of the provision. Home rule provisions are generally classified as self-executing, mandatory, and permissive.<sup>58</sup> A self-executing provision, such as that of Colorado, enables a city to adopt and exercise home rule powers immediately without the necessity of state implementing legislation. A mandatory provision, sometimes termed a non-self-executing provision, such as that of North Dakota, stipulates that the state legislature "shall" enact implementing legislation to provide for home rule adoption. A permissive provision, such as that of Georgia, New Hampshire, or Hawaii, merely authorizes home rule and empowers the state legislatures to grant it at its discretion.<sup>59</sup> Generally the self-executing type of provision is much preferred to the mandatory or permissive type, because under it the legislature cannot delay or wholly prevent home rule adoption. It has been said that "[l]egislative disinclination to act has no practical cure in 'mandatory' states and none at all in 'permissive' states."<sup>60</sup> Usually, state legislatures act in good

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VIII, § 8; N.H. CONST. Part I, Bill of Rights (art. 39); N. MEX. CONST. art. X, § 4; N.Y. CONST. art. IX, §§ 1-3; N. DAK. CONST. § 130; OHIO CONST. art. XVIII; OKLA. CONST. art. XVIII, §§ 2-7; ORE. CONST. art. XI, §§ 2, 2a; PA. CONST. art. IX, § 2; R.I. CONST. amend. XXVIII; S. DAK. CONST. art. X; TENN. CONST. art. XI, § 9; TEXAS CONST. art. XI, § 5; UTAH CONST. art. XI, § 5; WASH. CONST. art. XI, §§ 10-11; W. VA. CONST. art. VI, § 39a; Wis. CONST. art. XI, § 3.

58 Cf. PHILLIPS, *MUNICIPAL GOVERNMENT AND ADMINISTRATION IN AMERICA* 66-67 (1960).

59. The permissive type of provision removes all constitutional objections to the state legislature's authority to delegate home rule power to cities. Further, its usual brevity may overcome political objections found in some states to lengthy constitutional provisions; and with a legislature sympathetic to home rule, it can prove satisfactory.

60. KERSTETTER, *Municipal Home Rule*, MUNICIPAL YEAR BOOK 256, 257 (1956). As a remedy for state legislative refusal to provide charter-adoption procedure under the mandatory type of provision, the National League of Cities, formerly the American Municipal Association, has proposed that such procedure be prescribed by the local

faith in authorizing home rule adoption, but after adoption of a provision in 1922, the Pennsylvania legislature waited twenty-seven years before acting, and then it authorized home rule only for Philadelphia.<sup>61</sup> Following adoption of a provision in 1954, the Georgia legislature waited eleven years before authorizing cities to adopt home rule. Moreover, although Nevada adopted a permissive amendment in 1924, its legislature still has not authorized home rule adoption. Hawaii's permissive amendment authorizes home rule for all political subdivisions, but the legislature has authorized adoption only by counties. Therefore in the event the state legislature is likely to be unsympathetic toward home rule, a state writing a new constitution would be well-advised to include a self-executing provision.<sup>62</sup>

### THE MEANING OF HOME RULE

It is very difficult to formulate a precise definition of home rule, inasmuch as there exists no unanimity of agreement among authorities concerning its meaning.<sup>63</sup> In a sense, the term represents a metaphor which excites strong emotions and with some truth Thomas H. Reed has called it a "state of mind."<sup>64</sup> McBain defined it as the application of the federal principle to the state-local relationship.<sup>65</sup> Viewed this way, it may be considered a device for allocating powers and functions between the state and its municipalities. It may also be considered

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legislative body; and, in the event this latter agency refuses to act, it suggests forcing action through judicial notice upon petition. AMERICAN MUNICIPAL ASSOCIATION (National League of Cities), SUGGESTED CONSTITUTIONAL PROVISIONS FOR HOME RULE § 4 (1953). Provisions based on the NLC proposal are now contained in the Alaska and Pennsylvania constitutions. See ALASKA CONST. art. X, § 9; PA. CONST. art. IX, § 2. See also *infra* note 61.

61. In April, 1968, Pennsylvania abandoned its former provision (art. XV, § 1) by adopting a provision based largely on the NLC model. The new provision authorizes any general-purpose unit of local government which adopts a charter to exercise any power or perform any function not denied by the state constitution, by charter, or by state law. It also contains a safeguard against state legislative refusal to provide charter-adoption procedure. It stipulates that, in the event of state legislative inaction, a charter or procedure for framing and adopting a charter may be submitted to the electorate by the local governing body or by local vote initiative. PA. CONST. art. IX, § 2.

62. When the state legislature itself proposes an amendment, however, it may, of course, choose to make it non-self-executing.

63. Various conceptions of home rule are discussed in CHICAGO HOME RULE COMM'N, *supra* note 2, at 193-197.

64. See REED, *supra* note 19, at 133.

65. See MCBAIN, *supra* note 2, at 109-110.

both a legal and a political concept; legal in the sense that the allocation of powers and functions rests upon law; and political in the sense that it involves exercise of political judgment. Although recognizing that it frequently fails to do so, one author has suggested that the aim of constitutional home rule is to alter the constitutional position of cities within the state, *i.e.*, assure cities some powers independent of state legislative control.<sup>66</sup>

Home rule does not mean, and has never been intended to mean, complete local autonomy within the state, because home rule cities must always remain integral parts of state government and must assume, like non-home rule cities, responsibility for enforcement of state law. Further, state constitutions usually expressly restrict or prohibit altogether municipal home rule authority in such state matters as municipal incorporation, establishment of municipal territorial boundaries, definition of crimes, education, and taxation and indebtedness.<sup>67</sup> A recent definition of home rule as "the autonomy of local government in the sovereign state over all purely local matters" appears to express correctly the legal position of the home rule city.<sup>68</sup>

Ordinarily, a home rule grant transfers authority from the state legislature to municipalities to enact measures of purely municipal concern.<sup>69</sup> Historically, home rule has been associated with the local charter-making power, because in most instances, as a prerequisite to exercising home rule powers, municipalities have been required to adopt charters or "municipal constitutions" drafted by local charter commissions selected according to terms prescribed by the state constitution or by state law.<sup>70</sup> But this requirement has not been universal inasmuch as cities in New York, Wisconsin, and, to a large extent, Ohio, have been permitted to exercise home rule powers without adopting charters. Some comparatively recent home rule provisions, including those of Maryland, Tennessee, Kansas, and Massachusetts, also permit direct exercise of home rule powers. In some of these states, however, charter

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66. Rusco, *supra* note 2, at 4.

67. For illustration of these restrictions, see N.Y. CONST. art. VIII, art. IX, § 3; NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION, § 8.01 (6th ed. 1963).

68. MASSACHUSETTS LEGISLATIVE RESEARCH COUNCIL, *supra* note 48, at 35.

69. Cf. Home Rule is the "complete or partial transfer of a portion of government power from the state to the city." McGOLDRICK, *supra* note 2, at 2.

70. As an illustration of the association of the charter-making power with home rule, Professor Bromage has defined home rule as the "authority of a city under a state constitution and laws to draft and adopt a charter for its own government." Bromage, *The Home Rule Puzzle*, 46 NAT. MUN. REV. 118 (1957).

adoption in the traditional manner is authorized, and some cities have adopted charters. But charters written and adopted in the traditional fashion are unknown in New York, Wisconsin, and Kansas. In Ohio, where the charter-making power is widely used, a non-chartered city may exercise all home rule powers not in conflict with general laws.<sup>71</sup> In Tennessee, where twelve cities have adopted charters, a city may adopt home rule merely through a favorable referendum vote, and may then function under its existing charter, which it may amend. The recently adopted Massachusetts provision confers direct broad home rule authority on all cities, and adoption there of a municipal charter serves only to limit exercise of municipal powers.

Although McBain believed a city adopting home rule should begin its home rule experience by writing an entirely new charter, thus re-examining and recodifying all its municipal law,<sup>72</sup> there is much to commend provisions which authorize direct exercises of home rule powers. In most states, charter adoption procedure prescribed by the state constitution involves a long drawn-out process; and for this apparent reason, some cities may hesitate to adopt charters. It is therefore probable that, if directly authorized, home rule powers, will be more widely adopted and exercised.

#### EXTENT OF HOME RULE ADOPTION

A mere enumeration of states whose constitutions contain home rule provisions reveals little concerning the existence and practice of home rule. In some states it is not constitutionally authorized for all cities, and in other states with permissive provisions the state legislature has not enacted the necessary implementing legislation to make home rule adoption possible. In some states, judicial decisions asserting state interest in matters perhaps considered by some as municipal have discouraged home rule initiative by narrowing the sphere within which home rule powers may be exercised.<sup>73</sup> Municipal initiative is also discouraged when

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71. Following the 1923 decision in *Village of Perrysburg v. Ridgeway*, 108 Ohio St. 245, 140 N.E. 595 (1923), it was widely believed that non-chartered cities in Ohio could exercise all home rule powers granted by the state constitution. But in a 1964 decision, *Leavers v. City of Canton*, 1 Ohio St. 2d 33, 203 N.E. 2d 354 (1964), the Ohio Supreme Court ruled that such cities could exercise only those powers which are consistent with general law. For additional comment on the Ohio provision, see text and notes 103-106 *infra*.

72. MCBAIN, *supra* note 2, at 617.

73. See Richland, *Courts Nullify Home Rule*, 44 NAT. MUN. REV. 565-570 (1955);

charter provisions must be consistent with state law.<sup>74</sup> Doubtless also, numerous cities fail to adopt and exercise home rule powers out of sheer apathy.<sup>75</sup>

Home rule charter adoption appears most widespread in the following states:<sup>76</sup> Michigan, 211 cities and 51 villages; Texas, 175 cities; Ohio, 122 cities; Minnesota, 92 cities; California, 71 cities; Connecticut, 52 cities;<sup>77</sup> Oklahoma, approximately 50 cities; and Colorado, 24 cities. Although exact information is unavailable, during the past thirty years, one hundred Oregon cities have adopted new or revised charters, making Oregon one of the leading home rule states. Almost all cities incorporated there since 1906 have adopted charters and some cities incorporated prior to that time have adopted charters or made extensive charter revisions.<sup>78</sup> Missouri, the birthplace of constitutional home rule, had ten home rule cities. Home rule is also widely practiced in Alaska, with twelve of its fourteen first-class cities adopting it. Charter adoption appears to have made least progress in Nebraska and Utah with only two cities each, and in Hawaii, where only the City and County of Honolulu has adopted it. New Mexico, where home rule is authorized for combined city-counties with 50,000 or more population, has had no charter adoptions.

As earlier noted, in a growing list of states, home rule provisions authorize cities to exercise home rule powers directly without adopting charters. Since most of these states have adopted such provisions only within recent years, incomplete information exists concerning the extent of their home rule activity. In New York, where, subject to state general laws, municipalities are empowered to enact and amend local

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Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1148-1151 (1966); HAGENSICK, *supra* note 30, at 351.

74. In order to be assured of home rule powers, the cities of Lincoln and Omaha, Nebraska have lobbied to have their charter provisions written into state law. See A.B.A., LOCAL GOVERNMENT LAW SERVICE LETTER, 52 (Supp. 1963).

75. Concerning home rule apathy in Nebraska cities, see Winter, *Home Rule Neglected*, 47 NAT. MUN. REV. 451-456 (1958).

76. Except as otherwise indicated, information contained in the remainder of this section was obtained by replies received during the fall of 1965 to a questionnaire sent primarily to state municipal leagues.

77. Includes revisions, some minor, to charters originally granted by special legislative acts. Constitutional home rule, which in effect validated legislative home rule, was adopted in 1965. CONN. CONST. art. X, § 1.

78. Oregon has perhaps the briefest home rule provision of all states. It provides: "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon . . ." ORE. CONST. art. XI, § 2.

laws relating to their "property, affairs or government," adoption of local laws is not widespread. In Wisconsin, where cities may exercise home rule powers by exempting themselves from state statutes through enactment of what are called "charter ordinances," home rule authority also appears little exercised. No Wisconsin city has ever adopted a completely new charter as home rule activity there has been confined to charter amendments. During the first thirty years of home rule, 166 of Wisconsin's 550 cities and villages adopted 558 charter ordinances, more than 250 of which were adopted by Milwaukee.<sup>79</sup> In Kansas, however, under a recently adopted home rule provision, cities appear to be making reasonably wide use of their home rule authority. During the period, July 1, 1961 to December 31, 1964, 127 cities enacted 197 "charter ordinances" (ordinances exempting them from provisions of state statutes), and at least 115 cities enacted some 187 "ordinary ordinances" (ordinances initiating legislation).<sup>80</sup>

Only after a considerable period of time has elapsed can these recent provisions which authorize direct exercise of home rule authority be fully evaluated. It would seem that, all other factors being equal, such provisions would encourage home rule activity. In summary, it appears that although constitutional home rule exists in name throughout much of the United States, there are only a few states in which it is widely practiced.

#### GENESIS AND DEVELOPMENT OF HOME RULE THOUGHT

Most students of state and local government generally consider home rule desirable, but they have never been able to determine satisfactorily either what it should constitute, or what should be the most satisfactory method for granting it. Although a proper home rule provision, *i.e.*, a provision which grants broad home rule authority protected against legislative and judicial encroachment,<sup>81</sup> will not, in itself, guarantee

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79. Hagensick, *supra* note 30, at 349.

80. DRURY, HOME RULE IN KANSAS 74, 76 (Univ. of Kan. Publications, Governmental Research Series, No. 31, 1965). For additional comment on the Kansas provision, see p. 302 & notes 163-164 *infra*.

81. Those who advocate adoption of provisions based on the model suggested by the American Municipal Association, now the National League of Cities, in its study MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953) are not likely to agree with the author's definition of a "proper" provision. The NLC model leaves the substantive area of home rule entirely to legislative control. Concerning it, see p. 299 *infra*, *Model Home Rule Plans: The NLC Model*. The model plan of the American Municipal Association, now the National League of Cities, is hereafter referred to as the "NLC model."



municipal exercise of home rule powers, home rule surely cannot flourish under provisions which discourage or inhibit its exercise. Under such circumstances, experience demonstrates municipalities will display very little home rule initiative. Undoubtedly, the home rule provision must be considered a major factor determining exercise of home rule powers. Indeed, it has been said that "the area of greatest possibility of influencing the practical working of home [rule] . . . is in the specific wording of home rule provisions."<sup>82</sup> Unfortunately, throughout the entire home rule period, many home rule provisions have been worded in such language that home rule initiative has not been encouraged.

### *The Missouri Provision*

It is not surprising that states first adopting home rule should have been exceedingly cautious, as many have since been, to preserve state legislative supremacy over cities. Indeed, in their desire to preserve supremacy, authors of early home rule provisions phrased them in such ambiguous language that home rule, where it did emerge, owes its origin largely to favorable judicial interpretation. The first constitutional provision, adopted by Missouri in 1875, authorized any city above 100,000 population (St. Louis) to "frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the State," provided in addition that charters should always be in harmony with and subject to the constitution and state law.<sup>83</sup> Further, it stated that the state legislature should have the same power over the City and County of St. Louis as it had over any other city.<sup>84</sup> Judged by its phraseology, it is difficult to understand how this provision actually granted home rule, because it would seem that its statement "consistent with and subject to the Constitution and laws" alone would have nullified the grant of authority made to a city to "frame and adopt a charter for its own government."

But, taking the view that those who authorized and those who ratified the amendment intended cities to have some home rule, the Missouri Supreme Court eventually held that only in matters involving state-wide concern did charter provisions have to be consistent with and subject to the constitution and laws. Charter provisions, involving matters of purely local concern were held to prevail over conflicting state

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82. *Rusco*, *supra* note 2, at 44.

83. Mo. CONST. art. IX, §§ 16, 23 (1875).

84. *Id.* § 25.

laws.<sup>85</sup> Most other state supreme courts interpreting provisions similar to Missouri's eventually reached the same conclusion.<sup>86</sup> The Missouri provision is also significant because, as interpreted by the Missouri Supreme Court, it created an area within which cities, freed entirely from state control, could govern themselves. In setting apart an area, however vague, within which the legislature could not intrude, it created what Mr. Justice Brewer of the United States Supreme Court was later to call an *imperio in imperium*.<sup>87</sup>

### *The California Provision*

In 1879, California adopted a provision granting the charter-making power in language similar to that of the Missouri provision, but it included the requirement that charter provisions should be subject to and controlled by general laws.<sup>88</sup> Unlike the Missouri court, the California Supreme Court interpreted this provision to mean that all charter provisions, including those involving municipal affairs, were subordinate to conflicting state general laws.<sup>89</sup> Before California cities obtained meaningful home rule, its provision had to be amended to remove municipal affairs from control by general laws.<sup>90</sup>

85. See, *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S.W. 943 (1897); *State ex rel. Kansas City v. Field*, 99 Mo. 352, 12 S.W. 802 (1889). Early decisions involving the meaning of the Missouri provision are very conflicting, and only gradually did the Missouri court adopt the *imperio in imperium* doctrine. See MACDONALD, *supra* note 6, at 60-62; MCBAIN, *supra* note 2, at chaps. 2, 3; Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 KAN. L. REV. 367, 369-370 (1964). The Missouri, California, and Minnesota provisions are treated at some length in order to reveal the thought of this important home rule period.

86. The Oklahoma Supreme Court, for instance, in interpreting the Oklahoma provision followed the reasoning of the Missouri Supreme Court. See *Lackey v. State*, 29 Okla. 255, 116 P. 913 (1911). See also Merrill, *Constitutional Home Rule for Cities—Oklahoma Version*, 5 OKLA. L. REV. 139, 149-150 (1952).

87. *St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 468 (1893). For a comparatively recent assessment of Missouri home rule, see Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. UNIV. L. QUART. 385-412 (1953).

88. CAL. CONST. art. XI, § 6 (1879). The Washington State provision of 1889 (art. XI, § 10), borrowed from the California provision, also subjected municipal charters to control by general laws. The Washington provision remains basically unamended and Washington home rule has been, and continues to be, a matter of legislative grace. Concerning home rule in Washington State, see BUREAU OF GOVERNMENT RESEARCH AND SERVICES, UNIV. OF WASH., *MUNICIPAL GOVERNMENT IN THE STATE OF WASHINGTON* 14-17 (1962). See also note 141 *infra*.

89. See, *People v. Henshaw*, 76 Cal. 435, 18 P. 413 (1888); *Staube v. Election Commissioners*, 61 Cal. 313 (1882). See also Jones, "*Municipal Affairs*" in the *California Constitution*, 1 CAL. L. REV. 132-147 (1913).

90. CAL. CONST. art. XI, § 6 (1896). The California provision, as amended, now pro-

### *The Minnesota Provision*

In its wording at least, the Minnesota provision of 1896,<sup>91</sup> since amended, was equally if not more emphatic than Missouri's in subjecting home rule to legislative control. After conferring the charter-making power in language similar to that of the Missouri provision, it stated that before any city should incorporate, the legislature should prescribe the general limits within which charters should be framed, that charters should always be in harmony with and subject to the constitution and laws, and that the legislature might provide general laws relating to the affairs of cities, which should be paramount to the same subject matter included in city charters. Because the Minnesota Supreme Court interpreted this provision literally,<sup>92</sup> Minnesota home rule, like home rule in many other states, has been a matter of mere state legislative grace.<sup>93</sup>

### *Provisions Adopted Since 1912*

Following adoption of the Minnesota provision and through the year 1912, all states adopting provisions, save Michigan and Texas whose provisions emphasized legislative supremacy, adopted provisions based on the Missouri or *imperio in imperium* model. The Colorado provision of 1912 differed from other provisions of this era in that, in addition

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vides: "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered . . . to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters." The language of this provision constitutes a limitation rather than a grant of power. California is generally regarded as one of the better home rule states. For recent comment on California home rule see, WICKWARE, *NEW COUNCILMEN AND THE LAW OF MUNICIPAL CORPORATIONS IN CALIFORNIA* (League of California Cities, May, 1964).

91. MINN. CONST. art. IV, § 36 (1896).

92. See *Western State Utilities Co. v. Waseca*, 242 Minn. 302, 65 N.W. 2d 255 (1954); *State ex rel. Dann v. Hutchinson*, 206 Minn. 446, 288 N.W. 845 (1939).

93. This provision was amended on Nov. 4, 1958, to remove much of the restrictive language subjecting charters to legislative control. It now reads: "Any city or village . . . may adopt a home rule charter for its government in accordance with this constitution and the laws." MINN. CONST. art. XI, § 3. Although there has been very little case law interpreting it, this provision is still regarded as subjecting charters entirely to state legislative control. See A.B.A. LOCAL GOVERNMENT LAW SERVICE LETTER 53-54 (Supp. Dec., 1963). Since there appears very little difference between the language of the current Minnesota provision and that of *imperio in imperium* provisions of such states as Missouri and Oklahoma, it now seems logical, at least to the author, for the Minnesota court to read the *imperio in imperium* doctrine into the Minnesota provision.

to giving cities a broad general grant of home rule authority in "local and municipal matters," it enumerated several specific home rule powers.<sup>94</sup> Unlike the Colorado provision, other provisions based on the *imperio in imperium* model granted home rule in vague language, whose meaning has been subject to judicial determination.

Although varying somewhat in language, most provisions adopted since 1912 are based primarily on or emphasize legislative supremacy. But because it reserves exclusively for municipalities the area of municipal affairs, the Utah provision of 1932, likely borrowed from California, must be classified as *imperio in imperium*.<sup>95</sup> The Wisconsin home rule provision of 1924, which empowers cities to determine their "local affairs and government,"<sup>96</sup> appears also to be based on the *imperio in imperium* model, but the Wisconsin Supreme Court has ruled otherwise. It has held that Wisconsin home rule enactments can be nullified through state legislation applicable uniformly to all cities.<sup>97</sup> Although the New York home rule provision of 1923, since amended, is sometimes considered to contain features of the *imperio in imperium* model, it is doubtful whether this classification is wholly correct, inasmuch as powers falling within its home rule grant in "property, affairs or government," as well as the additional specific home rule powers enumerated, must all be exercised consistently with general laws.<sup>98</sup>

Provisions based on the legislative supremacy model usually consist of two principal types: first, those which grant home rule within a limited sphere, such as "property, affairs or government" subject to control by general laws; and, second, those which make no specific home rule grant, but rather leave determination of the quantity of home rule to be authorized, often within a limited sphere, entirely to legislative discretion. As an illustration of the first type, the Louisiana provision of 1952 grants every municipality home rule within the area of "local affairs, property and government" but provides also that the

94. COLO. CONST. art. XX, § 6. Denver, however, was granted home rule in 1902.

95. UTAH CONST. art. XI, § 5 (1932). The Utah provision, like the Colorado provision, enumerates a few home rule powers and functions. Home rule has made but little progress in Utah, with only two cities adopting it by 1965. Apparently, the principal reason for adoption of home rule is to enable cities to change their form of government. Letter from A. M. Ferro, Legal Consultant, Utah Municipal League, to Kenneth E. Vanlandingham, Oct. 15, 1965.

96. See WIS. CONST. art. XI, § 3.

97. Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936). For additional comment on Wisconsin home rule, see p. 292 & notes 119-122, 158-161.

98. N.Y. CONST. art. IX, § 2b(2) (Supp. 1967).

"Constitution and any general laws passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith."<sup>99</sup> The home rule provision of the Connecticut Constitution, adopted in 1965, illustrates the second type. It provides that "[t]he General Assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs relative to the powers, organization, and form of government of such political subdivisions."<sup>100</sup> The current model home rule provisions of both the National League of Cities and the National Municipal League, as well as provisions based on them, may also be cited as examples of the legislative supremacy type of provision.<sup>101</sup> They differ from the traditional type of legislative supremacy provision, however, in that they empower the state legislature to prohibit home rule action, not to grant it.

### *General Concluding Observations*

Certain general observations should be made concerning the nature of the various types of home rule provisions now existing. First, some of them, and particularly those based on the *imperio in imperium* model, are poorly phrased and drafted; seldom do they contain definitions to clarify the meaning of expressions or terms they employ—the New York provision is an exception<sup>102</sup>—and extensive judicial interpretation of them is frequently required. The Ohio provision, which grants the charter-making and substantive powers in separate sections is perhaps the worst of such provisions.<sup>103</sup> In a 1956 opinion, Chief Justice Wey-

99. LA. CONST. art. XIV, § 40(d).

100. CONN. CONST. art. X, § 1.

101. In addition to enumerating home rule powers and functions, the home rule provision contained in the fifth edition of the MODEL STATE CONSTITUTION makes a broad general grant of home rule in *imperio in imperium* fashion. See NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.04 (5th ed. 1948). This model is hereafter referred to as the "old NML model." The present edition of the MODEL STATE CONSTITUTION grants home rule powers and functions subject to legislative control. See NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1963). This model is hereafter referred to as the "new NML model." However, it must be noted that the 6th edition was revised in 1968.

102. See N.Y. CONST. art. IX, § 3 (3d) (Supp. 1967).

103. OHIO CONST. art. XVIII, § 3 provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." And § 7 of the same article 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."

gandt of the Ohio Supreme Court noted that these sections "have been highly and often bitterly controversial even from the time they were first proposed."<sup>104</sup> In order to give meaning to the Ohio provision, the state supreme court has been required to "read" into section three a comma following the word "self-government" which its authors either intentionally or unintentionally neglected to insert.<sup>105</sup> Moreover, in a 1964 decision, the Ohio court ruled that, in the absence of charter adoption, Ohio cities can no longer exercise home rule powers which are inconsistent with general laws.<sup>106</sup>

Second, most home rule provisions, and particularly those adopted during recent years, emphasize state legislative supremacy. Although a few provisions based on the *imperio in imperium* model have been adopted during the past forty-five years, this type of provision belongs largely to the home rule era ending in 1912. Frequently, in cases arising under provisions of this character, state supreme courts have tended to uphold state authority as against home rule prerogatives. Consequently, authors of recent home rule provisions, evidently frustrated in their efforts to draft satisfactory provisions based on the *imperio in imperium* model, have usually devised provisions based on or emphasizing legislative supremacy.<sup>107</sup>

Third, in addition to the fact that most amendments adopted throughout the entire home rule period authorize legislative control of home rule, it should also be noted that, in general, rather than showing originality and inventiveness in drafting provisions, most states have displayed a rather marked tendency to borrow from previously existing or contemporary provisions. The Arizona provision is apparently borrowed from the Oklahoma provision, the West Virginia provision from the Michigan provision, the Louisiana provision from the New York and California provisions, and the Kansas provision in part from the Wisconsin provision. Several states, including Louisiana, Rhode Island, Maryland, and Tennessee, have either borrowed verbatim or paraphrased the home rule grant in "property, affairs or government" contained in

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104. State *ex rel.* Lynch v. City of Cleveland, 164 Ohio St. 437, 132 N.E. 2d 118, 120 (1956).

105. See *supra* note 103; State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E. 2d 574, 577 (1960).

106. Leavers v. City of Canton, 1 Ohio St. 2d 33, 203 N.E. 2d 354 (1964). See also *supra* note 71.

107. Early provisions emphasized legislative supremacy; the *imperio in imperium* doctrine is largely judicial in origin. See p. 286 & note 85 *supra*.

the New York Constitution.<sup>108</sup> The California constitutional provision which empowers "any county, city, town, or township to make and enforce within its limits such local, police, sanitary, and other regulations as are not in conflict with general laws"<sup>109</sup> has been either borrowed verbatim or paraphrased in the constitutions of Washington, Idaho, Ohio, Utah, and Louisiana. States currently adopting home rule provisions display a tendency to borrow from the model provision of the National League of Cities.

Finally, apparently for fear of opening a "Pandora's Box" through judicial interpretation of new provisions, states are reluctant to alter existing provisions radically even to improve them. For example, Michigan and Missouri in adopting new constitutions, and New York and Minnesota, in amending provisions, made few significant home rule changes. Thus, at present, there exist among several states provisions reflecting the thoughts of the various home rule periods.

#### HOME RULE IN OPERATION

Attainment of successful home rule under either *imperio in imperium* or legislative supremacy provisions is frequently very difficult. Under the former type of provision the principal difficulty is that of judicially determining home rule powers, while under the latter, the main problem is that of securing sympathetic legislative treatment in the matter of legislative delegation of adequate home rule authority. This statement, and the general tenor of the discussion of this entire section, should not be interpreted to imply that home rule under either type of provision cannot be successful, or at least moderately successful in practice, since it is generally regarded as reasonably satisfactory under *imperio in imperium* provisions in California, Oregon and Ohio, and under legislative supremacy provisions in Michigan and Texas. Although the home rule provision is unquestionably an important factor determining the success of home rule, other factors, such as a favorable legislative and judicial climate and municipal willingness to exercise home rule powers, are equally or perhaps more important. There is also

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108. See note 98 *supra*.

109. CAL. CONST. art. XI, § 11. Recently, the California Supreme Court has displayed a tendency to hold that the state legislature has by implication pre-empted powers granted by this section to units of local government. See *In re Hubbard*, 62 CAL. 2d 119, 396 P. 2d 809 (1964); *In re Lane*, 58 Cal. 2d 99, 372 P. 2d 897 (1962). See also Comment, *The California City versus Preemption by Implication*, 17 HASTINGS L. J. 603-618 (1966).

much truth in the statement that “. . . there is no fool-proof home-rule doctrine in the sense that you can set it up in a state constitution, walk away, and forget it. Under all known systems, cities and villages must be alert to what goes on and may happen at the state capital.”<sup>110</sup> In any event, for whatever the reason or reasons, home rule under both types of provisions has proved successful in some states.

#### *Under “Imperio in Imperium” Provisions*

Save for a few provisions, such as those of Colorado and Utah which enumerate some specific home rule powers along with making a broad general grant of home rule authority, most provisions based on the *imperio in imperium* model define the home rule grant in vague language, such as “frame and adopt a charter for its own government” (Mo.),<sup>111</sup> “all powers of local self-government” (Ohio),<sup>112</sup> “municipal affairs” (Cal.),<sup>113</sup> “all local and municipal matters” (Colo.),<sup>114</sup> “property, affairs or government” (N.Y.),<sup>115</sup> and “local affairs and government” (Wis.).<sup>116</sup> Under such provisions, determination of which matters are state and which matters are local constitutes the crux of the home rule problem. Such determination, however, is in most instances exceedingly difficult. The Nebraska Supreme Court, for instance, has confessed: “It is not easy in all cases to distinguish between municipal powers and state powers, and when they come within the classification of police powers, they are as impossible of accurate definition as the police power itself.”<sup>117</sup> Determination of home rule powers is sometimes further complicated by the fact that the character of governmental functions changes. As noted by the California Court of Appeals: “The term ‘municipal affairs’ is not a fixed quantity, but fluctuates with every change in the conditions upon which it is to operate.”<sup>118</sup> Local functions for this reason are sometimes judicially reclassified as state; and

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110. Bromage, *Rededication to Municipal Home Rule*, 40 MICH. MUN. REV. 4 (1967).

111. MO. CONST. art. VI, § 19.

112. OHIO CONST. art. XVIII, § 3.

113. CAL. CONST. art. XI, § 6.

114. COLO. CONST. art. XX, § 6.

115. N.Y. CONST. art. IX, § 2b(2) (Supp. 1967).

116. WIS. CONST. art. XI, § 3.

117. *Consumers Coal Company v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643, 646 (1922).

118. *Helmer v. Superior Court of Sacramento County*, 48 Cal. App. 140, 191 P. 1001 (1920).



when reclassification occurs, the possible quantity of home rule is thereby decreased.

When considering the meaning of the Wisconsin home-rule provision which provides that "[c]ities and villages . . . are hereby empowered to determine their local affairs and government, subject only to this constitution and to such enactments of the state legislature of state-wide concern as shall with uniformity affect every city or every village,"<sup>119</sup> the Wisconsin Supreme Court commented that it could find no answer to the question of when an enactment of the state legislature is of state-wide concern "in any decision of any court in this country."<sup>120</sup> The Wisconsin court apparently resolved the problem, though surely not satisfactorily from the viewpoint of home rule advocates, by holding that, though not absolutely binding upon it, determination of what is a local affair and what is a matter of state-wide concern belongs in the first instance to the state legislature, for the reason that it involves large considerations of public policy.<sup>121</sup> As might be expected in deciding cases involving conflicts between municipal ordinances and state statutes, the Wisconsin court frequently holds in favor of the state.<sup>122</sup> Although other state supreme courts do not expressly follow the Wisconsin judicial policy in determining the character of governmental functions, decisions reached by most of them in cases involving state-municipal conflict are much the same as Wisconsin's decisions. Coupled with the fact that local laws relating to "property, affairs or government" must be consistent with general laws, judicial assertion of "state interest" in numerous cases, some involving only a single city, has been an important factor seriously weakening New York home rule.<sup>123</sup> Judicial assertion of "state interest" has also been a significant factor eroding home rule in Rhode Island, whose 1951 provision is based largely on New York's provision.<sup>124</sup>

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119. Wis. CONST. art. XI, § 3.

120. *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25, 28 (1936).

121. *Id.* 267 N.W. at 31.

122. Hagensick, *supra* note 30, at 350.

123. See, e.g., *Salzman v. Impellitteri*, 305 N.Y. 414, 113 N.E.2d 543 (1953); *County Securities, Inc. v. Seacord*, 278 N.Y. 34, 15 N.E. 2d 179 (1938); *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929). The draft NEW YORK CONSTITUTION, defeated in referendum vote, November, 1967, would have abandoned the home rule provision of the present constitution for one based on the NLC or new NML models. Concerning this draft provision, see art. IX, § 2 (Supp. 1967). This constitution is contained in the *New York Times*, Sept. 27, 1967.

124. See *Newport Amusement Co. v. Maher*, 92 R.I. 51, 166 A.2d 216 (1960); *Opinion to the House of Representatives*, 80 R.I. 288, 96 A.2d 627 (1953). The draft RHODE

In deciding cases involving conflict between municipal ordinances and state statutes, state supreme courts for several reasons frequently rule in favor of the state. First, enactments of the state legislature, a body coordinate with the state supreme court, are ordinarily presumed constitutional.<sup>125</sup> Second, determination of the character of governmental functions is admittedly a very difficult task. Actually, the problem of classifying these functions appears to have no satisfactory solution, since in a complex society state and local governments frequently have a concurrent interest in them, and they cannot be assigned to exclusive spheres save on the basis of arbitrary reasoning. Finally, since the state does have an interest in most functions, the judiciary usually allows it to prevail. Most state supreme courts today apparently agree with the statement of Justice Cordozo, made while a member of the New York Court of Appeals, that “. . . affairs, though concerns of a city, are subject none the less to regulation through the usual forms of legislation if they are concerns also of the state.”<sup>126</sup> Indeed, today, when a state supreme court in a case involving municipal versus state interest rules against the state and in favor of the municipality, its decision is usually noteworthy.<sup>127</sup>

#### *Under Legislative Supremacy Provisions*

Michigan and Texas early adopted constitutional provisions subjecting home rule to legislative control.<sup>128</sup> Throughout the entire home rule period, and particularly during recent years, perhaps due to dissatisfaction with provisions based on the *imperio in imperium* model, other states have adopted provisions, which though different in language and in approach, likewise subject home rule in varying degrees to such control. Several states, including New York, Maryland, Massachusetts,

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ISLAND CONSTITUTION, defeated in referendum vote, April, 1968, would have abandoned the home rule provision of the present constitution for one based on the NLC or new NML models.

125. See, e.g., *State v. Double Seven Corp.*, 70 Ariz. 287, 219 P. 2d 776 (1950); *Peterson v. Hancock*, 155 Neb. 801, 54 N.W. 2d 85 (1952).

126. *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705, 713 (1929).

127. This may represent an overstatement, but, nevertheless, it contains a large element of truth. See, e.g., *State ex rel. Henig v. City of Milwaukee*, 74 Ore. 1115, 373 P. 2d 680 (1962), wherein the Oregon Supreme Court held civil service for municipal firemen to be a local function. In its opinion, the Oregon court made clear that a municipal ordinance involving a matter of local concern prevails over a state statute applying uniformly to all cities. This case is noted in *THE MUNICIPAL YEAR BOOK* 72 (1963).

128. MICH. CONST. art. VII, § 21 (1908); TEXAS CONST. art. XI, § 5 (1912).

Kansas, Louisiana, and Rhode Island, require local laws or city charters to be consistent with general laws, such laws being applicable to all or to particular classes of cities. The "consistency requirement" contained in these provisions thus enables a state legislature to prevent or veto municipal exercise of home rule powers. In some states, including New York, Rhode Island, Massachusetts and Kansas, based on the idea that there is "safety in numbers," the legislative veto must apply uniformly to all cities, but in other states, it can apply to one or more classes of cities, sometimes even to a single city in a class. When the latter situation obtains, home rule can be nullified through special legislation enacted under guise of classification. The National League of Cities has proposed that, for classification purposes, the state legislature group municipalities into not more than four classes, with at least two in each class.<sup>129</sup> Although their classification schemes vary somewhat from the NLC plan, its basic idea of preventing legislative discrimination against the more populous cities has been incorporated into the constitutions of Massachusetts and Florida (Dade County).<sup>130</sup> The Louisiana provision, applicable to New Orleans, also protects that city against legislative discrimination by providing that legislation applicable to fewer than five of the state's most populous cities, including New Orleans, may not become effective until approved by its voters.<sup>131</sup>

Some states, including Connecticut, Pennsylvania, Hawaii, North Dakota, and Georgia, have provisions which give the state legislature discretion to determine the quantity of home rule to be delegated to cities. This is true also of the Michigan and West Virginia provisions which stipulate that charters shall be written "under general laws" enacted by the state legislature. All of these provisions appear to represent scarcely more than constitutional authorization for the state legislature to delegate its powers to cities. Under such provisions, the municipalities' freedom to determine their local affairs depends solely upon legislative grace.<sup>132</sup> According to one author such freedom is "com-

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129. AMERICAN MUNICIPAL ASSOCIATION (National League of Cities), SUGGESTED CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE, § 3 (1953).

130. FLA. CONST. art. VIII, § 11(6); MASS. CONST., art. of amend., art. II, § 8 (Supp. 1967).

131. LA. CONST. art. XIV, § 22 (1950).

132. Some directors of state municipal leagues replying to the author's home rule questionnaire assert that home rule under legislative supremacy provisions is not truly home rule; and, indeed, it does seem paradoxical that constitutional provisions should provide that home rule municipalities should derive their powers from, or have them controlled by, acts of the legislature.

parable to that of a cow staked out to graze by a chain which may be lengthened or shortened at will.”<sup>133</sup> Interestingly enough, however, if measured merely by number of charter adoptions, home rule enjoys its greatest success in states with such provisions. Michigan, the leading home rule state in the number of charter adoptions, has had this kind of provision for sixty years and has enjoyed reasonable, though perhaps not spectacular, success with it. By giving its home rule cities a broad range of permissive powers, and by usually refraining from enacting laws violating home rule principles, the Michigan legislature has been somewhat liberal in its treatment of municipalities. But these cities, through their state municipal league, still must keep constantly on the alert to prevent erosion of home rule through enactment of state general laws.<sup>134</sup> On the other hand, under a provision borrowed almost verbatim from the Michigan provisions,<sup>135</sup> West Virginia cities have enjoyed very little success with home rule, for the reason that the state legislature has granted home rule cities no significant powers not granted non-home rule cities. The principal reason West Virginia cities have adopted home rule is to enable them to adopt council-manager government.<sup>136</sup>

Of all the older home rule states having the legislative supremacy type of provision, Texas appears the most successful in making home rule work. The success of home rule there apparently results largely from a favorable legislative and judicial climate. The fact that Texas home rule cities are not subject to classification for state legislative purposes appears to be another factor responsible for its success.<sup>137</sup> Although the Texas Supreme Court has ruled that home rule cities derive their powers directly from the state constitution,<sup>138</sup> almost im-

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133. Merrill, *supra* note 86, at 149. In his statement, Professor Merrill was obviously referring to the Oklahoma and other similar provisions, but his observation is applicable to all legislative supremacy provisions.

134. For recent comment and observations on Michigan home rule, see Bromage, *Home Rule: The Strength of Local Government in Michigan*, 38 MICH. MUN. REV. 136-137 (1965); *Rededication to Municipal Home Rule*, 40 MICH. MUN. REV. 3-5 (1967).

135. W. VA. CONST. art. VI, § 39(a).

136. Letter from Claude J. David, Director, Bureau for Government Research, West Virginia University, to Kenneth E. Vanlandingham, Nov. 24, 1967.

137. Inasmuch as the Texas home rule provision intends to place all cities above 5,000 population on an equal footing, classification of them for state legislative purposes is precluded by implication. Letter from Riley E. Fletcher, General Counsel, Texas Municipal League, to Kenneth E. Vanlandingham, June 23, 1967.

138. *City of El Paso v. State ex rel. Town of Ascarate*, 209 S.W. 2d 989 (Tex. Civ. App. 1947).

mediately following adoption of home rule, the Texas legislature enacted legislation, since amended, giving the cities a broad grant of home rule authority, and enumerating "for greater certainty" thirty-four specific home rule powers.<sup>139</sup> Apparently wherever possible, Texas courts cite this statute to uphold municipal exercise of home rule powers; but they show no reluctance to uphold exercise of other powers not enumerated in it.<sup>140</sup> In general, these courts take the view that unless the legislature has forbidden with unmistakable clarity the exercise of a particular power, home rule cities may exercise it.<sup>141</sup>

In evaluating the legislative supremacy type of provision one must note that it has enjoyed mixed success, apparently succeeding in some states, though not in others. Perhaps to understand the reason for this mixed success one needs to recall the observation of Thomas H. Reed that home rule is a "state of mind." In other words, where home rule of this kind has succeeded, conditions generally have been favorable to it. Logically, two factors appear to enhance its chance of success: (1) a requirement that state legislation negating home rule should be uniformly applicable to a large number of cities, including the more populous ones; and (2) the existence of a strongly effective state municipal league to lobby for home rule interests. Without such adequate safeguards, a state having a long history of undue legislative interference in municipal affairs, such as Washington, might do well not to adopt this kind of provision.<sup>142</sup>

### MODEL HOME RULE PLANS

Due primarily to the dynamic nature of American society—altering

139. See VERNON'S ANN. TEX. CIV. STAT. art. 1175 (1963). Cities may be more prone psychologically to exercise home rule perogatives under a provision enumerating home rule powers and functions than under one granting broad undefined home rule authority. This observation appears substantiated by Texas and Wisconsin experience. Under a broad legislative grant, Wisconsin cities appear hesitant to exercise home rule powers. Hagensick, *supra* note 30, at 353.

140. Letter from Riley E. Fletcher, General Counsel, Texan Municipal League, to Kenneth E. Vanlandingham, April 3, 1967.

141. See, e.g., *City of Sweetwater v. Geron*, 380 S.W. 2d 550, 552 (Tex. Sup. Ct. 1964). See generally Keith, *Home Rule—Texas Style*, 44 NAT. MUN. REV. 181-188 (1955).

142. Home rule in Washington State is a matter of legislative grace. See *supra* note 88. In its reply to the author's home rule questionnaire, the Association of Washington Cities indicated that it prefers a provision granting home rule in broad general terms along with an enumeration of home rule powers and functions. It stated this reason for its preference:

Legislative bodies are subject to extreme political pressures from special interest groups with private axes to grind. The will of these groups is often given much greater consideration because of campaign contributions, etc.,

social, economic, and technological factors can change a local function today into a state function tomorrow—no home rule plan satisfactory to everyone can probably ever be devised. Nevertheless, two principal model home rule plans have been proposed, each with its advantages and disadvantages.<sup>143</sup> These plans are not intended to be definitive; rather, they are intended, as suggested by the National League of Cities, “to provide a helpful formulation of ideas for those concerned with home rule in the political context of any state in the Union.”<sup>144</sup> Therefore, any state considering writing and adopting a provision can well profit from studying them, but any provision finally adopted should reflect the peculiar conditions of the particular state adopting it.

### *The Old NML Model*

The first plan, that of the National Municipal League, published in the 1921 *Model State Constitution*<sup>145</sup> and in succeeding editions of that document through 1948, is considered by the National Municipal League as being based on the *imperio in imperium* model. Under the 1948 version of this model, “each city is . . . granted full power and authority to pass laws and ordinances relating to its local affairs, property and government.” The provision further states that “this grant of authority shall not be deemed to limit or restrict the power of the legislature to enact laws of statewide concern uniformly applicable to every city.” It

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than the recommendations of the duly constituted local authorities. Unless cities are given some specific powers which the legislature cannot constantly override, the whole concept of home rule is in shambles. The legislature, in other words, will constantly go over the heads of local officials to appease an interest group, hamstringing an administration, or place undue burdens on cities without providing the funds to pay the bill.

Association of Washington Cities questionnaire reply to Kenneth E. Vanlandingham, Oct. 5, 1965.

143. A third model plan, similar to the AMA or NLC model, has been suggested by the U. S. Advisory Commission on Intergovernmental Relations. This model proposes granting units of local government residual powers. In general, it would allow them to exercise all powers not denied by general law. See U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *STATE LEGISLATIVE PROGRAMS* 185-186 (1963).

144. AMERICAN MUNICIPAL ASSOCIATION (National League of Cities), *MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE* 5 (1953).

145. Early editions of the *Model State Constitution* were sometimes published as an appendix to texts on state government. See, e.g., HOLCOMBE, *STATE GOVERNMENT IN THE UNITED STATES* 571-588 (2d ed. 1926); MATHEWS, *AMERICAN STATE GOVERNMENT* 619-680 (Rev. ed. 1934). In terms of actual adoption, the old NML model has never been widely accepted. Features of it, however, are contained in the New York and Utah provisions. See N.Y. CONST. art. IX, § 2(c); UTAH CONST. art. XI, § 5. The old NML model is also similar to the earlier Colorado provision. See COLO. CONST. art. XX.

also enumerates powers and functions which it states "shall be deemed a part of the powers conferred upon cities . . . when not inconsistent with general law." Included among such enumerated powers and functions are the police power, taxation and indebtedness, local public services, cultural facilities, local public utilities, eminent domain, and urban redevelopment.<sup>146</sup>

This provision appears to contain ambiguities which cause some intellectual difficulties. Although it grants a city "full power and authority to pass laws and ordinances relating its local affairs, property and government," it enumerates as part of this grant powers and functions which it specifies must be exercised consistent with general law. The provision appears a paradox in that, although apparently containing an unqualified grant of home rule authority based on the *imperio in imperium* model, it provides that a part of the grant must be exercised consistent with general law. Moreover, it is extremely difficult to believe that any state supreme court would hold those powers enumerated in the provision, most of which appear either to be state in character or to contain elements of state interest, to belong properly within the sphere of "property, affairs and government."<sup>147</sup> If granted subject to general law, however, they very properly can be included in a home rule provision. This entire provision appears to combine features of both *imperio in imperium* and legislative supremacy models. The National Municipal League, however, apparently considers it as being based on the *imperio in imperium* model and intends it to confer authority on cities to act in the area of "local affairs, property and government," limited only by general laws of state-wide concern uniformly applicable to all cities; and in this article it will be interpreted to have this meaning.<sup>148</sup> In any event, its intended purpose is that of assuring cities

146. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.04 (5th ed. 1948).

147. For additional comment on the ambiguities of this provision, see Sandalow, *supra* note 53, at 651.

148. In his explanatory article on this provision, Professor Bromage confirms this interpretation. See NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION §§ 45, 46-47 (5th ed. 1948). In a letter of Nov. 19, 1967 to the author, Professor Bromage commented:

My interpretation of the *imperio in imperium* doctrine is that most constitutions creating it, recognize that the state may still enact and control by acts of statewide concern uniformly applicable to every city. I am sure this is the proper interpretation of NML 8.04 (1948). The phrase "general law" follows directly after another sentence which refers to "statewide concern." I think you would be correct in saying that the 1948 model, like other *imperio* doctrines, is subject to the restraint of general laws of statewide concern—not just any general law.

some home rule powers beyond state legislative control; but inasmuch as the enumerated powers and functions must be exercised consistent with general law, cities are assured of home rule powers only to the extent that the state judiciary "reads" them into the general grant in "local affairs, property and government."

### *The NLC Model*

The second principal model home rule plan, proposed by Jefferson Fordham in a 1953 study, *Model Constitutional Provisions for Municipal Home Rule*, prepared for the National League of Cities, subjects home rule in the substantive area entirely to legislative control. In the procedural area, *i.e.*, in matters concerning municipal executive, legislative and administrative structure, organization, personnel, and procedure, the plan declares municipal action superior to state law.<sup>149</sup> The National League of Cities is critical of *imperio in imperium* provisions because they require judicial assignment of governmental functions into state and municipal categories, an impossible task in its judgment. Like the Wisconsin Supreme Court, it believes that assignment of such functions should be made by the legislature, because it involves considerations of public policy.<sup>150</sup>

In the sixth edition of its *Model State Constitution*, published in 1963, though retaining as an alternative plan a modified version of its old home rule plan, the National Municipal League, by adopting as its preferred plan a plan very similar to those of the National League of Cities, has accepted in principle the thinking of the National League of Cities.<sup>151</sup> One of the major differences between the home rule plans of these two national organizations lies in the degree of home rule granted: the new NML model subjects home rule in both its procedural and substantive aspects to legislative control, while the NLC model grants virtually complete home rule in the procedural area.

### THE OLD NML MODEL CONSIDERED

Although concurring in part with the National League of Cities' criticism of the old NML model, the author would question it further because it contains important provisions borrowed from existing constitutional provisions which, from the viewpoint of students of home

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149. MODEL CONSTITUTIONAL PROVISIONS FOR HOME RULE *supra* note 144, at § 6.

150. *Id.* at 20-21.

151. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1963).



rule, have received unfavorable judicial interpretation. Such interpretation is highly significant, inasmuch as state supreme courts construing borrowed constitutional provisions usually accord them the same meaning as courts in states from which they are borrowed.<sup>152</sup> Indeed, authors of the recent Kansas provision, based in large measure on the Wisconsin provision, evidently gave careful study and consideration to Wisconsin judicial construction of the Wisconsin provision.<sup>153</sup> In this article, moreover, the author feels obligated to consider the old NML model provision as interpreted by the highest courts of New York and Wisconsin, states from whose constitutions it is largely borrowed.

The phrasing of the home rule grant of the old NML model, "local affairs, property and government," is borrowed from the New York Constitution's phrase, "property, affairs or government."<sup>154</sup> The New York phrase, originating in an 1894 New York constitutional amendment,<sup>155</sup> and now copied or paraphrased in the constitutions of several states, already had been narrowly construed prior to its incorporation into the 1923 New York home rule amendment.<sup>156</sup> This phrase, according to the New York Court of Appeals, had become "words of art," and had restricted significance. When placed in the New York home rule amendment, it had a "court of appeals definition, not that of Webster's Dictionary."<sup>157</sup> In numerous cases, the New York court has held what some might consider proper home rule powers and functions not to be included within the phrase.<sup>158</sup> If this court's interpretation of the New York Constitution's phrase is considered as the meaning of the *Model Constitution's* home rule phrase, "local affairs, property and government," then the Model's home rule grant is not very broad.

The *Model State Constitution's* statement following its general home rule grant that the grant "shall not be deemed to limit or restrict the power of the legislature to enact laws of state-wide concern uniformly applicable to every city" is borrowed from the Wisconsin constitutional

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152. See, e.g., Opinion of the Justices, 181 A. 2d 215 (Del. 1962); Jaramillo v. City of Albuquerque, 64 N.M. 427, 329 P. 2d 626 (1958).

153. Letter from E. A. Mosher, Executive Director, League of Kansas Municipalities, to Kenneth E. Vanlandingham, May 31, 1967. See also DRURY, HOME RULE IN KANSAS 48-51 (Univ. of Kan. Publications, Govt. Research Series No. 31, 1965).

154. N.Y. CONST. art. IX, § 26(2) (Supp. 1967).

155. N.Y. CONST. art. XII, § 2 (1894).

156. See *Admiral Realty Co. v. City of New York*, 206 N.Y. 110, 99 N.E. 241 (1912).

157. *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705, 707 (1929).

158. See *supra* note 123.

provision which empowers cities and villages to determine their local affairs and government “. . . subject only to . . . such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village.”<sup>159</sup> This latter provision has been interpreted by the Wisconsin Supreme Court to have a meaning probably never intended by its authors. Read literally, it appears like the old NML model to confer on cities authority to determine their local affairs and government, while at the same time to restrict the legislature to enactments of state-wide concern uniformly applicable to all cities. As already noted, however, the Wisconsin Supreme Court has held determination of local affairs to be a matter primarily for the legislature.<sup>160</sup> In addition, emphasizing that the home rule amendment was intended to apply only to local affairs, the court has held that in matters of state-wide concern, the state legislature may classify cities for purposes of state legislation. To hold otherwise, according to its reasoning, would impair the right of the legislature to control state government.<sup>161</sup> What the Wisconsin provision really means, according to the court, is that when the state legislature enacts local legislation, not applicable uniformly to all cities, a city may, through enactment of a charter ordinance, exempt itself from such legislation. This provision, as interpreted by the Wisconsin court, permits the state legislature to prohibit exercise of home rule powers provided it acts through uniform enactments applicable to all cities.<sup>162</sup>

This interpretation is not evident from the language of the provision; and any state adopting a provision based on that portion of the old NML model derived from the Wisconsin provision should be aware of this fact. Although another state supreme court might arrive at a different interpretation of the Wisconsin provision, it normally would note the Wisconsin interpretation and would likely accord that interpretation great weight. Whether it is good public policy to require a state legislature, when dealing with matters of state-wide concern, to act only by general law applicable to all cities may be debatable. Occasionally, peculiar circumstances may justify classification. In any event, a state adopting a provision based on the old NML model and desiring that the state legislature act in state-wide matters only by uniform law applicable to all cities should add an additional statement prohibiting

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159. Wis. CONST. art. 11, § 3.

160. See p. 292 & notes 119-122 *supra*.

161. *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25, 29-30 (1936).

162. *Id.* 267 N.W. at 35-36.

classification of cities for purposes of enacting legislation state in character.

### *The Kansas Amendment*

In 1960, Kansas adopted a somewhat unique home rule provision, yet to receive major judicial interpretation, borrowed largely from the Wisconsin provision and from the home rule plan of the National League of Cities.<sup>163</sup> This provision, like that of Wisconsin, empowers cities to determine their "local affairs and government" subject to state legislative enactments uniformly applicable to all cities. But being aware of the judicial interpretation of the Wisconsin provision and the pitfalls involved in judicial determination of home rule powers, its authors provided that, save for matters of municipal incorporation, establishment of municipal territorial boundaries, and taxation, cities may exempt themselves from state legislative enactments, state or local, not applicable uniformly to all cities. This provision accomplishes what the authors of the Wisconsin provision apparently intended by requiring the state legislature to act by uniform law applicable to all cities in the area of state affairs, but at the price of depriving the state legislature of its unrestricted right to conduct state government through classifying cities.

Inasmuch as Kansas cities may perform such functions as are not forbidden by uniform law applicable to all cities, judicial determination of what constitutes local affairs and government and what constitutes state affairs appears to have become unnecessary. The criterion for determining the legality of local action in either local or state affairs is whether the state legislature has already acted by uniform law applicable to every city. If the state has so acted, local action is thereby precluded. Evidently, the home rule provision's sole purpose in authorizing cities to determine their local affairs and government is to enable them to initiate legislation on matters which they conceive to be within the sphere of local affairs and government. Restrictions on local action will have to come from the state legislature. It seems a paradox that under a provision intended primarily for home rule, unless forbidden by uniform law applicable to all cities, cities may initiate legislation on state matters.<sup>164</sup> Although the Kansas provision may represent a na-

163. KAN. CONST. art. XII, § 5. See also DRURY, HOME RULE IN KANSAS (Univ. of Kan. Publications, Govt. Research Series No. 31, 1965).

164. Under some *imperio in imperium* provisions, municipalities have been permitted to act on state matters until forbidden by state law. See, e.g., Barrett v. State,

tional trend in current home rule thought, particularly as embodied in recent model home rule plans, it has its pitfalls, particularly where the state legislature neglects to place appropriate prohibitions on local action in matters usually considered state matters.<sup>165</sup>

### *Enumeration of Powers and Functions*

The old NML model's enumeration of home rule powers and functions which must be exercised consistent with general law may be dubious in principle, inasmuch as the "consistency requirement" can result in complete legislative denial of any powers granted. But, as noted earlier, most of the enumerated powers are either inherently state powers or contain elements of state interest, and consequently cannot be delegated unless subject to control by superior state law. Nevertheless, in any instance where the legislature has authority to deny or to interfere with exercise of home rule prerogatives, the temptation is always present for it to do so. For example, although the Alaska Constitution authorizes home rule cities to "exercise all legislative powers not prohibited by law or by charter," the Alaska legislature has enacted a statute requiring charter provisions not to conflict with the laws of the state.<sup>166</sup> Further, the New York home rule amendment directs the state legislature to enact a "statute of local governments" granting municipalities additional powers in areas other than "property, affairs or government," such powers to be repealed only by specific legislation enacted in two consecutive sessions.<sup>167</sup> But some belief exists that the New York legislature has reserved to itself authority to repeal, at any time, all powers granted. Further, the statute does not grant any significant powers not already existing in either the state constitution or statutes.<sup>168</sup>

In the ideal sense, home rule powers should not depend upon legis-

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44 Ariz. 270, 36 P. 2d 260 (1934). On the other hand, it has been judicially held that home rule municipalities lack authority to act on state matters. See *Green v. City of Amarillo*, 244 S.W. 241 (Texas Civ. App. 1922); *Madison v. Tolzman*, 7 Wis. 2d 570, 97 N.W. 2d 513 (1959). These decisions, however, are isolated and thus do not represent the trend in judicial thinking of Wisconsin and Texas courts.

165. For consideration of this problem which arises from provisions based on the NLC and new NML models, see p. 310 *infra*, *The NLC and New NML Models Considered: The State-Municipal Dichotomy*.

166. ALASKA CONST. art. X, § 11; ALASKA STAT. § 29.40.010 (1962).

167. N.Y. CONST. art. IX, § 2b(1) (Supp. 1967).

168. See Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1144, 1152-1153 (1966).

lative or judicial whim, but should be granted directly by the constitution. Although, in view of the fact that it involves largely state matters, the particular enumeration of powers and functions to be exercised consistent with general law made in the old NML model seems proper, enumeration of other specific powers and functions for exclusive municipal exercise also seems desirable. Writing in 1953, Schmandt observed: "Since experience has shown that it is undesirable to leave matters of policy as to state-city relations completely in the hands of the legislature, the determination should be made with as much exactness as possible by terms of the fundamental law itself."<sup>169</sup>

Whether strictly home rule powers and functions ever can be enumerated adequately in a constitutional provision is a question crucial to the future of home rule. Although proponents of the model home rule plan of the National League of Cities evidently believe they cannot be, the fact remains that the Colorado Constitution does enumerate some such powers and functions, including the municipal court system, which, by express constitutional language, are declared superior to state law.<sup>170</sup> As noted earlier, state and municipal governments possess a concurrent interest in most governmental functions, and Mendelson has suggested that home rule provisions should recognize this concurrent interest.<sup>171</sup> The recent draft New York Constitution, defeated in referendum vote November 7, 1967, did recognize this concurrent interest by empowering every local government to enact local laws not inconsistent with general laws relating to local aspects of matters of state concern.<sup>172</sup>

### *Suggested Changes*

Assuming that home rule represents good public policy, to prevent judicial and legislative erosion of home rule powers, and to enlarge the home-rule sphere, a provision should: (a) enumerate some home rule powers and functions, and (b), subject to the undoubted right of the state to conduct and control its government, grant municipalities authority to exercise those powers and functions in which they possess a concurrent interest with state government.

Since it is generally agreed that allocation of state-municipal powers

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169. Schmandt, *supra* note 87, at 410.

170. COLO. CONST. art. XX, § 6.

171. Mendelson, *Paths to Constitutional Home Rule for Municipalities*, 6 VAND. L. REV. 66, 69-70 (1952).

172. Art. XI, § 2(1). Draft Constitution may be found in New York Times. Sept. 27, 1967.

and functions is a political task, draftsmen of home rule provisions might attempt to designate some specific home rule powers and functions. Any attempt to enumerate should, of course, recognize that some matters, such as incorporation of cities, establishment of municipal territorial boundaries, and definition of crimes, should be assigned exclusively to state government. Moreover, the draftsmen should not designate as exclusively municipal any power or function which in the future may become state. But any enumeration whose local exercise would not unduly impair the conduct of state government seems both desirable and proper. In the numerous areas of concurrent municipal and state concern, some method should be devised which will allow municipal activity, provided it does not interfere with state interest. For example, municipalities could be empowered to act in areas or on subjects where the state legislature has acted, subject to a legislative veto by more than a mere majority vote, the veto to be exercised within a particular period of the next legislative session.<sup>173</sup>

Considered generally, the old NML model, though instructive to draftsmen of home rule provisions, should be viewed with some skepticism. This observation should not be construed as an entire condemnation of the model but rather as suggesting that it needs strengthening in areas where it now appears defective. Fully realizing the difficult problems involved, the author does believe that much can be gained from the standpoint of home rule by adoption of provisions which enumerate at least some home rule powers and functions and which authorize municipal activity in the sphere of concurrent state and municipal interest.

#### MODEL HOME RULE PLANS BASED ON LEGISLATIVE SUPREMACY

##### *Basic Differences Between NLC and New NML Models*

Based on the assumption that in a dynamic society home rule powers are largely incapable of precise constitutional or judicial definition, both the National League of Cities and the National Municipal League have now adopted model provisions which subject home rule to legislative control. These model plans are very similar in principle, the new NML model apparently being borrowed from the model adopted ten years earlier by the National League of Cities; however, they do contain

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<sup>173</sup>. Precedent for state legislative approval of local home rule action already exists under Delaware and Vermont legislative home rule provisions. See p. 276 & notes 49 and 50 *supra*.

some important differences. First, since the NLC model in *imperio in imperium* fashion places the procedural area of home rule, *i.e.*, the area concerned with administrative organization and related matters, entirely under municipal control, the scope of state legislative authority over home rule is broader under the new NML model. This latter model provides: "A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, or to counties or cities of its class, and is within such limitations as the legislature may establish by general law."<sup>174</sup>

In its grant of substantive powers, the NLC model employs somewhat more involved language than the new NML model. The meaning of this language is not altogether clear. In addition to granting a home rule municipal corporation all powers granted a general law city of its particular class, save as limited by its charter, the NLC model provides:

A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute.<sup>175</sup>

Second, these models provide different methods for classifying cities

174. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1963). This edition of the MODEL STATE CONSTITUTION confers home rule on counties and cities in the same section. County home rule, which is not considered in this article, is constitutionally authorized for all or some counties in California, Maryland, Ohio, Texas, Missouri, Louisiana (parishes), Washington, Florida, Minnesota, New York, Oregon, Michigan, Alaska (boroughs), and Hawaii. But in terms of actual adoptions, compared with municipal home rule, it has made very little headway in this country. California, with ten home rule counties, leads in the number of adoptions. Concerning county home rule generally, *see* DUNCOMBE, COUNTY GOVERNMENT IN AMERICA 242-246 (1966); SNIDER, LOCAL GOVERNMENT IN RURAL AMERICA 104-113 (1957).

175. AMERICAN MUNICIPAL ASSOCIATION (National League of Cities), MODEL CONSTITUTIONAL PROVISION FOR MUNICIPAL HOME RULE, § 6 (1953). Although several states have recently adopted provisions embodying the idea of legislative control of home rule expressed in this provision, only two, North Dakota and South Dakota, have adopted provisions borrowing its phraseology. The North Dakota amendment, moreover, is permissive in character. *See* N.D. CONST. § 130 (1965); S.D. CONST. art. X, § 5 (1963).

for purposes of enacting legislation applicable to them. The new NML model, along with forbidding enactment of special or local legislation, provides that cities may be classified by general law into as many civil divisions as necessary on the basis of population, or on any other reasonable basis.<sup>176</sup> But the NLC model, along with stipulating that the legislature may act in relation to a municipal corporation only by laws which are general in terms and effect—an indirect prohibition of special and local legislation—provides that municipal corporations may be grouped into not more than four classes based on population, with not less than two cities in each class.<sup>177</sup>

Since it would seem to lend itself less to state legislative abuse, the NLC classification plan appears much preferable to that of the new NML plan. Under the latter, certain legislative abuses can occur: (1) any number of classes of cities can be created which could result in special legislation disguised as classification; and (2) inasmuch as the phrase "on any other reasonable basis" involves exercise of value judgment, some undesirable classification scheme, provided it wins judicial sanction, can be established.<sup>178</sup> Because it places the procedural area of home rule largely beyond state legislative control and because its classification plan appears to guard the more populous cities against state legislative discrimination, the NLC model appears generally preferable to the new NML model. But in the substantive area both models make home rule a matter of legislative grace, *i.e.*, they grant no home rule beyond legislative retraction, and, as experience demonstrates, the state legislature is sometimes an untrustworthy guardian of home rule powers.

Both the new NML and NLC models appear unique in home rule thought in reversing Dillon's rule by enabling cities to exercise all powers and perform all functions not denied by state legislation. Under Dillon's rule, cities can ordinarily exercise only those powers granted

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176. §§ 4.11, 8.01(1).

177. §§ 1, 3.

178. The KENTUCKY CONSTITUTION (§ 156) establishes six classes of cities with specific population limits, and provides that, in classifying cities, the state legislature "in the absence of other satisfactory information . . . shall be governed by the last preceding federal census." In view of this constitutional language, the Kentucky Court of Appeals, the state's highest court, refuses to take judicial recognition when the legislature assigns a city to a class not warranted by its actual population. *See Griffin v. Powell*, 143 Ky. 276, 136 S.W. 626 (1911). Presently, based on 1960 U.S. Census figures, some seventy cities are apparently improperly classified. *See KY. LEGIS. RESEARCH COMM'N, KENTUCKY LAW AND THE CITIES 1* (June, 1966).



by the legislature. From the viewpoint of home rule, this provision of these models represents a significant advance, since municipalities need only to lobby to prevent enactment of inimical legislation in order to protect home rule prerogatives. Further, since they permit a home rule city to exercise all powers not forbidden by charter or by state law, the charter serves only as an instrument to limit municipal action. In contrast to a charter which is considered a grant of power, wherein municipal powers and functions must be stated in great detail,<sup>179</sup> a charter of this character should not only be less difficult to draft, but also should broaden the sphere of home rule authority. Since there has been very little case law interpreting provisions based on these models, it is perhaps too early to conclude how successful they will prove in practice.

#### THE NLC AND NEW NML MODELS CONSIDERED

Both the NLC and new NML models and provisions based on them reflect not only a sense of failure in provisions based on the *imperio in imperium* model, but also represent an acceptance or acquiescence in judicial rulings of state interest in home rule cases. They appear to offer, at least in theory, a much wider area for exercise of municipal home rule initiative than do *imperio in imperium* provisions, such as those of New York and Rhode Island, and numerous other states, where the substantive grant of home rule has been narrowly contracted through adverse judicial rulings.

#### *The State Legislature and Home Rule*

Whether these models will provide a long-run satisfactory solution for resolving the problem of conferring substantive home rule remains unanswered. Certain serious questions, however, can be raised. First, like several other existing home rule provisions, they make home rule a matter of state legislative grace, and home rule of this character, some believe, is not truly home rule, at least in its historic sense. In general, home rule under this type of provision has enjoyed only mixed success, having succeeded only where there has been present a favorable legislative climate. But it is possible that a home rule provision based on legislative supremacy, particularly when coupled with a plan for classifying cities similar to that suggested by the NLC model, can prove satisfactory, especially with a state legislature where urban populations

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179. Cf. ADRIAN & PRESS, *supra* note 6, at 172.

are properly represented. In Texas, where home rule is generally considered successful, for state legislative purposes home rule cities are treated as a group. The constitutions of several recent home rule states, such as Maryland and Kansas, require that before home rule ordinances may be negated, state legislation applicable to all cities must be enacted. Provisions such as these possess two advantages: (1) since it must consider on a state-wide basis the consequences of its action, the state legislature may hesitate to enact unwise or ill-considered legislation; and (2) in the event it attempts to enact such legislation, resistance from all cities should suffice to thwart the legislative will.

Since the reapportionment decision in *Baker v. Carr*<sup>180</sup> and the decisions in subsequent cases growing out of that decision, cities are in a better position to defend their home rule interests because they are more properly represented in the state legislature. Writing prior to *Baker v. Carr*, Professor Bromage, an advocate of the old NML model stated:

One might be willing to give more acceptance to the AMA (NLC) model if there were greater assurance over-all, of the reapportionment of state legislatures in the direction of greater urban representation. A state legislature representing urban populations more accurately might be intrusted with the kind of life or death discretion over a home rule power, delineated in the AMA (NLC) Model.<sup>181</sup>

Now it may plausibly be argued that if cities acting through their state municipal leagues do not lobby effectively to protect their interests, they deserve whatever state legislative treatment they receive. Still, this may be a questionable argument since urban representatives in at least some state legislatures sometimes do not vote in unison. Further, a large proportion of the urban population is newly arrived and, consequently, may be inarticulate in expressing the urban viewpoint. In any event, because of their increasing representation in the state legislature, cities at least appear to be in a better position to advance their own interests. Moreover, in instances where all cities are classified into a single group for legislative purposes or in instances where a state's most populous city is included along with several others in a single class, the likelihood of state legislative discrimination against the most populous

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180. 369 U.S. 186 (1962).

181. Bromage, *Home Rule—NML Model*, 44 NAT. MUN. REV. 132, 135 (1955).

city is lessened. The fact remains, however, that in states whose constitutions subject home rule to legislative control, cities must lobby to protect and advance their interests, and a favorable home rule climate must exist.

### *The State-Municipal Dichotomy*

Another perhaps equally serious objection to the NLC and new NML models is that they do not face at all the fundamental question, raised years ago by Frank G. Goodnow, concerning what should constitute the proper sphere of municipal autonomy, but rather by leaving the question for legislative determination, they merely lay it aside.<sup>182</sup> There is strong reason for believing that this question, which has plagued home rule since its inception, will inevitably recur under provisions based on these plans.<sup>183</sup>

The evident purpose of all home rule provisions, explicitly stated in some and strongly implied in others, is to enable municipalities to legislate in the area of municipal affairs, not state affairs. Yet, under provisions based on model plans emphasizing legislative supremacy, cities can exercise state powers in the absence of legislative prohibitions. As an illustration of the problem which can occur with provisions of this kind, when the city of Newport attempted to license certain businesses under guise of exercising the police power, a power inherent in state government, the Rhode Island Supreme Court not only ruled that the police power was not included within the home rule grant to enact local laws relating to "property, affairs and government," but it also called attention to the fact that the Rhode Island home rule provision expressly states that its intent is to confer the right of self-government only in all local matters.<sup>184</sup>

The Alaska Local Affairs Agency has noted that, in Alaska, whose constitution empowers cities to exercise all legislative powers not prohibited by law or charter, "[s]tatutes covering divorce, consumer protection, civil rights, criminal and civil procedure, licensing, intra-state transportation, and so forth are all supposed to apply uniformly throughout the state. Yet, few (if any) legislative prohibitions are attached to

182. GOODNOW, *supra* note 2, at 9-10. See also CHICAGO HOME RULE COMM'N *supra* note 2, at 222.

183. Cf. RUSCO, *supra* note 2, at 47; SANDALOW, *supra* note 53, at 687-691.

184. R.I. CONST. amend. 28, § 1; Newport Amusement Co. v. Maher, 92 R.I. 51, 166 A. 2d 216 (1960). See also p. — & note 164 *supra*.

these statutes to prevent home rule powers being exercised in conflict with them.”<sup>185</sup>

In the Alaskan situation, the state legislature should enact legislation to provide appropriate prohibitions,<sup>186</sup> but in the event the legislature neglects to act and in the event the courts should refuse to intervene on the ground of lack of jurisdiction, near chaos could result. The Alaska Agency believes, however, that in the absence of state legislative action “the courts will be hard pressed not to adopt a rule of conflict or inconsistency or, at least, of implied prohibition of home rule powers.”<sup>187</sup> It suggests that the courts perhaps can find the answer to the problem by returning to the concept of local government itself. Although the Alaska Constitution does give cities all legislative powers, it does not make each city a state legislature. Rather, the power conferred on each city is for carrying out its own purposes. The courts, according to this reasoning, can inquire whether municipal exercise of a particular power is pertinent to the function a city is intended to serve.<sup>188</sup>

Although the Alaska Agency states that judicial determination of pertinence does not involve application of a test of state versus local function, it would seem at least to require a test closely approximating it. Thus it appears quite likely that provisions of this type may eventually, like earlier and more traditional provisions, throw home rule into the judicial arena, a situation which its authors have sought to avoid. Much legislative wisdom and diligence will be required for these provisions to be entirely successful. Not only must the state legislature itself refrain from enacting measures violating home rule principles, but it also must enact appropriate legislation to guard against local en-

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185. Office of the [Alaska] Governor, *Home Rule in Alaska*, 2 ALASKA LOCAL GOVERNMENT 1.4 (1962).

186. The home rule provision of the draft NEW YORK CONSTITUTION, defeated in referendum vote November 7, 1967, which was based on the NLC and new NML models, contained a safeguard against local encroachment on state legislative authority. It provided that the home rule authority which it delegated should become effective, and should remain in effect, only while there existed a state statute of restrictions limiting exercise of home rule powers. See art. XI, § 2(b). The U. S. Advisory Commission on Intergovernmental Relations also recognizes the necessity for placing limitations on local initiative under provisions based on the NLC and new NML models. It suggests that “delegation of residual powers should be preceded by careful review of affirmative limitations upon the powers of local government within a state.” U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOVERNMENT 73 (Oct., 1962).

187. Home Rule in Alaska, *supra* note 185.

188. *Id.*

croachment on state prerogatives. Since this model was formally proposed only in 1953, more time must elapse before it can be fully evaluated.

### THE FUTURE OF HOME RULE

Constitutional home rule has now existed in the United States for almost a century and is presently authorized in thirty-three states, although in some states it has in practice made little or no headway. While its quality and degree of success in any particular states is difficult to assess, it appears most successful in Michigan, California, Texas, Oregon, and Ohio. Since the end of World War II, it has been authorized by fifteen states, including the new states of Hawaii and Alaska, but it appears too early to evaluate it in these states. If judged merely by adoption of provisions and by degree of present home rule activity, sentiment favorable to home rule appears weakest in some special legislation states of the South and in the sparsely populated states of the Rocky Mountain region. Except for New Jersey, where legislative home rule appears successfully practiced, Illinois remains the most populous urban non-constitutional home rule state.

Inasmuch as several states are currently in the process of constitutional revision and other states may follow suit, considerable thought and attention within the near future may be focused upon adoption or amendment of home rule provisions. Progress in adoption and amendment of provisions, however, will not likely be uniform. Because of fear of worsening their current home rule situation, some states, such as Ohio, whose provisions have received extensive judicial treatment, may hesitate to amend them, even for improvement, and little desire for home rule will likely be manifested by states wherein the practice of special legislation remains firmly entrenched. The General Counsel of the North Carolina League of Municipalities said:

There has been no agitation for so called "home rule" in North Carolina; perhaps this is for the reason that, historically, municipalities have been able to secure the types of authority they desired by local charter acts, generally. With extremely rare exceptions, any local act desired by a member of our General Assembly for his county or a municipality in his county is enacted without hesitation (and naturally, without adequate consideration). So long as this situation obtains, I do not believe that the towns and cities of North Carolina will want to trade it for any "home rule" constitu-

tional or statutory provisions which would of necessity become the subject of numerous technical law suits. . . .<sup>189</sup>

On the basis of past experience, it is possible to foresee, at least with some degree of accuracy, the future course of home rule. Apparently the revived interest in it which arose following World War II has not wholly abated, and more home rule activity in the way of adoption of new or amended provisions may be expected. Home rule provisions of the future, like those of the recent past, will likely be based on the NLC and new NML models which, except for precedural matters under the NLC model, emphasize legislative supremacy. Existing provisions based on the *imperio in imperium* model, such as that contained in the old NML model, though not likely to disappear wholly, will rarely be adopted in the future.<sup>190</sup> Provisions based on legislative supremacy models, currently popular, have yet to prove themselves wholly satisfactory in practice; and experience, which only time can provide, may yet substantiate the arguments of their critics.<sup>191</sup>

The principal problem involving home rule, which remains unresolved, is that of determining or defining its proper province. Since state and municipal governments possess a concurrent interest in most governmental functions, these functions cannot be divided into separate and distinct categories except on the basis of arbitrary reasoning. Future provisions may allow municipal exercise, subject to a state legislative veto, of powers and functions in these areas of concurrent interest. And although, apart from the procedural area of home rule, it is very difficult to define powers and functions which home rule cities should be allowed to exercise exclusively, at least some attempt should be made in this direction. But no power or function should be designated as exclusively municipal if its character is likely to change.

Recently adopted provisions reveal important trends in current home rule thought, which, while not altogether new, is becoming more pronounced. Particularly significant is the fact that some of these

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189. Questionnaire reply by Ernest H. Ball, General Counsel, N.C. League of Municipalities, to Kenneth E. Vanlandingham, Fall, 1965.

190. This statement should not be interpreted to imply that *imperio in imperium* provisions have altogether failed; they have apparently succeeded in California, Oregon, and Ohio. But they belong largely to the home rule era ending 1912, and are not likely to be adopted in the future.

191. These arguments are: (1) they leave undefined the proper sphere of home rule; and (2) they make home rule a matter of legislative grace. See p. 308 *supra*, *The NLC and New Models Considered*.

provisions, such as those of Kansas and Massachusetts, empower cities to exercise home rule powers in the absence of charter adoption. In the past, charter adoption procedure prescribed by the state constitution has frequently been a long-drawn-out and time-consuming process, hedged in by cumbersome and unreasonable restrictions, and consequently some cities apparently have not adopted charters. If granted authority to exercise home rule powers directly, cities will be more likely to exercise them. Moreover, even where charter adoption is absolutely required, there appears to be a developing tendency to provide that a city charter shall constitute a limitation rather than a grant of power. When a charter is legally constituted a grant of power, in order to comply with Dillon's Rule, municipal powers and functions must be stated in minute detail; hence, long charters. A charter which is legally considered a limitation of power, such as Alaska's, is much less difficult to draft, inasmuch as it must state only prohibited powers and functions. Further, constitutional efforts have been made, and will continue to be made, to prevent arbitrary state legislative treatment of the more populous cities. Classification provisions based on the NLC model, some versions of which have already been adopted, should prove effective in accomplishing this aim in most instances.

The population of most urban areas, particularly those of the great cities and their suburbs, will continue to grow, and some may contend that increasing state interest engendered in the affairs of cities by this increasing population will thereby decrease opportunity for home rule. But, if the myriad units of governments situated within many metropolitan regions can ever be integrated under a single unit of government, this unit conceivably could be vested with vast home rule powers. Finally, better representation of cities in the state legislature, apparently assured by the United States Supreme Court's decision in *Baker v. Carr*, should result in more sympathetic and understanding legislative treatment. But home rule begins at home; no constitutional provision alone can assure it. If home rule is to become more meaningful, cities must not only become more aggressive in exercising it, but they must remain on the alert through their state municipal leagues to advance and protect their proper interests.