Constitutional Municipal Home rule Since the AMA (NLC) Model

Kenneth Vanlandingham
CONSTITUTIONAL MUNICIPAL HOME RULE
SINCE THE AMA (NLC) MODEL†

KENNETH VANLANDINGHAM*

Throughout its formative period, municipal home rule in the United States was defined primarily by the *imperium in imperio* doctrine.¹ That construct allows municipal autonomy within a limited sphere, such as

† This article is based in part on information obtained from questionnaires sent during the years 1970 and 1971 to directors of state municipal leagues, state departments of community affairs, state legislative reference bureaus, and university professors of law and political science, and on correspondence since then with several of these officials. The author wishes to thank all those who cooperated by supplying information, both published and unpublished. Responsibility for all conclusions drawn, and for all errors, is his own.

* A.B., M.A., University of Kentucky; Ph.D., University of Illinois. Associate Professor of Political Science, University of Kentucky.

¹ The *imperium in imperio* doctrine originated in the development of constitutional home rule in Missouri. By the provisions of that state’s constitution, cities were authorized to frame charters for their own government “consistent with and subject to the Constitution and laws of the State.” Mo. Const. art. IX, § 16 (1875). This requirement was eventually interpreted to mean “that only in matters involving statewide concern did charter provisions have to be consistent with and subject to the constitution and laws.” Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 284 (1968). See also Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 Mo. L. REV. 45, 51-57 (1968). The term “*imperium in imperio*” was used by Justice Brewer to describe this form of judicially defined municipal autonomy in St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468 (1893). For a general discussion of the development of the *imperio* doctrine, see Vanlandingham *supra*.

There is no unanimity among authorities as to the proper meaning of municipal home rule, but historically there is inherent in the concept the idea of some degree of local power free from state legislative and administrative control. At least one author has suggested that home rule implies a federal relationship between the state and its municipalities. See H. McBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE*, ch. 4 (1916). Those attempted judicial definitions of home rule suggest that it pertains solely
“municipal affairs,” the boundaries of which are left to judicial determination. Believing the imperio model to be unsatisfactory as an excessively narrow and uncertain avenue for municipal exercise of home rule powers, the American Municipal Association (AMA), subsequently re-to local self-government or to the internal affairs of a municipality. See, e.g., Attorney Gen. ex rel. Kies v. Lowrey, 131 Mich. 639, 642-43, 92 N.W. 289, 290 (1902); Commonwealth ex rel. Smillie v. McElwee, 327 Pa. 148, 152, 193 A. 628, 630-31 (1937); People ex rel. Metropolitan St. Ry. v. State Bd. of Tax Comm’rs, 174 N.Y. 417, 431-32, 67 N.E. 69, 70-71 (1903); People ex rel. Miller v. Johnson, 34 Colo. 143, 159, 86 P. 233, 238 (1905); Fragley v. Phelan, 126 Cal. 383, —, 58 P. 923, 925 (1899); Plantation Pipe Line Co. v. City of Bremen, 227 Ga. 1, 16-17, 178 S.E.2d 868, 879 (1970) (Hawes, J., dissenting). Constitutional provisions stating the purpose or meaning of home rule, reinforce the judicial limitation. See, e.g., ALAS. CONST. art. X, § 1 (“maximum local self-government”); COLO. CONST. art. XX, § 6 (“the full right of self-government in both local and municipal matters”); MASS. CONST. art. of amend. II (“the right of self-government in local matters”); N.M. CONST. art. X, § 6E (“maximum local self-government”); R.I. Const. amend. XXVIII, § 1 (“the right of self-government in all local matters”). The Florida constitutional provision is particularly illustrative of the restrictive approach to municipal home rule. It provides that: “Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.” FLA. CONST. art. VIII, § 2(b).

Throughout the entire period of constitutional home rule, and particularly during the past 40 years, most provisions adopted have placed home rule, especially substantive home rule, almost completely subject to state legislative control. Inasmuch as these provisions make home rule a matter of state legislative grace, not a constitutional right, proponents of imperio home rule usually consider them unsatisfactory, and the character of home rule existing under them seems inconsistent with judicial and constitutional definitions.


2. CAL. CONST. art. XI, § 5(a).


4. The imperium in imperio model contained in all editions of the Model State Constitution published by the National Municipal League (NML) between 1921 and 1962 is hereinafter referred to as the imperio model. In its most recent edition, the NML has preferred a legislative supremacy model with the imperio model as an alternative. See NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. VIII (6th ed. 1963) [hereinafter cited as NML, MODEL STATE CONSTITUTION].

5. “The familiar distinction between state and general concerns and municipal or local affairs, with which courts are confronted in certain existing home rule states, has not been susceptible to satisfactory application.” AMERICAN MUNICIPAL LEAGUE
named the National League of Cities (NLC), published a report, *Model Constitutional Provisions for Municipal Home Rule,* which proposed a different, though not entirely new or unique, approach to home rule. After reserving to cities themselves most of the procedural aspects of home rule, administrative organization, and related matters, the proposed model left allocation or determination of most substantive home rule powers and functions to the state legislature. Information obtained from replies to questionnaires sent by the author during the years 1970 and 1971 to directors of state municipal leagues and other interested students of municipal government in the United States revealed no unanimity of opinion concerning the utility of the report, or of the home rule model proposed in it. Nevertheless, the NLC report has greatly influenced the

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[National League of Cities], *Model Constitutional Provisions for Municipal Home Rule* 20 (1953) [hereinafter cited as NLC, *Model Constitutional Provisions*]; “*Imperium in imperio* is not a workable concept,” reply to author's home rule questionnaire, Victor C. Hobday, Executive Director, Municipal Technical Advisory Service, University of Tennessee, October 22, 1970. Although some municipal exercise of power has been upheld under the *imperio* doctrine, its critics point to the few powers actually sustained and the involved legal proceedings often required to define the limits of legitimate municipal action as substantially detracting from the validity of the doctrine. See generally Westbrook, supra note 1, at 76.

6. Although the report was never officially approved by either the old AMA or its Committee on Home Rule, it nonetheless represented the best available guide to constitutional municipal home rule according to the AMA's Executive Director at the time of its issuance. See NLC, *Model Constitutional Provisions,* supra note 5, at 3. The home rule model contained therein is hereafter referred to as the NLC model. That model is frequently associated with its principal author, Dr. Jefferson B. Fordham, Dean Emeritus of the University of Pennsylvania Law School, although its basic thesis—state legislative supremacy over cities in the substantive realm—is as old or older than the concept of home rule itself. Perhaps its unique contribution is its attempt to reverse Dillon's Rule by permitting municipal enactment of home rule ordinances absent contrary substantive state legislation. See note 16 infra. While the state legislature can prohibit or nullify such enactments through prior or subsequent legislation, the model precludes delay or denial of home rule by mere legislative inaction. There is no indication that the NLC intended the verbatim adoption of its home rule model, but considering in the aggregate all state constitutions in which portions of the model have been included, virtually the entire model has been adopted.

Curiously, only four years prior to publication of its 1953 home rule report, the then American Municipal Association published a study in which the *imperio* model was advocated. See R. Mott, *Home Rule for America's Cities* (1949). Dr. Mott defined home rule “as a relationship between the cities and the state in which the cities enjoy the fullest authority to determine the organization, procedures, and powers of their own governments, and a maximum of freedom from control by either the legislature or state administrative officers.” *Id.* at 5.

7. See note 13 infra & accompanying text.

8. Only a slight majority of respondents to the author's home rule questionnaire preferred the NLC model to the *imperio* model. Excluding those which were ambiva-
drafting of several newly adopted and revised constitutional provisions, and may have stimulated the adoption of constitutional home rule, although no concrete proof of this effect is available. Its greatest impact has been in states where home rule was not earlier authorized inasmuch as of all imperio states, only Missouri has constitutionally substituted an NLC provision for its existing imperio scheme. In its sixth edition of the *Model State Constitution*, the National Municipal League adopted as its preferred model one very similar to that of the NLC. Judging solely

9. In practice, home rule is virtually dormant or nonexistent in some states, though authorized constitutionally or by statute in every state except Indiana, Mississippi, and Alabama. Legislative home rule, which obtains by mere statutory authorization, and the constitutionality of which is uncertain until judicially upheld, is not widely practiced except in New Jersey and Virginia, and possibly also in Wisconsin and Washington. These latter two states additionally make constitutional provision for home rule. Concerning legislative home rule, see Vanlandingham, * supra* note 1, at 273-77.


Although it is difficult to determine precisely the extent to which home rule powers currently are exercised, with some few exceptions they appear more widely used in states having the longest history of home rule. With time, cities in states which have more recently enacted home rule likely will make more extensive use of their powers. Replies to the author's questionnaire received during 1970 and 1971 and subsequently published information have led the author to conclude that among the states with long-standing home rule provisions, home rule has been most vigorously exercised in Michigan, Texas, Ohio, Oregon, California, Minnesota, Colorado, Oklahoma, and Arizona, and among states with more recent home rule enactments, in Maryland, Connecticut, Illinois, and Alaska. Home rule powers also appear widely utilized in the legislative home rule states of Virginia and New Jersey.

10. New York and Rhode Island have unsuccessfully attempted to adopt constitutionally the NLC model.

11. The text of the NML home rule provision, evidently borrowing from the NLC model, is contained in *NML, Model State Constitution*, * supra* note 4, art. VII, § 6:

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
from the number and content of constitutional provisions adopted since its publication, the NLC model appears much more popular than the *imperio* model as a plan for authorizing home rule.

**Fordham-NLC Home Rule Theory**

Dean Fordham, the principal author of the NLC model, apparently became convinced of the validity of that approach to home rule through his research of the records of the Ohio Constitutional Convention of 1912, wherein the present Ohio *imperio* provision was proposed. He recently stated his inspiration for the NLC model:

> It is very interesting that among the delegates at the [Ohio] convention in 1912 was a member of the history faculty of the Ohio State University, Professor George W. Knight, who articulated a home rule theory which in much more recent years has had large influence....

Professor Knight believed that the constitutional grant of home rule should not be like that in California. He espoused a broad grant to municipalities, that were to have home rule status, of all powers that the legislature might, within its plenary competence, confer upon local government, always subject to the paramount authority of the legislature to impose by general statute such limitations, exceptions or exclusions as it should find desirable in the general interest. In other words, a home rule charter municipality would have a broad sweep of authority except as might be limited by its charter or by general legislation. This dispensation would generally eliminate the necessity of running to the legislature now and again for enabling legislation as to this or that. It would, moreover, impose political accountability upon the legislature for any limitations it might impose.

This conception, it seemed to me, involved a very sound and flexible approach, and I articulated it in a draft of Model Constitutional Provisions for Municipal Home Rule in 1953. The ‘Model’ was published by the American Municipal Association, now known as the National League of Cities.12

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Allocation of Powers—NLC Model

The most crucial portion of the NLC model is that which allocates powers and functions between the state and home rule municipalities.

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. This devolution of power does not include the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power, nor does it include power to define and provide for punishment of a felony.

A home rule municipal charter corporation shall, in addition to its home rule powers and except as otherwise provided in its charter, have all the powers conferred by general law upon municipal corporations of its general class.

Charter provisions with respect to municipal executive, legislative and administrative structure, organization, personnel and procedures are of superior authority to statute, subject to the requirement that the members of a municipal legislative body be chosen by popular election and except as to judicial review of administrative proceedings, which shall be subject to the superior authority of statute.13

13. NLC, Model Constitutional Provisions, supra note 5, at 19. The NLC model (§ 3) properly prohibits the enactment of special legislation for cities by suggesting the establishment of a maximum of four classes based on population with no fewer than two cities in a single class. While it has been said that the purpose of home rule is "to minimize the need for special legislation," Littlefield, Municipal Home Rule—Connecticut's Mature Approach, 37 CONN. B.J. 390, 402 (1963), and while most states have long had constitutional prohibitions of some sort against special legislation, only Massachusetts has constitutionally adopted the NLC stipulation. Mass. Const. art. of amend. II, § 8. Although what is tantamount to special legislation is enacted occasionally, sometimes at municipal request, in almost every state, in the few states where home rule is widely adopted and successfully practiced, especially Michigan, Ohio, Minnesota, Oregon, Texas, and California, it has virtually ended special legislation. The vast majority of states, however, follow the example of New York, where, despite its constitutional provision which requires state legislation applicable to the "property, affairs or government of any local unit" to apply alike to all affected units by laws general in "terms and effect," N.Y. Const. art. IX, § 2(b)(2), home rule is often thwarted through special legislation enactments disguised as general legislation in the form of "population acts."
Objective of the NLC Model

Beside seemingly offering wider opportunity for municipal exercise of home rule initiative in permitting home rule cities to act in areas not denied by state legislation, the NLC model shifts responsibility for determining home rule powers and functions from the judiciary, where it rests under imperio provisions, to the state legislature. Absent constitutional or legislative prohibitions, then, municipalities authorized to exercise home rule powers may exercise them free from judicial restraint. Viable home rule thus depends upon successful lobbying by cities to prevent enactment of anti-home rule legislation. The advocates of the NLC model evidently believe prevention of such measures to be easier than securing favorable decisions in the courts. This rationale apparently rests upon two primary unproved and perhaps unprovable assumptions: first, that imperio provisions are unworkable and have failed, and second, that the state legislature is a more competent and trustworthy guardian of home rule powers than the judiciary. A corollary premise is that legislative control or determination of these powers will allow greater flexibility in adjusting the state-municipal legal relationship. Such flexibility is considered highly desirable in the present context of sophisticated urban civilization and intricate patterns of local governmental units. Whether provisions based on the NLC model will successfully foster home rule remains to be seen, but at the least they preclude the municipal excuse for inaction afforded by Dillon's Rule.

14. Although a constitutional provision, however, may grant a home rule city all powers not forbidden by the state constitution or by the state legislature, there may still exist implied limitations on the authority of such a city to enact certain ordinances. See, e.g., Summer v. Township of Teaneck, 53 N.J. 548, 552-53, 251 A.2d 761, 763-64 (1969); Wagner v. Mayor & Mun. Council, 24 N.J. 467, 480, 132 A.2d 794, 800 (1957). Further, the judiciary always is responsible for resolving conflicts between state statutes and municipal ordinances by determining when the state legislature has preempted the municipal prerogative to legislate in a particular area. See notes 121-24 infra & accompanying text.


16. Dillon's Rule stipulates that a municipal corporation possesses only those powers expressly granted, fairly implied in or incident to the powers expressly granted, or essential to the accomplishment of the declared objects and purposes of the corporation. All reasonable doubt concerning the existence of a power is to be resolved against the corporation. See 1 J. DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).
Persistence of the Imperio Idea

Though the NLC model currently appears more popular than the imperio model, there is disagreement as to which model is preferable. No state has adopted a strictly imperio provision since Utah did so in 1932, but the fact that several states have recently adopted provisions combining features of both NLC and imperio models evidences strong sentiment in favor of the imperio idea. These provisions express the home rule grant in imperio language such as "municipal concerns, property and government," and make it subject to state legislative supremacy. Municipal home rule having been historically conceived as directed solely to municipal affairs, it is perhaps logical and proper to draft provisions in the imperio style, but since such provisions limit the exercise of home rule initiative to the area of the grant, the allowable scope of home rule is seemingly not as broad as would be permitted by provisions based strictly on the NLC principle of municipal initiative in all areas not forbidden. Although somewhat logical inasmuch as the imperio idea seems inherent in the concept of home rule itself, provisions which combine NLC and imperio features likely will have the effect of defeating the broad intent of NLC proponents to lessen the role or influence of the judiciary in home rule. Such provisions not only will necessitate the definition of home rule powers and functions, a task NLC proponents believe almost impossible, but also will require a resolution of conflicts between state and municipal governments arising from disputed authority to exercise powers.

The influence of the NLC model on recently adopted home rule provisions, and the controversy concerning the relative merits of the NLC and imperio models, invites their study and comparison. Although it has now been issued for some 22 years, the NLC concept has been the

17. See notes 8-11 supra & accompanying text.
19. The NLC principle is embodied by the Pennsylvania provision which empowers a home rule city to "exercise any power or perform any function not denied" by the state constitution, by its home rule charter or by the state legislature. Pa. Const. art. 9, § 2. Similarly, the Alaska constitution empowers a home rule city to "exercise all legislative powers not prohibited by law or by charter," Alas. Const. art. X, § 11; the New Mexico constitution empowers a home rule city to "exercise all legislative powers and perform all functions not expressly denied by general law or charter," N.M. Const. art. X, § 6D; and the Montana constitution empowers a home rule city to "exercise any power not prohibited by [the state] constitution, law, or charter," Mont. Const. art. XI, § 6.
subject of few interpretive judicial decisions. Nonetheless, decisions in a few states, especially Massachusetts, New Mexico, and Alaska, may offer sufficient information to allow some evaluation of the NLC model as well as a comparison of its viability and effectiveness with earlier provisions based on the *imperio* construct.

**The NLC Model Analyzed**

Although advocates of the NLC model may consider an *imperio* provision antiquated and unworkable because of the language in which it is phrased and because of the manner in which it attempts to confer home rule authority, the NLC model itself presents serious practical, as well as constitutional or legal, difficulties. Its most significant aspects are its reversal of Dillon's Rule, its conferral of most procedural functions upon home rule cities, a power generally accorded municipalities under *imperio* provisions, and its subjection of most substantive home rule powers to state legislative control. The absence of judicial interpretation of provisions based on the NLC model has left much of the concept unclear and unexplained. Most states which have adopted portions of it have rephrased them in more traditional and perhaps more meaningful language. The majority of provisions adopted in recent years are hybrids, taken partially from the NLC model and partially from existing home rule provisions. Since the phraseology of similar provisions differs greatly, the meaning of home rule accordingly varies from state to state. For this reason discussion, in this article, of the various major provisions of the NLC model cannot accurately describe home rule as it functions in any particular jurisdiction. Its meaning in any given state must neces-

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20. Lack of judicial interpretation may be explained in part by the fact that provisions based on the NLC model have been adopted only very recently. It is also possible, though by no means certain, that provisions based on the NLC model may require less judicial interpretation than *imperio* provisions.

21. Some state courts have adhered to a primary role confined to the decision of actual controversies, and, avoiding constitutional questions whenever possible in reaching decisions, have done little to explain the meaning of constitutional home rule provisions. In Leavenworth Club Owners Ass'n v. Archison, 208 Kan. 318, 492 P.2d 183 (1971), the Supreme Court of Kansas, finding no conflict between a state statute regulating the serving of alcohol and a more restrictive city ordinance, declined to reach the home rule issue. The court said, "This is not the occasion for a treatise construing article 12, § 5 [the home rule provision] and defining the powers bestowed thereby upon Kansas municipalities." *Id.* at 323, 492 P.2d at 187. One recent author has commented, "Few people even after a decade of experience under Article 12, Section 5 really know what 'home rule' means in Kansas." Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 Kan. L. Rev. 631 (1972).
arily derive from interpretations of its home rule scheme by the state judiciary.

The NLC Home Rule Grant

In making the home rule grant the NLC model empowers a charter (home rule) city to exercise any power or perform any function which the legislature has power to devolve upon a non-home rule city, and which is not denied to that city by its charter or by general law. Several questions are raised by the language and the manner in which the grant is stated. First, although the word "devolve," adopted only in the North Dakota provision, obviously means "to transfer power or authority to," its inclusion in a home rule provision seems somewhat inappropriate. According to an early opinion of the Supreme Court of California, "instances of [the] appropriate use [of "devolve"] are found when speaking of the succession of estates upon death, or upon a change of official incumbents; also in proceedings in bankruptcy or insolvency, whereby the act or operation of law the estate of the bankrupt devolves upon his assignee." The United States Constitution uses the word "devolve" to describe the transfer of powers from the President to the Vice President. While its use in a home rule provision is perhaps a trivial matter and evidently has no legal significance, it is submitted that "grant," "delegate," or "confer" would have been more meaningful.

Second, as Dean Fordham has admitted, it is not known precisely what powers the legislature may devolve upon a non-home rule city. Such powers are likely broad, but they may not be unlimited. It may be that because of the local or municipal idea inherent in the concept of home rule, only local or municipal powers may be conferred. That interpretation would be tantamount to reading the imperio concept into the NLC model, since while home rule may be difficult to define, it usually does not encompass the exercise of state powers by home rule

22. The provision making the grant is set out at the text accompanying note 13 supra.
23. N.D. Const. art. VI, § 130.
25. U.S. Const. art. 2, § 1, cl. 6.
27. It has been held that a state legislature cannot delegate authority to district courts to decide annexation cases. See City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969).
Indeed, the Alaska and New Mexico Supreme Courts have already imported the state-municipal dichotomy into their home rule provisions, provisions very similar in principle to the NLC model. Despite the language of the Alaska provision, which empowers a home rule borough or city to exercise all legislative power not prohibited by law or charter, the Alaska court said that the power of a home rule municipality to enforce an ordinance which conflicts with a state statute depends upon whether the matter regulated is of state-wide or local concern. That court had earlier adopted what it called the "local activity rule," which was virtually the old state-versus-local test used in imperio states to resolve conflicts between state statutes and municipal ordinances.

The New Mexico home rule provision stipulates that "[a] municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." In Apodaca v. Wilson the Supreme Court of New Mexico upheld the right of the city of Albuquerque to levy increased sewage and water service charges on the ground that management of sewage and water facilities was local in character. The court found the term "general

28. It seems paradoxical that while some provisions, such as those of Alaska and New Mexico, expressly state "maximum local self-government" as their purpose, see note 1 supra, they further authorize home rule cities to exercise all powers, including presumably state powers, not forbidden by the state legislature. These provisions imply great faith in the state legislature's competence to prevent municipal governments from interfering in state affairs. By contrast, judicial interpretation in some imperio states allows home rule cities to act upon state matters until forbidden by state law. See notes 108-12 infra & accompanying text.

30. See Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d 115, 122 (Alas. 1970), in which it was held that the city of Anchorage could not deny Chugach a permit to extend its services into the city limits after Chugach had obtained a certificate of public convenience and necessity from the state public service commission. This decision was criticized in Sharp, Home Rule in Alaska: A Clash Between the Constitution and the Court, 3 U.C.L.A.-Alas. L. Rev. 1, 53-54 (1973). Sharp contended that by reading the imperio doctrine into the Alaska provision, the Supreme Court of Alaska acted contrary to the intentions of the authors of the state constitution. The decision of the court would appear correct inasmuch as it had been anticipated earlier. See note 38 infra & accompanying text.

The Alaska court subsequently decided a case involving conflict between a state statute and a municipal ordinance without mentioning the "local activity rule." See Jefferson v. State, 527 P.2d 37 (Alas. 1974). In its opinion the court stated, "The test we derive from Alaska's constitutional provisions is one of prohibition, rather than traditional tests such as statewide versus local concern." Id. at 43 (footnote omitted). In a concurring opinion, Justice Connor reaffirmed his support of the "local activities" rule. Id. at 44.

31. N.M. Const. art. X, § 6D.
law" as stated in the provision to mean "a law that applies generally throughout the state, or is of statewide concern as contrasted to 'local' or 'municipal' law." The court looked to the interpretations of imperio provisions by other state courts, and adopted the Oregon rule that "while a general law supersedes a municipal charter or ordinance in conflict therewith, . . . the subject matter of the general legislative enactment must pertain to those things of general concern to the people of the state. A law general in form cannot . . . deprive cities of the right to legislate on purely local affairs germane to the purposes for which the city was incorporated." Thus despite the plain language of the New Mexico provision empowering the state legislature to deny altogether to home rule cities the right to exercise all legislative powers and to perform all functions, the court has effectively extinguished that power where functions and powers are local or municipal in character. This decision will impose upon the court the task of classifying governmental powers and functions into state and municipal categories. The possibility of a reading of the state-municipal dichotomy into the recently adopted Missouri provision has been raised, and some decisions of the Supreme Judicial Court of Massachusetts indicate that that court eventually may move in that direction. Such an interpretation would place

33. Id. at 521, 525 P.2d at 881. The court, however, failed to elaborate upon its apparent distinction between a law of state application and a law of statewide concern, H. McBAIN, supra note 1, at 636-37. The problem could have been avoided had the constitutional provision itself defined "general law."

34. 86 N.M. at 522, 525 P.2d at 882, quoting City of Portland v. Welch, 154 Ore. 286, 296, 59 P.2d 228, 232 (1936).

35. In its opinion the court also noted the phrase "not expressly denied" and took it "to mean that some express statement of the authority or power denied must be contained in . . . general . . . or otherwise no limitation exists." 86 N.M. at 521-22, 525 P.2d at 881-82. This view is similar to that of Antieau. See note 45 infra & accompanying text. Implied preemption was not involved in this case, nor did the court indicate an awareness of the difficulties involved in the preemption question.

Apodaca illustrates the difficulty courts have in avoiding the influence of earlier imperio decisions. From the opinion in this case, it appears that the New Mexico court was wholly unfamiliar with the theory underlying the NLC model.

36. See Comment, State-Local Conflicts Under the New Missouri Home Rule Amendment, 37 Mo. L. Rev. 677, 692 (1972). Thus far, the Missouri provision has not been litigated extensively. Without referring to it, a Missouri court of appeals decision involving county home rule based on the imperio doctrine established that a county home rule charter provision relating to a private or local matter prevailed over a conflicting state statute. State ex rel. St. Louis County v. Campbell, 498 S.W.2d 833 (Mo. Cr. App. 1973). Missouri may be unique in having an imperio provision for county home rule and a legislative supremacy provision for municipal home rule.

MUNICIPAL HOME RULE

states with provisions based on the NLC model in much the same predicament as those with imperio provisions, a position the authors of the NLC model sought to avoid.38

The absence of a specific imperio grant in the NLC model, as well as in provisions based on, or similar to, the NLC model, such as those of Alaska, New Mexico, Montana, and Pennsylvania, poses a difficult problem by obfuscating the line of demarcation between state and municipal authority to exercise powers. This problem has existed since the inception of home rule itself, and has never received an entirely satisfactory answer. One solution is judicial reading of the state-municipal dichotomy or the imperio concept into NLC-type provisions, but such an approach alters or defeats the intent and purpose of the creators of the NLC model. Another solution might be the enactment of a state code of restrictions on home rule initiative. The 1967 draft New York State Constitution contained a provision based in part on the NLC model and provided that home rule powers could be exercised only during the period when such a code of restrictions was in effect.39 Although the New York provision may represent the best approach, the preparation and enactment of a fully effective code presents significant difficulties, especially in older states with considerable statutory law governing municipalities, where codification would necessitate a great deal of time and expense and might encounter substantial opposition from municipal officials fearing loss of municipal autonomy.40 Further, legislative inability to foresee conflict between a code and legislation both present and future may render the code ineffective at times.41 Nevertheless, enactment of a code specified by a proposed law to be sufficiently a state concern and therefore open to state legislation; the second blocked the effectuation of a statute which the court first determined to involve a municipal interest (proportional representation), and then found it to be impermissible special legislation.


39. Draft N.Y. Const. art. XI, § 2(b), published in the N.Y. Times, Sept. 27, 1967, at 25, col. 6. This draft was rejected in a referendum vote.


41. Following the decision in Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d
appears desirable even though it may later prove defective and require amendment. Failure or neglect of the state legislature to draw a clear line between state and municipal authority to exercise powers could pave the way for abuse of municipal initiative and result in a disruption of state-municipal relations. The NLC report itself is somewhat inconsistent in this area, inasmuch as the text of the model does not contain the word "expressly," yet in the explanatory comment it is stated that a home rule city may exercise any appropriate power or function unless expressly limited by charter or general statute. The term "appropriate power or function" is left undefined, but in view of the home rule grant supplied in the model, it apparently means any power or function which the state legislature has authority to devolve upon a non-home rule city. As earlier noted, the extent of a state legislature's authority to devolve power upon such a city remains judicially undetermined.

Constitutional provisions based on the NLC model evidence an awareness that the NLC text does not contain the word "expressly." Although the New Mexico and Illinois provisions do include the term or its equivalent, it is absent from other recently adopted provisions. The inclusion or omission of the term has considerable bearing on cases involving state-versus-municipal authority to exercise powers, inasmuch as there exists authority for the proposition that, absent an expressed legislative prohibition, municipal home rule enactments should be judicially upheld. Regardless of whether a provision specifies the manner of legisla-

115 (Alas. 1970), see note 30 supra, the Alaska municipal code was rewritten and re-adopted. The restrictions imposed on municipalities are set out in ALASKA STAT., § 29.13.100 (1972 & Supp. 1974).


43. See note 26 supra & accompanying text.

44. See N.M. Const. art. X, § 6D, ILL. CONST. art. VII, § 6(i). For discussion of the Illinois preemption provision, see note 52 infra & accompanying text.

45. See generally 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW, § 5.41, at 5-125 to 5-126 (1975). The approach to the complex problem of preemption offered by both Antieau and drafters of the NLC model appears to be too simplistic. Permitting a home rule unit to do whatever is not expressly forbidden by the state legislature does not often lend to a satisfactory resolution of the preemption issue. See notes 46-51 infra & accompanying text. The Supreme Court of Alaska has declined to deal with this problem as one of preemption by treating it rather as involving resolution of conflict between a state statute and municipal ordinance. See, e.g., Macaulay v. Hildebrand, 491 P.2d 120 (Alas. 1971); Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d 115, 121 (Alas. 1970); Rubey v. City of Fairbanks, 456 P.2d 470, 475 (Alas. 1969). The preemption doctrine has been widely applied by the Supreme Court of California. See, e.g., In re Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962). According to
tive proscription, the neglect or failure of a state legislature to circumscribe the home rule enactments should not necessarily require automatic judicial sanction of municipal action. There are some circumstances in which the judiciary must act to protect the rights and interests of the larger community, the state.46 Home rule cities can be neither permitted to enact ordinances having substantial impact on citizens living beyond their territorial borders,47 nor allowed to enact ordinances on matters requiring uniform state regulation.48 Further, the idea that the tension between state and municipal interests can be resolved by express legislative prohibition presumes too great wisdom and knowledge on the part of the state legislature. Despite judicial doctrine that a state legislature is presumed to have knowledge of its own previous enactments,49 actual experience demonstrates a not uncommon absence of such knowledge. Moreover, it is exceedingly difficult, if not impossible, for a legislature to anticipate completely the impact of each enactment upon existing state law and on municipal ordinances.50 Stating that it would place "an unwarranted burden upon the state legislature and would accomplish very little," the Supreme Court of Alaska rejected the argument that the legislature should label each piece of state legislation intended to limit the power of home rule cities; the court further said it was not within its province to specify the form in which the legislature should enact laws.51 Although highly desirable and perhaps necessary,

one California court the term "preemption" (also sometimes called "occupation of the field doctrine") means that "where the legislature has adopted a scheme for the regulation of a given subject, local legislative control over such phases of the subject as are covered by state legislation ceases." Alta-Dena Dairy v. County of San Diego, 271 Cal. App. 2d 66, 75, 76 Cal. Rptr. 510, 516 (1969).

46. "There is within a municipality no political pressure to check the enactment of ordinances adverse to the interest of the state and, if the state legislature is unwilling or unable to preclude municipal enactments, the judiciary is the only available protector of the state's interest." Note, Conflicts Between State Statutes and Municipal Ordinances, 72 Harv. L. Rev. 737, 747 (1959).


50. See note 41 supra & accompanying text.

51. Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d 115, 120 (Alas. 1970). In his concurring opinion to a subsequent decision by the same court, Justice Connor said:

A home rule concept which relies only on express prohibition to define
a state-enacted code of restrictions on home rule municipalities may not prove entirely satisfactory by reason of this same inability to foresee the future impact of legislation. Of course, judicial decisions can always trigger corrective action by the legislature.

During the brief period of constitutional home rule in Illinois, the Illinois General Assembly has attempted to indicate its intent to preempt powers otherwise secured to home rule cities. This constitutionally-required legislative procedure, though at times raising questions concerning proper labeling of bills, has apparently worked satisfactorily. Obviously, in these and in other states questions of state-municipal conflict or state preemptions will continually arise, and their only resolution appears to lie with the judiciary acting on an ad hoc basis.

State Enactment of Private Law Governing Civil Relationships

Another troublesome aspect of the NLC model, contained in the same section as the home rule grant, is the stipulation that, "[t]his devolution of power does not include the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." This provision, likely considered a necessary limitation of the broad grant of authority, apparently including the scope of local power presupposes a degree of legislative foresight and draftsmanship ability which is completely unrealistic.

Those who advocate that the conflict between statutes and ordinances should be resolved by simply holding in favor of home rule in all instances where the legislature has not stated an express prohibition are seeking an illusionary, unworkable solution to a problem which is quite complex and which is, like many things in modern life, not susceptible to decision by mere slogans or mechanical formulae.


52. The Illinois constitution contains a very complex preemption provision, not yet entirely judicially interpreted. By a three-fifths majority vote of each house, the general assembly may deny to home rule counties or cities the right to exercise a power not exercised by the state. A three-fifths majority vote in each house is also required to deny or limit taxing powers, other than those specifically accorded or limited by the constitution. General laws of statewide concern may be passed by a simple majority vote of each house and will prohibit local enactment of ordinances bearing upon the subject matter of the legislation. Except where specifically limited by the general assembly, home rule units may exercise powers concurrently with the state. In summary, almost any area can be preempted by the state legislature, but the three-fifths voting requirement makes preemption of powers not exercised by the state and taxing powers difficult. See Ill. Const. art. VII, §§ 6(g)-(i). See also Cole, Illinois Home Rule in Perspective, in HOME RULE IN ILLINOIS 19 (S. Cole & S. Gove eds. 1973) (background paper prepared for the Illinois Assembly on Home Rule held April 5-7, 1973).

53. NLC, Model Constitutional Provisions, supra note 5, § 4 at 19.
police power, has been constitutionally adopted only in Massachusetts,\(^5\) Louisiana,\(^5\) and New Mexico,\(^6\) and statutorily enacted by Iowa,\(^7\) Delaware,\(^8\) Georgia,\(^9\) and Montana.\(^6\) Although its meaning has been the subject of some speculation, its obvious intent, as noted in the NLC report, is to protect private rights against possible municipal infringement.\(^6\) According to Dean Fordham, "It is perfectly plain that we do not want to devolve upon local government independent authority to enact private law. To have contract law or property law vary from city to city would be horrendous. At the same time, the exercise of any one of a number of important powers, whether taxing, regulatory or whatnot, necessarily bears upon civil relationships."\(^6\)

This provision has been judicially construed only by the Supreme Judicial Court of Massachusetts, which, taking note of its novel language, ruled that absent specific enabling legislation, a city could not enact a rent control ordinance pursuant to its home rule authority.\(^6\) Although the Massachusetts home rule provision was read as conferring the police power upon cities,\(^6\) it appears likely that this particular provision will operate to inhibit or impede the exercise of such power. Uncertainty concerning the impact specific measures will have on private civil relationships may force municipalities to seek enabling legislation for many desired police power measures.\(^6\) The result will be effectively a restoration of Dillon’s Rule in the area of police power, and a consequent in-

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55. La. Const. art. VI, § 9(A). It is further provided that “the police power of the state shall never be abridged.” Id. art. VI, § 9(B).
56. N.M. Const. art. X, § 6D. Additionally, the limitation has been incorporated by the NML Model State Constitution. See note 11 supra.
64. See Marshal House Inc. v. Rent Rev. & Griev. Bd., 357 Mass. 709, 717-18, 260 N.E.2d 200, 206 (1970). The Massachusetts court’s conclusion that the home rule provision confers the state police power upon cities may not be followed in other states; since the power is state in character, an argument may be made that such power cannot be delegated to home rule cities absent specific enabling legislation. See notes 26-28 supra & accompanying text.
crease in the workload of the state legislature. Inclusion of the NLC limitation in a home rule structure may be unnecessary since the vast majority of home rule states, including some with provisions based largely on the NLC model, generally function very well without it.66 Most matters which it seeks to remove from municipal jurisdiction are state functions rather than local, and would ordinarily be denied municipalities since, regardless of what a home rule provision specifies, courts cannot sanction parochial enactments on subjects which, by their nature, demand uniform treatment throughout the state.67 Further, the due process clause of the fourteenth amendment to the United States Constitution, and similar provisions of state constitutions, should afford sufficient protection to private rights against municipal infringement without the specific limitation stated in the NLC model. Municipalities, of course, must be delegated some authority to exercise the police power inherent in state government, but they should also be required to act by means consistent with general state law.68

State Legislative Control of Home Rule

Apart from constitutional questions, the principal objection to the NLC model is that it makes most substantive home rule powers depend solely upon state legislative grace.69 While preferring the NLC model to the *imperio* model, one respondent to the author's home rule questionnaire remarked, "In a state with no effective home rule tradition, it may produce almost complete control by the legislature."70 This aspect of

67. See notes 44-46 supra & accompanying text. Cities themselves are generally aware that there are some subjects upon which they cannot legislate. It has been noted that "by common understanding such general subjects as crime, domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many others have never been regarded by anyone, least of all the cities themselves, as appropriate subjects of local control. No city has been so foolhardy as to venture generally into any of these fields of law. It has simply been universally accepted that these matters are strictly of 'state concern.'" H. McBAIN, supra note 1, at 673-74.
68. A widely borrowed California constitutional provision is directed toward this end. It stipulates: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. art. XI, § 7.
69. See Keith, Sharing of Powers, 56 NAT. CIVIC REV. 621, 624 (1967). Because he believes it the more flexible approach to home rule, Keith prefers the NLC to the *imperio* model. Id. at 623-24.
70. Reply to author's home rule questionnaire, Russell W. Maddox, Department of Political Science, Oregon State University, Spring, 1971. Another respondent noted,
the NLC construct is not far removed from a state legislative grant of home rule whereby the legislature retains complete control of home rule powers and functions, and really amounts to little more than constitutional authorization for the legislature to delegate home rule powers to cities.\textsuperscript{71} An argument can be made that the NLC approach is predicated on expediency inasmuch as there is little disagreement with the proposition that the procedural aspects of home rule are properly municipal concerns, but the difficult problem of defining substantive home rule powers and functions is left to the state legislature. This allocation of functions seems particularly inappropriate in light of Dean Fordham's statement that "[i]n a sense, home rule is a recognition of state legislative weakness and an effort to escape its effects."\textsuperscript{72} To avoid legislative hamstringing of home rule cities, California amended its constitution in 1896 to exempt home rule ordinances pertaining to municipal affairs from the operation of state laws.\textsuperscript{73} The NLC scheme seems to have reversed that development. Finally, since some degree of municipal freedom from state legislative control is inherent in the concept of home rule, one might question whether the governmental status defined by the NLC model is worthy of the name "home rule."\textsuperscript{74}

"The most glaring weakness of the Fordham proposal [NLC model] is that it grants cities no protection from a temporary legislative majority." Letter from Chester Biesen, Executive Director, Association of Washington Cities, to Kenneth Vanlandingham, Oct. 5, 1970. Distrust of the state legislature was evidenced by the Illinois constitutional convention which adopted a proposal requiring a three-fifths majority vote in each house before powers not exercised by the state and taxing powers could be preempted. See note 52 supra.

71. Cf. GA. CONSR. art. XV, § 1. The Georgia provision expressly authorizes the state general assembly "to delegate its powers so that matters pertaining to municipalities upon which, prior to the ratification of this amendment, it was necessary for the General Assembly to act, may be dealt with without the necessity of action by the General Assembly." Prior to this amendment, the Supreme Court of Georgia had held unconstitutional a legislative act delegating home rule powers to cities. See Phillips v. City of Atlanta, 210 Ga. 72, 77 S.E.2d 723 (1953).

Similarly, the Connecticut constitutional provision stipulates: "The 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." CONN. CONSR. art. X, § 1.


73. CAL. CONSR. art. XI, § 6 (1896). California retained its imperio version of home rule when a revised local government amendment was adopted in 1970. CAL. CONSR. art. XI, § 5 (1970). Its failure to adopt a provision based on the NLC model may have been "a result of inertia plus the fear of doing things which were too drastic." Letter from Sho Sato, Professor of Law, University of California, Berkeley, to Kenneth E. Vanlandingham, March 13, 1973.

74. It is difficult for the author to characterize power as "home rule" when it may
The NLC model places great faith in the competence of the state legislature to deal effectively with municipal problems in delegating to it the regulation of the state-municipal legal relationship by dictating the substance of home rule. On the basis of past and present experience such faith may be misplaced. During the century that constitutional home rule has been authorized, legislative supremacy provisions similar in principle to the NLC model have achieved only limited or mixed success. With some qualification, they appear to have been successful in Michigan\textsuperscript{75} and Texas,\textsuperscript{76} but far from satisfactory in Washington\textsuperscript{77} and West...
Virginia. Home rule under such provisions is effective only where the state legislature, motivated either by a belief that home rule is good public policy or by pressure from strong state municipal leagues, exercises self-restraint and wisdom in guarding home rule prerogatives. The experience in some states makes this condition perhaps too much to expect. Absent contrary constitutional provisions state legislatures legally possess plenary authority over cities, but it nonetheless may not be desirable to entrust the granting of home rule powers to them. One executive director of a southern state municipal league in his reply to the author's home rule questionnaire stated, "So far, we have few statesmen in our legislature." This observation likely applies to many other state legislatures as well. Membership turnover is very high with possibly 50 percent of first term legislators failing either to seek or to secure reelection. Not only are many legislators evidently inexperienced in dealing with each house of the state legislature, or unless funds sufficient to cover the increased expenditure are appropriated for the city in the same legislative session.

78. Under a provision borrowed almost verbatim from the 1908 Michigan constitution, West Virginia has had very little success with home rule, for its legislature has delegated to home rule cities no significant powers not granted non-home rule cities. West Virginia cities adopt home rule primarily in order to change to a council-manager form of government. See Vanlandingham, supra note 1, at 295. The atmosphere at both state and local levels appears unfavorable for viable home rule. As of 1971, there existed no active state municipal league to lobby for municipal interests, and consideration and enactment of special legislation constituted at least one-fourth of the workload of each annual legislative session. Reply to author's home rule questionnaire, West Virginia Legislative Services, Feb. 26, 1971. For additional comment on West Virginia home rule, see E. ELKINS, MUNICIPAL HOME RULE IN WEST VIRGINIA (1965), the appendix to which includes a proposed imperio home rule amendment with stipulation of some home rule powers submitted in 1963 by the West Virginia Commission on Constitutional Revision. Id. at 50-51.

79. One reviewer has noted, "[L]egislative dominance of local concerns in general and big city affairs in particular always has been a universal phenomenon of American politics. The historical 'father knows best' type of state-local relationship, whereby municipalities possess few or no rights of self-government and exist virtually at the pleasure of the legislature, is legion. Boston is no special case. The heavy hand of the state legislature is still felt today, even after some home rule gains, and even though the Irish Democrats, rather than the Yankee Republicans, now dominate the legislature . . . ." Gere, Book Review, 67 AM. POL. SCI. REV. 623, 624 (1973).

80. See 1 J. DILLON, supra note 16, § 237; City of Clinton v. Cedar Rapids & Mo. R.R., 24 Iowa 455, 475 (1868).

81. See J. STRAAYER, AMERICAN STATE AND LOCAL GOVERNMENT 92 (1973). Although the rate of turnover is unquestionably high (in the 1960's nearly double that of the United States Congress), Straayer's figure may be somewhat inflated. Another recent study, surveying the period 1963-1971, found overall turnover in the 50 state senates to be 30.4% and overall turnover in the 49 state houses (Nebraska having a unicameral legislature) to be 36.1%. See Rosenthal, Legislative Turnover in the States, 47 STATE GOV'T 148, 149 (1974). In any event, legislative turnover, which varies considerably
municipal problems, but as part of a body which is frequently highly partisan, they are beset by special interest groups that often can exert greater influence upon representatives than can state municipal leagues or the cities themselves. Moreover, the selection of many municipal officials on nonpartisan ballots may render them ineffective lobbyists with the state legislature. For these reasons, questions may be raised concerning both the competence and willingness of state legislatures fairly to represent municipal interests. One respondent to the author's home rule questionnaire stated, "I simply do not believe that the legislature can be counted on to represent adequately the municipal interest, and I think that local action to preserve that interest is desirable, with reliance on judicial review to curb abuses." 82

Historically, the state legislature, jealous of its legislative prerogatives, seldom has been an ardent advocate of home rule. Since the Missouri Constitutional Convention of 1875, home rule frequently has originated with or proceeded from constitutional conventions rather than from amendments proposed by state legislatures. 83 It is difficult to ascertain whether without the initiative of those conventions home rule would be as widespread as it is at present. However, Illinois and Montana finally authorized home rule in 1970 and 1972 respectively only through the ratification of new state constitutions, and Indiana, currently the most among the states, id., is sufficiently high in some instances to affect adversely the legislative process, and raises questions concerning the political accountability of the state legislature, the body which in NLC states has virtually complete control over substantive home rule powers. Of course, this assertion assumes without empirical proof that experience is preferable to inexperience in state legislators. One writer has noted that in comparison with the United States Congress the average state legislature lacks a corps of career legislators. See K. PALMER, STATE POLITICS IN THE UNITED STATES 65-66 (1972).

Dean Fordham, nevertheless, apparently has no little faith in the competence of the state legislature to grant home rule powers to cities. He recently stated, "To denigrate state legislatures as weak institutions is unimpressive. They are central, basic policymaking and power distribution centers and the obvious positive approach is both to strengthen and to trust them." Letter from Jefferson B. Fordham to Dale A. Harris, Acting Director, Montana Commission on Local Government, March 22, 1974 (quoted by permission). Granting the correctness of his conception, some doubt remains as to whether the state legislature can fulfill its role adequately where home rule prerogatives are involved.

82. Reply to author's home rule questionnaire, Maurice H. Merrill, Emeritus Professor of Law, University of Oklahoma, Jan. 22, 1971.

83. States in which home rule was initiated by limited or unlimited constitutional conventions include Alaska, Arizona, California, Connecticut (pre-existing legislative home rule still in effect), Hawaii, Idaho, Illinois, Michigan, Missouri, Montana, Ohio, Oklahoma, Tennessee, and Washington. Oregon adopted it by popular constitutional initiative. Kentucky rejected a constitution providing for home rule in 1966.
populous non-home rule state, has never succeeded in adopting it despite the introduction of numerous resolutions on the subject since 1937. 84

It has been assumed that granting municipalities proportional representation in the state legislature would make that body more sympathetic to urban problems. This viewpoint was expressed indirectly by an early critic of the NLC model:

One might be willing to give more acceptance to the AMA [NLC] model if there were greater assurance, overall, of the reapportionment of state legislatures in the direction of greater urban representation. A state legislature representing urban populations more accurately might be entrusted with the kind of 'life or death' discretion over a municipal home rule power, delineated in the AMA [NLC] model. 85

More equitable representation for cities subsequently was assured by the landmark one-man, one-vote decisions of the United States Supreme Court in Baker v. Carr 86 and Reynolds v. Sims. 87 In retrospect it appears that these decisions may not provide the long sought panacea of making state legislatures more responsive to urban problems of cities, nor may they prevent legislative meddling in the internal affairs of cities. Many who advocated more equitable political representation for cities prior to Baker v. Carr, in the belief that the result would improve municipal leverage, failed to anticipate future population movements within the metropolitan region. The 1970 census revealed that for the first time, total suburban population exceeded that of the central cities. 88 Although both central cities and suburban areas are urban in character, their populations have different social, economic, and racial characteristics, and hence different political interests. Suburban residents, including many

84. As of 1971, there had been 11 unsuccessful attempts during 16 previous sessions of the Indiana General Assembly to institute constitutional home rule. An observer has noted that the Indiana legislature would never consider an imperio authorization, but might consider the NLC model for the reason that it could control home rule. Reply to author's home rule questionnaire, Arden R. Chilcote, Local Government Research Analyst, Indiana Legislative Council, Feb. 9, 1971. Mayors of Indiana cities have opposed home rule adoption, believing that it will foster the development of council-manager government. C. ADRIAN & C. PRESS, GOVERNING URBAN AMERICA 205 (4th ed. 1972). Ironically, West Virginia cities opt for home rule for the purpose of adopting council manager government. See note 78 supra.

86. 369 U.S. 186 (1962).
88. 1 BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION 1-180 (1972) (Table 34).
emigrants from the urban core, are evidently as hostile toward the central city as the farmer allegedly has been. 89

Very few respondents to the author's home rule questionnaire believe that political reapportionment will either obviate the need for home rule 90 or make the state legislature more responsive to urban needs. Further, only a small fraction of the total population of many, if not most, states resides in the largest cities. In no state do representatives from the two most populous cities constitute a majority in either house of the legislature. Further, although not expressly overruling Baker v. Carr and subsequent reapportionment cases, the Supreme Court of the United States, by permitting greater population deviations among legislative districts, appears to have retreated somewhat from its previous requirement of the most exact proportional representation practicable. 91

It is highly unlikely that legislative malapportionment will be as insidious as in the era prior to Baker v. Carr, but nevertheless a state legislature in which suburban and rural areas are amply represented seems an uncertain and unreliable guardian of home rule prerogatives. Skepticism voiced concerning the wisdom of vesting legislatures with "life or death" authority over municipal legislation 92 may not be altogether unwarranted.

89. Jerome P. Cavanagh, former Mayor of Detroit, has said, "I could work better with rural Republican legislators than I could with suburban Democrats. The suburbanites feel they have escaped the city, and they are not about to share anything with the cities." Milwaukee Mayor Henry Maier has said he finds the suburban attitude to be one of "Let us tap into your sewage and water systems and your transportation systems, but keep your damn blacks out of our backyards." David Murray, The Suburbanite is Described as Today's "Typical" American, The Courier Journal & Times (Louisville, Ky.), July 19, 1970, § E at 3, col. 1. For comment on the future of the central city and its suburbs, see M. Stedman, Urban Politics 201-04 (2d ed. 1975). Stedman suggests that in the largest metropolitan areas the suburbs have become increasingly independent of the central city economically and socially as well as politically.

90. Even assuming perfect proportional representation, home rule remains necessary and desirable inasmuch as it relieves legislatures of the burden of legislation concerning local affairs.

91. The Court has upheld reapportionment schemes as constitutional if they are based on some rational state policy. See, e.g., Gaffney v. Cumming, 412 U.S. 735 (1973) (redistricting in accordance with policy of establishing a rough equality of major political party strength in each district justified representative deviation of 7.83% in the house districts and 1.81% in the senate districts); Mahan v. Howell, 410 U.S. 315 (1973) (maintenance of existing political boundaries justified representative deviation of 16.4%); Abate v. Mundt, 403 U.S. 182 (1971) (preservation of town-county cooperation justified multimember districting despite total representative deviation of 11.9%); cf. Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973).

92. See note 85 supra & accompanying text.
Omissions from the AMA (NLC) Model

Direct Grant of Home Rule Authority

The NLC model does not reflect some ideas current in home rule provisions at the time of its publication. For example, it requires charter adoption as a prerequisite to municipal exercise of home rule powers. Prior to 1953, New York, Wisconsin, and, to a large extent, Ohio permitted cities to exercise home rule powers without adopting charters, a concept which has been followed in the recently adopted Kansas, Wyoming, Florida, Iowa, Massachusetts, Maryland, and Illinois provisions. The home rule idea has been associated historically with the charter-making power; one early authority endorsed charter writing, with its attendant examination and review of existing municipal law, as having a salutary effect upon municipal government. Further, before home rule is adopted, favorable local sentiment arguably should be sufficiently strong to impel the writing of a municipal charter. Occasionally, however, drafting and adopting a municipal charter involves cumbersome and difficult procedure similar to that required for drafting and instituting a new state constitution, and tends to discourage or delay adoption of home rule. Although experience in some home rule states, especially the older ones such as Michigan, California, Colorado, and Oregon, reveals that home rule has not been blocked by charter adoption requirements, direct constitutional authorization would ease the implementation of home rule.

Liberal Judicial Construction of Municipal Powers

Provision is lacking in the NLC model for liberal judicial construction of municipal powers, a stipulation which first appeared in the New Jersey constitution of 1947 and has been included in most recently

93. See H. McBain, supra note 1, at 617.
94. See generally Vanlandingham, supra note 1, at 280-81.
95. N.J. Const. art. IV, § 7, ¶ 11. Although no provision for liberal judicial construction is contained in the text of the NLC model, the New Jersey provision is noted in the accompanying report. See NLC, Model Constitutional Provisions, supra note 5, at 9. Missouri did not stipulate liberal judicial construction in the NLC-type provision adopted in 1971. California decisions under a revised local government article that does not specify liberal interpretation have favored the state. The judicial philosophy has been "When there is doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, the doubt must be resolved in favor of the legislative authority of the state..." Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960).
adopted home rule provisions. Because a judicial presumption favoring the validity of state statutes arises under the separation of powers theory, cities are placed at a serious disadvantage in the litigation of state-municipal conflicts. Requiring liberal judicial construction of home rule powers may induce the courts to take a more enlightened attitude toward those municipal ordinances not entirely consistent with state laws, and it appears that such a stipulation has reduced the impact of the traditional pro-state presumption.\(^\text{96}\) The Supreme Court of Kansas noted, "This provision simply means that the home rule power of cities is favored and should be upheld unless there is a sound reason to deny it."\(^\text{97}\) In New Jersey, the liberal construction provision raises a presumption in favor of the validity of municipal ordinances,\(^\text{98}\) and during the first two years of home rule experience in Illinois, it is believed to have been an influential factor in several favorable home rule decisions by the supreme court.\(^\text{99}\) The impact of the liberal construction tenet is nonetheless difficult to assess given the various possible factual situations involving conflicts between municipal ordinances and state statutes. Moreover, the rule of liberal construction cannot grant to cities powers not delegated to them,\(^\text{100}\) and where there is direct conflict between state and municipal governments in their exercise of powers, the state must always remain supreme. Finally, the efficacy of the rule rests upon the willingness of courts to consider and apply it conscientiously.

**Imperio Home Rule Analyzed**

Insofar as the *imperio* model involves a difficult definition of substantive home rule powers, it merits criticism, but in comparison with the NLC model, the *imperio* theory offers a more substantial guarantee of meaningful home rule power. As noted above, particularly in states with politically weak state municipal leagues and without an effective home

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96. But see Moser, *County Home Rule—Sharing the State's Legislative Power with Maryland Counties*, 28 Md. L. Rev. 327, 345 n.58 (1968), wherein it is argued that liberal judicial construction has done little to enlarge local powers.
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rule tradition, provisions based on the NLC model most likely will result in significant legislative denial of substantive home rule powers.\(^{101}\) By contrast, to the extent that substantive home rule powers are capable of judicial definition, the *imperio* model assures cities of at least some important home rule prerogatives. Of course the dynamic nature of urban society requires occasional judicial redefinition of governmental powers and functions. Thus some exclusively municipal affairs are later judicially declared state in character, a factor deemed a shortcoming of the *imperio* theory. This, however, overlooks the fact that redefinition of governmental powers is not unique to *imperio* states.\(^{102}\)

Although delineation of home rule powers under *imperio* provisions admittedly is difficult, it is not an impossible task, and certainly presents no greater obstacles than does the resolution of numerous other governmental problems, especially those involving conflict of laws.\(^{103}\) Further, while under *imperio* provisions the judiciary must resolve conflicts between state and municipal spheres of action, legislative supremacy forces courts to make equally difficult determinations of whether municipal powers have been preempted by state legislation.

The *imperio* experience suggests that its opponents may have exaggerated the difficulty of definition: In some states where *imperio* home rule is considered at least moderately successful, notably California, New York, Ohio, Oregon, Oklahoma, Arizona, and Colorado, cities for many years have attempted to exercise home rule powers, and the judiciary has not hesitated to interpret and define them. Judicial construction has made California one of the few home rule states wherein home rule cities enjoy rather broad taxing authority,\(^{104}\) seemingly essential to the

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101. See notes 75-82 *supra* & accompanying text.
103. Reply to author's home rule questionnaire, Maurice H. Merrill, Emeritus Professor of Law, University of Oklahoma, Jan. 22, 1971.
104. See, e.g., City of Los Angeles v. A.E.C. Los Angeles, 33 Cal. App. 3d 933, 109 Cal. Rptr. 519 (1973); City of Glendale v. Trondsen, 48 Cal. 2d 93, 308 P.2d 1 (1957). To avoid political opposition, home rule provisions generally exclude taxation from the powers granted under them. For example, the 1972 Wyoming provision provides that "[t]he levying of taxes, excises, fees, or any other charges shall be prescribed by the legislature." Wyo. Const. art. XIII, § 1(b). The better view is that substantive home rule with no independent sources of revenue is impotent. Illinois, while making license fees, occupation taxes, and taxes based on income or earnings subject to legislative authorization, constitutionally forbids the general assembly otherwise to deny or limit the taxing power of home rule units except by a three-fifths majority vote. Ill. Const.
successful functioning of home rule. No exhaustive or immutable list of home rule powers can ever be drawn, but constitutions of a few states, including New York, California, Illinois, Colorado and Utah, wisely define some of these prerogatives. Because cities may hesitate to act under a broad grant of home rule authority such as that provided by the NLC model, enumeration of some powers within the grant not only should encourage their use, but also should remove all doubt concerning municipal authority to exercise such powers.\textsuperscript{105}

The alleged failure of *imperio* provisions cannot be asserted without question. It is significant that of the older constitutional home rule states only Missouri has abandoned an *imperio* provision and adopted one based on the NLC model. While a complex urban society with metropolitan regions containing myriad governmental units may dictate fewer and less easily defined home rule powers, such powers nevertheless exist and can be secured effectively given an intelligent and sympathetic judiciary. The courts have not been altogether unmindful of their role. One of the principal critics of the NLC model noted that the report itself called attention to favorable decisions in the *imperio* state of Ohio.\textsuperscript{106} Another writer, calling for additional studies to determine the effectiveness and viability of provisions based on the two major home rule models, noted the tendency of New York State courts to uphold municipal exercise of home rule powers absent conflicting legislation under New York's partly *imperio* provision.\textsuperscript{107}


105. It has been suggested that Massachusetts should have enumerated some specific powers appropriate for municipal exercise in its home rule provision. See Zimmerman, *Home Rule in Massachusetts: Some Historical Perspectives*, in Home Rule in Action, Nov. 1970, at 17 (lecture delivered at the Massachusetts Municipal Training Institute at Boston College, 1970).


107. Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. Urb. L. 335, 357-58 (1971). Professor Macchiarola suggested that these studies be conducted before it was "too late." If his alarm stemmed from the specter of states consistently adopting provisions based on the NLC model, it may be already "too late." Professor Macchiarola has also observed that the New York judiciary appeared to be a better friend to home rule than the state legislature. Reply to author's home rule questionnaire, Frank J. Macchiarola, Graduate School of Business, Columbia University, Feb. 18, 1971.
In some *imperio* states, such as Oklahoma,\(^{108}\) Nebraska,\(^{109}\) Arizona,\(^{110}\) New York,\(^{111}\) and California,\(^{112}\) judicial interpretation has enabled home rule cities to enact ordinances on state matters until forbidden by state law. In these jurisdictions, such cities possess not only judicially defined municipal powers but also virtually all powers belonging to home rule cities in states with NLC provisions. Under such circumstances, home rule authority actually may be broader under the *imperio* construct than under NLC provisions. Other *imperio* states might effect this rule by constitutional amendment.\(^{113}\)

*Home Rule and Metropolitan Area Problems*

There are decisions that hold municipal home rule ordinances having an impact beyond the political boundaries of the city to be non-home rule in character.\(^{114}\) Hence a major criticism of home rule generally, and *imperio* home rule in particular, is its alleged impossibility of success for cities within metropolitan regions.\(^{115}\) The advocates of *imperio* home

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110. City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 6, 164 P.2d 598, 601 (1945).


113. This procedure would be especially desirable where such a judicial doctrine has been advocated without success. See, e.g., Kelly v. City of Fort Collins, 163 Colo. 520, 523, 431 P.2d 785, 787 (1967).

114. See notes 47-48 supra & accompanying text.

115. It has been said, "It is one of those curious facts of history that more and more communities are finally getting home rule at a time when urban problems are less and less susceptible of solution by one locality. In this situation, home rule can be a barrier to progress." W. Fisher, S. Brown & J. Gibson, *Government in the United States* 404 (1967). See also C. McCandless, *Urban Government & Politics* 61 (1970).

Many cities, however, do not have "typical" metropolitan area problems. See Elazar, *Are We a Nation of Cities?*, in *A Nation of Cities* 94 (R. Goldwin ed. 1968). This is especially true of the smaller municipalities, unfortunately, despite occasional clamor of their officials for home rule, cities of this size seldom make wide use of the power afforded by it. For instance, during the first thirty years of Wisconsin constitutional home rule (the state also has legislative home rule), the city of Milwaukee accounted for more than 250 of the 558 charter ordinances adopted by the 550 cities and villages of the state. Hagensick, *Wisconsin Home Rule*, 50 Nat. Civic Rev. 349 (1961). Also, during the first six years of Georgia home rule, almost half of the charter amendments adopted in the state (38 of 77) were adopted by Atlanta. Sentell, "Home Rule": *Its Impact on Georgia Local Government Law*, 8 Ga. State B.J. 277, 287 (1972).
rule assert that the inability of these cities to exercise home rule powers does not stem from any defect in the home rule principle itself, but rather from an inability or unwillingness to readjust political boundaries. In many instances, the remedy seems to be annexation of suburban areas by the central city, or the establishment of metropolitan or regional governments. Several recently adopted constitutional provisions permit such governments, and their actual establishment would facilitate greater opportunity for exercise of home rule powers.

New Judicial Interpretation of Imperio Provisions Needed

Although *imperio* provisions have not yielded as much in the way of home rule as their early advocates hoped or anticipated, in some states, especially those in which cities have made serious efforts to exercise home rule powers, experience with them has not been altogether unfruitful. More than any other factor, narrow and restrictive judicial interpretation has impeded expansion of home rule powers under *imperio* provisions. Advocacy of the *imperio* model, therefore, must include a campaign for new approaches in its judicial interpretation. Inasmuch as very few substantive functions performed today by state and municipal governments are purely state or purely municipal, neither the NLC nor the *imperio* model can prevent the inevitable conflicts of authority between these entities. Yet in the "gray area" wherein governmental functions fuse or overlap lies the greatest opportunity for municipal exercise of home rule powers. This fact apparently was recognized in the draft New York State constitution, defeated in a 1967 referendum.


117. In a previous article the author was more critical of *imperio* provisions than he is presently. Vanlandingham, *supra* note 1, at 291-93. Perhaps at that time he had given insufficient thought to the mixed character of governmental functions. Further, at least some state supreme courts since have displayed a greater tendency not to uphold state preemption of municipal powers. Lastly, should a state legislature follow a persistent policy of preemptsing so-called home rule powers, the *imperio* provision may be the best corrective.

118. As early as 1899 it was stated, "The relationship existing between a state and its municipalities is so close that it may be said every city ordinance and every state statute is a matter of interest to both state and municipality. It may be said that all state affairs are a matter of substantial interest to the municipality, and that likewise all municipal affairs are a matter of concern to the state." Fragley v. Phelan, 126 Cal. 383, 386, 58 P. 923, 924-25 (1899).
which would have authorized home rule in “local aspects of matters of state concern.”

Much of the future success of home rule under both imperio and legislative supremacy provisions rests, as Professor Bromage has suggested, upon a wiser and broader sweep of judicial interpretation. Where substantive state and municipal functions overlap, the judiciary must ferret out such powers as are appropriate for municipal exercise. Absent a clear legislative intent to make enactments bearing upon a particular subject area exclusive, a home rule city should be permitted to enact ordinances within the same area, unless such municipal ordinances directly frustrate or impede the accomplishment of a state purpose. This policy is consistent with the current position of the Supreme Court in cases involving federal preemption of state powers. Of course, as noted by Justice Holmes, all preemption decisions must be based upon the facts in each case. To assist the judiciary in deciding home rule cases, express constitutional or statutory standards might be prescribed. For example, state preemption of municipal home rule powers should never be presumed, and there should be a finding of clear and irreconcilable conflict before a state statute is allowed to override a home rule ordinance.


120. See Bromage, Home Rule—NML Model, 44 Nat. Mun. Rev. 132, 136, 158 (1955). Professor Bromage’s observation was directed particularly toward imperio provisions, but it is equally applicable to NLC provisions, especially insofar as they involve the problem of state-municipal conflict or state preemption of municipal powers.

121. Preemption should be upheld with caution. If a single enactment containing no expression or inference of legislative intent as to the scope of its application is held to preclude all municipal action in a particular area, the effect will be to limit severely municipal action, and will render any form of home rule worthless. Cf. Moser, supra note 96, at 351, n.80.


124. An Iowa statute provides: “An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law.” Iowa Code Ann. § 364.2 (3) (Spec. Pamphlet 1975). Coupled with a provision for liberal judicial construction of municipal powers, such a measure should serve to protect home rule municipalities against unreasonable judicial findings of preemption.
The future success of home rule provisions based on the NLC model cannot be predicted accurately, for any meaningful evaluation of their performance depends upon the accumulation of many more years of experience under the model. The development of legislative supremacy provisions has exposed two principal difficulties: the judicial reading of the *imperio* doctrine or the state-municipal dichotomy into NLC-type schemes, as the Alaska and New Mexico supreme courts have already done, and the denial of legitimate home rule prerogatives by "state centered legislatures" with or without the urging of local special interest groups. But whether NLC provisions actually are preferable to *imperio* provisions presently appears completely irrelevant. Many states, especially those which have not previously had home rule, have adopted NLC provisions constitutionally, and will retain them for some time. In the event legislative supremacy proves unsatisfactory, however, the only alternative is a return to *imperio* home rule.

Because they consider state and municipal powers difficult to define and separate, proponents of the NLC model have deemed *imperio* an unworkable concept. Nevertheless *imperio* remains an active doctrine; only one of the older *imperio* states, Missouri, has abandoned an *imperio* provision for one based on the NLC model, while several other states have adopted provisions combining features of both *imperio* and NLC models. As previously noted, these latter provisions may result in even less home rule than could be obtained under provisions based solely on either model. Having developed a substantial body of case law on their own provisions and perhaps fearing less satisfactory home rule under an NLC model, the older *imperio* home rule states are unlikely to change doctrines in the near future.

In a complex urban civilization, substantive governmental functions which can be deemed purely state or purely municipal are rare. The greatest opportunity for municipal exercise of home rule powers lies in the gray area wherein such functions mix. The future viability of home rule under either *imperio* or NLC provisions therefore depends upon the willingness and ability of the judiciary to extract from this area such powers as are appropriate for municipal exercise. Under the NLC model, and to some extent under *imperio* provisions, the state legislature can preempt powers and hence maintain its proper role as the embodiment of state authority. For this reason, the importance of competent leg-

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125. See notes 18-19 supra & accompanying text.
islators concerned with the welfare of both the state and home rule municipalities cannot be overemphasized. Further, where the legislature has acted in a particular area, a home rule ordinance operative within the same sphere should not be disallowed judicially unless it impedes the accomplishment of a state purpose. Some state courts already have embraced this tenet; to the extent that other jurisdictions follow, the scope of home rule powers will be enlarged greatly.

For home rule to succeed under either imperio or NLC-type provisions, cities must recognize that home rule begins at home. They must become more aggressive in exercising home rule powers, taking the initiative by acting on matters properly within their province without inviting delay and frustration by first requesting enabling legislation. Unfortunately, many city councils probably hesitate to act on legitimate home rule matters because they are uncertain of the extent of their authority. This is especially true under NLC-type provisions, which may include broad, undefined grants of municipal power. Constitutional or legislative enumeration of at least some powers would tend to stimulate local action. A state administrative agency such as a state department of community affairs, through advice and assistance, could encourage greater municipal use of home rule powers. Including a constitutional provision directing liberal construction of home rule powers may effectually broaden the scope of home rule. At worst it may be ignored, but in some states where this step has been taken, it has had a promunicipal influence on the courts. Since, absent state legislative authorization, municipalities usually cannot exercise authority beyond their territorial boundaries, metropolitan integration either through central city annexation of surrounding suburban areas or through establishment of regional or metropolitan governments should increase the potential of home rule, especially in imperio jurisdictions.

Properly understood, home rule certainly is no panacea for all municipal problems, the greatest of which transcend individual city boundaries. A comment made concerning the Illinois constitution of 1970 noted, "Unfortunately, nothing written in the new constitution is likely to affect the reality of urban problems—of decay, deprivation, segregation, crime, sprawl, and pollution. Whatever solutions there may be to these problems will be found largely outside of legal concepts of state constitutions and judicial interpretations of municipal powers." 126 Home

rule is widely desired by cities, nonetheless, and to the extent that cities adopt and utilize granted powers, they will free the state legislature to spend more time on state affairs. In an earlier era, home rule fostered such advances as the council manager plan in municipal government. Today and in the future, it can make citizens more responsible participants in the federal system. But successful self-government depends upon a favorable state legislative and judicial climate and a willingness by the municipality to exercise powers aggressively. Assuming these conditions, home rule can flourish under either NLC or imperio provisions.