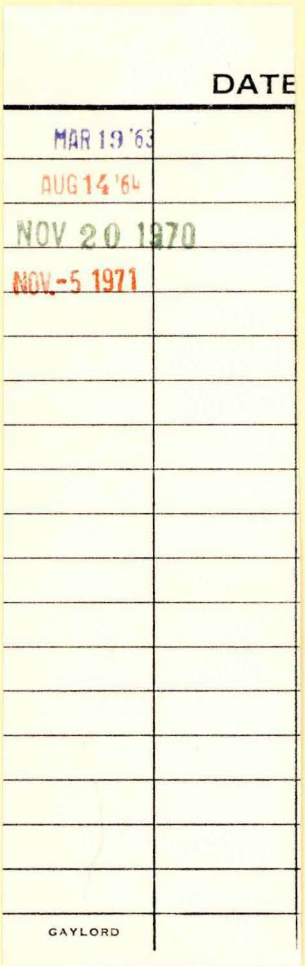
Home Rule for Iowa?

Institute of Public Affairs
of the State University of Iowa
Iowa City



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Foreword

The adoption of municipal home rule frequently has been suggested as a means of strengthening municipal government in Iowa. Before any decision can be made on this, however, it is important that the citizens of the state be informed about what is meant by the term "home rule."

This booklet was written to serve that purpose. It attempts to summarize the development and principles of home rule in the United States and to point out the strengths and weaknesses of various approaches to the subject. It is hoped that this will be a useful source of information for both public officials and the general public.

Dean Zenor, Director
Institute of Public Affairs

Preface

The first constitutional home rule provision was enacted nearly a century ago in the state of Missouri. Since that time more than one-half of the states have experimented with some form of home rule; in some cases it has been successfully utilized, and in some it has not been effective. Despite its lack of complete success, however, home rule is still considered to be a significant means of strengthening the legal relationship between a state and its units of local government, through promoting both local autonomy and state responsibility.

The purpose of this study is to present a brief description of the principles and operation of home rule as they have developed in the United States. It was prompted by evidence of a continuing interest in the topic by citizens and public officials of the state. A discussion of home rule theory and practice in relation to what might be accomplished in Iowa would seem, therefore, to fill a need for accessible and pertinent information upon which decisions for future action could be based.

Home rule is a broad and flexible concept, and thus is subject to continuous experimentation in an attempt to meet the changing character of state-local relations. For example, the first home rule provisions were concerned largely with "protecting" cities from the abuses of the state legislature by denying certain powers to the state. In recent years, however, it has been generally recognized that it is unrealistic for home rule grants to isolate cities from the state, and so the modern approach is to view home rule as a legal framework in which both the state and local units of government can

share responsibility for providing governmental services. That is, home rule should allow local governments freedom to exercise initiative so far as possible in solving their local problems without restricting the state's authority to deal with matters of statewide concern.

It is apparent, therefore, that if the adoption of home rule is to be considered seriously in this state, citizens should be appreciative of the general meaning of home rule as it has developed and aware of the purposes it attempts to serve in our present-day society. It is hoped that this publication will aid in this function.

Any author would be remiss in not acknowledging the assistance given him. Special thanks for the help given in the preparation of this study are due to Dr. Deil Wright, Associate Professor, Department of Political Science, State University of Iowa; Dr. Wynona Garretson, Research Specialist, Division of Special Services, State University of Iowa; Clayton Ringgenberg, Research Director, League of Iowa Municipalities; Leslie Holland, Administrative Assistant, League of Iowa Municipalities; and the following city managers: Gilbert Chavenelle, Dubuque; Walter Sales, Clarinda; and Robert Hayes, Maquoketa. Each of these persons offered many helpful suggestions. Of course, the author assumes responsibility for any errors of fact or interpretation.

H.R.S.

Contents

CHAPTER I

State Control over Municipalities

This chapter presents some background material on the topic of state-local relations that is important for an understanding of the significance of local government home rule. The first two sections describe respectively the legal status of cities, and the evolution of methods of state legislative control over municipalities. In these sections, the description is about cities in the United States generally, with references to practices in Iowa. The third section focuses exclusively on Iowa, and is a brief description of the current situation of legislative control in this state.

Legal Status of Municipalities

When America was a British colony, corporate or city charters were issued by the colonial governor acting under authority of the crown or proprietor. After the Revolution, the legislatures of the several states succeeded to this power; in three states by express grant, and in the remainder by tacit implication.[1] When the Federal Constitution was drafted, no mention was made of cities in distributing the powers of government. Instead, the authority to create and control cities was one of a large group of original, inherent, and largely undefined powers recognized as belonging to the state governments only.

Sound authority states that for many years this power was not abused, and the legislatures often deferred to the wishes of the cities.[2] It is a well-known historical fact, however, that this early attitude of deference was abandoned and the legislatures began passing an extensive number of laws relating to municipalities.

An example from Iowa history illustrates the extremes to which this could go. In 1840 the city of Dubuque was granted a special charter with a council of six members. But during the seventeen-year period that followed, the legislature changed the number of councilmen from six to thirteen, from thirteen to six, from six to eleven, and finally provision was made for a council consisting of two members from each ward.[3] Whimsical legislation such as this was typical of legislative action throughout the country.

Doctrine of Inherent Right of Local Self-Government

In a few states, courts attempted to give cities relief from such practices by announcing a theory to the effect that, wholly in the absence of any express provision of the constitution, municipal corporations enjoyed certain inherent rights of local self-government.[4] The earliest formulation of this doctrine is usually ascribed to a Michigan court[5] and it was later briefly applied by courts in Kentucky, Indiana, Nebraska, Texas, and Iowa.

One typical Iowa case[6] that followed this reasoning arose out of actions by the 26th, 27th, and 28th General Assemblies in creating boards of waterworks trustees for cities of the first class. The boards were to be appointed by the district court of the county in which the cities were located. The important question raised was whether the legislature had the constitutional power to take away from the city council the control and management of the waterworks and invest it in a board of trustees. The Iowa Supreme Court held that it would be unconstitutional to take away the power of management from the city because this would be divestiture of property by reason of taking away the authority of management. In reaching this conclusion the court noted that the constitution should be construed with reference to well-recognized principles lying back of all constitutions. This would indicate an implied limitation on the power of the legislature.

There were only a few applications of the doctrine of in-

herent right of local self-government in Iowa. It is important only as an indication of reaction to policies of legislative interference. Elsewhere, the doctrine also enjoyed only a brief life span.

Doctrine of Legislative Supremacy Over Cities

It is now a well-accepted principle that the state exercises plenary power over municipalities. John F. Dillon, a justice of the Supreme Court of Iowa from 1862 to 1869, has provided the basic description of this authority:[7]

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.

Justice Dillon's thesis was repeated by the courts in many states, and some years later the same reasoning was expressed by the United States Supreme Court when it held:[8]

> A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. *The city is the creature of the state.*[9]

As a corollary to this theory of municipal dependence on the will of the state legislature, Justice Dillon formulated a

definition of municipal powers. This is termed "Dillon's Rule" and is stated as follows:[10]

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others:* First, those granted in *express words;* second, those *necessarily* or *fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

Dillon's Rule remains controlling today and is the basic doctrine regarding the legal status of municipalities. Even in states which have a constitutional provision conferring home rule powers on cities, Dillon's Rule supplements the constitutional provision and is used by the courts in interpreting the scope of home rule powers.

Federal Restrictions on State's Power Over Cities

Although the Federal Constitution contains certain limitations on the power of the states in behalf of the rights of individuals, municipalities do not seem to enjoy similar protection. States are prohibited from passing laws impairing the obligation of contract, but the charter granted a city does not constitute a contract.[11] Also, the U.S. Supreme Court has ruled that the equal protection of the laws clause of the fourteenth amendment was never intended to limit any state's control over its civil subdivisions.[12] Although the due process clause has sometimes been invoked successfully to protect the "rights" of a city, these instances are quite rare and in cases of this kind the doctrine of legislative supremacy over the political subdivisions of the state has been upheld with little regard for the property rights of the subdivisions.[13] On

the whole, then, the rights guaranteed to individuals have not been extensively applied to municipal corporations.

Methods of State Legislative Control

It is clear that the legal status of cities is firmly established. They exist at the will of the state to perform duties for it and to meet the needs and desires of their residents. To accomplish these ends, they exercise powers granted by the state legislature.

The focal point of the controversy concerning state-local legal relationships is not this fact of state supremacy; rather, it is the *methods used* by the state legislature in exercising its dominance. Historically, states have used five general methods of control. These are: (1) special legislation, (2) general laws, (3) classified general laws, (4) optional charters, and (5) home rule.

Special Legislation

Special legislation refers to the practice of passing laws that apply exclusively to one municipality. This type of lawmaking was at its zenith during the middle of the nineteenth century and was largely responsible for the aborted attempt to declare that cities had certain inherent rights of self-government that were beyond the purview of legislative authority.

Special charters written for Iowa cities during the territorial period and under the constitution of 1846 are examples of special legislation. Each charter was written by the state legislature for a specific community. When Iowa became a state in 1846, fifteen of these special charters had been written—two when Iowa was part of the territory of Wisconsin, and thirteen by the legislature of the territory of Iowa.[14] From 1838, when the first special charter was written, until 1858 when the legislature passed a general law for the incorporation of cities, a total of forty cities and two towns had been granted these charters.[15] This added up to a total of sixty

charters, however, since two municipalities had each received four separate charters, three cities had received three charters each, and eight cities had received two charters.

There is no evidence to suggest that a special charter for a city in Iowa was ever initiated by the legislature. All charters were first requested by the local community.[16] These special charter bills usually passed without much discussion in the legislature;[17] the implication would seem to be that they were not considered very important legislation. It is significant to note, however, that the municipalities which were granted special charters were among the most important communities of the state at that time. Twenty-four of the special charter cities were along rivers—the towns that were growing rapidly and becoming the leading commercial centers of the state.[18] It is probable that these communities needed more flexibility in the form and powers of city government than was generally permitted, and this type of legislation was the easiest, if not best, method of obtaining it.

Special legislation is usually criticized for the following reasons. A great amount of time may be spent in logrolling and lobbying for special privileges in connection with the granting of charters. Or, the opposite procedure may occur and legislation will be passed without adequate consideration. Further, special legislation tends to promote instability in local government. The number of charter amendments and other special acts is often so great that it is practically impossible to know just what powers the municipality possesses. Frequent changes in the governmental organization make efficient administration of municipal activities difficult. When special legislation is relied on for municipal powers, the government may be unable to meet new situations as they arise because of lack of authority in their charters. Thus, they must wait until the next session of the legislature to obtain the needed authority. Their only alternative is to perform technically illegal acts.

The state also suffers from a system of special legislation.

At each session of the legislature, a deluge of local bills is introduced. Not only is the legislator's time frittered away in making decisions on details in which he has no interest or information, he also is prevented from dealing effectively with the state's business.

General Laws

In Iowa, as elsewhere, there was much dissatisfaction with special legislation.[19] At the same time that special acts were being passed with the greatest frequency, many states began working to prohibit this by passing constitutional provisions prohibiting special legislation. Constitutional conventions in Ohio and Indiana in 1850-1851 were the first to do this.[20]

When the present Iowa constitution was adopted in 1857 a similar prohibition was included. It is as follows:[21]

> The General Assembly shall not pass local or special laws in the following cases:
>
> For the assessment and collection of taxes for State, County, or road purposes;
>
> For laying out, opening, and working roads or highways;
>
> For changing the names of persons;
>
> For the incorporation of cities and towns;
>
> For vacating roads, town plats, streets, alleys, or public squares;
>
> For locating or changing county seats.
>
> In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it.

It should be noted that this provision does not prohibit all special legislation, but enumerates six subjects on which

it is forbidden, and then states that general laws shall be made in all other cases where possible.

Of the six specific limitations, two have special significance for cities. First, cities may not be incorporated by special legislation. It was soon decided by the Iowa Supreme Court that this provision prohibited not only the first incorporation of any town or city by special act, but also prohibited the amendment of any existing charter by such an act.[22] Second, streets may not be vacated by special acts.

The provision relating to the vacating of streets arose out of early grievances of the cities against the state for the passage of special acts vacating streets at the request of private persons, and the improving of streets at the request of land speculators. Such practices apparently were quite common throughout the country, and the constitutions of Michigan, Indiana, Oregon, and Missouri, written at about the same time, contained similar prohibitions.[23]

The provision concerning the incorporation of cities and towns requires much more extensive explanation. As a consequence of it, in 1858 the Iowa legislature enacted a comprehensive general law for the government of towns and cities of two classes.[24] This law applied, however, only to municipalities which might *thereafter* become incorporated. No provision was made whereby existing cities might surrender their special charters and become organized under the general law. However, cities were authorized to *amend their charters without legislative intervention.* According to Professor McBain, this seemed to indicate that it was the view of the Iowa legislature that the constitutional requirement of general legislation had ushered in an era of home rule in Iowa.[25]

The Iowa Supreme Court at the time apparently had a similar view for it stated:[26]

> We think the intention was, to require the legislature to pass general laws upon this subject, under which the towns and cities of the State, could frame their

> articles of incorporation, and amend them at any time, in any manner not inconsistent with the constitution, or the general laws. It was designed to leave these matters with the people composing the corporation, instead of consuming the time of the legislature in the consideration of local and special laws.

Later, however, McBain concludes:[27]

> Had the original view of the Iowa supreme court as to the logic of such a requirement been adopted by state legislatures generally, and had it been judicially sustained as a valid exercise of legislative power, it is entirely conceivable that the vexatious question of home rule would long since have ceased to occupy a place in the front rank of state political problems. Cities would not only have been emancipated from special interference but would also have enjoyed large opportunity to expand their functions and to determine their organic life in accordance with local ideals.

The failure to realize this early potential was due, at least in part, to the inherent difficulty of legislating for all cities by general law. If a law must apply equally to all cities, this would mean that both large and small municipalities would possess identical powers. The result would be that the large cities would not have enough powers for their needs and the smaller cities would have a surfeit of them.

Such a situation actually occurred in Ohio when the supreme court of that state forced the legislature to enact a general code for all cities. The result of this was that each city, even the smallest, was required to maintain a director of public service, a director of public safety, a city solicitor, a city engineer, and many others. The large cities complained that they were understaffed, and the small cities had too many officials.[28]

In sum:[29]

> The chief value of constitutional prohibitions against special legislation is that such prohibitions may compel a legislature to formulate statutes in general terms

> and thus remove itself from the affairs of individual localities. There can be little doubt that this pressure has produced some beneficial results, especially for smaller cities. By virtue of prohibitions against special laws, these cities are freed from the annoyance of a constant legislative tinkering with their charters.
>
> . . . . . .
>
> Against this beneficial effect must be balanced the peculiar dilemma inherent in blanket restrictions of local laws. If they can be evaded by the legislature, they may become worthless. If they are rigidly enforced, they may do more evil than good. . . . .
>
> . . . . . .
>
> Speaking broadly, it may therefore be stated that prohibitions against special legislation, in the main, have been unsuccessful. They have not, in a large number of states, produced general legislation at all.

Classified General Laws

The practice of classifying cities was undertaken as an antidote to the requirement that laws be of a general application. Classification means that the legislature adopts laws that are applicable to certain classes of cities. The classes are usually based on population, but other criteria, such as proximity to a river, etc., also have been used.

It was by use of this classification device that the Iowa legislature "got around" the third part of the Iowa constitution relating to special legislation which stated: ". . . and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State. . . ."

The basic classification was established in the incorporation law adopted by the 7th General Assembly.[30] This provided that municipalities of the state were grouped into: (1) cities of the first class, (2) cities of the second class, and (3) towns. All cities having a population of at least 15,000 were classified as cities of the first class, those between 2,000 and 15,000

were known as cities of the second class, and those municipalities with populations under 2,000 were classed as towns.[31]

This classification had for its purpose the grouping of municipalities so that the powers granted might be in accordance with the needs of the various sizes of cities.[32] The cities were, of course, not opposed to this use of classification since it could be used to give certain ones, especially the larger cities, additional powers to carry out their governmental responsibilities.

The legislature soon began making laws applied to a more narrow range of cities than that established by the general incorporation act. Special charter cities were designated as a class by themselves, and this was upheld by the Iowa Supreme Court.[33] The state's largest city, Des Moines, frequently has been placed in a class by itself through some legislation, and this often has been upheld.

The court's reasoning in upholding an act establishing a park board in cities of over 125,000 population indicates the basis on which classified laws will be upheld in this state.[34]

> If the act in question must be found to be special or local in character, it is because its application is presently and prospectively limited to the city of Des Moines. The enactment by the legislature of the chapter may possibly have been inspired by those primarily interested in the city of Des Moines. On this point we are not advised. There is nothing, however, in the character of the act itself indicating that the legislative intent was to so restrict its application. It is possible and perhaps probable that considerable time will necessarily intervene before any other city of this state, by the process of ordinary normal growth, will attain the prescribed population. If however and when they do, the act by its very terms will at once become applicable thereto. No matter how many cities of this state shall attain the required population, all will come under the provisions of the act, and none will be excluded.

It must be said, however, that classification has not been abused in Iowa to the extent that it has been in other states. Texas, for example, once knew a system where a law would apply to a city having, for example, "a population of 10,000 according to the census of 1910."[35] It is easy to see that where practices such as this were exercised, classification often degenerated into the worst features of special legislation.

Optional Charters

Several states have attempted to resolve the dilemma posed by special *versus* general legislation by offering an alternative means for the organization and operation of municipal government. This is known as the optional charter system.

Under this system cities are allowed to choose from a variety of "ready-made" charters. Alternatives such as mayor-council, commission, and council-manager government are usually available.

New Jersey is one of the most noteworthy states for this system of state legal control of cities. It was adopted by New Jersey's legislature in 1950 after a study made by a state commission on municipal government. The goal of the commission, and of the optional charter plan in general, is to "further local initiative in the revision of municipal charters within the framework of a general prescription laid down by the Legislature."[36]

Under the New Jersey scheme, municipalities desiring to change their form of government are offered a variety of choices. Three basic plans are proposed: the mayor-council, the council-manager, and the small municipalities plan. Within the mayor-council scheme there are six optional forms. There are five different council-manager options, and four variations of the small municipalities plan.

By the election of a charter commission, the citizens may study their form of government and may recommend either the adoption of one of the optional plans or a special charter more suitable to local needs. The voters may dispense with

the services of the charter commission and by the process of petition and referendum adopt one of the alternative plans.[37]

The Iowa plan for municipal government is roughly analogous to that of New Jersey. Although the variations are not so extensive, municipalities may choose between the mayor-council, commission, and council-manager forms. There are two variations of the council-manager form: it may be authorized either by popular election or by ordinance. The ordinance plan is designed more for the smaller municipalities, and is even available to towns in this state.

In evaluating the importance of the optional charter system it might be said that it represents a basic flexibility in government forms. It does not, however, provide a means whereby cities are granted the flexibility to meet their changing needs. Cities must still appeal to the legislature for special concessions to alter the established options.

A quotation from a study on state-local relations conducted by the Council of State Governments illustrates a basic weakness of the optional charter form in Iowa.[38]

> The question and answer columns of a single issue of the publication of the Iowa Municipal League illustrates the situation in that optional charter state. An official of one small town inquired if the town council might purchase uniforms for the members of its police force; an officer of a second municipality wanted to know if the city had authority to assess property owners for the cost of paving a sidewalk which extended from the benefited property to the corner curb; a third town asked if it would be possible to raise the salaries of underpaid council members; and a fourth official inquired if city funds might be used to erect a civic plaque, listing the names of local men and women serving in the armed forces.

The Council of State Governments concludes:[39]

> It would be difficult to find four spheres of governmental activity more purely local in character than po-

lice officers' uniforms, special assessments for sidewalks, the salary of city councilmen, and the erection of a war memorial. But, in each case, the city was advised that no state law existed under which the proposed project might be achieved. In each case, the inhibiting hand of the state can be clearly seen.

Home Rule

The chief characteristic of the methods of state control described so far is the municipal dependence on the will of the legislature. In large measure this results from: (1) the principle that cities may act only as the state gives them power and cannot act in the absence of specific authorization; (2) the legal axiom of strict construction which produces the rule that a city will be declared without power when the existence of that power is doubtful; and (3) the right of states to assume the exercise of any power subject only to generally ineffective constitutional limitations.[40]

Home rule, basically, is an attempt to relieve this dependence on the legislature. Although the state remains supreme, a constitutional home rule grant gives cities power to act without specific legislative authorization. It is an alternative means of establishing state-local legal relationships that was conceived to overcome the limitations of the other methods.

The Current Situation in Iowa

The purpose of this extensive background has been to point out that the Iowa legislature controls municipal government through a heritage of diverse practices. Four municipalities—Davenport, Wapello, Camanche, and Muscatine—still have special charters granted prior to the constitution of 1857. The remainder are controlled by an extensive portion of the Iowa Code. All municipalities do not receive the same powers, however, for there are more than 200 provisions of the Code that apply exclusively to cities within certain designated population ranges. Also, certain powers apply only to cities with a specific form of government. For example, use of the

recall device to remove elected officials from office is allowed only to cities that have the commission form of government.

In interpreting these laws, courts have adopted the principle of strict construction. Therefore, unless a certain power is explicitly spelled out, it is denied. This has led to three consequences:

First, the Code of Iowa is filled with minute detail. Sections 566.17-.18, for example, authorize cities to send delegates to cemetery conventions. They also allow the cities to subscribe to cemetery periodicals. Presumably, these things could not be done if the authorization did not exist. And further, the legislature has made the more general powers granted to cities replete with extensive detail on the basis that these things must be clearly established if the act is to be valid. The courts, on the other hand, have adopted the position that if it was the intention of the legislature to grant a specific power, then they would have spelled it out.

Second, a "lag" system of legislation has developed. If a municipality wishes to perform some function not specifically defined, it must petition the legislature for authorization. Thus, the city has to wait until the next session of the General Assembly to get the necessary authority to act.

Finally, this not only takes time and effort on the part of municipal sponsors, it also diverts the attention of the legislators from state affairs to matters of only local importance. In the last four sessions of the General Assembly, approximately 326 bills relating to municipalities were presented for consideration. Of this number, only 130 became law. If each of these bills represented some authority that municipal officials considered important for the effective management of their cities, then the legislature was spending a great deal of time on local bills, but assisting the cities only thirty-nine per cent of the time.

In 1950 the Municipal Statutes Study Committee noted:[41]

> That it is impossible for the state, acting through the state legislature, to anticipate all of the local problems

> that are by-products of changing conditions and advancements in living standards and to grant specific authority to municipal corporations to enable them to successfully cope with such problems.

The committee agreed: [42]

> That municipal corporations should be given broader powers of self-determination in the regulation of local affairs.

Since this report, a great deal of statutory revision has been accomplished. The basic goal, however, of giving municipal corporations broader powers of self-determination has not been faced. It is the purpose of the subsequent chapters to describe how home rule may assist in making this goal possible.

CHAPTER II

Municipal Home Rule: Principles and Practices

The concept of municipal home rule as the legal basis for state-local relations was conceived in an era rife with legislative abuse of cities. Missouri, in 1875, was the first state to put the home rule idea into constitutional form. The basic idea of this state's plan was to prevent legislative tinkering by empowering cities to frame a charter for their own government, the charter to be consistent with and subject to the laws and constitution of the state. When home rule was taken up by California four years later, its provision was broadened by granting cities not only charter-making authority but also the authority to legislate on certain subjects without the necessity of deriving authority from legislative enabling acts.

As other states joined the home rule movement, they contributed numerous other variations to this basic theme in an attempt to adapt the home rule concept to local conditions and to overcome difficulties in applying the basic home rule doctrine. At present slightly more than one-half of the states have adopted some form of home rule; thus, there are multitudinous practices which may justifiably be included within the scope of the concept.

The purposes or objectives of home rule also have been altered since the inception of the plan. Writing in 1916, Professor McBain thought of home rule as "the federal idea" applied to city-state relations.[1] According to him, the purpose of home rule is to specify an area of power for the cities in which they can act with complete freedom, much like the division of areas of action for the state and federal governments specified in the Federal Constitution. Current thinking, in contrast, tends to place more emphasis on the idea of in-

terdependence of cities and the state, and also of interdependence among cities such as those in a metropolitan area. These people argue that it is unrealistic to promote a system of separatism and independence among governmental units. They view home rule more as an integrating device.[2]

Also, it should be noted that in interpreting the home rule provisions, many courts have adopted the position that a city cannot be an *imperium in imperio,* a state within a state. The basis for a city's authority must be the state, and consequently there can be only gradations of authority delegated to the municipality. Thus, home rule, as applied, is a matter of degree.

These facts tend to establish a basic conclusion: that home rule is a relative concept, and it has no precise meaning. The meaning of home rule, instead, must be expressed by describing the basic characteristics or principles of the topic and indicating the results obtained from their application. This chapter attempts this kind of description and is, accordingly, an attempt to answer the basic question: What is home rule?

Constitutional Basis

Home rule attempts to modify the constitutional status of the cities. That is, in home rule states the state constitution prescribes the basic powers available to cities. In non-home rule states, these powers are derived from the state legislature. This fact has been recognized by the U.S. Supreme Court, which stated in 1919 that a home rule city "occupies a unique position." . . . "It does not, like most cities, derive its powers by grant from the legislature, but it frames its own charters under express authority from the people of the State, given in the constitution."[3]

In one sense, therefore, home rule may be said to be the attempt to change the constitutionally subordinate position of cities within the state, to some degree, by a constitutional grant of charter-making and substantive powers.[4] It does not deny the Dillon doctrine, but it does attempt to "soften" it.

Types of Constitutional Provisions

Although each constitutional home rule provision has its unique features, there is a convenient classification which groups the provisions in three broad classes: (1) self-executing, (2) mandatory, and (3) permissive. Although it is not based on constitutional enactment, "legislative" home rule is also sometimes considered.

Self-executing—"The 'self-executing' constitutional provision *grants* home rule and itself contains sufficient procedural direction to enable a municipality to claim home rule by its own action."[5] The constitution of Ohio, for instance, provides that: "Any municipality may frame and adopt or amend a charter for its government. . . ."[6] In Hawaii, "Each political subdivision shall have the power to frame and adopt a charter for its own self-government."[7]

Mandatory—"The 'mandatory' constitutional provision asserts that home rule *is granted* and requires the legislature to provide implementing procedural statutes."[8] The Texas provision is typical of this type of home rule. It states: "Cities . . . may . . . adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature . . . ."[9]

Permissive—"The 'permissive' constitutional provision states that the legislature *may grant* home rule, leaving wholly to the legislature exactly what, when, and how."[10] The constitution of Nevada illustrates this type of grant. ". . . the legislature may . . . permit and authorize . . . any city or town to frame, adopt, and amend a charter for its own government . . . ."[11]

Legislative—In "legislative" home rule states such as Connecticut, the legislature, by its enactment, provides home rule powers. There is no constitutional authority.

Discussion of Types

The classification of "self-executing," "mandatory," "permissive," and "legislative" home rule is used by many authorities, but there is little agreement on which states should be

included within each category. Sometimes a state should be in two categories. In Alaska, for example, the home rule charter-making power is self-executing with respect to boroughs of the first class and cities of the first class.[12] The legislature is permitted to extend home rule to other cities and boroughs.[13]

The self-executing provision generally is regarded as the most desirable. This type allows cities to frame their charters on the basis of the constitution alone, without the necessity of legislative action. One disadvantage, however, is that most self-executing provisions also spell out in the constitution the procedure a city must follow to obtain home rule. The California constitution can be cited as an example of the extremes to which this can go. The section prescribing the method of preparing a charter is as follows:[14]

> The board of freeholders shall, within one year after the result of the election is declared, prepare and propose a charter for the government of such city or city and county. The charter so prepared shall be signed by a majority of the board of freeholders and filed in the office of the clerk of the legislative body of said city or city and county. The legislative body of said city or city and county shall, within 15 days after such filing, cause such charter to be published once in the official newspaper of said city or city and county and each edition thereof, during the day of publication (or in case there be no such official newspaper, in a newspaper of general circulation within such city or city and county and all the editions thereof issued during the day of publication) and in any city or city and county with over 50,000 population shall cause copies of such charter to be printed in convenient pamphlet form and in type of not less than 10 point and shall cause copies thereof to be mailed to each of the qualified electors of such city or city and county, and shall until the day fixed for the election upon such a charter, advertise in one or more newspapers of general circulation in said city or city and county a notice that copies thereof may be had upon application therefor.

The constitution of this state also points out other procedural matters in equally great detail. Detail such as this in a constitution is contrary to a basic principle of constitution-making which holds that this basic document of a state should be as short and as free of detail as possible. To change the printing requirement of the use of ten-point type to five-point type, for example, would require a constitutional amendment.

In the "mandatory" type of provision, the constitution is free of procedural detail and directs the legislature to provide a means of implementing the home rule grant. Although this has many advantages in terms of constitutional brevity, the legislature could, if it wished, make the adoption procedure so difficult that cities would be prevented from realizing the constitutional grant.

When "permissive" home rule is available, the legislature may act at its discretion in providing home rule. This approach has the overriding disadvantage that as long as the legislature remains inactive the constitutional provision is worthless.

The least favored type of home rule is the "legislative" variety. Any grant of home rule powers made to a city stems from legislative act alone, and there is no guarantee that the legislature will not withdraw the grant at its discretion. Further, since there is no constitutional authorization, a legislative grant of home rule may be questioned as an improper delegation of legislative authority.

Attempting to confer home rule by broadening municipal statutes is an equally ineffective approach. Although statutory revision may provide for more local discretion, it does nothing to improve the basic legal framework of municipal powers, and there is no guarantee that the liberal approach will be continued by the legislature.

Legislative home rule in Iowa—The state of Iowa, under the constitution of 1846, experimented with a type of legislative home rule. Chapter 42 of the Code of 1851[15] set forth

a means whereby villages containing at least 300 inhabitants could become incorporated as towns, and towns or villages of 2,000 or more inhabitants could become incorporated as cities under a procedure that was very similar to some more recent methods of home rule incorporation. The statute authorized the municipalities to decide by vote for or against incorporation, and if the vote was favorable, a charter commission was to be chosen to prepare a charter for the municipality. The proposed charter was then submitted to a vote of the people. The statute also lists certain powers that could be included in the charter.

This right to adopt and approve locally a charter is a hallmark of home rule. There is, however, no evidence of any municipality acting under authority of this chapter, and the authorization was discontinued after the adoption of the constitution of 1857.

Nature and Extent of the Grant

Home rule provisions contain one or more of the following types of powers: (1) the power to make charters, (2) a general grant of power, and (3) certain substantive powers. The general rule is that the charter-making power must be exercised before the grant of substantive power. But in Ohio, because the general grant of power and the grant of charter-making power are in separate provisions, the courts have reached the opposite conclusion.[16]

Charter-making power—It appears, from a study of the constitutional provisions, that the power to make, amend, repeal, and adopt a new charter is the most frequently granted home rule power. However, the Alaska constitution states that "A home rule borough or city may exercise all legislative powers not prohibited by law or by charters."[17] This specifically makes the charter a limitation and not a grant of power.

The importance of including the right to amend or repeal a charter has been noted by pointing out that the California Supreme Court once concluded that once a city had adopted

a charter it could not adopt another, but had to content itself with amending the existing charter.[18]

General power—After stating the power to frame charters, many constitutional provisions set forth a general grant of power to the municipalities. This grant is usually in terms of the right to exercise "self-government," "local self-government," or the power to control "local affairs." Many variations and combinations exist, but these three terms are the most frequently used. Basically, they all suggest that there is an area of power which is reserved exclusively to the cities.

These terms should be examined closely, for ever since the inception of the home rule concept they have been a focal point of controversy on the subject, and often have been the key to the success or failure of a home rule plan.

The reason for this becomes apparent when the question is posed: What are the powers of "self-government," and what are "local affairs?" It is evident that there can be no satisfactory answer to this question since it is folly to assume that governmental services or functions could be divided neatly between the state and local governments. Yet, when courts must interpret these home rule provisions, they are asked to perform this very duty. That judges do not care for this task is evidenced by the following comment by a justice of the California Supreme Court: "The section of the constitution in question uses the loose, undefinable, wild words 'municipal affairs' and imposes upon the courts the almost impossible duty of saying what they mean."[19]

Substantive powers—One attempted answer to the problem of defining what powers are "local" and what are "state" has been to write into the constitution certain powers that shall be determined local functions, or to list powers that shall be denied to local governments. Utah, for example, has an extensive list of things that municipalities may do, such as borrow money, own and operate utility plants, etc.[20]

The implications of this topic of general and substantive powers will be considered more fully in the next section which

describes the scope of the problem and the attempted solutions to it.

Other Features of Constitutional Provisions

The home rule articles of the constitutions, especially in the ones that grant self-executing home rule, also contain extensive provisions describing the selection, compensation, etc. of local boards to draw up home rule charters; requirements concerning the ratification and approval of the charter; and similar matters. These are not of great relevance in a description and evaluation of the substance of home rule, but it should be noted that sometimes these procedural requirements are so difficult to meet that cities are prevented from adopting a charter.

Determining Matters of State and Local Concern

The major differences among the theoretical doctrines of home rule and also among the constitutional enactments are, in large part, the result of divergent approaches toward resolving the problems presented by the state-local dichotomy. That these are extensive and difficult is evidenced by the fact that they have existed in various forms ever since the original grant of home rule power was made in 1875.

When the home rule idea was presented by the Committee on St. Louis Affairs to the Missouri constitutional convention, it was met with considerable opposition—largely from delegates representing rural areas.[21] As a result of this feeling, the following amendment was proposed: "Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State."[22] With this addition the home rule proposal was enacted.

The opposition to the California proposal, four years later, raised practically the same point: they feared that home rule was an attempt to create an independent city of San Francisco. So to the home rule proposal was added an amendment

to the effect that all charters, after being ratified by the people, were to be submitted to the state legislature for approval. By this provision it was clear that the legislature still retained control over San Francisco just as it did over other cities.[23]

Thus, the early home rule powers were somewhat a matter of legislative grace. The legislature could eliminate municipal authority by passage of a general statute or through disapproval of a charter.

General Grants

In an attempt to give more strength to the home rule concept, later home rule advocates tried to give constitutional recognition to at least some degree of municipal authority that the states could not pre-empt so easily. This they sought by including in the home rule grant provisions granting cities authority over such things as "local affairs."

It has been pointed out that these general statements of intent did not clarify the situation. Instead, the courts were placed in the unhappy position of trying to determine what were "local" as opposed to "state" affairs. This was never easy, and became more difficult with the passage of time. The advancement of our technological society increased the need for coordination and interrelations between the levels of government so that it became impossible to define any major governmental function as inherently "local" or "state" in character.

Also, the courts used Dillon's Rule as a guide for determining what were "state" or "local" affairs. Since this rule emphasized the authority of the state, the tendency of court interpretations was to minimize the scope of what could be considered "local affairs."

Specific Grants

Professor McBain, in 1916, recognized the weakness of the general grants, and suggested that perhaps it might be advantageous, in addition to bestowing the usual grant of gen-

eral powers on cities, to enumerate certain functions in the constitution that should be regarded definitely as matters of local concern.[24] Seventeen years later, Professor McGoldrick was more sure that this was necessary. He stated: "If home rule is to mean anything . . . it must be home rule in particular matters."[25]

Several states have taken this course of action. The Colorado constitution enumerates the following as local functions: creation and terms of municipal offices; the creation and regulation of police courts; all matters pertaining to municipal elections; the issuance, refunding, and liquidation of municipal obligations; consolidation and management of water districts; and the assessment and regulation of property.[26] The constitutions of Oklahoma, Michigan, Ohio, Utah, and New York are among those that also contain some degree of specification of power.

The *Model State Constitution*[27] prepared by the National Municipal League in 1946 advocated the use of special grants.[28] In this model the powers of cities are set forth in broad terms:[29]

> . . . each city is hereby granted full power and authority to pass laws and ordinances relating to its local affairs, property, and government; and no enumeration of powers in the constitution shall be deemed to limit or restrict the general grant of authority hereby conferred; but 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.

Following this there is a list of nine broad areas of activity that are to be construed as a partial enumeration of the powers conferred on cities.

These powers are:[30]

> (a) To adopt and enforce within their limits local police, sanitary and other similar regulations.
> (b) To levy, assess and collect taxes, and to borrow

money and issue bonds, and to levy and collect special assessments for benefits conferred.

(c) To furnish all local public services; and to acquire and maintain, either within or without its corporate limits, cemeteries, hospitals, infirmaries, parks and boulevards, water supplies, and all works which involve the public health and safety.

(d) To maintain art institutes, museums, theatres, operas, or orchestras, and to make any other provision for the cultural needs of the residents.

(e) To establish and alter the location of streets, to make local public improvements, and to acquire, by condemnation or otherwise, property within its corporate limits necessary for such improvements, and also to acquire additional property in order to preserve and protect such improvements, and to lease or sell such additional property, with restrictions to preserve and protect the improvements.

(f) To acquire, construct, hire, maintain and operate or lease local public utilities; to acquire, by condemnation or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and regulate the exercise thereof.

(g) To issue and sell bonds, outside of any general debt limit imposed by law, on the security in whole or in part of any public utility or property owned by the city, or of the revenues thereof, or of both, including in the case of a public utility, if deemed desirable by the city, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.

(h) To organize and administer public schools and libraries.

(i) To provide for slum clearance, the rehabilitation of blighted areas, and safe and sanitary housing for families of low income, and for recreational and other facilities incidental or appurtenant thereto; and gifts of money or property, or loans of money or credit for such purposes, shall be deemed to be for a city purpose.

It is stipulated that this enumeration shall not be deemed to restrict the grant of authority; that is, additional home rule powers outside this list may be assumed. On the other hand, the legislature's power to enact laws of state-wide concern uniformly applicable to every city is not restricted.

The principle of this model is to provide a broad constitutional grant of self-executing home rule requiring no legislative action. It attempts to provide a definite grant of home rule powers in the nine enumerated areas, but home rule powers do not have to be confined to these specified subjects. Professor Bromage has pointed out that the language of the provision seeks to create an *imperium in imperio;* that is, there is an area of home rule power, partially enumerated, which is not subject to legislative grace.[31] Thus, the constitution itself attempts to resolve part of the problem of determining what affairs are of "local" as opposed to "statewide" concern by listing certain functions which are to be considered as being primarily of local concern.

The principal criticism that can be levied against this "model," and the use of specific constitutional grants in general, is that, although it restricts the legislature in certain areas and gives some guidelines to the courts, it does nothing more than the earliest general grant clauses did to resolve the problem of conflict with state action. That is, the legislature could confine the scope of home rule to the subjects enumerated.

American Municipal Association Model

The importance of the American Municipal Association Model [32] is that it seeks to depart from the usual approach to home rule which attempts to establish exclusive spheres of state and local concern. This feature is expressed in section 6 of the model:

> 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.

By this provision, municipalities have the full range of powers that the legislature is capable of granting under the constitution and unless the municipal power is limited by constitutional provision or uniform statutory legislation applicable to all home rule cities, the muncipality has the authority to proceed on any subject without petitioning the legislature for positive enabling legislation.

One consequence of this is that the problem of determining what matters are of local as opposed to state concern has been avoided, at least in theory. Since the municipalities are granted all the powers the legislature could bestow on them, there is no need to differentiate which of these should be kept from the cities as matters of state concern.

A second consequence of the provision is that the legalism of the *imperium in imperio* doctrine is buried because the constitution gives municipalities all the powers that the legislature could.

Finally, it should be pointed out that by the provision, legislative supremacy is maintained. The legislature, by positive enactment, may deny any power, whether it be of statewide or local concern.

The basic difference between the two models just discussed is that the National Municipal League approach attempts to reserve at least a small area of home rule that is beyond legislative discretion through its enumeration feature. On the other hand, the American Municipal Association approach is that perhaps more home rule will be gained by giving the cities a broad authorization, and if the legislature wishes to limit this it has to act affirmatively.

It has been reported that in the state of Texas, judicial interpretation of that state's home rule provision has tended to parallel the approach of the AMA model, since courts have

adopted the position that any power available to the legislature under the Texas constitution is available to home rule cities unless denied by general law.[33]

Kansas Approach

On July 1, 1961, a home rule amendment to the constitution of Kansas was put into effect.[34] A discussion of this is presented here because it is considered to have some unique features and variations from the approaches listed above.

Principally, the Kansas provision is a modification of the American Municipal Association model. It grants broad powers of self-government to cities, while at the same time investing the legislature with important powers—"the result being a sort of controlled home rule."[35]

Paragraph (a) of the provision sets forth certain absolute powers of the legislature. These include: (1) the procedure for incorporating cities, (2) the means of altering boundaries, (3) means by which cities may be merged or consolidated, and (4) the methods by which cities may be dissolved. These topics are outside the purview of the cities' authority, and the constitution directs the legislature to provide for these matters by general law applicable to all cities. Although there are, at present, various statutes relating to annexation, etc., that do not apply to all cities, the legislature cannot enact new laws that apply to fewer than all the cities. The legislature must enact a general statute applicable to all municipalities, but the present laws remain in effect until it does.

The basic grant of home rule powers to municipalities is expressed in paragraph (b). This provides: "Cities are hereby empowered to determine their local affairs and government. . . . Cities shall exercise such determination by ordinances passed by the governing body. . . ."[36] The import of this is that cities are given constitutional authorization to act in meeting their local problems without having to ask the legislature for enabling legislation.

However, the provision goes on to state that the legisla-

ture may establish four classes of cities and pass enactments applicable uniformly to all cities, enactments applicable uniformly to all cities of the same class limiting or prohibiting the levy of any tax, excise, fee, or other exaction, and enactments prescribing limits of indebtedness.

The implication of this provision would seem to be that cities are free to experiment in meeting their problems without legislative action, unless the legislature acts affirmatively in passing laws of general applicability, or laws regarding revenue that apply to all cities of the same class.

The unique feature of the Kansas provision is set forth in the next paragraph which describes the use of a charter ordinance.[37] "A charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature as referred to in this section and which may provide substitute and additional provisions on the same subject."[38] In effect, this provides an additional safeguard against excessive legislative control because a city can exempt itself from the whole or any part of a legislative enactment other than those applicable uniformly to all cities, or enactments prescribing debt limits. Passage of a charter ordinance requires the two-thirds vote of the city council and is subject to certain requirements of publication, etc.

Thus, it would seem that Kansas cities, by use of either ordinary or charter ordinances, are free to exercise local discretion except as prevented by statutes applicable to all cities, debt limit statutes, statutes relating to incorporation, alteration of boundaries, merger or consolidation, or dissolution, and possibly statutes limiting or prohibiting revenue measures applying to classes of cities.

The chief criticism of the Kansas provision may be directed toward the legislative power to limit sources of revenue. It appears that the legislature can do this by passage of laws applicable to a class of cities, and these cities cannot exempt themselves by charter ordinance. Thus, with a legislative limitation on sources of revenue for a new function, the power

of the cities may be limited effectively. This objection is speculative, however, for the meaning of the provision has not yet been interpreted by the Kansas courts.

It has been reported that some cities have taken action on the strength of the home rule provision. Certain cities have exempted themselves from a statute prescribing two-year terms for certain officials, and have substituted four-year terms instead. One city made the city treasurer an appointed rather than an elected official.[39]

Numerous other actions have been taken, but while the amendment has been mentioned in a few supreme court decisions, no questions relating to home rule have yet been considered. The effectiveness of the Kansas approach is still to be determined.

Operation of Home Rule

Given these diverse theoretical approaches, how has home rule worked out in actual practice? Which approach would tend to grant the most home rule for cities? These are difficult questions to answer, as opinions differ concerning whether home rule provisions have resulted in a substantial increase in municipal powers. To use a single state, Wisconsin, for example, one authority reports that home rule has been given a liberal interpretation.[40] Another reports that home rule has been exercised only in a restricted fashion.[41] This does not mean that one statement is correct and the other faulty, but simply indicates that the success of home rule is a topic on which reasonable men may differ.

Home Rule Adoptions

One evidence that home rule is considered significant is that states are continuing to adopt home rule provisions. The table on the next page indicates the number of states adopting home rule provisions by decades.[42]

There is a possibility that even more states will adopt home rule provisions or revise their present article in the 1960's.

ADOPTIONS OF HOME RULE PROVISIONS BY DECADES

1870 - 1880	2
1881 - 1890	1
1891 - 1900	1
1901 - 1910	4
1911 - 1920	6
1921 - 1930	4
1931 - 1940	2
1941 - 1950	2
1951 - 1959	7

The Kansas provision went into effect July 1, 1961, and the states of South Dakota and Wisconsin, among neighboring midwestern states, have shown interest in revising their present system.

Furthermore, in comparison between the years 1949 and 1956, the percentage of cities adopting home rule charters increased in eleven of the states which had home rule available in both years. In three states the percentage of adoptions stayed the same, and in only two did it decline.[43]

Substantive Powers Available

No comprehensive analysis of the substantive powers of home rule cities has been made, and even if there had, it would be out of date almost immediately, since the scope of home rule is constantly being expanded or contracted by the legislatures and the courts. In a report prepared by Rodney Mott for the American Municipal Association in 1949, it was noted, however, that conflict between state and local authority tended to occur in certain areas. The principal areas of conflict at the time were: division of tax sources between the state and the localities; the organization of local courts; annexation or consolidation procedures; authority to regulate utilities, traffic, health matters, and building; and the control of major public services such as education, police, or housing.[44] Presumably, one would be inclined to judge the ef-

ficacy of home rule in a state on the basis of how much local authority was allowed in each of these areas.

The availability of home rule powers in one state, Arizona, has been summarized as follows:[45]

1. Adopt its own property assessment system (but all Arizona's home rule cities now use county assessment machinery).
2. Sell or dispose of city property without advertising same.
3. Control its own municipal elections.
4. Levy revenue taxes not expressly authorized municipalities by state law.
5. Levy a transaction privilege tax (commonly referred to as a 'sales tax').
6. Compensate its mayor and councilmen as much as the city deems necessary.
7. Raise and use funds for advertising purposes over and above the usual legislative limitations.

On the other hand, home rule municipalities must submit to state laws in the following areas:[46]

1. The State Corporation Commission's regulatory jurisdiction over public utilities (privately owned).
2. The State Department of Liquor License and Control's jurisdiction over the regulation and licensing of liquor traffic. But charter cities can tax liquor sellers for revenue purposes.
3. The State Highway Code. The Code is superior where it conflicts with charter or ordinance provisions dealing with various subjects, including reckless driving, speed limits, and drunk driving.
4. The State Budget Law which prohibits a municipality from exceeding, by ten per cent (with exceptions), the expenditures or direct tax revenues budgeted in its preceding fiscal year, unless approval for the excess is given by the State Tax Commission.
5. State laws governing property tax liens.
6. State publication laws concerning the method for incurring municipal debts.

7. State municipal indebtedness laws.
8. State laws requiring a municipality to purchase tax delinquent properties where there are no other purchasers.
9. State minimum wage and maximum hour laws.
10. State municipal employee pension laws (where the home rule city did not have an employee pension system prior to passage of the state law).
11. State municipal housing laws; but the whole field of housing hasn't been appropriated by the state.
12. State garnishment laws.
13. The State Dairy Code.

In evaluating the substance of home rule, similar balances would have to be made for each state.

CHAPTER III

Expanding Home Rule

In recent years much attention has been given to the interdependent nature of levels of government. This has led some authorities to the conclusion that the more traditional goals of municipal home rule, such as promoting municipal independence and creating an area of power that is outside the authority of state legislation, are anomalous to the fact that most governmental problems are now problems of shared responsibility rather than the exclusive concern of either the state or local governments. Persons with this view would conclude that if home rule has any potential, it is as a means of integrating the levels of government for the solution of common problems and performance of common functions.

Home Rule and Other Units of Local Government

It is important to recognize that cities can no longer isolate themselves from other units of local government. Instead of being independent corporations surrounded by rural countryside, the modern city is frequently just a part of a sprawling metropolitan region surrounded by incorporated places and unincorporated territory. Although the powers of the city may be confined to the area within its boundaries, municipal-type services are required on a much broader basis.

Recently it has been proposed frequently that the problems of carrying out governmental functions that have outgrown municipal boundaries can be met at least partially by more effective use of the county level of government. Several states, notably New York and California, have adopted an "urban county approach" and have transferred piecemeal certain individual functions from the local government to the coun-

ties, or have expanded the status of counties to include an array of urban activities which they perform in unincorporated urban areas.[1] Another approach has been the concept of city-county consolidation. Under this scheme, the functions of a city and county are consolidated under one jurisdiction. Still another approach has called for the expansion of county home rule.

County Home Rule

Traditionally, county home rule has consisted largely of constitutional authorization enabling counties to adopt a form of government different from that prescribed by general statute. It has been sort of an "optional charter" scheme, allowing counties to experiment with the form of government, but allowing no considerable change in the substantive powers of government. The principal advantage of county home rule has been that it has allowed the counties to modify the more progressive forms of city government to their own needs. The "county manager plan" and "county president plan" are counterparts of council-manager and strong mayor government on the municipal level.

In light of the growing demands on urban counties, however, it can be claimed that more authority than this is required. The services being performed by counties frequently include planning, zoning, police and fire protection, recreation activities, and many other municipal-type functions—all in addition to the more traditional functions of a county.

Furthermore, many of the problems faced in urbanized counties are susceptible of solution on a county-wide basis. Minimum standards for zoning are one example of this.

It is frequently considered, therefore, that home rule could become more meaningful not only for cities but also for the other units of local government if there was authorization for intergovernmental relations between these forms of local government. In this way the types of services offered by the city and county would not be duplicated, nor would such

things as police and fire protection stop at the city limits. Uniform standards could be adopted on a county-wide basis, and the small municipalities and unincorporated places in the urban county could enjoy the same quality of governmental services as the larger city.

Several states have experimented with this approach, and the result has been a wide variety of city-county relationships ranging from informal cooperative agreements to a city-county charter designed specifically to create a metropolitan government in Dade County, Florida.

In 1960-1961, the Connecticut and New Mexico legislatures passed statutes authorizing interlocal agreements between governmental units in the states, and also authorized interlocal agreements to be made with local agencies in other states. The Colorado legislature authorized the creation of metropolitan capital improvement districts by the governing body of any county, city-county, or town containing thirty per cent of the total county population.[2]

A constitutional amendment in Ohio in 1959 authorizes the voters of a county to adopt a charter changing the form of county government to give the county powers concurrent with those of the municipalities. In counties of 500,000 or more population, a majority vote by the voters of both the county and its largest city can approve a charter giving the county municipal powers for that area.[3]

Other recent examples of interlocal relations have occurred in Washington where the legislature has authorized cities and counties to form air pollution control districts, and in Utah where a recent act authorized counties to establish county service areas for extending urban services to unincorporated areas or to areas where the local government has failed to provide services.[4]

The Iowa legislature also has taken cognizance of the need for interlocal relations. It has authorized cities, counties, and towns to participate jointly in several functions. For example, cities can own and operate fire equipment jointly with any

other city, town, or township. They also may collaborate with other political subdivisions of the state in establishing airports. Counties also are authorized to join with other counties in establishing drainage districts, and soil conservation districts. In all, there are more than fifty topics on which various political subdivisions of the state are allowed to join together for joint performance.

Home Rule in Metropolitan Areas

The Advisory Commission on Intergovernmental Relations has recently recommended a modification of the home rule concept:[5]

> Local home rule for strictly local problems; metropolitan home rule for areawide problems but with the State free to legislate and otherwise act with respect to problems which transcend county boundaries and which are not soluble through interlocal cooperation.

This recommendation is based on the realization that the more traditional home rule concepts could be carried to an extreme. The Advisory Commission points out that constitutional provisions which confer home rule powers on municipalities and spell out functions with respect to which the state legislature may not intervene have the effect of placing handcuffs on the state in helping the local area meet a functional problem which has grown beyond effective local administration. The Commission cites the example of water supply and sewage disposal. If these are municipal-type functions enumerated in a constitutional home rule provision for municipalities, the state is hampered in any attempts to influence an areawide approach to solving the problems these functions present.[6]

Other authorities also question whether traditional home rule might not lead to a built-in inflexibility concerning solutions to metropolitan area problems. One points out that incorporation of suburban communities is frequently conceived and carried out with the express purpose of obtaining "home

rule" protection for municipal boundaries, thus thwarting development of the larger metropolitan area.[7] Another concludes that it would seem more advisable to create a state-local-area power relationship which can be changed and adapted in a more convenient manner than by constitutional amendment.[8]

However, many of these objections may be overcome by working for a form of home rule that will allow not only the most desirable amount of local discretion, but also permit the greatest degree of intergovernmental cooperative action. Perhaps the basic goal has been well-put by Luther Gulick when he stated that municipal home rule in the mid-twentieth century is not the right to be left alone behind a legally defined bulwark, but rather, the right to participate as an equal partner in arriving at decisions which affect community life.[9]

Summary and Conclusions

The history of home rule has been basically an attempt to increase the powers available to local government by means of constitutional authorization. Three types of constitutional provisions have been used: (1) the grant of charter-making powers; (2) the grant of general powers of local government; (3) the grant of specified powers. Each of these has proved to be a less than ideal means of achieving home rule. When the right to make charters is granted, the state legislature can retain control over all municipal functions by passage of general laws. If a right to control "local affairs," or some such variation, is granted, courts are forced to determine what constitute "local" affairs. And when specific powers are granted, home rule is largely confined to those powers specifically granted and the constitutional enumeration tends to promote rigidity and hamper the state in helping to solve governmental problems which transcend municipal boundaries. The American Municipal Association approach seeks to overcome the disadvantages of these three types of grants by investing

municipalities with all the powers the legislature could devolve upon them. Then, the legislature has to take positive action if it wishes to limit municipal powers.

Recommendation for Iowa

It is recommended that if Iowa decides to give legal sanction to the home rule concept, it should be expressed in a self-executing constitutional provision. By this means, home rule would be granted without the necessity of legislative action to provide enabling legislation.

It is further recommended that the basic approach prescribed by the American Municipal Association be followed. That is, municipalities should be granted the widest possible range of home rule powers, but with the stipulation that the legislature, by positive enactment, can assume authority. Kansas, the most recent state to adopt a home rule amendment, has adopted this approach with modifications. The Constitution of Alaska, adopted in 1959, also provides for this type of municipal authority. Although the AMA approach has not been in use long enough to be tested fully, it appears, at least in theory, to meet the objections presented by the other types of home rule. Also, it provides a means for the solution of areawide or metropolitan problems, since the legislature, by positive enactment, can assume authority when statewide or areawide policy is needed.

Since counties can contribute to the strengthening of home rule, it is recommended that the constitutional home rule provision direct the legislature to establish optional forms of government that may be selected by the counties.

Finally, it is recommended that the home rule provision include a statement to the effect that laws regarding municipalities be construed liberally and that it is the intent of the enactment to promote means whereby units of local government can join together and initiate cooperative agreements

for the solution of common problems and the carrying out of common functions.

Conclusion

The constitutional home rule enactment is the basis for the ultimate operation of home rule in a state. Consequently, great care should be exercised in preparing the provision so that it will indicate clearly the scope and nature of home rule power that is to be available. The constitutional provision itself, however, will not guarantee that home rule will be exercised profitably. The attention of the legislature, the courts, and of local officials themselves must be directed constantly toward determining how the home rule power can best assist local government units in providing services for the citizens to which they are responsible.

Notes

CHAPTER I

1. Howard L. McBain, *The Law and the Practice of Municipal Home Rule* (New York: Columbia University Press, 1916), p. 3
2. *Ibid.*, p. 4
3. O. K. Patton, "Home Rule in Iowa," *Applied History*, Vol. II (Iowa City: The State Historical Society of Iowa, 1914), p. 104
4. McBain, *op. cit.*, pp. 12-13
5. People ex rel. Le Roy v. Hurlbut, 24 Mich. 44 (1871)
6. State v. Barker, 116 Iowa 96 (1902)
7. City of Clinton v. Cedar Rapids and Missouri River R.R. Co., 24 Iowa 455 at 475 (1868)
8. Worcester v. Worcester Consolidated Street Ry. Co., 196 U.S. 539 at 548-549 (1905)
9. Italics supplied
10. *Commentaries on the Law of Municipal Corporations* (5th ed.; Boston. Little, Brown, and Company, 1911), Vol. I, pp. 448-450
11. Mt. Pleasant v. Beckwith, 100 U.S. 514 (1880)
12. Williams v. Eggleston, 170 U.S. 304 (1898)
13. McBain, *op. cit.*, p. 23
14. George F. Robeson, *The Government of Special Charter Cities in Iowa* (Iowa City: The State Historical Society of Iowa, 1923), pp. 24-25
15. *Ibid.*, p. 26
16. *Ibid.*, p. 27
17. *Loc. cit.*
18. *Ibid.*, p. 175
19. *Ibid.*, p. 21
20. Arthur W. Bromage, *Introduction to Municipal Government and Administration* (New York: Appleton-Century-Crofts, Inc., 1957), p. 111
21. *Constitution of Iowa*, Art. III, Sec. 30
22. *Ex parte* Samuel Pritz, 9 Iowa 30 (1859)
23. McBain, *op. cit.*, p. 59
24. *Laws of Iowa, 1858*, Ch. 157
25. McBain, *op. cit.*, pp. 82-83
26. *Ex parte* Samuel Pritz, *supra* at page 33
27. McBain, *op. cit.*, pp. 100-101
28. Council of State Governments, *State-Local Relations* (Chicago, 1946), pp. 151-152
29. *Ibid.*, p. 152

30. *Code of Iowa* 1860, Ch. 51
31. This classification remained in effect until 1951 when the 54th General Assembly eliminated the two classes of cities and established "cities" as municipal corporations of 2,000 or more population while "towns" are municipal corporations of less than 2,000 population. This division of cities and towns is the classification currently used. (*Code of Iowa* 1962, Sec. 363.4)
32. Patton, *op. cit.*, pp. 106-107
33. Ulbrecht v. Keokuk, 124 Iowa 1 (1904)
34. State ex rel. Welsh v. Darling, 216 Iowa 553 at 559 (1933)
35. John P. Keith, *City and County Home Rule in Texas* (Austin: Institute of Public Affairs, The University of Texas, 1951), p. 58
36. Benjamin Baker, *Municipal Charter Revision in New Jersey* (New Brunswick: Bureau of Governmental Research, Rutgers University, 1953), p. 1
37. *Ibid.*, p. 2
38. *State-Local Relations, op. cit.*, p. 156
39. *Loc. cit.*
40. *Ibid.*, p. 155
41. *Report of Municipal Statutes Study Committee* (Des Moines: The State of Iowa, 1950), p. 20
42. *Loc. cit.*

CHAPTER II

1. Howard L. McBain, *The Law and the Practice of Municipal Home Rule* (New York: Columbia University Press, 1916) pp. 109-110
2. Kenneth C. Tollenaar, "A Home Rule Puzzle," *National Civic Review*, Vol. 1, no. 8 (September, 1961), pp. 411-416
3. Withnell v. Ruecking Construction Co., 249 U.S. 63 (1919)
4. Elmer R. Rusco, *Municipal Home Rule: Guidelines for Idaho* (Moscow: Bureau of Public Affairs Research, University of Idaho, 1960), p. 4
5. John R. Kerstetter, "Municipal Home Rule," *The Municipal Year-Book, 1956* (Chicago: International City Managers' Association, 1956), p. 257
6. *Constitution of Ohio*, Art. XVIII, Sec. 7
7. *Constitution of Hawaii*, Art. VII, Sec. 2
8. Kerstetter, *op. cit.*, p. 257
9. *Constitution of Texas*, Art. XI, Sec. 5
10. Kerstetter, *op. cit.*, p. 257
11. *Constitution of Nevada*, Art. VIII, Sec. 8
12. *Constitution of Alaska*, Art. X, Sec. 9
13. *Ibid.*, Art. X, Sec. 10
14. *Constitution of California*, Art. XI, Sec. 8(d)
15. Reprinted in George F. Robeson, *The Government of Special Charter Cities in Iowa* (Iowa City: The State Historical Society of Iowa, 1923), pp. 239-243
16. Rusco, *op. cit.*, p. 17

17. Article X, Sec. 11
18. Rusco, *op. cit.*, p. 16
19. *Ex parte* Braun, 141 Cal. 204, 214 (1903)
20. *Constitution of Utah*, Art. XI, Sec. 5
21. O.K. Patton, "Home Rule In Iowa," *Applied History*, Vol. II (Iowa City: The State Historical Society of Iowa, 1914), p. 126
22. *Constitution of Missouri*, 1875, Art. IX, Sec. 20, as quoted in Patton, *loc. cit.*
23. Patton, *ibid.*, p. 128
24. McBain, *op. cit.*, p. 127
25. Joseph D. McGoldrick, *Law and Practice of Municipal Home Rule* (New York: Columbia University Press, 1933), p. 303
26. Article XX, Sec. 6
27. National Municipal League, *Model State Constitution* (5th ed., New York: 1948)
28. The National Municipal League is currently revising the *Model State Constitution*, and it is understood that the local government article is undergoing considerable revision. This discussion should, therefore, not be interpreted as reflecting the present policy of the National Municipal League.
29. Sec. 804
30. *Loc. cit.*
31. Arthur W. Bromage, "Home Rule—NML Model," *National Municipal Review*, Vol. XLIV, no. 3 (March, 1955), p. 135
32. Jefferson B. Fordham, *Model Constitutional Provisions for Municipal Home Rule* (Chicago: American Municipal Association, 1953)
33. John P. Keith, "Texas Home Rule," *National Municipal Review*, Vol. XLIV, no. 4 (April, 1955), pp. 184-188
34. *Constitution of Kansas*, Art. XII, Sec. 5
35. Albert B. Martin, "Home Rule for Kansas Cities," *University of Kansas Law Review*, Vol. 10, no. 1 (May, 1962), p. 501
36. Although Wisconsin utilizes the concept of charter ordinances, it is by legislative rather than constitutional authorization.
37. *Constitution of Kansas*, Art. XII, Sec. 5, par. b
38. *Ibid.*, par. c
39. Martin, *op. cit.*, pp. 513-514
40. William H. Cape, *Toward Home Rule in South Dakota* (Vermillion: Governmental Research Bureau, University of South Dakota, 1956), p. 28
41. A. Clarke Hagensick, *Municipal Home Rule in Wisconsin* (Madison: University of Wisconsin, 1961), p. 3
42. Rusco, *op. cit.*, p. 51
43. *Loc. cit.*
44. Rodney L. Mott, *Home Rule for America's Cities* (Chicago: American Municipal Association, 1949), p. 13
45. David A. Bingham, *Constitutional Municipal Home Rule in Arizona* (Tucson: Bureau of Business and Public Research, University of Arizona, 1960), p. 33
46. *Ibid.*, p. 32

CHAPTER III

1. Advisory Commission on Intergovernmental Relations, *Governmental Structure, Organization, and Planning in Metropolitan Areas* (Washington: Government Printing Office, 1961), p. 30
2. *The Book of the States,* 1962-1963 (Chicago: The Council of State Governments, 1962), p. 289
3. *The Book of the States,* 1960-61, p. 267
4. *The Book of the States,* 1958-59, p. 241
5. Advisory Commission on Intergovernmental Relations, *op. cit.,* p. 20
6. *Ibid.,* pp. 20-21
7. Kenneth C. Tollenaar, "A Home Rule Puzzle," *National Civic Review,* Vol. 1, no. 8 (September, 1961), p. 416
8. Neil Littlefield, *Metropolitan Area Problems and Municipal Home Rule* (Ann Arbor: The University of Michigan, 1962), p. 78
9. *Governmental Structure, Organization, and Planning in Metropolitan Areas, op. cit.,* p. 21

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