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## Home Rule: A Solution for Municipal Problems

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## HOME RULE: A SOLUTION FOR MUNICIPAL PROBLEMS?

## I. STATEMENT OF THE PROBLEM

A. *Urbanization and Some of Its Effects.*

The past 120 years have brought great changes in the average American's way of life—physical changes, changes in methods, concepts and ideas. During this period the United States has evolved from an agrarian nation to an industrial nation, with the population becoming more concentrated in cities and towns each year. In 1840, the urban population of the nation was only 10.8%; by 1900, it was 39.7% and in 1950, it was 64.0%.<sup>1</sup> In Wyoming, according to the 1960 Bureau of Census reports, 69.2% of the people reside in cities and towns, leaving only 30.8% rural dwellers. During the past decade, the state as a whole increased in population by 13.6%, whereas municipalities experienced a 26.2% gain.<sup>2</sup>

The variety and scope of services which we expect our municipalities to supply have been constantly mounting. The general inflationary trend, bringing with it a higher cost of living, has naturally led to an increase of labor organizations in securing shorter working hours and higher pay for employees, along with a general reappraisal of the nature of man's status as a social creature, have resulted in a demand for more and better services and expanded recreational facilities. The maintenance of existing services and facilities at the present level is not enough. It has been the experience that large cities (especially in the Eastern part of the United States) have, like Topsy, "just growed," with little or no advance planning. This lack of advance planning has decreased the ability of cities to serve their citizens and has tended to increase the cost of services.

B. *The Finance Bottleneck.*

Perhaps the most serious problems confronting cities generally are the lack of adequate financial support and the limitations on sources of revenue. These two problems are, of course, closely related. The principal source of revenue for cities in the ad valorem property tax, levied upon the real and personal property of all the inhabitants of the state. On the national average, 46.3% of the total general revenue of all cities and towns was derived from property taxes in 1960.<sup>3</sup> In Wyoming, at least, the money received from this tax does not by any means go entirely to cities, but is apportioned according to law among the state, counties, school districts, and cities. The percentage received by Wyoming cities varies conversely to the population of the city; as the size decreases, the percentage of revenue received from property tax increases. For instance, in the 1959-60 fiscal year the cities with a population of 20,000 and over derived 27.3% of their general revenue from the property tax while those

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1. Phillips, Jewel Cass, *Municipal Government and Administration in America*, Mac-Millan Co., 1960, p. 27, Table I. citing Bureau of Census Reports, 1950.
  2. Wyoming Legislative Research Committee Report No. 4, *Municipal Finance in Wyoming*, December, 1960, p. 1.
  3. *Id.* at p. 6.

cities and towns having a population of less than 4,000 derived 43.3% from that source.<sup>4</sup> Many services and facilities produce little or no revenue by which to sustain themselves, as in the instance of fire and police protection. Fire departments produce no revenue, and police departments do not take in enough in fines and forfeitures to support themselves. In 1959-60 fines and forfeitures amounted to only 5.2% of the general revenue of all cities and towns in Wyoming,<sup>5</sup> while police expenditures accounted for 20.0% of all expenditures (excluding bond retirement and utilities expenditures) of all Wyoming municipalities. During the same period expenditures for fire departments amounted to 11.1%.<sup>6</sup>

In most states limitations are imposed either by the constitution or by statute on the property tax mill levy that may be imposed, and on the amount of indebtedness that various governmental units may incur. All too often it is found that these limits were fixed in the early years of statehood and have not been modified to meet the changing conditions. A discussion of the variations found among the states is beyond the scope of this paper, but suffice it to say that they are many. The effect of such limitations on municipal services is obvious when the municipality is utilizing all available sources of revenue. When new or relatively insignificant sources of revenue are sought to be utilized, it sometimes develops that the income is not sufficient to pay the cost of collection.

As a general rule, states enumerate by statute the particular capital improvements for which cities may incur bonded indebtedness. The variations found here are as multitudinous as those in the mill levy field. Often, some capital improvements are excepted from the usual debt limitations. For example, a provision is sometimes found that will permit cities to exceed the basic limit for such improvements as sewer and water systems. Debt limits are established by taking a fixed percentage of the assessed valuation of the city. It should be remembered that assessment practices vary widely among the states, and if property is assessed at a low percentage of its market value, the debt limit is often not great enough to permit construction of a needed capital improvement with the city.<sup>7</sup> This problem is especially notable in smaller towns. When it is encountered, it means either that the city must eliminate its current bonded indebtedness before even considering the project, or in the alternative, construct it piece-meal over a long period of years. Each of these alternatives has its disadvantages.

### C. *Variations in the Needs of Cities.*

It is difficult, if not impossible, to standardize and evaluate the

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4. *Id.* at p. 3. (See generally tables I and IA)

5. *Id.* at p. 4.

6. *Id.* at p. 13. (See generally tables I and II)

7. At the present time residential property in Wyoming is assessed at 21.1% of its market value. Wyoming Association of Municipalities, *Facts About the Property Tax*, 1959, p. 9.

needs of municipalities principally because of the variations from city to city in the attitudes of the people living in each. Cities tend to have personalities as different and individual as are the personalities of people. In some places the consensus seems to be that the city should supply only the bare minima necessary for existence, eliminating such "frills" as paved streets, sidewalks, and recreation facilities. Others regard such items as basic necessities, and believe that consideration should also be given to the aesthetic features. Surely no one can dictate to a person or a city what its "needs" are, but the law should be adequate to permit choices within reason.<sup>8</sup> There must be flexibility if cities are to be able to cope with problems as they arise and to advance in proportion to the world around them.

#### D. *Conflicting Theories as to the Extent of Municipal Powers.*

The two basic theories underlying municipal government appear to be at opposite extremes of the spectrum, with a continuum of variations lying between them. At the one extreme is the classical political concept of inherent power in municipalities to govern local affairs, and at the other, the attitude that municipalities are only "creatures" of the state and therefore have only the powers given them by their creator. The theory of inherent right to self-government has been traced by many writers and in many cases from the early beginning of small groups of families united for mutual protection to the present-day system of municipal corporations. The history of Rome is an account of the greatest municipal corporation the world has ever seen.<sup>9</sup> The term "municipal" is a derivation of the Roman "municipium" meaning a free city capable of governing its local affairs.<sup>10</sup> The term, in early England, was applied to self-governing cities and towns, thus carrying out the "self-governing theme,"<sup>11</sup> D'e Toqueville remarked in the work, *Democracy in America*, that municipal corporations form the principal of American liberty existing to this day.<sup>12</sup> In the same line of thought, Cooley<sup>13</sup> stated that ". . . the American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by local authorities, and general affairs only by the central authorities." Madison, writing in the *Federalist*, stated it in these words, ". . . the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere."<sup>14</sup> That these are not merely historical theories outmoded by modern practice is demonstrated by a recent Ohio opinion, in which the court said, "The purpose of the adoption of a home-rule charter is to

8. *Aesthetic Factors in Zoning*, 15 Wyo. L.J. 77 (1960).

9. *State ex rel. White v. Barker*, 116 Iowa 96, 89 N.W. 204, 205, 57 L.R.A. 244 (1902).

10. Rhyne, *Municipal Law*, 1957, p. 1.

11. *Ibid.*

12. Vol. I, pp. 64, 96.

13. Cooley, *Constitutional Limitations*, p. 223.

14. *The Federalist Papers*, Number 39, Madison.

provide for local self-government and secure exemption from general laws."<sup>15</sup>

The "creature theory" does not have such a long history, but the authority for it is no less respectable. The creature theory represents an emphasis on and expansion of the corporation concept to include municipalities. Chief Justice Marshall in the Dartmouth College case described a corporation as "... an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."<sup>16</sup> In *Williams v. Baltimore* it was held that because a municipal corporation is a creature of the state, it cannot invoke the equal protection clause of the Fourteenth Amendment against an act of the state legislature.<sup>17</sup> Dillon, an eminent authority on local government law, formulated what has come to be known as "Dillon's Rule," that "they (municipalities) possess no powers or faculties not conferred upon them, either expressly or by implication, by the law which creates them or by other statutes applicable to them."<sup>18</sup>

It is not necessary that these two basic theories be regarded as hostile, however, if more than a casual glance is given to them. The "inherent right" advocator acknowledge that the sovereign power of cities is limited to that area which is of strictly local concern, and do not advocate that municipal authority should extend beyond local concerns so as to affect the general government of the state. In this light, the "creature concept" is in reality a limitation upon the inherent right theory rather than being diametrically opposed to it. It is implicit in the writings of the authorities of the creature school that municipalities should be permitted to control their own affairs, but the nature and extent of those affairs is to be determined by the legislature. Theoretically, the legislature could provide for the creation of municipal corporations and give them absolutely no authority to act on any matter, local or not. This fact focuses attention upon the scope of the powers which the legislature delegates. The important difference in the two theories is that under the creature theory the legislature is free to define a "municipal affair" without regard to whether or not it is of local concern, and thus the legislature may freely invade areas of local concern; whereas under the inherent right theory the state would be stopped by the barrier of local concern which it could not penetrate. By the same token municipal authority could not extend beyond the boundary of local concern. Under the creature theory cities and towns are usually subject to the whims of each successive legislature. Since the adoption of the inherent right theory is usually built into the

15. *Sanzere v. City of Cincinnati*, 157 Ohio St. 515, 106 N.E.2d 286, 290 (1952).

16. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L.Ed. 629 (U.S. 1819).

17. 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933).

18. Dillon, *Municipal Corporations*, 5th Ed., Vol. 1, § 33(21), p. 61. (On the divergent theories generally, see McQuillin, *Municipal Corporations*, § 1.93)

state constitution, there is less possibility of "legislative tinkering" from session to session.

Two related issues, collateral to the two basic concepts just discussed, have received some consideration. The first has generally been referred to as the "state-within-a-state" theory. Principally, this was used as a rebuttal argument to the proposal of giving municipalities a broad discretion in controlling their own local affairs whether through home rule or some other form of local self-government. In 1909, the Oregon court said that even though the language in the home rule constitutional amendments would indicate that cities have the right to legislate within their own borders to the exclusion of the state, those amendments must be read in the light of other fundamental laws.<sup>19</sup> Continuing, the court explained that a state cannot surrender its sovereignty to a municipality to the extent that it loses control over it, because to do so would result in the creation of a state within a state contrary to Article IV, section 3, of the United States Constitution, which provides that ". . . no new state shall be formed or erected within the jurisdiction of any other state; . . . ." Power to enact legislation may be delegated, the court agreed, but the state may at any time revise, amend, alter or repeal any of the charters within it. In the following year the Oregon court further defined the authority of municipalities and held that a city could include in its charter any provision or right which the legislature might have granted before the amendment to the constitution (permitting cities to adopt and amend their own charters), subject to the constitution and criminal laws of the state.<sup>20</sup>

The Colorado Supreme Court voiced its opinion of the state-within-a-state argument in a later case in which it said, referring to the City and County of Denver, that it is still subject to the constitution as much as any other part of the state;<sup>21</sup> that the people of the state have the plenary power to provide for such methods of government so long as they do not violate the Federal Constitution. In other words, (the court concluded), so long as the people retain control over municipalities by having the authority to amend the constitution so as to be able to do away with the home rule provision, no state within a state is created.

The other collateral theory, which represents a departure from both the creature and the inherent right theories, may be called "local federalism." Under local federalism the state would have only those powers delegated to it by the municipalities, and all residual powers would reside in the latter. This would create the same relationship between the municipalities and the state as now exists between the states and the federal government by virtue of the Tenth Amendment to the Constitution.<sup>22</sup>

19. *Straw v. Harris*, 54 Ore. 424, 103 Pac. 777 (1909).

20. *Kierman v. City of Portland*, 57 Ore. 454, 111 Pac. 681 (1910).

21. *Reed v. Blakely*, 115 Colo. 559, 176 P.2d 681 (1947). (See generally cases cited in *McQuillin, Municipal Corporations*, Vol. 2, § 9.08, at n. 60).

22. U.S. Const., Amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Local federalism would be a radical departure and has not as yet been implemented anywhere in the United States. It presents some interesting speculations along the lines of the old Greek City-States.

## II. IS HOME RULE THE BEST ANSWER TO THE PROBLEM?

### A. *Underlying Theory.*

For all practical purposes the theory of home rule can be stated in one sentence: That municipalities should be free to regulate their own "municipal affairs" without interference by the state. Nothing should be handled at the state level that can be handled efficiently at the local level. The thinking is that because of the peculiar nature of problems arising for cities, those people who are in closest contact with them should be best equipped to deal with them, and with a minimum of interference. This is in reality only another aspect of the economic concept of the division of labor, that those who are best equipped or suited to perform a particular task can do it with less cost and greater efficiency than those less suited to perform the same task.

It must be pointed out that home rule was never intended to extend beyond those affairs that are purely *local*, but in the event of a conflict between the general law of the state and the home rule charter, the charter should have precedence over the statute in those matters of *local* concern. Home rule charters are subject to the general law when the matter reaches beyond the limits of the municipality or affects more than one municipality. A liberal grant of self-government to municipalities is not the same as home rule if it is subject to withdrawal at any time by the legislature.

### B. *Sketch of Home Rule History.*

Home rule was first recognized as a possible remedy for municipal growing pains 86 years ago, when the people of Missouri, recognizing the need to free cities from legislative control, passed an amendment to their constitution in 1875 granting home rule to St. Louis.<sup>23</sup> Since that time thirty other states have granted some form of home rule to their cities either by constitutional provision or legislative enactment. Not all of these are "true" home rule provisions, however, and for that reason some of them have not provided the desired results.

### C. *Sketch of the Basic Types of Home Rule.*

As has already been indicated, home rule provisions are basically of two types, Constitutional and Legislative. The Constitutional type further breaks down into three classifications, self-executing, mandatory, and permissive. The latter two require legislative action.

#### 1. Constitutional Home Rule.

a. *Self-executing.* In essence this is the true form of home rule provision. It requires that both the substantive grant of authority and

23. Mo. Const. Art. VI, §§ 19 and 20.

the procedural methods for carrying it out be included in a constitutional amendment. Under this form the legislature has nothing to do with the granting of authority to the cities. Fourteen states have utilized this approach,<sup>24</sup> the last of which was Kansas in 1960.<sup>25</sup> The home rule amendment of the Colorado Constitution (Article XX, section 6) illustrates one form of the self-executing type. It provides as follows:

Section 6. *Home rule for cities and towns.* The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal election, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms of tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging,

24. Alaska, 1959; Ariz., 1910; Calif., 1879; Colo., 1901; Kan., 1960; Mo., 1875; Neb., 1912; Ohio, 1912; Okla., 1907; Ore., 1906; R. I., 1951; Tenn., 1953; Utah, 1932; Wash., 1889; Phillips, *supra* at note 1, table at p. 65.

25. Kan. Const. Art. XII, § 5.



canvassing, certifying the result, securing the purity of election, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park and water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalites coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

In contrast to the lengthy recitation of powers in the Colorado provision, the Alaska Constitution (Art. X, sec. 11) states that "A home rule borough or city may exercise all legislative power not prohibited by law or by charter." The home rule provisions of these two states represent the two basic approaches to granting self-executing powers to municipalities.<sup>26</sup>

26. Colorado closely approximates the NML Model, while Alaska follows the AMA thinking. See note 27 for the comparison of NML and AMA model home rule provisions.

As patterns available for a state desiring home rule, both the American Municipal Association (the AMA) and the National Municipal League (the NML) have proposed constitutional amendments. They vary somewhat in theory, but both have as basic tenets the right of cities to govern their own local affairs, relatively free from legislative interference. These were not formulated as "models" or to secure uniformity, but as guides for drafting the amendment for individual states.<sup>27</sup>

27. The AMA (American Municipal Association) proposed amendment (Model Constitutional Provisions for Municipal Home Rule, authorized by Jefferson B. Fordham, Dean of the Law School, University of Pennsylvania, 1953) departs somewhat from the McBain (McBain, Howard Lee, *Law and Practice of Municipal Home Rule*, New York, Columbia University Press, 1916) or classical approach to home rule at the point of charter adoption. Both require that a charter be adopted, but under the McBain theory the charter was the grant of power with the scope of the city's authority to be set out in the charter. Under the AMA proposal (AMA Model, § 6. "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. . . .") the charter is a limitation on the cities and not the grant. The city would be permitted to exercise any power not denied by the charter or which the legislature has not denied to all home rule cities. The last phrase of the quoted section is perhaps the weakest point of the AMA Model in that theoretically the legislature would be able to restrict the home rule city's power to legislate on local affairs merely by denying the power to all home rule cities alike. This does not put any of the home rule powers beyond the reach of the legislature. The theory of the draft is not to create an imperium in imperio with municipal freedom from legislative control, but to permit them to exercise appropriate powers that are expressly denied. From notes to § 6, (supra).

Dean Fordham states that, "What is most important about the AMA draft is that the provision (§ 6) not only avoids the general versus local affairs business, but also is designed to obviate both resort to constitutional specificity and the need to appeal to the legislature for enabling legislation." (44 Nat. Mun. Rev. 137, 140 (1955) Home Rule—AMA Model, Fordham).

Dean Forham rejects the idea that certain powers are by their very nature either local or general in concern and believes that there should be a policy-making power on the state level competent to make decisions on the devolution of power to local bodies short of the general electorate. (Id.). This approach makes what seems to be a rather broad assumption, that is, that the legislature will always be very liberal in its attitude toward cities. In the effort to avoid the *imperium in imperio* the more concrete approach would seem to be that as long as the people, and not the legislature, retain control no government within a government will be created. One other element of the AMA proposal that deserves mention is that through a grant of all powers not specifically denied, the need for a long and detailed recitation of powers in the charter is not necessary. It is the theory in rejecting the labeling of powers that the greatest flexibility and adaptability can be achieved, in that what is now a power considered to be solely of concern to one or the other levels of government may at some future time be shifted to the other camp.

The AMA Model presupposes a municipal corporation *in esse* at the time of charter adoption and would permit no original incorporation under a home rule charter. It considered prior governmental experience as necessary. It would require no minimum population to adopt a charter, and no enabling legislation would be necessary either. Either the governing body of the city or a charter pursuant to a petition signed by some percentage of the electorate. The proposed charter would then be submitted to the voters for approval. The commission or the legislative body of the city would not have the final determination.

The AMA Model also leaves the initial incorporation of cities up to the legislature and the authority of home rule cities would include all of the powers granted to the general law municipal corporations.

The National Municipal League Model (Model State Constitution, 4th Ed. 1948) differs primarily from the AMA Model in the definition of the "self-executing" powers given to cities. The NML Model sets out the powers in broad general terms to act in regard to its local affairs, property, and government. Also there is

Just as there are two basic types of constitutional grant, there are also two basic patterns for charter-making for the home rule cities. The classic, or "McBain approach"<sup>28</sup> is that the charter should spell out the powers of the city and all powers not set out are denied. This approach requires a very detailed recitation in the charter. In contrast, a charter adopted under a provision granting all power not denied (by statute or charter) becomes an instrument of limitation upon, rather than grant to, the city.

b. *Mandatory.* The basic difference between this form and the self-executing provision is that no direct grant of either substantive or procedural authority is made to the municipalities. Instead the constitution makes it mandatory upon the legislature to provide for such authority. Seven states have used this approach.<sup>29</sup> The provisions of the Michigan Constitution, Article VIII, section 20, et seq., are illustrative:

Section 20. The legislature shall provide by a general law for the incorporation of cities, and by general law for the incorporation of villages; such laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

Section 21. Under the general laws, the electors of each city or village shall have power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state.

c. *Permissive.* The third form of constitutional home rule is readily

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an enumeration of specific powers conferred upon the city. (Id. § 804 (a) — (i)). Such a specific enumeration does in fact create such a self-executing *imperium in imperio*, so far as the legislature is concerned, that the AMA sought to avoid. In case of a conflict between cities and legislature over this power, the courts must decide. Under the NML Model the power of the legislature is more restricted. In a comment by Arthur W. Bromage, (44 National Municipal Review 132, 133 1955) Home Rule—NML Model, Bromage) it was stated that the AMA may have sacrificed too much in the effort to escape an *imperium in imperio*, the dichotomy of local v. general affairs, and to lighten the burden of the courts in resolving those disputes. The articles by Bromage and Fordham have been combined along with several others and published by the National Municipal League under the title, *A Symposium, New Look at Home Rule.*

Comment on the NML Model should perhaps be reserved until a later date, however, for in a letter received from the League, it was indicated that they are in the process of reviewing their home rule provision and that it is very likely that in the new edition of the Model State Constitution a radically changed proposal will be adopted. The writer of the letter indicated that the draftsmen of the new model lean in the direction of the Fordham plan (the AMA Model). We can only speculate at this time as to the reasons for the change in attitude.

28. McBain, Howard Lee, *Law and Practice of Municipal Home Rule*, New York, Columbia University Press, 1916.
29. La., 1952; Md., 1915; Mich., 1908; Minn., 1896; Tex. 1912; W. Va., 1936; Wis., 1924; Op. cit. Phillips. (Hawaii has a mandatory provision in its constitution, however, as yet it has not been implemented by legislative action. National Civic Review, July 1961, pp. 379, 380. Hawaii Const., Art. VII, § 2, provides that "each political subdivision shall have power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be prescribed by law." Compare with the Michigan provision quoted, supra.)

distinguishable from the other two in that the authority of the legislature to provide for city government is put in discretionary form. Six states have had this form, two of which have recently dropped it.<sup>30</sup> The general form of wording is demonstrated by Article VIII, sections 1 and 8, of the Nevada Constitution:

Section 1. The legislature shall pass no special act in any matter relating to corporate powers except for municipal purposes; . . . .  
 Section 8. The legislature shall provide for the organization of cities and towns by general laws and shall restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water; *provided, however, that the legislature may, by general laws, in the manner and to the extent therein provided, permit and authorize the electors of any city or town to frame, adopt and amend a charter for its own government, or to amend any existing charter of such city or town.* (emphasis supplied)

## 2. Legislative Home Rule.

Legislative home rule is wholly the child of the legislature, having no constitutional sanction of any form. Some writers prefer to call all but the self-executing form "legislative" or "statutory" home rule. It is generally regarded as inadequate because of its inherent lack of stability. It is subject to repeal or amendment by the legislature at any time, as any other statute. Only three states have attempted to use this method, and Phillips states that it has not worked out in practice.<sup>31</sup> New Mexico has provided a "mandatory" constitutional amendment applying only to combined city-county governments, but New Mexico Annotated Statutes, 1953, Chapter 14, Section 13, paragraphs 1-14 provide a type of legislative home rule for cities only. Some amendments were adopted in New Mexico in 1959 which tended to broaden their scope, but did not change the substance. Some of the present statutory sections relating to legislative home rule will illustrate this approach.

14-13-1. Any city in this state, whether incorporated under general or special laws, may adopt a charter and reorganize under the provisions of this act.

14-13-5. The said charter may provide for any system or form of government that may be deemed expedient and beneficial to the people of the incorporated municipality, including the manner of appointment or election of its officers, the recall of the officers and the petition and referendum of any ordinance, resolution or action of the municipality, provided that such charter shall not be inconsistent with the Constitution of the state; shall not authorize the levy of any tax not specifically authorized by the laws of the state, and shall not authorize the expenditure of public funds for other than public purposes. All by-laws, ordinances and resolutions lawfully passed and in force in the incorporated municipality

30. Nev., 1924; N. J., 1950; (New Jersey has an extremely liberal optional charter law, but it is not home rule in the strict sense). N. Y., 1923; Pa., 1922; *Ibid.* It was indicated in a letter from the American Municipal Association that Connecticut and Georgia have recently dropped from this category.

31. Fla., 1915; N. M., 1917; N. C., 1917; *Ibid.*

before the adoption of such charter shall remain in force until amended or repealed.

14-13-11. A city organized under the provisions of this section is governed by its charter and no law relating to municipalities inconsistent with the charter shall apply to such city.

D. *A Comparison of the Basic Types of Home Rule.*

In comparing the basic types of home rule provisions it can be seen that each contains some detrimental factors. The principal drawback in the constitutional self-executing type is the difficulty of persuading the legislature to adopt it! Legislators are cautious about relinquishing power; they do not like to feel that they have divested themselves of control, and are conscious of the "mandate" which the people have given them through the process of election. Self-executing constitutional home rule is the most preferable of the several types—if it can be adopted—because of the stability achieved from being wholly within the constitution and not dependent upon the legislature for implementation. Its distinctive feature is that both the substantive provisions and the procedural authority to carry it out are contained in the amendment. The grant to the cities comes from the people themselves in the form of a constitutional amendment, and needs no legislative supplementation to give it effect. It is the combination of both factors that tend to make this the most effective type of home rule provision.

Both the "mandatory" and "permissive" types have the advantage of constitutional protection, but are both dependent upon the legislature for implementation. The grant of power is not made directly to the cities, but to the legislature as an intermediary. Under the "mandatory" provision the legislature *must* make some provision for municipal home rule, but it is left to the discretion of the legislature as to what those provisions should be. The "permissive" form is even less effective, because it is entirely within the discretion of the legislature whether or not it will give municipalities even the most rudimentary elements of authority to govern their own local affairs.

The wholly legislative or statutory form, as it is sometimes referred to, has no more status than any other general enactment of the legislature and its disadvantages have already been indicated. Moreover, this form also runs the risk of resulting in unconstitutional delegations of legislative power. Such a determination would be possible, if not highly probable, under Article III, section 37, of the Wyoming Constitution.<sup>32</sup> As Professor Phillips indicated in his work,<sup>33</sup> this type has not worked out satisfactorily in the three states that have adopted it as home rule. Thus, if the prime purpose of home rule (which is to prevent legislative interference) is to be achieved, the constitutional self-executing form is the best if not the only one capable of achieving the desired result.

32. "The Legislature shall not delegate to any special commissioner, private corporation or association, any power to make, supervise, or interfere with any municipal improvements, moneys, property or effects, whether held in trust or otherwise, to levy taxes, or to perform any municipal functions whatever."

33. *Supra* note 1 .

### E. *Inherent Problem of Home Rule.*

The biggest legal problem arising in connection with the interpretation of home rule legislation is one of definition: What is included in the terms "municipal affair" or "local concern?" McQuillin defines a municipal function as one appropriate "to the orderly conduct of municipal affairs, or that which relates to a matter of local self-government and administration consistent with national and state organic law," but he also states that no general rule has resulted for determining what is a municipal function.<sup>34</sup> There is some variety of constitutional expression here. For example, in Colorado the grant extends to "all its local and municipal matters."<sup>35</sup> The California Constitution authorizes a city which has adopted a home rule charter "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."<sup>36</sup> The new Alaska Constitution provides that "the purpose of this article is to provide for maximum local self-government. . . . All local government powers shall be vested in boroughs and cities."<sup>37</sup> The power is often stated in terms of right to alter, frame, or amend a charter for its own government. (See Colorado provision, Art. XX, section 6, quoted, *supra*). Several states follow the Missouri pattern in stating that a home rule city has the power to "frame a charter for its government consistent with and subject to the Constitution and laws of the state."<sup>38</sup> The reference made to compliance with the constitution and laws of the state or to the general law of the state is a common element found in many home rule provisions.

Where is the line to be drawn in separating a *municipal affair* from one of *general concern* so as to delineate the scope of power under home rule? One court proposed as a test whether or not the activity is carried on by the city in its proprietary capacity, or as agent for the state; if it is carried on by the city in its proprietary capacity, it is a power incidental to home rule.<sup>39</sup> This test would seem merely to substitute one set of problems for another.

The cases have frequently dealt with specifics in connection with the question of what are local concerns within the meaning of home rule legis-

34. McQuillin, *Municipal Corporations*, § 9.04, p. 473.

35. Colo. Const., Art. XX, § 6.

36. Calif. Const., Art. VI, § 6.

37. Alaska Const., Art. X, §§ 1 and 2.

38. Mo. Const., Art. VI, § 19; Ariz. Const., Art. XIII, § 2; Neb. Const., Art. XI, § 2; Wash. Const., Art. XI, § 10; Okla. Const., Art. XVIII, § 3a.

39. *City of Tucson v. Tucson Sunshine Climate Club*, 64 Ariz. 1, 164 P.2d 598, 602 (1945). The test was previously announced in *Luhrs v. City of Phoenix*, 52 Ariz. 438, 83 P.2d 283, 285 (1938).

In addition the court in the Tucson case, at page 601, said (after referring to other cases dealing with home rule powers of Arizona cities) that ". . . [I]t will be seen that where a home rule city has powers by its charter it may act in conformity with such power not only in matters of local concern, but also in matters of statewide concern, within its territorial limits, unless the Legislature has appropriated the field, and directly or by necessary implication established a rule, beyond which the city may not go."

lation. Some of the matters which have been held to be of local concern are the issuance of building permits for construction within the city, regulation of claims filed against the city, certain condemnations of property, selection of form of government, and methods of changing charters and enacting ordinances, with assessments and collection of special assessments for local improvements generally being held to be municipal affairs.<sup>40</sup> On the contrary (according to the same author) matters held to be of state concern include the keeping and licensing of dogs, care of neglected children, courts, and court procedure. McQuillan observes that the result is often determined by the exact terminology of the legislation; e.g., in California where the statute permits the establishment of police and municipal courts by cities, these are undobutedly municipal affairs. He adds that education is held to be a state affair, as is garbage disposal generally, although there is some conflict regarding the latter, and that public health, some civil service jobs and pension plans and police powers in general are all considered matters of general concern.<sup>41</sup> This brief enumeration is sufficient to indicate many of the difficulties which confront the courts in connection with classifying particular activities as local or general in nature.

In Colorado, in 1937, it was held that home rule cities have the exclusive power to regulate rates charged by public utilities companies under municipal franchises, and that the State Public Service Commission therefore lacked jurisdiction to hear the petition of a utility patron to lower rates within the City of Denver.<sup>42</sup> However, when the question of who should regulate intra-city telephone rates in a Colorado home rule city arose in 1952, the court held that intra-city business of a telephone company is not a matter of local and municipal concern and that the right to regulate urban telephone rates was with the Public Utilities Commission.<sup>43</sup> The court went on to say that "whether a particular business activity is a matter of municipal concern to a city depends upon the inherent nature of the activity and the impact and effect which it may or may not have upon the areas outside the municipality."<sup>44</sup> The court did not elaborate on a definition of "inherent nature of the activity," but stated that the services supplied by a utility company within a municipality cannot be considered matters of local or municipal concern without reference to "the kind of service offered, the nature and extent of the physical properties involved, or the demand for, and use of, the service in areas outside the city."<sup>45</sup>

The power of a city to incur bonded indebtedness for municipal purposes is demonstrated by two other illustrative Colorado cases. In

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40. McQuillan, *Municipal Corporations*, Vol. 2, §§ 4.89-4.113.

41. *Id.*

42. *Spears v. Public Utilities Comm.*, 100 Colo. 369, 67 P.2d 1029 (1937).

43. *People v. Mountain States Tel. and Tel Co.*, 125 Colo. 167, 243 P.2d 397 (1952).

44. *Id.* 243 P.2d 397, 399.

45. *Id.* at 399.

*McNichols v. Denver*,<sup>46</sup> it was held that the City of Denver had power to issue bonds for the purchase of a bombing range to be donated to the federal government, such property being for a municipal purpose. When this case arose, the City of Denver as well as the state of Colorado and the whole of the United States were writhing in the throes of the depression and unemployment was extensive. Huge outlays had been made for direct relief of those indigent and unemployed persons. It was successfully argued that by the purchase of the land and the subsequent building of an Air Corps technical school and bombing range, approximately one thousand of those presently unemployed persons could be gainfully employed, thus relieving the City of the burden of making direct support payments to them. The beneficial effect of relieving unemployment measured by the earnings of the people to be employed would exceed the cost of the land to the city. The court indicated that the advantage to the City of relieving unemployment was sufficient in itself to make the purchase of the land to be donated to the Federal Government a matter of local and municipal concern to a home rule city.<sup>47</sup>

In a later case in which the element of local concern is a bit clearer, the Colorado court said that the use of revenue bonds to finance off-street parking facilities was for a "municipal purpose" under the home rule Amendment of the Colorado Constitution, Art. XX, sec. 6 (g). The off-street parking facilities were for the benefit of the whole community, thus being a public and municipal purpose, although the benefit might be greater to the downtown retail area.<sup>48</sup>

The Colorado home rule provision in Art. XX, sec. 6 (b) and (c), grants the power to municipalities to create police and municipal courts and define their jurisdiction, but it was held in *Denver v. Bridwell*<sup>49</sup> that an ordinance making the judgment of municipal courts final is unconstitutional as a violation of due process. The statutory right of appeal to the county court was held to be applicable to municipal courts. The Denver ordinance creating the municipal courts, said the court, incorporated the state statute governing the appeals from municipal courts; and because that procedure had been followed previously in numerous instances by the city, the practice had acquired "the force and effect of law." The court used the term "inherent right" in saying that such was the right of appeal, whether in a home rule municipality or otherwise. Moreover, it was also stated in dictum in this case that in the absence of legislative authority or grant from the people a home rule city could not, by

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46. 101 Colo. 316, 74 P.2d 99 (1937).

47. Id. 74 P.2d 99, 195. Some of the advantages which the court deemed incidental were: Stimulation of air transportation service to Denver; beautification of the suburbs of the city; increase in the population brought about by the advent of the faculty and students of the school to the community; protection of the city against possible future air raids; and the general promotion of trade and industry. On the latter ground, see *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066 (1905).

48. *Brodhead v. Denver*, 126 Colo. 119, 247 P.2d 140 (1952).

49. 122 Colo. 520, 224 P.2d 217 (1950).



ordinance, expand or create appellate jurisdiction in a state court to hear appeals from the municipal or police court.

To illustrate that a home rule charter by no means builds a wall around the city so as to deprive the state of tax revenue, in *People v. Denver*<sup>50</sup> it was held that there is no provision in the home rule amendment which deprived the state of power in the matter of taxation of the residents of home rule cities. The court rules that the streets of home rule cities are public highways in so far as the right of the state to put a gasoline tax on vehicles using them is concerned.

**F. Under Home Rule Provisions, Does the Legislature Retain the Right to set Mill Levy and Debt Limits of Cities?**

Since one of the basic elements motivating home rule is to limit legislative interference, one of the most widely disputed questions is whether or not home rule cities should be forced to work within fixed constitutional or statutory limits placed on mill levies and on bonded indebtedness. Is the mill levy on the property of the city dwellers of general concern to the state as a whole, or is it a municipal affair? And what about the amount of bonded indebtedness which home rule cities should be able to incur to construct services and facilities for their residents? Both of these are important battlegrounds.

In almost every state in which constitutional provisions express some form of municipal home rule, the reservation of legislative control over municipal revenues belies the concept of local autonomy, making illusory the political idealistic conception of home rule. Until a reconciliation is effected which bridges or narrows this gap between political ideal and the constitutional reality, municipal autonomy in revenue will depend largely upon legislative grace.<sup>51</sup>

In writing of the home rule situation in Nebraska, it was said that "Taxing for municipal purposes under a home rule charter (in Nebraska) is one area in which it is clear that the home rule charter overrides 'general' state statutes."<sup>52</sup> The Nebraska court has said that ". . . city taxes, to be used strictly for city purposes, are a matter of municipal concern and in no way concern the state in their subject-matter nor in the way they were assessed and levied in the case at bar."<sup>53</sup>

50. *People v. Denver*, 90 Colo. 598, 10 P.2d 1106 (1932).

51. Cohn, Rubin G., *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 Nw. U.L. Rev. 27, 29.

52. Winston, Arthur B., *Municipal Home Rule, 1 Progress Report?* 36 Neb. L. Rev. 447, 463.

53. *Epply Hotels Co. v. City of Lincoln*, 133 Neb. 550, 557, 276 N.W. 196, 200 (1937). Plaintiff sought to prevent the city of Lincoln from using an amended charter provision which increased the tax levy limit from the original statutory limit which had been incorporated into the charter when the charter was adopted. It was held that the amended charter superceded the previous statutory limit which had been incorporated into the charter when adopted. The general limitation did not bind the city after its adopted a home rule charter as to taxes for purely municipal purposes. *Cf.*, *Macomb County v. City of Mount Clemens*, 271 Mich. 334, 260 N.W.

A contrary conclusion has been reached in Oklahoma, however, where it was held that the constitutional home rule grant has not affected legislative supremacy in the property tax field. In *City of Sapula v. Land*<sup>54</sup> the court said "It is therefore our conclusion that taxes in this state (Oklahoma) must be assessed and collected pursuant to and under the authority of general laws enacted by the Legislature."

In a leading Oregon case<sup>55</sup> it was held that the state taxing commission could not revise or eliminate items in the city budget when the city had not gone beyond the constitutional or statutory limits of indebtedness or taxation. The court said that the home rule amendments to the Oregon Constitution were adopted to prevent "legislative interference and intermeddling with purely municipal affairs," however, the power of the legislature to enact general laws applicable alike to all municipalities is paramount and controls charter provisions in conflict with it.<sup>56</sup> That is to say, home rule cities in Oregon are free to control their own local and municipal affairs, but only within limits fixed by the legislature. It is submitted that the philosophy of the *Land* and *Welch* cases is disastrous to the cause of home rule.

The Colorado home rule amendment did not alter or limit the constitutional provision (Colo. Const. Art. XI, secs. 1 and 2) prohibiting a city from lending its credit to any company or corporation for any purpose, "and all cities operating under the twentieth article (home rule amendment) are clearly subject to such limitations."<sup>57</sup> In *McNichols v. Denver* it was held that a proposed bond issue which included a mortgage of city-owned property to insure payment created a debt within the meaning of the constitutional provision limiting the amount of municipal indebtedness.<sup>58</sup> All Colorado cities, however, are free "To levy and collect for general and special purposes on real and personal property."<sup>59</sup> The Colorado Legislature has granted that authority to all cities pursuant to Article X, section 7 (Colo. Const.), which provides that the general assembly may vest in the corporate authorities the power to assess and collect taxes for all purposes of such corporation. Colorado home rule cities have, in their respective charters, imposed general fund mill levy

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885 (1935). "The city . . . is under the Home Rule Act . . . and therefore its power of taxation is not limited by the fifteen-mill Constitutional amendment (Mich. Const., Art. X, § 21) School District of Pontiac, 262 Mich. 338, 247 N.W. 474.

54. 101 Okla. 22, 223 Pac. 640, 644 (1924). See also *Ryan v. Roach Drug Co.*, 113 Okla. 130, 239 Pac. 112 (1925).
55. *City of Portland v. Welch*, 154 Ore. 286, 59 P.2d 228, 106 ALR 1188 (1936). This case was cited as controlling on the question of whether or not the legislature could by an act, general in form, effect an amendment to a city charter so as to permit residents of land on the edge of a city to initiate an action to have their land excluded from the city. Held: "Exclusion of territory from a city by act of city is an exercise of municipal legislation and amounts to an amendment of the charter. The legislature is powerless to enact a special law (although general in form) amending a city charter. *Schmidt v. City of Cornelius*, 211 Ore. 505, 316 P.2d 511 (1957).
56. *Id.* 59 P.2d 228, 231.
57. *Lord v. Denver*, 58 Colo. 1, 143 Pac. 284, 292 (1914).
58. 123 Colo. 132, 230 P.2d 591 (1950). (Referring to Colo. Const., Art. XI, § 8).
59. Colo. Rev. Stats. 1953, § 139-31-1(5). Relating to the general power of cities.

limitations upon themselves which vary from 12 to 25 mills.<sup>60</sup> In addition, Colorado home rule cities generally abide by the requirement that an increase of 5% or more over the previous year's property tax levy must have state approval.<sup>61</sup>

From this brief discussion it should be apparent that there are a number of approaches to the question of the taxing authority of home rule cities. If taxation and indebtedness limitations are imposed upon home rule cities, it is important to note whether they are fixed by the constitution or by statute. If home rule is to be a successful plan and the basic tent of limiting legislative interference relative to matters of purely local concern is to be achieved, then home rule cities should have complete control over both taxation and indebtedness for those municipal purposes. Any restrictions upon the authority to tax and incur indebtedness should be placed in the charter so that if changes become desirable, the inhabitants of the home rule city will be able to act upon them. Even in the absence of charter limitations, however, ordinary good business practices and the discretion of the local governing authorities should prevent any abuse of that authority. A home rule city in need of added revenue or increase indebtedness for a municipal purpose should not be dependent upon the whims of the legislature, or upon a constitutional amendment, to relieve their plight.

*G. Possibility of Removing Conflict Over What Municipalities Should Be Allowed To Do Under Home Rule Provisions.*

Is it possible to resolve the conflict between matters of local and state-wide concern? Because of the very nature of the relationship between city and state it seems clear that no single test or rule can ever be devised. If a conflict arises should the courts or the legislature be the final arbiter? The most reasonable conclusion would no doubt be the courts. Two reasons for this stand out; the first, and perhaps most apparent is that if the legislature were permitted resolve the dispute, it would almost certainly do so in its favor. The second is that if home rule is to give freedom from legislative interference it would hardly be advisable to give the legislature the function of resolving disputes between it and a city on the question of municipal or state affair. Such authority would certainly place the cities at the mercy of the legislature to as great a degree as they were before the adoption of home rule. Certainly, by the same token, no one would seriously contend that the city should be the one to make such a decision. Conflicts, then, should be resolved by judicial determination.

Some of the conflict could perhaps be eased if there were a rebuttable presumption in favor of the city in dealing with matters which concern its inhabitants or property. The burden would then be upon the challenger to rebut this presumption. Perhaps such a presumption arises under pro-

60. *Tax Rates and Debt Limitations*, Wyoming Taxpayers Association, Report No. 226, Feb. 1960, p. 15.

61. *Id.*

visions such as that appearing in the new Alaskan Constitution in Article X, section 1: "A liberal construction shall be given to the powers of local governmental units." Section 11 of the same Article provides that "A home rule borough or city may exercise all legislative powers not prohibited by law or charter." The two sections taken together would appear to create such a presumption in favor of the city. Thus the only powers prohibited to Alaskan home rule cities will be those of undoubted state-wide concern, together with those which the cities impose upon themselves in their charters.

The Constitution of Alaska provides for two of the basic types of home rule; self-executing for boroughs and cities of the first class, and permissive for the other boroughs and cities. To avoid any confusion of terms, "borough" refers to a larger geographic area fixed by standards which shall include "population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible."<sup>62</sup> Each city within a borough is represented in the governing body of the borough by one or more members of the city council. Other members of the borough assembly are elected at large from the area outside of the cities.<sup>63</sup> In the event the legislature does not provide a method for the adoption of a home rule charter by a first class city or borough, the governing body of either may do so on their own initiative.

### III. THE HOME RULE SITUATION IN WYOMING

It should first be noted that no general form of home rule exists in Wyoming at the present time. However, there are three cities, (Cheyenne, Laramie, and Rawlins) that still retain their "special charters" enacted during territorial days. The Constitution now prohibits the legislature from passing special laws for the incorporation of cities, towns, or villages.<sup>64</sup> Wyoming cities do have a choice of the form of government they will adopt. Four patterns are provided for: Mayor-Council, Commission, Commission-Manager, and City Manager.<sup>65</sup> Three cities, Laramie, Casper, and Sheridan, operate under the city manager form; only Cheyenne has the commission form; and no city has adopted the commission-manager form. The other incorporated cities and towns follow the mayor-council form.<sup>66</sup>

Two provisions pertinent to the discussion here are found in Article XIII of the Wyoming Constitution.

Section 1. Organization and Classification. The legislature shall provide by general laws for the organization and classification of municipal corporations. The number of such classes shall not exceed four (4), and the powers of each class shall be defined by

62. Alaska Const., Art. X, § 1-15.

63. Id. § 4.

64. Wyo. Const., Art. III, § 27.

65. Wyo. Stats., 1957, §§ 15-54 to 15-63 and 15-179 to 15-348.

66. Trachsel and Wade, *The Government and Administration of Wyoming*, Thomas Y. Crowell Co., New York, 1953, pp. 316, 317. (Recent changes supplied).

general laws, so that no such corporation shall have any powers or be subject to any restriction other than all corporations of the same class. Cities and towns now existing under special charters or the general laws of the territory may abandon such charter and reorganize under the general laws of the state.

Section 3. Restriction on powers. The legislature shall restrict the powers of such corporations to levy taxes and assessments, to borrow money and contract debts so as to prevent the abuse of such power, and no tax or assessment shall be levied or collected or debts contracted by municipal corporations except in pursuance of law for public purposes specified by law.

As stated in Article XIII, section 1, of the Constitution, *supra*, the legislature may provide for four classes of cities and towns in Wyoming. However, at the present time there are only first class cities and incorporated towns. According to the 1960 Bureau of Census reports there are 14 cities having the required 4,000 population to be first-class cities.<sup>67</sup> Prior to 1960, 9 of the 14 had taken the required action to be known as first-class cities.<sup>68</sup>

In regard to the special charter cities the Wyoming court has said that if a legislative enactment showed the intent, it would apply to special charter cities as well as general law cities.<sup>69</sup> In Laramie, for instance, this means that the city operates under (1) its special charter, (2) the statutory provisions of City-Manager government, (3) the provisions of the statutes applying to first-class cities, and (4) other applicable general statutes. It is also interesting to note that each of the three special charters contains a limitation on the mill levy for general purposes; however, the general constitutional limitation of eight mills applying to all cities controls.<sup>70</sup>

So far as the special charter cities are concerned some other interesting notes can be derived from *May v. Laramie*.<sup>71</sup> One is that unless the general law clearly applies, the city must operate under its special charter; and another, that the city does not have the right under its charter to amend it by its own acts, whether by ordinance, acquiescence, custom, or usage. Considering all of this together, for all practical purposes about all that

67. Cheyenne, Casper, Laramie, Sheridan, Rawlins, Rock Springs, Riverton, Worland, Cody. Those exceeding 4,000 (for the first time) in the 1960 Census were Evanston, Powell, Newcastle, Lander, and Torrington.

68. *Op. Cit.* Trachsel and Wade, p. 319.

There is some variance in the statutes regarding first-class city status. Section 15-21 (W.S. 57) states that "all cities having more than 4,000 inhabitants shall be governed by the provisions of this act and be known as cities of the first class." Section 15-32 (W.S. 57), however, provides for the mayor of such city to certify the population figure to the governor, attested by the seal, and then the mayor shall issue a proclamation to the effect that the city is one of the first class and subject to the laws governing first-class cities.

69. *May v. Laramie*, 58 Wyo. 420, 131 P.2d 300 (1942).

70. Wyo. Const., Art. XV, § 6. (Cheyenne, 6 mills, 15-653, W.S. 57; Laramie, 10 mills, 15-686, W.S. 57; Rawlins, 2 mills, 15-724; W.S. 57; § 15-6, W.S. 57, expressly made the 8 mill limit applicable to special charter cities. Now covered by ch. 100, § 2 (34), Laws 1961.

71. *Supra* note 69.

a special charter city can do to change its charter is to abandon it and reorganize under the general laws of the state.

In Wyoming, the authority of cities to tax for general fund purposes and to incur bonded indebtedness is limited by the Constitution and statutes. Article XV, section 6, (Wyo. Const.) controls the levy for the general fund. It states, "No incorporated city or town shall levy a tax to exceed eight mills on the dollar in any one year, except for the payment of its public debt and the interest thereon." Article XVI, section 5, (Wyo. Const.) fixes the debt limit. It states:

No city, town or village, or any subdivision thereof, or any subdivision of any county of the state of Wyoming, shall in any manner, create any indebtedness exceeding two percentum on the assessed value of the taxable property therein; provided, however, that any city, town, or village may be authorized to create an additional indebtedness, not including four per centum on the assessed value of the taxable property therein as shown by the last preceding general assessment, for the purpose of building sewerage therein; . . . ; debts contracted for supplying water to such city or town are excepted from the operation of this section. (The deleted portion refers to school districts.)

Section four of the same Article requires that if any debt is to be created in excess of the taxes for the current year, the proposition must be submitted to a vote of the people. At the last general election (November, 1960), two proposed constitutional amendments were submitted to a vote of the people. One would have increased the mill levy in Article XV, section 6, to twelve mills on the dollar of assessed valuation; and the other would have increased the debt limit in Article XVI, section 5, to four percent of the total assessed valuation. Both of these failed to pass by the required majority. The proposed amendment to Article XVI, section 5, was rejected by its backers after it was determined that if passed in its proposed form, it would have reduced the limit presently available to school districts. Amendments to the Wyoming Constitution are faced with a formidable obstacle in Article XX, section 1, which provides that "a majority of the electors shall ratify the same." This has been interpreted to mean that a majority of all the people voting in the election must approve the proposed amendment if it is to be adopted and not merely majority of those voting on the amendment itself.<sup>72</sup> In effect, if a person does not vote on the amendment it is the same as a vote against it.

The powers of Wyoming cities and towns, including special charter cities, received a sweeping revision during the 1961 session of the Legislature.<sup>73</sup> For the most part the revision retained the existing substantive provisions, but eliminated much needless duplication. It was possible to combine several separate statutes into one comprehensive section in some instances. The new Act grants the powers in some detail and also includes the provision that:

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72. Op. city. Trachsel and Wade, p. 18.

73. Ch. 100, Laws 1961.

In addition to the existing powers and to special powers herein granted, the governing body may make any provisions or regulations not in conflict with such powers as it may deem necessary for the health, safety or welfare of the city; or such as may be necessary to carry out and make effective the provisions of the Act.<sup>74</sup>

One notable area that is not referred to in the revision, however, is the power of a municipality to own and operate its own utility systems, although the "additional powers provision" quoted above may be broad enough to allow a city to adopt such a regulation of its own initiative.

Although the cities and towns are given power to "control the finances of the corporation,"<sup>75</sup> they are still expressly made subject to the Constitutional limitations and statutes.<sup>76</sup> Statutory sections, however, still cover such municipal affairs as local (special) improvements and public improvements for which the city may incur bonded indebtedness.<sup>77</sup>

In the latest session of the Legislature (1961) 22 laws were passed which will have either a direct or incidental effect upon cities. Much legislative time and effort was consumed in considering such matters; and yet, pressing financial problems of municipalities remained largely unsolved. As a note of interest, the proposed Constitutional amendment to Article XVI, section 5, to increase the limit of bonded indebtedness to four percent was again passed by both houses of the Legislature and will be submitted to the people at the general election in November of 1962.<sup>78</sup> A proposal to increase the mill levy to twelve mills was not adopted, which means that for at least four more years the cities will have to work under the present eight mill limit.

A great number of the municipal activities which are now controlled by the Legislature or the Constitution could more easily and effectively be controlled by the governing body of the city concerned. A home rule provision would bring about such a shift in power. Moreover, considerable time now spent in each legislative session on municipal affairs could be released for application to problems of state-wide concern. In addition, the delay in meetings the needs of municipalities, inevitable under the present system, would be materially reduced.

#### IV. ADAPTABILITY OF HOME RULE TO WYOMING

In looking at the other states with municipal home rule, especially the self-executing type,<sup>79</sup> we have noted that they vary in many respects. Population distribution, economic interests, political tendencies, and various sociological factors are a few of the differences that can be discerned at a glance. Some of these states have experienced great surges of growth

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74. *Id.*, § 2 (36).

75. *Id.*, § 2 (7).

76. *Id.*, § 2 (34).

77. Wyo. Stat. 1957, §§ 15-444 to 15-603.

78. Original Senate Joint Resolution 5.

79. *Supra* note 24.

in the last ten to twenty years, while others have remained relatively static. Yet all 25 have recognized the need for local autonomy by adopting home rule and have made the grant of power necessary to meet the need.<sup>80</sup> There is a growing awareness of this need in Wyoming. The conditions out of which the need for home rule has developed elsewhere now exist in Wyoming: The dependency of the cities upon the legislative whim, population shifts within the state and general population growth, disproportionate urban legislative representative, long legislative interim periods, and short legislative sessions, to name but a few. Moreover, it would seem that the more isolated and widely distributed the urban centers in a state, the more they need an affirmative voice in the control of their own affairs. If this is true, then Wyoming is ideally suited to home rule. It is comparable to Alaska in this respect.

Among the home rule states there is considerable variation regarding the population of a city as the criterion of eligibility for home rule.<sup>81</sup> There is room for a great variety of treatment in Wyoming on this point. In Wyoming there are 14 cities that have in excess of 4,000 inhabitants. Two of these exceed 20,000. There are 11 municipalities in the 1,500 to 4,000 population range, and 63 towns with fewer than 1,500 residents.<sup>82</sup> In view of the variety of approaches in home rule states to the population eligibility of cities for home rule,<sup>83</sup> where, if at all, should the line be drawn? Roughly, 52% of the state's entire population resides in the fourteen cities over 4,000. Another 17% lives in those towns under 4,000, with the balance being rural dwellers.<sup>84</sup> Surely size alone is no criterion for determining a city's ability to govern itself relative to its own affairs. Home rule has a liquid nature, in that it will conform to the shape of the container into which it is placed. The predominate attitude of rugged individualism and the desire for self-expression so characteristic of Wyoming people should indeed be a healthful climate for home rule. An Alaska-type provision would be quite adaptable to Wyoming. If adopted, there should be self-executing home rule extended to all cities over 1,500 in population, and either a permissive or mandatory form for all those towns under that figure. The Alaska Constitution provides for permissive home rule for towns under 400 population.<sup>85</sup>

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80. Only those states having constitutional home rule, either self-executing, mandatory, or permissive are included in the 25

81. Colorado fixes the size at 2,000; Alaska has self-executing home rule for all first-class cities (any community with 400 or more permanent residents is eligible to become a first-class city); Missouri amended its Constitution in 1945 to extend home rule to all cities having over 10,000 inhabitants. Several states permit any municipality to adopt a home rule charter; i.e., Michigan, Nevada, Minnesota, and Maryland.

82. Bureau of Census Reports 1960.

83. *Supra* note 81.

84. *Supra* note 82.

85. Alaska Const., Art. X, § 10. See Alaska Stats., § 16-1-1 for eligibility of communities over 400 population to become first-class cities.



## V. PROPOSED HOME RULE AMENDMENT TO THE WYOMING CONSTITUTION

In view of all of the foregoing, it is submitted that Wyoming should adopt home rule. This could best be accomplished by means of a Constitutional amendment in the following language:

1. The purpose of this article is to provide for maximum local self-government in those affairs of solely local concern. A liberal construction shall be given to the powers of municipal government units.
2. The qualified voters of any incorporated municipality having a population of 1,500 inhabitants or more, as determined by the last preceding census taken under the authority of the United States, the State of Wyoming, or said city or town and certified to the Governor of Wyoming, may adopt, amend, or repeal a home rule charter in a manner provided by law. In the absence of such legislation the governing body of the city or town shall provide the procedure for the preparation and adoption or rejection of the charter. A charter so submitted and adopted by a majority of those who vote upon it shall be organic law of such city or town, and amendments to it shall be made only by ordinance adopted by a majority of the qualified voters voting upon the proposal.
3. The legislature may extend home rule to other incorporated municipalities, in such manner as it shall provide.
4.
  - a. A municipal corporation which adopts a home rule charter may exercise any power or perform any function in respect to its local affairs which the legislature has power to devolve upon a general law municipal corporation, and which is not denied to that municipal corporation by its charter.
  - b. Charter provisions with respect to municipal executive, legislative, and administrative structure, organization, personnel, and procedure 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.
  - c. From and after the certifying to and filing with the secretary of state of a charter framed and adopted in conformity with the provisions of this article, such city or town, and the citizens thereof shall have all powers necessary, requisite or proper to legislate upon, provide, regulate, conduct and control its local and municipal matters, which shall include, but not be limited to, the following:
    - (1) The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter.

- (2) The incurrence of debt, issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations. Provided, however, that no debt shall be contracted by any home rule city unless authorized for capital improvements or for municipal purposes by its governing body and ratified by a majority vote of those qualified to vote and voting on the question. The restriction on contracting debt does not apply to debt incurred through the issuance of revenue bonds by a home rule city when the only security is the revenue of the city, nor does the restriction apply to indebtedness to be paid from special assessments upon the benefited property.

No city adopting a home rule charter shall in any way be bound by the limitations and restrictions imposed upon general law cities, with regard to indebtedness, taxation, or revenue, by the Constitution or by statute; provided, however, that such general obligation indebtedness and general assessments shall be for a municipal purpose.

- (3) The creation of police and municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of magistrates and officers thereof, however, the right of appeal from the judgment of such courts shall not be in any way affected.
  - (4) All matters pertaining to municipal elections, including notices, dates, registration of voters, nominations, election judges, form of ballots, balloting, challenging, certification of results, and guarding against abuses of the elective franchise.
  - (5) The annexation of property adjoining and contiguous to the city upon a majority vote of the governing body of the city. Disannexation of like property shall be accomplished in the same manner.
  - (6) The imposition of any sales tax, use tax, income tax or other revenue raising device not denied because of pre-emption by the state or federal government.
- d. Any action taken pursuant to a home rule charter which affects the local affairs, residents, property, or government within the corporate limits of such municipality shall be presumed to be a valid exercise of the rights granted by this article, and the enumeration herein shall not be construed to deny to such municipalities and the people thereof any right or power essential or proper to the exercise of such right.
5. This article shall in all respects be self-executing.

## VI. CONCLUSION

We may summarize what has been said above in the following manner:

During the past hundred years, the greatly increased urbanization of the United States has produced many difficult problems for municipalities.

These include a notable expansion in the scope and variety of services which people expect cities and towns to supply; a tremendous increase in expense, resulting in a financial bottleneck because of limitations on the traditional sources of municipal revenue; and great variations in the needs of cities. Satisfactory solutions to these problems have been frustrated, in part, by the failure to agree on whether municipalities should be given the right to govern their own affairs, or whether they are merely creatures of the state. The advocates of the latter theory fear that home rule will create a "state-within-a-state," but this fear seems groundless.

In considering home rule as a partial solution to municipal problems we need to keep in mind its basic philosophy: that municipalities should be free to regulate their own local affairs without interference from the state. It was pointed out that there are three types of "constitutional" home rule—the self-executing, the mandatory, and the premissive—and examples of each were given. In contrast to these, home rule may be conferred by the legislature in such form as it may see fit. The merits of constitutional vs. legislative home rule were discussed, and the conclusion reached that because of its greater stability, the self-executing type of constitutional home rule is the best of the several alternatives.

It was demonstrated that one of the greatest problems involved in the application of home rule is one of definition—that is, defining the activities that are included in the term "municipal affair" or "local concern" so as to be subject to the jurisdiction of the city. No general rule has developed to decide these controversies, and although some courts have suggested tests, the controversies are for the most part resolved on the basis of the exact language of the home rule statute or constitutional provision.

Since one of the most serious problems facing cities is that of the lack of adequate financial resources, it was noted that there are numerous approaches to the question of taxing authority of home rule cities. It was recommended that if limitations on taxation and indebtedness are to be fixed, they should be provided in the charter and not by the legislature or in the constitution, so that if changes become necessary the inhabitants of the home rule city will be free to act upon them.

A possible solution was offered to help resolve the conflict over the scope of power of home rule cities. This would be to create a rebuttable presumption in favor of the city when it is acting with regard to its inhabitants, government, or property. Because of the apparent liberal attitude of the new Alaska Constitution regarding local government powers, such a presumption may exist in favor of Alaskan home rule cities. When conflicts do arise, it should be the function of the court to resolve them.

In discussing the possibility of adopting home rule in Wyoming, it was noted that there are a good deal of overlapping and conflicting provisions in the existing municipal statutes. Several important limitations upon taxing authority and indebtedness were discussed, and it was shown that

there are some formidable obstacles that must be overcome before financial relief for cities and towns can be obtained. It was pointed out that several of the factors that have prompted the adoption of home rule in other states now exist in Wyoming.

A proposed amendment to the Wyoming Constitution was submitted which would grant self-executing home rule powers to municipalities having a population of 1,500 or more. In addition, a permissive type of home rule would be extended to smaller incorporated municipalities in such manner as the legislature may provide. Certain areas are expressly set forth in the proposed amendment in which the authority of the city would be paramount to statute, and a rebuttable presumption in favor of home rule cities is provided with regard to enactments affecting the local affairs, residents, property, or government.

In conclusion, an enlightened citizenry is fundamental to a constructive application of home rule. It is only natural that people tend to reject what they do not understand. A program of education as to the nature and effect of home rule should be undertaken in Wyoming. Not only must the people be informed, but the legislature must be convinced that home rule is not meant to be a usurpation of its authority; instead, home rule can permit the legislature to focus its attention where reason dictates it should be—on problems that concern the state as a whole.

It should be apparent that by resolving some conflicts which may arise in inter-governmental relations prior to the adoption of home rule, its value can be greatly enhanced. The adoption of something called "home rule" will not be a magic panacea capable of curing the ills of municipalities overnight, but it should be recognized for its potential capabilities.

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