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The Limits of Municipal Power Under Home Rule: A Role for the Courts

After nearly a century of experience there is continuing uncertainty about the extent of power conferred upon municipalities by a grant of home rule. The uncertainty is at least partially attributable to the failure of many courts and commentators to separate the dual functions of home rule—as a grant of power to municipalities and as a restriction on the power of the legislature. One consequence of this failure, Professor Sandalow points out, is that many authorities have incorrectly assumed that the courts have narrowly limited home rule power. In recent years there have been proposals to formulate the grant of home rule in terms that would deny the courts authority to limit municipal power and would rest that responsibility solely on the legislature. Professor Sandalow takes issue with these proposals. After separating the various powers that might be exercised by home rule municipalities, he presents a searching analysis of the considerations relevant to a determination of the proper limits of municipal power and the relative abilities of courts and legislatures to impose such limits. He concludes that home rule provisions should include a broad grant of authority to legislate at the local level, but that the exercise of this authority should be subject to limitation by the courts to protect interests that may be inadequately protected by local political processes.

Terrance Sandalow*

*Associate Professor of Law, University of Minnesota Law School. I am indebted to Dean William B. Lockhart and Professor Jesse H. Choper for their valuable criticisms of portions of this Article; and to the Graduate School of the University of Minnesota for financial assistance which aided in the research.
Thirty years ago, a thoughtful student of municipal government wrote that "the home rule movement appears to be fading like all fads." For a time that prediction seemed accurate, but within the last fifteen years home rule provisions have been written into more state constitutions than during any similar period since the beginning of the home rule movement in 1875. This resurgence of interest suggests the desirability of a reexamination of home rule as a device for distributing power between state and municipal governments. Such a reexamination poses two conceptually distinct but nevertheless related problems: (1) identification of the considerations relevant in determining whether a particular governmental power should be exercised at the state or municipal level, and (2) determination of the respective roles of the legislature, the courts, and the municipalities in the process of distributing power between the two levels of government. These problems or similar ones have, of course, for many years been the staples of writing about home rule and, indeed, much of American constitutional law, both state and federal. But the passage of time brings new problems and, occasionally, fresh insights for dealing with older ones.

THE MEANING OF HOME RULE

Several years ago the Chicago Home Rule Commission observed that "there is perhaps no term in the literature of political science or law which is more susceptible to misconception and variety of meaning than 'home rule.'" The confusion is at least partly attributable to the dual purposes which the phrase has served, "as both a political symbol and a legal doctrine." As a political symbol "home rule" is generally understood to be synonymous with local autonomy, the freedom of a local unit of government to pursue self-determined goals without interference by the legislature or other agencies of state government. It describes a state or condition — autonomy — generally without

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2. A series of decisions by the United States Supreme Court established that the federal constitution has no voice in these matters. See note 11 infra.

3. CHICAGO HOME RULE COMM'N, MODERNIZING A CITY GOVERNMENT 193 (1954).


consideration of the means by which the state or condition of autonomy might be achieved. Since even the most enthusiastic advocates of local autonomy concede that complete autonomy is not feasible and since a substantial measure of autonomy can be achieved by a variety of different legal devices, "home rule" as a political symbol lacks precise meaning because of its failure to specify either the extent of local autonomy or the manner in which it is to be achieved.

As a legal doctrine, by contrast, home rule does not describe the state or condition of local autonomy, but a particular method for distributing power between state and local governments, i.e., a grant of power to the electorate of a local governmental unit to frame and adopt a charter of government. At the present time the constitutions of 27 states — 28 if Florida's provision for the municipalities in Dade County is included — contain provisions concerning municipal home rule. Although these provisions differ

7. These devices are discussed at text accompanying notes 15 & 19–24 infra.
9. ALASKA CONST. art. X, § 9; ARIZ. CONST. art. XIII, § 2; CAL. CONST. art. XI, § 8; Colo. Const. art. XX, §§ 1, 6; FLA. CONST. art. VIII, § 11; GA. CONST. art. XV, ch. 2–83; HAWAII CONST. art. VII, § 2; KAN. CONST. art. XII, § 5; LA. CONST. art. XIV, § 40; Md. Const. art. XI-E, § 3; Mich. Const. art. VIII, § 21; Minn. Const. art. XI, § 8; MO. CONST. art. VI, §§ 18(a), 19; Neb. Const. art. XI, § 2; Nev. Const. art. VIII, § 8; N.M. CONST. art. X, § 4; N.Y. Const. art. IX, § 16; Ohio Const. art. XVIII, § 7; OKLA. CONST. art. XVIII, § 3(a); Ore. Const. art. XI, § 2; PA. CONST. art. XV, § 1; R.I. CONST. amend. XXVIII, § 2; Tenn. Const. art. XI, § 9; Tex. Const. art. XI, § 5; Utah Const. art. XI, § 5; Wash. Const. art. XI, § 10; W. VA. CONST. art. VI, § 39(a); Wis. Const. art. XI, § 3.

Idaho, which Professor Antieau classifies as a home rule jurisdiction, 1 Antieau, MUNICIPAL CORPORATION LAW § 3.00, at 95 n.7 (1962), is omitted here because its constitution does not grant municipalities the power to frame and adopt a charter, but only to enact "local police, sanitary and other regulations . . . ." IDAHO CONST. art. XII, § 2. Although the power thus conferred increases local autonomy, the absence of the power to decide upon a form of government or to enact any but regulatory ordinances without legislative authorization sharply distinguishes Idaho municipalities from municipalities in states that grant true home rule.

Reference should also be made to jurisdictions in which there is statutory authorization, but not express constitutional recognition, of the power of municipalities to frame and adopt a charter. See, e.g., IOWA CODE §§ 420.280–288 (1962); N.C. GEN. STAT. §§ 160–363 to –363 (1917). Similarities and differences between "statutory" and "constitutional" home rule are discussed in text accompanying notes 99–108 infra.
in some degree as to matters of both substance and detail, in general they reflect dissatisfaction with what may be termed the "common law" of municipal corporations, i.e., the legal relationship of municipalities to the legislature in the absence of any specific constitutional provisions governing the relationship. To understand home rule, therefore, we necessarily begin with an examination of the distribution of governmental power between state and municipal governments in the absence of home rule.

The power of the legislature with respect to municipal corporations may be derived from the general theory of the position of the state legislature in American constitutional law. By that theory, the state legislature is possessed of all legislative power except as its exercise is prohibited by the federal or state constitutions. In the absence of express constitutional limitations, consequently, the power of the legislature over municipal corporations is plenary. It has the power to create and the power to destroy, the power to define the form of municipal government and the powers and functions which may — or even must — be exercised.


11. A number of theories limiting legislative power have been urged upon the courts. Although one or another has occasionally been accepted, none ever acquired sufficient vitality to warrant extended discussion. Nevertheless, brief mention of at least the more important of these limiting theories seems desirable.

(a) The United States Supreme Court has consistently denied municipalities any protection against the state legislature under the federal constitution. City of Newark v. New Jersey, 262 U.S. 192 (1923) (equal protection); City of Trenton v. New Jersey, 262 U.S. 182 (1923) (contract and due process clauses); see McBain, *The Law and the Practice of Municipal Home Rule* 17-28 (1916).

(b) The doctrine of an "inherent right of local self government," first advanced by Judge Cooley in *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44 (1871), although accepted in a few scattered decisions, has been rejected in the overwhelming majority of states. Even in those few states in which there are decisions accepting the doctrine, generally to invalidate legislation interfering with either the selection of local officials by local electors or the so-called proprietary activities of municipalities, its contours have never been clear. The classic discussion is that in McBain, *supra* note 10, at 299.

(c) Occasional decisions have held that a municipality is denied due process of law if it is required by the legislature to levy a tax or incur a debt for "purely municipal purposes." Constitutional theory, established practice, and the weight of judicial authority are to the contrary. See McBain, *Due Process of Law and the Power of the Legislature To Compel a Municipal Corporation To Levy a Tax or Incur Debt for a Strictly Local Purpose*, 14 Colum. L. Rev. 407 (1914).

12. 1 Antieau, op. cit. *supra* note 9, §§ 1.25, 2.00.
14. 1 Antieau, op. cit. *supra* note 9, §§ 2.00, 5.01 passim.
And, of course, what the legislature has given, it may take away. No grant of authority is beyond recall.

The legislature’s absolute power over municipal governments is not necessarily inconsistent with local autonomy. The very existence of local government implies a degree of independence. Moreover, the legislature may exercise its power so as to foster local autonomy. Thus, in the early years of our history, notwithstanding that in legal theory local units of government were wholly dependent upon the state legislature and lacked even the protections which currently appear in many state constitutions, there was a substantial degree of local autonomy. It was during the second half of the nineteenth century that state legislatures across the country established by usage the power which, from the beginning, they had in theory. As urban areas increased in number and population, fed by immigrants from the rural areas and abroad, governmental activity increased. Public services, such as water, gas, and transportation were needed and were made possible by the new technology. Class conflicts intensified. Increasingly, intervention by the state legislature was sought, to provide new municipal powers, to reverse decisions made at the local level, or to wrest control from corrupt local officials, frequently in favor of those who were equally corrupt. Legislation descended into regulation of the minutest details of municipal government.

15. See CHICAGO HOME RULE COMM’N, op. cit. supra note 2, at 197. The statement in the text should be read as an assertion of fact, not a standard of constitutional law. The occasional efforts to employ the mere mention of municipal corporations in a constitution as the basis for fashioning limitations upon legislative power over such governmental units, e.g., State ex rel. White v. Barker, 116 Iowa 96, 89 N.W. 904 (1909), suffer from the same difficulties as the doctrine of an inherent right of local self-government. See note 11 supra.

16. See DE TOCQUEVILLE, DEMOCRACY IN AMERICA 60–100 (Reeves transl. 1858); WOOD, SUBURBIA 20–28 (1958).

17. See McBAIN, op. cit. supra note 11, at 3-12; WOOD, op. cit. supra note 16, at 28-42.

18. The extent of legislative intervention is indicated in the following excerpt from REPORT OF THE COMMISSION TO DEVISE A PLAN OF GOVERNMENT FOR THE CITIES OF NEW YORK (1877), quoted in McBAIN, op. cit. supra note 11, at 9:

Cities were compelled by the legislature to buy lands for parks and places because the owners wished to sell them; compelled to grade, pave, and sewer streets without inhabitants, and for no other purpose than to award corrupt contracts for the work. Cities were compelled to purchase at the public expense and at extravagant prices, the property necessary for streets and avenues, useless for any other purpose than to make a market for the adjoining property then improved. Laws
In due course, a reaction set in. Local governments — more accurately, some of their citizens — sought, and frequently developed sufficient political strength to obtain, constitutional recognition of areas of assured local autonomy. Analysis suggests that, broadly speaking, constitutional provisions increasing local independence might have modified the "common law" of municipal corporations in either of two ways: (1) by granting municipalities the authority to exercise certain powers without prior authorization from the legislature, or (2) by limiting the legislature's power to legislate concerning municipal government. During the second half of the nineteenth century, constitutional provisions of the latter type were frequently written into state constitutions. Legislatures were prohibited from interfering with the local selection of local officials, appointing commissions to supervise or interfere with local government, levying taxes for local purposes or requiring local governments to do so, or interfering with local control of streets.

With the possible exception of home rule, the most pervasive of the limitations upon the power of the legislature written into state constitutions during this period were the prohibitions of special or local legislation. In the absence of such prohibitions, the plenary power of the legislature over municipal corporations permitted the enactment of legislation directed at particular situations, thus enabling the legislature to intervene in local affairs without the necessity of concerning itself with general implications, as would have been required if the legislation were of a more general nature. Further, the legislature's power to enact legislation applicable only to a single city deprived the city of

were enacted abolishing one office and creating another with the same duties, in order to transfer official emoluments from one man to another; and laws to change the function of officers with a view only to a new distribution of patronage, and to lengthen the terms of offices, for no other purpose than to retain in place officers who could not otherwise be elected or appointed.


20. See 1 Dillon, Municipal Corporations §§ 140–75 (5th ed. 1911); Winters, Classification of Municipalities, 57 Nw. U.L. Rev. 279 (1962). Initially, such provisions appear to have been part of a general legislative reform aimed at requiring the legislature to concern itself more with general policy and less with detail. The potential importance of the provisions as a means of increasing local autonomy was, however, soon recognized. See McBain, op. cit. supra note 11, at 64–106.
the normal political safeguards of statewide interest in the legislation; none but the residents of a single city would have any interest in such legislation and they frequently lacked sufficient political influence to prevent the interference.\textsuperscript{2} As a device to increase local autonomy, the primary utility of bans upon local legislation, if effective, is to decrease the opportunity for legislative intervention in matters of local interest. True, the legislature might, quite consistently with the spirit of such provisions, "regulate in superabundant detail many minute operations"\textsuperscript{3} of municipal government, but at least some detail must be eliminated. A legislature could not, for example, require the purchase of a particular parcel of land or the entry into a particular contract without descending into flagrantly special legislation.\textsuperscript{23}

Each of the constitutional provisions discussed thus far tends to increase local autonomy by limiting the power of the legislature. There remains the possibility, as suggested above, of increasing local autonomy by a quite different method: permitting municipalities to exercise certain powers without prior authorization from the legislature.\textsuperscript{24} In a period of marked social and eco-

\begin{footnotesize}
\begin{enumerate}
\item[21.] The problem of local legislation is discussed further at text accompanying notes 46–58 infra.
\item[22.] McBAIN, \textit{op. cit. supra} note 11, at 97.
\item[23.] For this reason an effective prohibition of special legislation has frequently been considered an indispensable element of home rule. See, \textit{e.g.}, Chicago Home Rule Comm'n, \textit{op. cit. supra} note 8, at 205; MOTT, \textit{op. cit. supra} note 5, at 6. Professor McBain, in his influential work on home rule, stated:
\begin{quote}
It is idle to discuss whether home rule charters should be made "subject to" laws of \textit{special} application that deal with \textit{special} matters of local concern. The establishment of such a relationship between the self-competence of the city and the superior competence of the legislature would be little short of ridiculous. It would rob the grant of home rule of its entire substance.
\end{quote}
McBain, \textit{op. cit. supra} note 11, at 677. Yet, as succeeding paragraphs demonstrate, a grant of home rule powers effects an important change in the legal relationships of city and state whether or not the power of the legislature to interfere in local affairs is limited. An effective prohibition of special legislation may serve to increase local autonomy, but its absence is not inconsistent with home rule. Thus, in Minnesota, the pre-1958 constitutional prohibition of local legislation did not substantially interfere with the power of the legislature to enact local legislation. Note, \textit{Home Rule and Special Legislation in Minnesota}, 47 \textit{Minn. L. Rev.} 621, 636–37 (1963). Yet, as even the Chicago Home Rule Commission observed, the grant of home rule powers did result in a substantial increase in the autonomy of Minnesota municipalities. Chicago Home Rule Comm'n, \textit{op. cit. supra} note 3, at 213–14.
\item[24.] In theory, an effective prohibition upon local legislation might have had an important secondary effect. The difficulty of framing detailed legislation applicable to a large number of municipalities facing an almost infinite
\end{enumerate}
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nomic change, with a seemingly ever increasing need for governmental regulation and service, the necessity of seeking legislative authorization for each new endeavor is an important limitation on municipal independence. Yet, under the "common law" of municipal corporations a grant of authority from the legislature is essential. "All acts beyond the scope of the power granted are void." The reversal of this doctrine was the distinctive contribution of home rule. At least with respect to what are usually termed matters of local or municipal concern, municipalities are, under a grant of home rule, empowered to exercise the initiative — to assume new power and functions without first seeking leave of the legislature.

The power of a municipality to frame and adopt a charter might also be understood as limiting the power of the legislature to enact laws with respect to municipal governments. In some jurisdictions this has been a consequence of the grant of home rule to municipalities. Careful analysis requires, however, that the two functions of home rule be recognized as distinct. A decision as to whether certain matters ought to be within the initiative power of municipalities involves considerations quite different from a deci-

25. See text accompanying notes 34–62 infra.
26. 1 DILLON, op. cit. supra note 20, at 450.
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.

27. Qualification is necessary in those jurisdictions in which the constitution empowers the legislature to define the area of municipal home rule. See text accompanying notes 99–108 infra.
sion as to whether such matters ought to be beyond the competence of the legislature. Moreover, failure to keep the distinction between the two aspects of home rule clearly in view has resulted in considerable confusion as to the extent to which correctives are needed for present home rule doctrines. A single example will suffice. Section 804 of the 1948 Revision of the National Municipal League's Model State Constitution grants “each city . . . full power and authority to pass laws and ordinances relating to its local affairs, property and government. . . .” The section provides, however, that “this grant of authority shall not be deemed to limit or restrict the power of the legislature to enact laws of statewide concern uniformly applicable to every city.” Phrases such as “local affairs, property and government” and “statewide concern” are, of course, not self-defining. To eliminate uncertainty, at least partially, and to minimize the possibility of judicial interpretations restrictive of municipal power, the draftsman included in the section an enumeration of “a part of the powers conferred upon cities. . . .” No similar content was given to the phrase “statewide concern,” which marked the boundaries

29. See discussion at text accompanying note 90 infra.

30. Section 804 contains several ambiguities concerning the extent to which limitations have been placed upon the power of the legislature. The first paragraph of the section provides, as stated in the text, that the grant of authority to cities “shall not be deemed to limit or restrict the power of the legislature to enact laws of statewide concern uniformly applicable to every city.” This language appears to place two distinct limitations upon legislative powers: (1) the legislature may legislate only with respect to subjects that are “of statewide concern” and (2) when legislating on such subjects, its enactment must be uniformly applicable to every city. Curiously, the very next sentence appears to contradict this conclusion. It states that “the following shall be deemed to be a part of the powers conferred upon cities by this section when not inconsistent with general law,” suggesting that quite apart from the subject matter of legislation, it supersedes municipal regulations if it is “general.” See Littlefield, Metropolitan Area Problems and Municipal Home Rule 71–72 (1962).

Moreover, a requirement that legislation be “general” has never been understood as meaning that it be “uniformly applicable to every city,” thus precluding classification. The confusion is compounded by the fact that the provision appears to have been borrowed, with some modifications, from Wis. Const. art. XI, § 3, which subjects the exercise of home rule powers “to such enactments of the legislature of state-wide concern as shall with uniformity affect every city . . . .” The Wisconsin Supreme Court has, however, interpreted this provision as not precluding classification. Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936).

Professor Bromage's explanatory article indicates that the interpretation adopted in the text corresponds to the intended meaning. National Municipal League, Model State Constitution 45, 46–47 (5th ed. 1948).

31. Ibid.
of the legislature's power. Yet, a review of judicial decisions concerning home rule, with the distinction between its function as a grant of municipal power and its function as a limitation on the legislature's power kept clearly in mind, plainly establishes that to achieve the League's stated goal, enumeration of the areas deemed not to be of statewide concern would have been far more meaningful than enumeration of subjects intended to be included within the initiative power of municipalities. Judicially imposed limitations on the initiative power, i.e., invalidations of the exercise of power by a home rule municipality in the absence of conflicting state legislation, have been relatively infrequent and of minor importance in undermining local autonomy.82 The more difficult problem for the courts, and hence the problem more productive of confusion in the reported decisions, has been that of determining whether state legislation shall prevail over a home rule charter or an ordinance enacted pursuant thereto when the two are in conflict.83 It is the doctrines developed in resolving this problem which have caused home rule to be a disappointment to advocates of substantial local autonomy.

THE ARGUMENT FOR A BROAD GRANT OF MUNICIPAL INITIATIVE

Almost without exception, modern students of municipal affairs have urged the desirability of a broad grant of municipal initiative through the mechanism of home rule.84 The virtual unanimity with which they have arrived at this conclusion reflects, in part, rejection of the distrust of municipal government which has traditionally marked American politics85 and which is embodied in Dillon's rule;86 in part, it also reflects a consensus that alternative

82. See text accompanying notes 77-170 infra.
83. The term "conflict" is employed in a broad sense to include not only an actual collision between state legislation and local charters or ordinances but also preemption by the former.
84. See, e.g., AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953); COMM'N ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO CONGRESS 49-50 (1955); MOTT, op. cit. supra note 5, at 18; NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. VIII (6th ed. 1969); cf. Ylvisaker, Some Criteria for a "Proper" Areal Division of Governmental Powers, in AREA AND POWER 27 (Maass ed. 1959).
86. See note 26 supra.
methods of providing municipal powers are unsatisfactory.

The "common law" doctrine that municipalities may exercise only those powers authorized by the state legislature has, in practice, required frequent trips to the state capitol by municipal officials. To some extent the necessity of legislative authorization has been mitigated by broad delegations of power, a practice increasingly common in recent years, but the danger of narrow construction of delegated powers by the courts has made local officials understandably reluctant to risk assertion of new powers without rather clear statutory authorization. Frequently, the absence of clear authority involves relatively minor matters: whether, for example, the municipality has power to prohibit the use of roller skates, bicycles, and scooters on sidewalks, to require installation of reflectors on the rear of automobiles, or to sell peanuts at a municipally owned pier. Lack of authority concerning any one of these minor matters may not seriously hamper municipal government, but frequent repetition of the same theme constitutes a substantial impediment to effective day-to-day operations. The problem is more acute when the municipality lacks power to undertake a program designed to meet an important new problem. Chicago, for example, has at times in the past been unable to regulate various occupations and businesses vitally affecting the welfare of its residents or to license automobile

37. Statement of Dillon's rule is frequently accompanied by a subsidiary proposition that "where there is any fair, substantial, or reasonable doubt whether a particular power is possessed by a municipal corporation the existence of the power in question must be denied." Law v. Phillips, 136 W. Va. 701, 779, 68 S.E.2d 452, 469 (1952). Although frequently attributed to Judge Dillon, the proposition as thus stated substantially modifies his position. See note 273 infra.

Commentators have often criticized the subsidiary proposition as well as other rules of construction at times employed by the courts to determine the existence vel non of authority claimed by a municipality. See, e.g., Walker, supra note 6, at 577-78, 583. Such criticism frequently overestimates the importance of constructional rules in guiding judicial decision. E.g., compare Nasfell v. Ogden City, 122 Utah 344, 346, 249 P.2d 597, 603 (1952), with Utah Power & Light Co. v. Provo City, 94 Utah 203, 74 P.2d 1191 (1937).


40. Hodes, Law and the Modern City 39-51 (1937).
operators even though the legislature had provided no system of state-wide control to protect the public. As experience or new problems indicate the need for additional powers, municipal officials may, of course, obtain necessary authorization from the legislature. Often there is little difficulty in obtaining the legislature's cooperation. Nevertheless, municipal dependence upon the legislature for new powers has proven unsatisfactory, at least in the absence of a broad delegation approximating the breadth of municipal initiative granted by home rule.

The task of obtaining authorizing legislation may be most difficult for the municipality when the legislature is restricted by an effective prohibition of local legislation. Although the authorization may eventually be forthcoming, the necessity of drawing legislation generally applicable throughout the state means that enactment may have to await crystallization of opinion on a state-wide basis. Since the pace at which problems develop is not likely to be even throughout the state, there may be considerable delay between the time when one municipality needs power and the time when general legislation is politically feasible. Often, too, the strength of the opposition to the municipality's proposal may be increased by the required application of the legislation to areas where the problem is less acute or, perhaps, non-existent.

The need for flexibility in handling municipal problems has led, in most jurisdictions, to a substantial watering down of constitutional provisions prohibiting special legislation. Although the availability of effective local legislation eliminates the problems created by constitutional efforts to force all municipalities into a single mold, or at best a limited number of molds, it raises other problems. Pressure from municipalities for local legislation es-

41. LEPAWSKY, op. cit. supra note 38, at 18-19.
42. The Report of the Chicago Home Rule Commission concludes, for example, that Chicago has usually been able to obtain authorization for new police powers or provision of new services. CHICAGO HOME RULE COMM'N, op. cit. supra note 3, at 265, 283.
43. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, op. cit. supra note 35, at 72.
44. See City of McMinnville v. Howenstein, 56 Ore. 451, 109 Pac. 81 (1910). The necessity of obtaining state-wide support for such legislation may, of course, constitute an important safeguard to political minorities in the municipality or others who may be adversely affected by exercise of the desired power. See text accompanying notes 191-293 infra.
45. Opposition to the legislation is not likely to be blunted by the fact that it merely authorizes and does not require municipal action, since it is obviously to the advantage of opponents of the municipality's program to make their fight in both forums.
46. Legislatures were not long in learning that constitutional provisions
HOME RULE

establishes precedent, both in the legislature and the courts, for local legislation which may not be desired by the municipality, thus returning full circle to the very problems which the constitutional provisions were designed to eliminate. In addition, technical problems are created by the necessity of phrasing the legislation in general terms even though it is intended to be only local in effect: The passage of years may result in loss of the characteristics by which the municipality that was intended to receive the power was defined.

There are, however, more fundamental objections to a system whereby municipalities are dependent upon the legislature for authorization of each new power. Probably the primary motivation for the development of constitutional bans upon special legislation was the drain on the legislature's time resulting from consideration of purely local measures. If the legislature adequately performs its duty, engaging in careful deliberation of the proposed local measures, the expenditure of time required will almost necessarily divert the legislators from their most important function and the one for which they are best equipped, formulation of state-wide policy. Control of municipal power, moreover, is vested primarily in representatives who are neither informed concerning the problems of the municipality nor responsible to its residents. Dependence on the legislature for new powers may also result in weakening the municipality's bargaining position in the legislature: The price exacted for authorization by legislators without direct responsibility to the municipality may be abandonment by the municipality of other state legislation in which it has an interest.

mandating general legislation might be evaded by the simple expedient of classifying municipalities by population or other characteristics. So long as the classification is supportable on some reasonable ground, the technique has generally withstood challenge. Indeed, classification has frequently withstood attack even where it is patently designed to achieve only individualized treatment for a particular municipality which is not, so far as the subject of the legislation is concerned, meaningfully different from other municipalities. See generally Winters, supra note 20.

47. The problem may be mitigated by permitting the legislature to enact local legislation if it has the consent of the affected municipality. See, e.g., Minn. Const. art. XI, § 2; N.Y. Const. art. IX, § 11.


49. See note 20 supra.


51. It was, for example, widely rumored that the price paid by Chicago for authority to reorganize its police department after the recent scandal was
Most frequently, however, strictly local measures are not carefully deliberated in the legislature. Legislators are guided almost entirely by the local delegation.\textsuperscript{52} While the controlling weight given to the views of the local delegation tends to mitigate the problems of unfamiliarity with local issues and lack of responsibility to the local electorate, it by no means eliminates them. The local delegation to the legislature is often elected on the basis of state issues.\textsuperscript{53} More importantly, it is not charged with the day-to-day operation of municipal government, in consequence of which it is less likely than municipal officials to be intimately familiar with the problem involved. The difficulty is accentuated when the local delegation is of a different political party than the one in control of the municipal government. Under such circumstances it may owe its election to the very groups opposing the action proposed by the municipality.

Uncertainty as to the extent of municipal power may also lead to what one commentator has termed “municipal pussyfooting.”\textsuperscript{54} Officials not only hesitate to embark upon new programs, but at times employ the confusion created by joint legislative-municipal responsibility as a pretext for failing to take action. The buck can be passed to the legislature for failing to provide the necessary authority, while the legislature, in turn, can remain indifferent or, frequently with some justification, argue that the municipality already has sufficient power. A broad grant of municipal initiative, by contrast, serves to promote the visibility of governmental decision making by pin-pointing responsibility.\textsuperscript{55}

Ultimately, the argument for a broad grant of municipal initiative rests upon the desirability of permitting municipalities to govern generally, rather than limiting them to the exercise of particular functions. A system under which municipalities are generally dependent upon legislative delegation of power is based upon the tacit assumption that there are numerous areas of governmental activity which are the exclusive concern of other levels of government. The abandonment of state-wide fair employment or fair housing legislation. Chicago Daily News, April 15, 1961, p. 5, col. 1.

52. See \textsc{Fordham, Local Government Law} 75 (1949); \textsc{McBain, op. cit. supra note 11, at 67; Nevada Legislative Counsel Bureau, Survey of the Functions of the Offices, Departments, Institutions, and Agencies of the State of Nevada and What They Cost (Bull. No. 1, 1947), quoted in Nevada Legislative Counsel Bureau, \textit{op. cit. supra} note 39, at 18; \textsc{Fordham, supra note 50, at 239–41.}

53. \textsc{Mott, op. cit. supra note 5, at 13.}

54. \textsc{Lepawsky, op. cit. supra note 38, at xxv.}

55. \textsc{U.S. Advisory Comm’n on Intergovernmental Relations, op. cit. supra note 35, at 72.}
of government.\textsuperscript{56} On that assumption, restricting municipalities to the exercise of power granted by the legislature serves the useful purpose of protecting other levels of government against municipal encroachment. The assumption, however, is invalid as either a description of municipal activity or a statement of desirable policy. Municipal government touches virtually every aspect of urban life. Instead of a division of function among the various levels of government, responsibility for the entire range of governmental functions has been shared among municipal, state, and (to a somewhat lesser degree) federal governments. There is, moreover, growing consensus that traditional assumptions limiting the sphere of municipal activity are not suited to current conditions.

The semantics and legal fictions of exclusive allocations of powers do not accord with the “seamless web” of governmental operations in our times. They suggest boundaries where there are no boundaries, absolute distinctions where there are only relative ones. . . .

And more, if governmental action at each level is to be well conceived and effective; if the citizen is to be drawn as a whole person into participation . . . and if the system of countervailing power is to have any meaning or vitality, then the concerns and the decisions which the component area can legitimately undertake ought to embrace the whole range of matters assigned to the governmental process by that society in its time.\textsuperscript{57}

Further, municipal power to govern generally — to deal with “the whole range of matters assigned to the governmental process” — is necessary to the establishment of a rational system of priorities. Effective choice among the competing demands upon government is meaningful only when a full range of alternatives is available.\textsuperscript{58} The fragmentation of governmental power implicit in municipal dependence upon delegated powers seriously curtails such choice by withholding alternatives.\textsuperscript{59}

Since a broad grant of municipal initiative does not imply any

\textsuperscript{56} The assumption that municipalities have limited functions is implicit in the frequent statement that they are established “chieflly to regulate and administer the local and internal affairs of the city, town, or district which is incorporated,” implying that there are governmental affairs which are not “local and internal” and hence beyond the province of local government. See, e.g., 1 Dillon, op. cit. supra note 20, §§ 31-88; 1 Yokley, Municipal Corporations § 5 (1956).

\textsuperscript{57} Ylvisaker, supra note 84, at 55.

\textsuperscript{58} Ibid. See also Gulick, The Metropolitan Problem and American Ideas 82-84 (1962).

\textsuperscript{59} Municipal power to govern generally does not, however, require a grant of municipal power coextensive with the power of the legislature. See text accompanying notes 221-93 infra.
limitation on the power of the legislature, there is always the possibility that the legislature may interfere with the exercise of local power either by denying it or by hemming it in with restrictions. While this danger (or safeguard) exists, it is generally recognized that "it is easier to block a legislature from denying a power than it is to secure from a legislature the authority to perform an additional function of government." In any event, under a broad grant of initiative, municipalities would, presumably, assume that they had the power to act. And so would their citizens. At least in the first instance, the formulation of plans for coping with new problems, or of devising better solutions for older ones, is, under a general grant of home rule power, placed squarely upon those most familiar with local problems and directly responsible to the local citizenry.

THE INITIATIVE IN THE COURTS

The Ambiguity of the Constitutional Provisions

The distinctive contribution of the home rule concept, as suggested above, was the grant of authority to municipalities to exercise governmental power without prior authorization by the legislature. So radical a departure from prevailing legal relationships, it might be expected, would have led the framers of home rule provisions to attempt to define with some care the areas in which the initiative was granted. Did the constitutional authorization provide power only to define the organization and procedures of local government, or did it also authorize the exercise of substantive powers? If the latter was intended, were municipalities to be free to enact any legislation which was within the competence of the state legislature, or was municipal initiative more limited? If it was more limited, to what subjects did it extend?

The language of constitutional home rule provisions provides remarkably little guidance concerning these questions. Virtually

60. See text accompanying notes 24-28 supra.
61. NATIONAL MUNICIPAL LEAGUE, op. cit. supra note 34, at 97.
62. But see HAGENSICK, MUNICIPAL HOME RULE IN WISCONSIN 14 (1961), reporting that in spite of a very liberal grant of municipal initiative in Wisconsin, "municipalities are often reluctant to assume new powers without specific [statutory] authorization." The practice is attributed to "an inbred attitude of municipal officials who psychologically accept the notion that the municipality is but a creature of the state."
63. The lack of clarity in the language employed was, of course, only symptomatic of the uncertainty surrounding the significance of the new technique for distributing power between state and municipality. See Schmandt,
all of the provisions state that a municipality may frame and adopt a "charter for its own government" or "a home rule charter," or employ somewhat similar language. Nearly half contain no further definition of the powers granted to municipalities. An effort to determine the scope of home rule power from such language involves considerable difficulty. Except in the context of home rule, the phrase "municipal charter" is generally understood as signifying "the creative act setting up the corporation, whether the act be general or special, together with all other laws, both statutory and constitutional, relating to the corporation and its rights, duties, powers, privileges, etc." To draw on this meaning in defining the term "charter" when it appears in a constitutional home rule provision might suggest that authorization to frame and adopt a charter permits a municipality to enact any laws within the competence of the state legislature. Such a conclusion, however, runs contrary to the common understanding that such general subjects as crime, domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many others are not appropriate subjects for local control. There are, moreover, weighty policy considerations which militate against granting municipalities initiative power coextensive with the competence of the legislature.

The grant of charter-making authority might be read more narrowly as authorizing municipalities to provide in their charters for only the exercise of such powers as might be delegated by the legislature to a non-home rule municipality. But this


64. SEASON & KAUFER, op. cit. supra note 19, at 105; see City of St. Petersburg v. English, 54 Fla. 585, 596, 45 So. 483, 487 (1907); People v. Briggs, 50 N.Y. 553, 559 (1879). The phrase is occasionally used in a more restricted sense, referring only to the creative act establishing the municipality. See 2 McQuillin, MUNICIPAL CORPORATIONS § 9.02 (3d ed. 1949).


67. See text accompanying notes 171-203 infra.

68. There is dicta adopting this construction. See, e.g., Platt v. San Francisco, 158 Cal. 74, 82, 110 Pac. 504, 507 (1910); City of McMinnville v. Howenstine, 56 Ore. 451, 456, 109 Pac. 81, 83 (1910). This approach has, moreover, been expressly adopted in the Model Constitutional Provisions for Municipal Home Rule prepared by Dean Fordham for the American Municipal Association. See text accompanying note 172 infra.
formulation merely restates the problem of determining the meaning of a grant of charter-making authority without substantially aiding its resolution. It does, of course, make clear that authorization to frame a charter permits the exercise of some substantive powers, but it implies a limitation on the exercise of such powers without providing any guidance as to the nature of the limitation. It is commonly stated that the legislature may properly delegate “all power incidental to municipal government,” or “appropriate to the orderly conduct of municipal affairs,” or which “relates to a matter of local self-government.” The absence of a constitutional tradition which would give content to these phrases deprives them of utility in defining the scope of initiative under home rule.

In more than half of the constitutional home rule provisions, some effort is made to further define the scope of municipal initiative. The language employed, however, is barely more instructive than that already discussed. Municipalities are, for example, authorized to enact laws or regulations “in respect to municipal affairs”; concerning their “organization, government, or affairs”; “relating to [their] property, affairs or government”; or to “adopt and enforce within their limits . . . local police, sanitary and other similar regulations.” For better or worse, the use of such phrases constitutes a clear invitation to policy making by judges before whom, in our system of government, all questions as to whether a municipality has exceeded its power must inevitably come.

69. 2 McQuillen, op. cit. supra note 64, § 9.04, at 473; Rhyne, Municipal Law 78 (1957).

70. For further criticism of such a formulation of the scope of municipal initiative, see text accompanying notes 178–90 infra.

71. CAL. CONST. art. 11, § 8(j).

72. Md. Const. art. XI-E, § 3.

73. N.Y. Const. art. 9, § 16; R.I. Const. amend. 28, § 2.

74. Ohio Const. art. XVIII, § 8; Cal. Const. art. 11, § 11.

75. See text accompanying notes 171–293 infra.

76. In a number of jurisdictions, the legislature has been expressly granted the power to define the area of municipal initiative. See, e.g., Mich. Const. art. VIII, § 21; Minn. Const. art. IV, § 36 (1896). (The power of the legislature presumably continues under the new home rule section of the constitution, but it is no longer express. Minn. Const. art. XI, § 3.) Legislative definition of the scope of municipal initiative is discussed in text accompanying notes 99–108 infra, but it is appropriate to note at this point that such power on the part of the legislature has been of varying utility in narrowing the range of policy alternatives open to the courts. In Minnesota, for example, charters “may provide for any scheme of municipal government not inconsistent with the constitution, and . . . for the establishment and administration of all departments of a city government, and for the
Some Common Misconceptions

The courts have, of course, had no alternative but to accept the invitation. Without the benefit of guidance from history, constitutional tradition, or sharply delineated principle, courts have been required to grapple with the questions of what "affairs" are "municipal" and when "police, sanitary, or other similar regulations" are "local." Acclaim has not been their reward. More than a few commentators have criticized the courts for restricting the scope of municipal initiative too narrowly. Even when commentators have not been critical, they have reported, as a fact, that courts have narrowly defined the power of home rule municipalities. It is, of course, generally conceded that the grant of home rule has produced a greater range of powers than would otherwise have existed, but much of the literature of home rule conveys the impression that the judiciary has been responsible for confining municipal power within narrow limits.

regulation of all local municipal functions, as fully as the legislature might have done before home rule charters for cities and villages were authorized by constitutional amendment in 1896. Minn. Stat. § 410.07 (1961). There is, in addition, express authorization for charter provisions dealing with the duties of certain courts and the acquisition of property within or without the municipal boundaries. Ibid. Although traditionally it has liberally construed the initiative power of municipalities, the Minnesota Supreme Court seems never to have taken seriously the authorization to regulate "all local municipal functions, as fully as the legislature might have done before home rule . . . ." See Young v. Mall Inv. Co., 172 Minn. 428, 215 N.W. 840 (1927); State v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915); Laird Norton Yards v. City of Rochester, 117 Minn. 114, 134 N.W. 644 (1912).


77. See, e.g., Council of State Governments, State-Local Relations 162–74 (1946); Nevada Legislative Counsel Bureau, op. cit. supra note 39, at 31–36; Richland, Constitutional City Home Rule in New York, 54 Colum. L. Rev. 311, 332, 335–36 (1954); Schmandt, supra note 63, at 390–403, 405, 411.

78. See, e.g., 2 McQuillen, op. cit. supra note 64, at 612; National Municipal League, op. cit. supra note 34, at 97; Ruud, Legislative Jurisdiction of Texas Home Rule Cities, 37 Texas L. Rev. 682, 686–88 (1959); 28 Ore. L. Rev. 395 (1949).

79. See, e.g., 1 Antieau, Municipal Corporation Law § 3.10 (1962); Council of State Governments, op. cit. supra note 77, at 164–66; Schmandt, supra note 63, at 405–07.

80. The failure of many commentators to distinguish between the two functions of home rule—as a grant of power to municipalities and as a possible limitation on the power of the legislature—at times renders it difficult to ascertain whether reference is being made to limitations which the courts have supposedly placed upon municipal initiative or to a failure to invalidate
If reliance is placed upon what the courts have said, there is some justification for this widespread impression. The cases are legion in which language employed by the court suggests that invalidation of an attempted exercise of municipal initiative rests upon the ground that the subject matter is not one of "local or municipal concern" and hence beyond the scope of the powers granted to municipalities. In some jurisdictions, the language employed by the courts, at least on occasion, has conveyed the impression that the effect of home rule has been to compartmentalize governmental power into an area of local concern, with respect to which only the municipalities are competent to legislate, and an area of statewide concern, which is within the exclusive province of the legislature. In such jurisdictions every decision sustaining state legislation appears to be a limitation of municipal initiative, with the implication that even if the legislation were to be repealed, municipal regulation under the grant of home rule powers would be impermissible. Conversely, every decision what the particular writer considers impermissible legislative intrusion on municipal autonomy. One commentator, for example, after a review of Nebraska decisions disclosing that home rule in that state has not resulted in any substantial restrictions on the power of the legislature, concludes that "the law of municipal home rule in Nebraska is embalmed in Dillon's Rule instead of being enshrined in the state constitution." Winter, Municipal Home Rule, A Progress Report?, 36 Neb. L. Rev. 447, 471 (1957). Dillon's rule, however, concerns municipal initiative, not limitations on legislative power. See note supra.


81. See, e.g., People ex rel. Miller v. Johnson, 84 Colo. 143, 80 Pac. 239 (1905); Kansas City v. J. I. Case Threshing Machine Co., 387 Mo. 913, 87 S.W.2d 195 (1935); Omaha & Council Bluffs St. Ry. v. City of Omaha, 125 Neb. 825, 252 N.W. 407 (1934); County Secs., Inc. v. Seacord, 278 N.Y. 34, 15 N.E.2d 179 (1939); Niehaus v. State ex rel. Bd. of Educ., 111 Ohio St. 47, 144 N.E. 493 (1924); City of Tulsa v. McIntosh, 141 Okla. 220, 284 Pac. 876 (1930); City of Woodburn v. Public Serv. Comm'n, 82 Ore. 114, 161 Pac. 301 (1916); City of Madison v. Tolzmann, 7 Wis. 2d 570, 97 N.W.2d 513 (1959); Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936).

82. See, e.g., Davis v. City & County of Denver, 140 Colo. 30, 342 P.2d 674 (1959); City of Canon City v. Merris, 137 Colo. 169, 313 P.2d 614 (1956); State ex rel. Garner v. Missouri & Kan. Tel. Co., 189 Mo. 88, 88 S.W. 41 (1906).

83. See discussion in Schmandt, supra note 63, at 987-98.
sustaining the exercise of municipal initiative would, in such jurisdictions, appear to have the effect of precluding later state legislation superseding the local charter or ordinance. Adherence to such a construction of the constitutional provisions would, as Professor McGoldrick has stated, "ultimately all but destroy municipal home rule." The considerations which militate against substantial judicially imposed limitations on the power of the legislature are sufficiently weighty that if courts are required to deny state control in order to permit the exercise of municipal initiative, it seems inevitable that the latter will be held to extend to progressively fewer subjects.

The impression created by such judicial language — that municipal initiative is limited to matters of "local" or "municipal" concern and that these are narrowly defined — is misleading. Analysis of the decisions reveals that, with the possible exception of a single state, the grant of municipal initiative in home rule provisions has been broadly construed by the courts. There are, of course, in almost every jurisdiction a few decisions limiting the scope of municipal initiative, but the record is clear that judicially imposed limitations upon municipal initiative are few in number and, in most jurisdictions, have not resulted in denying municipalities power to legislate concerning those matters which even the staunchest advocates of local autonomy consider appropriate for local control.


85. Wisconsin's experience with home rule tends to support this conclusion. Municipalities in that state are granted initiative by both constitution and statute. If the exercise of a particular power is attributable to the constitutional grant, the legislature's power to supersede the local determination is severely limited. No similar limitation on the legislature exists if the municipal power is based upon the statutory grant. The result has been that the constitutional grant of power to municipalities has been construed very restrictively, while the statutory grant has been construed quite liberally. See Hagensick, op. cit. supra note 62.

Caution should be exercised, however, not to read too much into the Wisconsin experience. The existence of the broad statutory grant of municipal initiative has meant, in practice, that reference to the constitutional grant is necessary only if there is state legislation inconsistent with the municipal regulation. Consequently, the Wisconsin Supreme Court has not been required to determine the scope of the constitutional grant of initiative in the absence of conflicting state legislation.

86. See text accompanying notes 162-66 infra.

87. See 1 Antieau, op. cit. supra note 79, § 3.10. Contrary conclusions by commentators are frequently unsupported by reference to judicial decisions. See, e.g., authorities cited in note 89 supra. These unsupported conclusions are then relied on as tending to prove similar conclusions by later commentators.
Proof of this assertion depends, in part, on an analysis of the grounds upon which courts may invalidate municipal legislation. Home rule, as stated repeatedly in this Article, is a method of distributing power between state and local governments. It is not intended to increase the sum total of governmental power. Con-See, e.g., the obvious reliance by the Nevada Legislative Counsel Bureau, op. cit. supra note 77, on the earlier report of Council of State Governments, op. cit. supra note 77.

When reference is made to judicial decisions, citations frequently fail to support the conclusion. For example, one leading treatise states that "it is generally held matters not pertaining to municipal government cannot be regulated by provisions of home rule charters . . . ." 2 McQuillan, op. cit. supra note 64, at 512. Of the eleven cases cited, the holding of only one supports the proposition: City of Pontiac v. Ducharme, 278 Mich. 474, 270 N.W. 754 (1936) (city has power to acquire land outside its limits); Attorney General ex rel. Lennam v. City of Detroit, 225 Mich. 631, 196 N.W. 991 (1923) (correctly cited; city lacks power to regulate wages and hours of employees of those of its contractors performing work of state-wide concern); State ex rel. Abel v. Gates, 190 Mo. 540, 89 S.W. 881 (1905) (jurisdiction of court to enjoin passage of ordinance); Morrow v. Kansas City, 186 Mo. 675, 85 S.W. 572 (1905) (city has power to adopt a new charter); Stanford v. Summers, 247 App. Div. 627, 238 N.Y.S. 921 (1936) (charter provision upheld); City of Portland v. Welch, 154 Ore. 286, 59 P.2d 233 (1936) (invalidating state legislation providing for administrative supervision of municipal taxation); City of Woodburn v. Public Serv. Comm'n, 82 Ore. 114, 161 Pac. 301 (1910) (state public utilities commission may regulate utility rates notwithstanding prior franchise granted by city); Cameron v. City of Waco, 8 S.W.2d 949 (Tex. Civ. App. 1928) (municipal power upheld); Green v. City of Amarillo, 244 S.W. 241 (Tex. Civ. App. 1922) (properly cited; city cannot exempt itself from tort liability resulting from proprietary function; on appeal, the decision, though affirmed, was expressly rested on quite different grounds: conflict with state statute, conflict with constitutional prohibition against damaging private property for a public purpose without compensation, and constitutional guarantee of a remedy for every injury—Green v. City of Amarillo, 267 S.W. 702 (Tex. Comm'n of App. 1924)); Keel v. Pulte, 10 S.W.2d 694 (Tex. Comm'n of App. 1928) (construction of charter); State ex rel. Sleeman v. Baxter, 195 Wis. 437, 219 N.W. 858 (1923) (legislature has power to enact special legislation concerning local affairs absent municipal exercise of home rule powers).

Similarly, the Chicago Home Rule Commission concluded that "it appears unlikely that a grant of constitutional home-rule power will materially enhance Chicago's power to perform services for its citizens . . . . Substantial increments to the city's service powers would probably still be dependent on delegations from the General Assembly . . . ." Chicago Home Rule Comm'n, Modernizing A City Government 262 (1954). But without exception the cases relied upon by the Commission to support this conclusion involved only the question of whether the performance of service functions by a home rule municipality was subject to control by the state legislature, not the question of whether a municipality might render a service without legislative authorization. See id. at 258-61.
sequently, a decision that municipal legislation violates the fourteenth amendment to the federal constitution or a provision of the state bill of rights is not a limitation on municipal initiative.\textsuperscript{88} In such cases, the limitation is not imposed because the matter is not one of "local" or "municipal" concern, but because it is beyond the power of government generally.\textsuperscript{89}

Municipal legislation may also be invalidated on the ground that it conflicts with state legislation or enters an area which the legislature has pre-empted for exclusive control at the state level. Consideration of whether limits ought to be placed upon the power of the legislature to supersede municipal legislation in this manner and the role of the courts in determining whether to construe state legislation as superseding local regulation is beyond the scope of this Article. The only point to be made here is, simply, that invalidation of local legislation on these grounds is not a judicial limitation of the initiative. The denial of municipal power, in such cases, does not result from a judicial determination that the subject dealt with by the municipal legislation is not appropriate for control at the local level, but from the necessity of choosing between giving effect to either municipal legislation or state legislation. Invalidation of the municipal legislation rests, therefore, not upon a determination that the municipality has no interest or insufficient interest to regulate the matter, but upon the ground that the legislature has determined that the state has a greater interest or that it is a more appropriate forum than the

\textsuperscript{88} Chicago Home Rule Comm'n, op. cit. supra note 87, at 272; Mott, op. cit. supra note 80, at 20. The state could not, of course, even if it would, exempt municipalities from the prohibitions placed upon states by the federal constitution. Moreover, the prevailing understanding that home rule municipalities are subject to general limitations on governmental power imposed by state constitutions is clearly reflected in the requirement, almost always express, that powers exercised by municipalities are to be "consistent with" or "subject to" the Constitution. The point has not, however, always been clearly recognized. See, e.g., Lepawsky, op. cit. supra note 38, at 50–51.

\textsuperscript{89} Occasionally, it is unclear whether invalidation of municipal legislation rests on the ground that the municipality has exceeded the power of government generally or upon the ground that the legislation exceeds merely the power of the municipality. See, e.g., Ford v. Kansas City, 181 Mo. 137, 79 S.W. 923 (1904); Good Humor Corp. v. City of New York, 200 N.Y. 312, 49 N.E.2d 153 (1943); State ex rel. Thomas v. Semple, 112 Ohio St. 559, 148 N.E. 342 (1925), overruled in State ex rel. McClure v. Hagerman, 155 Ohio St. 520, 98 N.E.2d 855 (1951). The technique of avoiding major constitutional questions, that particular legislation is beyond the power of government generally, by deciding comparatively less important constitutional questions, that the legislation is beyond the power of municipal government, is discussed in text accompanying notes 182–88 & 209–82 infra.
city council for resolving the problems dealt with by the regulation.\textsuperscript{90}

More difficult questions are raised by decisions invalidating municipal legislation on the ground that the subject with which it deals has, under the state constitution, been committed to the exclusive control of the state legislature. Since they do not rest upon a denial of governmental power generally or upon the necessity of choosing between conflicting state and local legislation, there is reason to read such decisions as establishing judicially imposed limitations on the scope of municipal initiative. This is particularly true when the constitutional provision construed by the court as assigning the subject exclusively to the legislature does not, on a fair reading, seem to compel that result.\textsuperscript{91} Nevertheless, closer analysis suggests that decisions of this type ought to be distinguished from decisions in which the invalidation of municipal legislation is based upon a determination that the subject dealt with is not one of "local" or "municipal" concern and hence beyond the grant of municipal initiative. The decision of the Pennsylvania Supreme Court in \textit{Commonwealth ex rel. Truscott v. Philadelphia}\textsuperscript{92} is instructive. In that case the court invalidated an ordinance, enacted pursuant to authority granted by the city charter, abolishing certain offices which prior to the City-County Consolidation Amendment to the Pennsylvania constitution\textsuperscript{93} had been county offices. That amendment provides, in relevant part, that upon its adoption "all county officers shall become officers of the City of Philadelphia and, until the General Assembly shall otherwise provide, shall continue to perform their duties. . . ." The decision was not, of course, based upon the ground that the organization of city government was beyond the grant of municipal

\textsuperscript{90} Opinions in cases of this type frequently contain language apparently restrictive of municipal initiative. Each of the cases cited in note 81 supra, and a majority of those cited in note 82 supra, actually involve conflicts between state and local legislation, although the language employed by the courts suggests that the decisions were dependent on a determination of the scope of municipal initiative.

\textsuperscript{91} See, \textit{e.g.}, Royal v. Barry, 160 A.2d 572 (R.I. 1960), in which, by dictum, the court indicated that even in the absence of conflict with state legislation a charter provision requiring final decisions of the school committee to be made in public session was invalid because "the constitution expressly and affirmatively reserves to the Legislature sole responsibility in the field of education. . . ." \textit{Id.} at 575. But R.I. Const. art. XII, on which the court based its decision, provides only that "it shall be the duty of the general assembly to promote public schools," hardly a compelling basis for concluding that the legislature's power is exclusive.

\textsuperscript{92} 580 Pa. 367, 111 A.2d 136 (1955).

\textsuperscript{93} Pa. Const. art. XIV, § 8.
initiative, but upon the explicit language of the City-County Consolidation Amendment assigning to the legislature the function of determining when to abolish the offices in question. Even in those cases in which the constitutional language relied upon by the courts as granting sole power over a subject to the legislature is less explicit, it is no less true that the invalidation of municipal legislation is based upon construction of some provision other than the one granting home rule powers. For this reason, it seems more appropriate to consider cases of this type together with those in which the question is whether state legislation should be construed as inconsistent with local legislation. In both types of cases, the question is not the meaning of the home rule provision, but the meaning of some other law, whether constitution or statute, which may have the effect of making inroads upon the power conferred upon home rule municipalities.

Repeated statements in the literature that the scope of municipal initiative has been narrowly construed by the courts are partially a consequence of failure to recognize that in the three types of cases discussed immediately above, invalidation of local legislation rests on some basis other than a judicial determination that the subject matter of the legislation is inappropriate for control at the local level. Such statements are also attributable to a too frequent failure to recognize that phrases such as "local affairs," "municipal affairs," and "self-government" have been made to serve a dual purpose. On the one hand, they mark the outer limits of the grant of power to home rule municipalities, the point beyond which a municipality may not legislate without delegation from the legislature. On the other hand, the phrases also describe, at least in those jurisdictions in which home rule is construed as a limitation on the power of the legislature, the area in which municipal legislation is superior to conflicting state legislation.

94. See, e.g., State ex rel. Cherrington v. Hutsinpiller, 112 Ohio St. 468, 147 N.E. 647 (1925); City of Sapulpa v. Land, 101 Okla. 22, 23 Pac. 640 (1924) (alternative holding); Ruth v. Merrill, 43 Okla. 764, 144 Pac. 371 (1914); In re Cloherty, 2 Wash. 137 (1891).

95. The desirability of considering the cases in this context is somewhat increased by the fact that most cases of this type appear to involve local legislation affecting either the judiciary or the educational system. See cases cited notes 91 & 94 supra. Since invariably there is a substantial amount of state legislation concerning these subjects, the possibility of conflict or preemption is almost always available as an alternative ground of decision. See State ex rel. Harbach v. City of Milwaukee, 189 Wis. 84, 206 N.W. 210 (1926).

96. See Fordham, supra note 50, at 329, 345. Still another function is served by these phrases in Minnesota. The Minnesota home rule provision has been construed as placing no limitations upon the power of the legisla-
court might, with no inconsistency, find that a particular subject is a matter of "local concern" for the former purpose, and yet not a matter of "local" but of "statewide concern" for the latter purpose. Indeed, courts have done so with some frequency.\textsuperscript{77}

This is not to suggest that home rule grants are construed as permitting municipalities to legislate on all subjects so long as there is no conflicting state legislation or constitutional provision assigning a particular subject to the exclusive control of the state legislature. There are, in almost every jurisdiction, decisions holding a particular subject beyond the scope of municipal initiative.\textsuperscript{78} A brief discussion of divergent theories concerning the source of municipal home rule power is necessary to an understanding of these decisions.

\textit{Constitutional and Legislative Home Rule}

In perhaps a majority of home rule jurisdictions, the grant of municipal initiative flows directly from the state constitution. In others, however, the source is statutory,\textsuperscript{79} the constitutional provision concerning home rule serving only to require or authorize
such an enactment by the legislature. The argument is occasionally made that in jurisdictions of the latter type, municipalities do not truly possess home rule because of the retention of ultimate power by the legislature to define narrowly the scope of municipal initiative. Although the legislature’s power to withhold charter-making authority lends credence to this argument, experience demonstrates that the statutory grant may materially increase the extent of local autonomy in fact. The statutes divide into two primary types, those in which the delegation of charter-making power is cast in broad terms similar to the terms employed in constitutional provisions and those in which the matters that must or may be dealt with in a charter are specified in some detail. In jurisdictions with the latter type of statute, municipal initiative is, of course, more restricted than it is in jurisdictions in which home rule is directly conferred by the constitution or those in which the statutory grant is broadly written. Consequently, the traditional classification of home rule states into “constitutional” and “statutory” seems inappropriate, at least for the purpose of determining the scope of municipal initiative. A more useful classification would divide the jurisdictions

100. A number of courts have held that in the absence of such authorization, statutes conferring charter-making authority upon municipalities are invalid delegations of legislative power. See, e.g., Phillips v. City of Atlanta, 210 Ga. 72, 77 S.E.2d 723 (1953); Elliott v. City of Detroit, 121 Mich. 611, 84 N.W. 820 (1899); State ex rel. Mueller v. Thompson, 149 Wis. 488, 137 N.W. 20 (1912). The problem is carefully considered in McBain, The Delegation of Legislative Power to Cities, 32 Pol. Sci. Q. 276, 391 (1917).

101. See, e.g., Council of State Governments, op. cit. supra note 77, at 162; Mott, op. cit. supra note 80, at 14.

102. Strangely, the proponents of the argument recognize that Wisconsin municipalities possess substantial autonomy, greater than in perhaps any other state. See Council of State Governments, op. cit. supra note 77, at 166. But the broad initiative power of Wisconsin municipalities is derived from the statutory and not the constitutional grant. See Hagensicke, op. cit. supra note 62. The Minnesota experience is similar. See Anderson, Municipal Home Rule in Minnesota, 7 Minn. L. Rev. 905 (1925); Note, Home Rule and Special Legislation in Minnesota, 47 Minn. L. Rev. 621, 631–34 (1963).

Moreover, such arguments tend to ignore the failure of the courts in constitutional home rule jurisdictions to construe home rule provisions as restricting to any substantial degree the power of the legislature to enact laws concerning local government. To the extent that the legislature retains unlimited or virtually unlimited power to supersede an exercise of municipal initiative conferred by the constitution, there is only a semantic difference between constitutional and legislative home rule, at least when the latter is defined in broad terms.


according to the terms of the grant, whatever its source. Since the primary—perhaps the only—purpose of home rule is to provide a flexible system of change emanating from the community where the problems originate, to the extent that municipalities are bound to detailed authorizing legislation, thus weakening municipal initiative, the very concept of home rule is threatened.\textsuperscript{105}

The differences in the terms by which power is granted, in the two types of jurisdictions, are to some extent reflected in judicial decisions. A legislative policy of defining with a degree of specificity the powers exercisable by home rule municipalities, whatever its merits, has quite properly led the courts in such jurisdictions to hold that important or novel powers not specified in the statutory grant are beyond the scope of municipal initiative.\textsuperscript{106} The extent to which municipal initiative, in such jurisdictions, is restricted by the absence of specific grants of power should not, however, be overstated. Municipal power has frequently been sustained in situations where the courts might, without undue restrictiveness, have required a more specific authorization from the state legislature.\textsuperscript{107} In short, the detailed definition of home rule powers narrows somewhat the opportunities for judicial

\begin{itemize}
  \item \textsuperscript{105} See \textit{Council of State Governments}, \textit{op. cit. supra} note 77, at 172.
  \item \textsuperscript{106} See, \textit{e.g.}, Attorney General v. City of Detroit, 225 Mich. 691, 190 N.W. 591 (1922) (charter provision establishing minimum wages and maximum hours for employee of city's contractors held invalid as applied to projects of state concern); Clements v. McCabe, 210 Mich. 207, 177 N.W. 722 (1920) (general grant of police power held not to confer power to adopt zoning ordinance); City of Kalamazoo v. Titus, 208 Mich. 222, 175 N.W. 480 (1919) (authorization to control use of streets held insufficient to confer power to regulate rates of public utility); State \textit{ex rel.} Navin v. Weir, 26 Wash. 501, 67 Pac. 226 (1901) (city lacks power to authorize council to try election contests); State \textit{ex rel.} Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 29 (1896) (city lacks authority to confer upon state court of general jurisdiction power to try election contests); City of Tacoma v. State, 4 Wash. 64, 20 Pac. 847 (1889) (dictum that city lacks power of eminent domain).
  \item \textsuperscript{107} \textit{E.g.}, the Michigan decisions cited in note 106 \textit{supra} should be contrasted with Dooley v. City of Detroit, 370 Mich. 104, 121 N.W.2d 724 (1963) (authorization to levy and collect excises held sufficient to confer power to levy income tax on both residents and nonresidents); Bowler v. Nagel, 228 Mich. 434, 200 N.W. 258 (1924) (authorization to provide for the compensation of officers confers power to establish employee pension system). Similarly, the Washington decisions cited in note 106 \textit{supra} should be contrasted with Hilzinger v. Gillman, 56 Wash. 228, 105 Pac. 471 (1909) (charter provision providing for recall of councilmen held valid notwithstanding absence of statutory authority); Howe v. Barto, 12 Wash. 627, 41 Pac. 908 (1895) (authority to provide for assessment and collection of taxes confers power to provide that tax deed is prima facie evidence of compliance with procedural requirements).
\end{itemize}
policymaking concerning the scope of municipal initiative, but it does not obliterate them.

If the tendency of judicial decisions, whatever the source of home rule powers, were to narrowly restrict the municipal initiative, legislative definition might serve the function of making clear that certain subjects were of "local" or "municipal" concern. The tendency of judicial decisions, however, has been otherwise. Although the number and importance of judicially imposed limitations on municipal initiative has been somewhat greater in those jurisdictions where the source of municipal power is statutory, particularly where the legislature has prescribed the areas of local concern in some detail, there are relatively few reported decisions in either "statutory" or "constitutional" jurisdictions in which an exercise of home rule power has been invalidated on the ground that the municipality has attempted to go beyond matters of local concern. Perhaps the most surprising conclusions to emerge from a review of these decisions is that after nearly a century of experience with home rule, no definition of the extent of municipal initiative has evolved.108 Decisions in which municipal initiative is limited are scattered, seemingly lacking any solid foundation in principle. Only a few of the limitations imposed have gained the support of a majority of the courts which have had occasion to consider them.

Abrogation of Common Law

There are, for example, several decisions invalidating an exercise of municipal power on the ground that municipal initiative does not extend to abrogation of "applicable rules of common law or equity."109 These decisions rest upon the theory that the "laws" with which municipal charters are, by the constitution, required to be consistent include decisional law.110 It is difficult to imagine a doctrine potentially more threatening to local initia-

110. The Minnesota decisions appear to rest on a construction of the word "laws" in the state constitution. Minn. Const. art. IX, § 36 (1896). So straightforward an approach was not possible in Texas since the constitution requires only consistency with "general laws enacted by the legislature . . . ." Tex. Const. art. XI, § 5. But the court of civil appeals reasoned that the state's common-law reception statute had the effect of making the common law a "general law enacted by the legislature." The argument is convincingly refuted in Ruud, supra note 78, at 691-93.
tive. Although the power to determine governmental organization or the services to be performed by municipalities apparently would not be limited by such a doctrine, it presumably would result in a very substantial, perhaps a total, denial of municipal police power in the absence of legislative authorization. A municipal zoning ordinance enacted under home rule powers would, for example, appear to collide with the common-law right of a landowner to determine for himself the use to be made of his land, subject only to the law of nuisance. Other uses made of the power conferred by home rule grants would also seem to be prohibited under the doctrine.\textsuperscript{111}

The doctrine is plainly at variance with the fundamental purpose of home rule, permitting municipalities to exercise new powers, and hence to alter the common law, without prior authorization by statute. It is, moreover, patently inconsistent with decisions in other jurisdictions\textsuperscript{112} and, indeed, with decisions in the very jurisdictions in which it was announced.\textsuperscript{113} These latter decisions recognize that insofar as a subject is one of "local concern" the municipal council has been granted initiative power coextensive with that of the legislature.\textsuperscript{114} Examination of the decisions announcing the doctrine suggests that they represent merely another instance of the ancient adage about hard cases, for it reveals that in each case the court employed an unfortunate theory to deal with an inherently difficult problem. Two of the cases raised questions concerning the power of a city to regulate its own contractual liability; the third involved one of the few instances in which a municipality has attempted to exercise home rule powers for the purpose of enacting purely civil law.

\textit{Regulation of Claims Against Municipalities}

The tendency of some municipalities to employ their law-making power in a manner oppressive to claimants has placed considerable stress on the exercise of municipal initiative to regulate tort, contract, or other claims against the municipality. Courts have invalidated municipal legislation in this area on

\textsuperscript{111} See, e.g., Howe v. Barto, 12 Wash. 627, 41 Pac. 908 (1895); cases cited in notes 112 & 113 infra.

\textsuperscript{112} E.g., State ex rel. Vogt v. Reynolds, 295 Mo. 375, 244 S.W. 920 (1929); State ex rel. McBride v. Deckebach, 117 Ohio St. 227, 157 N.E. 758 (1927).

\textsuperscript{113} E.g., Schigley v. City of Waseca, 106 Minn. 94, 118 N.W. 259 (1908); Dallas Ry. & Terminal Co. v. Bankston, 51 S.W.2d 304 (Tex. Comm'n App. 1932).

\textsuperscript{114} See Anderson, supra note 102, at 315–16. \textit{But see} McBain, \textit{The Law and the Practice of Municipal Home Rule} 447 (1918).
such tenuous grounds as that it violates the common law, or that it contravenes a prohibition upon damaging private property without payment of compensation or prohibitions upon special legislation, or simply on the ground that it is “unreasonable.” Nevertheless, the propriety of such legislation has, in the absence of conflicting state regulation, frequently been upheld by the courts and is supported by the clear weight of judicial authority. There is, undoubtedly, a strong argument to be

116. City of Tulsa v. McIntosh, 141 Okla. 220, 284 Pac. 875 (1930). There is language in the opinion which suggests that the municipal legislation involved was not a matter of local concern, and hence beyond the initiative, because it might affect any resident of the state. As Professor Merrill has pointed out, however, if this were the test “there would be nothing left of the home rule privilege.” Merrill, supra note 97, at 170.

The actual ground of decision, that the municipal legislation violates constitutional provisions prohibiting the legislature from enacting special legislation, is no more satisfactory. The court reasoned that municipal power could not be greater than the power of the legislature. While this is undoubtedly true as respects those constitutional provisions that are meant to limit governmental power generally, such as guarantees of due process or free speech, it plainly is inappropriate to prohibitions of special legislation. Viewed in historical context, such provisions clearly were intended only to limit the power of the legislature. Moreover, to construe the provisions as applicable to municipalities would render the home rule provision of the constitution meaningless. See Merrill, supra note 97, at 157–59.

117. See, e.g., City of Tulsa v. Wells, 79 Okla. 39, 191 Pac. 186 (1920); Born v. City of Spokane, 27 Wash. 719, 58 Pac. 586 (1902). Professor McBain has suggested that these cases might be understood as resting on the power of a court to declare municipal ordinances invalid because they are “unreasonable.” McBain, op. cit. supra note 114, at 448. That judicial power does not, however, exist independently but only as a rule of construction to aid in determining whether a particular exercise of municipal power has been authorized by the legislature. See Stason & Kauper, MUNICIPAL CORPORATIONS 122 n.4 (3d ed. 1959).

A somewhat more likely basis for the decisions is that the municipal legislation was deemed by the court to be violative of due process. This view is supported by language in one such decision, quoted in the others, that “charter provisions of the character in question, whether enacted by the legislature, or, as in the present case, by the city itself, are to be upheld only so far as they are reasonable and tend to the due administration of justice.” Durham v. City of Spokane, 27 Wash. 615, 622, 68 Pac. 383, 386 (1902); see Merrill, supra note 97, at 157.

119. See, e.g., Salo v. City of Pasadena, 162 Cal. 714, 124 Pac. 599 (1912) (dictum); Schigley v. City of Waseca, 106 Minn. 94, 118 N.W. 259 (1908); Brun v. Kansas City, 216 Mo. 108, 115 S.W. 446 (1908); State ex rel. Gavigan v. Dierkes, 214 Mo. 378, 118 S.W. 1077 (1908); Evans v. Berry, 262 N.Y. 61, 186 N.E. 263 (1933); City of Waco v. Landingham, 138 Tex. 156, 157 S.W.2d 631 (1941); Scurry v. City of Seattle, 8 Wash. 278, 36 Pac. 145 (1894).
made for state regulation of municipal liability, not only in the interest of uniformity but as a means of achieving a proper balance between the interests of local governments and the interests of those who deal with them. In the absence of such regulation, however, governmental liability, because of its impact upon the municipal treasury, unquestionably is of sufficient interest to municipalities to come within the grant of power to deal with all matters of “local self-government.” Even those courts which have invalidated a particular municipal regulation of liability have not, with but one exception,\(^\text{120}\) rested their decisions on a contrary conclusion. Nevertheless, the unfairness of regulations adopted by some municipalities does suggest that although the subject of claim regulation is of municipal concern, courts should perhaps have power to determine that a particular regulation is outside the scope of municipal initiative, at least in the absence of specific authorization by the legislature. The justification for this approach rests upon the differences between the municipal council and the state legislature, a matter discussed at length in a subsequent section of the Article.\(^\text{121}\)

\textit{Enactment of Private Law}

The grant of home rule power has not generally been understood as authorizing municipalities to enact purely private law, \textit{i.e.} law governing civil relationships.\(^\text{122}\) Municipalities have not sought an express grant of such power and if they had, it is virtually certain that it would not have been granted. Public and private law are not, however, separated by a clear line of division. It is, for example, common practice for a court to refer to a municipal safety regulation, enacted under the police power, as a standard for determining whether an individual is guilty of negligence.\(^\text{123}\) Suppose, however, that the city attempts to regulate the conduct without enacting penal regulations but merely by declaring what standard of care should be observed. Decisions in Ohio\(^\text{124}\) and Missouri\(^\text{125}\) apparently sustain municipal power

\(^{120}\) See note 116 supra. In Green v. City of Amarillo, 244 S.W. 241 (Tex. Civ. App. 1922), an ordinance exempting the municipality from liability arising from operation of a municipally owned streetcar system was invalidated on the ground that the matter was not one of local concern because the public at large was affected. See discussion note 116 supra. However, the affirmance of this decision by the Texas Supreme Court was expressly rested on other grounds. See note 87 supra.

\(^{121}\) See text at notes 257–90 infra.

\(^{122}\) McBain, \textit{op. cit. supra} note 114, at 673–74.

\(^{123}\) Prosser, \textit{Torts} § 34, at 152–64 (3d ed. 1955); see note 130 infra.

\(^{124}\) Leis v. Cleveland Ry., 101 Ohio St. 162, 128 N.E. 73 (1920).

\(^{125}\) State \textit{ex rel.} Vogt v. Reynolds, 296 Mo. 375, 244 S.W. 929 (1929).
in such cases, though without facing up to the question of the power of a home rule municipality to enact private law. In a few cases, the municipality has gone further and attempted to create a new liability. *Genusa v. City of Houston*,\(^{126}\) in which the Texas Court of Civil Appeals pronounced the curious doctrine that a home rule city could not alter an established common-law doctrine, was such a case. The ordinance in question required the owners of automobile rental agencies to post a bond or insurance policy in favor of any person who might be injured through the fault of the operator of a rented vehicle. Liability was created where none had existed previously, for under Texas decisions the owner of an automobile was liable only for his own negligence or that of an agent. Invalidation of the ordinance on the ground that the municipality lacked power to create a new civil liability would have been more persuasive than the ground actually stated by the court. Although the municipality obviously had an interest in protecting its citizens, reliance upon this interest to sustain municipal power would prove too much, for it would justify any purely civil law enacted by a municipality, contrary to the general understanding that the grant of charter-making authority does not authorize wholesale enactment of private law by municipalities. Courts in other jurisdictions have indicated that imposition of civil liability is beyond the scope of municipal initiative under home rule.\(^{127}\)

The problem of private law making by home rule municipalities was explicitly considered for the first time in a legislative context in the *Model Constitutional Provisions for Home Rule* drafted by Dean Fordham for the American Municipal Association. Section 6 thereof provides that the grant of initiative "does not include the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power..."\(^{128}\) Virtually identical language has been adopted in the sixth edition of the National Municipal League's *Model State Constitution*.\(^{129}\) The meaning of these pro-

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\(^{126}\) 10 S.W.2d 772 (Tex. Civ. App. 1928).

\(^{127}\) *Young v. Mall Inv. Co.*, 172 Minn. 428, 215 N.W. 849 (1927); *King v. J. E. Crosbie, Inc.*, 191 Okla. 825, 131 P.2d 105 (1942). In *State ex rel. McBride v. Deckebach*, 117 Ohio St. 227, 157 N.E. 758 (1927), the court sustained an ordinance requiring every applicant for a taxi license to deposit a liability insurance policy with the city. The ordinance did not, however, attempt to create a new liability but only to provide a means of collection for any judgment that might be rendered under applicable law.


visions is not altogether clear. Conceivably, they are intended only as a validation of the inevitable impact of public regulation on private rights, as, for example, a zoning ordinance affects the use which a landowner may make of his property. Such a construction would deny municipalities the power to define legal relationships between private individuals, although municipal legislation might continue to have indirect consequences for such relationships.  

At the other extreme, the provisions might be construed as permitting municipalities to regulate any purely private legal relationships which in some manner are related to an area of traditional municipal concern. Under this construction a municipality would not, for example, be permitted to declare void all contracts not under seal, but its traditional power to regulate the use of its streets would, presumably, permit enactment of an ordinance establishing comparative, rather than contributory, negligence as a defense to all automobile accidents occurring on its streets. In view of the wide scope of municipal initiative traditionally granted to home rule municipalities and contemplated by both model constitutional provisions, such a construction would throw open the flood-gates. It would be a singularly unimaginative municipal attorney who was unable to find a connection between some traditional municipal power and almost any private law which the council desired to enact. Dean Fordham's brief commentary to section 6 indicates that so broad a power of private law making was not intended. Moreover, the text of section 6 indicates that private law making by a municipality is dependent upon not only the existence of an independent municipal power but "an exercise of an independent municipal power."

In view of this requirement and since "independent municipal power" presumably means a power other than that of enacting private law, the most likely construction of the model provisions

130. Municipal legislation may indirectly affect private rights if it is adopted to give content to a generalized standard under state law (e.g., where a court holds that violation of a municipal traffic regulation constitutes negligence). In such cases, the ordinance does not of its own force render the conduct negligent; and state law, not the ordinance, establishes the civil consequence of a violation. See Freund, Legislative Regulation 24–25 (1932).

131. See text accompanying notes 171–73 infra.


133. American Municipal Ass'n, op. cit. supra note 128, at 19. (Emphasis added.)
HOME RULE

is that private law may be enacted only if it is in aid of some municipal policy or program which is expressed, at least in part, by means other than the regulation of purely civil relationships. If this construction is correct, a municipality might, as an incident of Sunday closing legislation, declare retail sales contracts entered into on Sunday unenforceable; it could not, however, legislate only with respect to the contracts. Similarly, although the municipality presumably could not as part of a safe driving program merely do away with contributory negligence as a defense and establish comparative negligence in its stead, since that would not be in aid of a municipal policy expressed independently of the regulation of private rights, it might provide that any person injured in consequence of the violation of a municipal speed limit is entitled to recovery of treble damages.

The primary virtue of the model provisions, construed in this manner, is that they enable municipalities to invoke the aid of private parties in the implementation of local policy.\(^{126}\) This benefit is obtained, however, only at a considerable cost, since the wide range of activities in which the modern municipality engages means that the area in which enactment of private law is permitted is a large one and the opportunity for unsettling legal relationships created by general law is correspondingly great. Although the enactment of private remedies for violation of police regulations is perhaps the most likely area for enactment of private law by municipalities, other possibilities also exist. In Raisch v. Myers\(^{127}\) the question arose whether the holder of an assessment bond secured by a lien was entitled to share in the surplus proceeds of a foreclosure sale ordered on the suit of a prior lienor. The bondholder's right of action for foreclosure was barred by the statute of limitations, but the ordinance authorizing issuance of the bonds provided that the lien should "continue until such assessment is fully paid." In reliance upon this language, the bondholder argued that his lien remained in existence and might be enforced by any remedy other than foreclosure. The property owner urged that the lien had been destroyed under the general law principle that a lien is extinguished by the lapse of time within which an action can be brought upon the principal obligation.\(^{128}\) Under the Model Constitutional Provisions for Home Rule,

\(^{124}\) See Dunham, Private Enforcement of City Planning, 20 LAW & CONTEMP. PROB. 463 (1955).

\(^{125}\) 27 Cal. 2d 773, 167 P.2d 198 (1946).

\(^{126}\) The principle had been enacted into statute, but to avoid the added complexity of a conflict between ordinance and statute, it is treated in the ensuing discussion as having been established only by judicial decisions.
the bondholder's position apparently would be sustained.\textsuperscript{137} The regulation of private rights is clearly "an incident to an exercise of an independent municipal power," that of assessing landowners for the cost of improving streets.

Analysis of the \textit{Raisch} case suggests that the model provisions' solution to the problems posed by municipal enactment of private law is not satisfactory. To focus solely upon the question of whether the private law regulation is incidental to an exercise of an independent municipal power, excludes from consideration the more important factors of the importance of private law regulation to the municipality's total program and the extent to which the regulation trenches upon state law. In \textit{Raisch} the interest of the municipality cannot be considered more than nominal.\textsuperscript{138} The disruptive effect of the ordinance upon state law is more difficult to appraise. To some extent, the ordinance collides with the policy underlying the limitation of actions. And although not directly involved in \textit{Raisch}, there is at least a potential conflict with policies favoring the free marketability of land. However, even if the private law enacted by the municipality does not appear to have a seriously disruptive effect on legal relationships created by general law, it should not be given effect unless it is demonstrably of some importance to the implementation of a municipal policy or program. The prevailing assumption has been that home rule powers do not extend to the enactment of private law.\textsuperscript{139} Deviations from that understanding should be permitted only in the event of clear necessity. The complexities created by 51 different law-making jurisdictions in what has become a single economic and social community are manageable; if each of the thousands of cities and villages entitled to exercise home rule powers were thereby empowered to adjust contract, property,
and the host of other legal relationships between private individuals, chaos would ensue.  

If this analysis is correct, it seems to follow that the primary error made by the draftsmen of the model constitutional provisions was the decision to attempt to deal with the problem by a constitutional formula. Experience with private law enactments by municipalities has been too limited. Litigation has been too infrequent to permit generalization from the issues suggested by the cases; and neither courts nor commentators, as Dean Fordham has stated, have "given adequate thought" to the problems. It is true that under the model provisions the legislature retains power to curb any abuse by municipalities, but unless the legislature exercises its power to deny municipalities all authority to enact private law, thus avoiding the problem entirely, the retention of power by the legislature is an inadequate solution to the problem. The legislature has neither knowledge nor time adequate to permit it to assume primary responsibility for the myriad issues presented by private law making at the local level. Although the legislature should, of course, have power to override decisions made by the courts, "we make an ill use of the legislature," as Professor Hart has stated, "when we ask it to even try to assume primary responsibility for all the questions of interstitial and subordinate policy making which come before the courts." If for no other reason than the limited experience with issues raised by municipal enactment of private law, "there is no substitute for the intensive analysis and creative exposition of principles and policies at the point at which general propositions come into contact with concrete situations, so that they can be tested there." This must be accomplished, if at all, in a judicial forum.

Regulation of Other Governmental Units

The extreme functional division of governmental power characteristic of most American states inevitably results in conflict between the various agencies or political subdivisions. Predictably, therefore, a substantial number of cases raise questions concern-

141. AMERICAN MUNICIPAL ASS'N, op. cit. supra note 128, at 21.
142. Although the restraint exercised by municipalities in the past might be taken as an indication that there is little reason to fear extensive private law making in the future, the invitation has never before been as clear.
144. Id. at 42.
ing the power of home rule municipalities to legislate with respect to other agencies of state government. Since these other agencies invariably owe their existence to constitutional provisions or statutes and are extensively regulated thereby, virtually all of the decisions rest upon some ground other than a determination of whether the initiative granted home rule municipalities extends to legislation concerning these other agencies. In a few cases, however, attempted municipal regulation of state agencies or other political subdivisions has been invalidated in the absence of conflicting statutes and without reliance upon a constitutional provision construed as assigning the problem exclusively to the legislature.

In La Grande v. Municipal Court the Oregon Supreme Court stated broadly that the initiative exercisable by home rule municipalities did not extend to "extramural legislation," defined, in part, as legislation operating upon governmental agencies other than the municipality. Exercise of such power, the court held, continued to be dependent upon legislative authorization even after home rule. The necessity of protecting other governmental agencies from interference by home rule municipalities lends persuasiveness to the court's sweeping generalization. Ultimate responsibility for the distribution of power among the various agencies and subdivisions of state government is necessarily vested in the legislature as the most broadly representative lawmaking body in the state. But these principles provide only a starting point for analysis, not a mechanical answer for the manifold problems created by the conflicts between home rule municipalities and other agencies of state government.

The precise issue in La Grande was the validity of a charter provision which established a municipal court with jurisdiction over offenses against the city and granted defendants a right of appeal to the state circuit court in the manner provided by state law for appeals from justice of the peace courts. Invalidation of the attempted conferral of jurisdiction upon the circuit court

145. See, e.g., Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1950); Matter of Means, 14 Cal. 2d 254, 93 P.2d 105 (1939); State ex rel. Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940).
146. 120 Ore. 109, 251 Pac. 308 (1926).
147. The court also suggested, contrary to its prior holding in City of McMinnville v. Howenstein, 56 Ore. 451, 109 Pac. 81 (1910), that the initiative did not extend to extraterritorial legislation. See text accompanying notes 191–220 infra.
was grounded primarily upon the court’s concern that “the municipality . . . [might] appropriate to its own use and behest the whole judicial system of the state.”149 If the city were permitted to confer appellate jurisdiction, the court reasoned, it might also confer original jurisdiction of every offense against its ordinances, possibly swamping the court with minor matters to such an extent as to interfere with its regular business.150 This argument might have been more persuasive if there had been evidence of legislative concern to limit state courts to matters of general law. The charter provision was, however, apparently quite consistent with legislative policy, for the state courts had been given appellate jurisdiction of presumably similar cases originating in justice of the peace courts. Although not directly applicable to the city’s municipal court, the state legislation evidenced a policy, common to every state, of making the judicial machinery of the state available to the citizen as an appellate tribunal for correction of errors in the frequently less formal and often less qualified local courts. Under such circumstances, the imagined risks which led the court to deny the municipality’s power seem insufficient. Retention of power by the legislature to limit or deny the municipality’s authority to confer jurisdiction on the courts was an adequate safeguard.

In other contexts limitation of the initiative to preclude imposition of duties upon another agency of state government is appropriate. Thus, in Kiernan v. Portland151 the Oregon Supreme Court held a charter amendment authorizing the city to build a bridge invalid insofar as it attempted to impose the duty of maintenance upon a county without the latter’s consent. Although the potential threat to the county was essentially similar to that posed by the effort to confer jurisdiction upon the courts, the municipality’s assertion of authority in Kiernan was not supported by the tradition or consistency with legislative policy which existed in La Grande. Under these circumstances, it seems appropriate to require that the municipality obtain authorization

(1891); State ex rel. Barber Asphalt Paving Co. v. District Court, 90 Minn. 457, 97 N.W.132 (1903). In several jurisdictions courts have reached a conclusion in accord with the decision in La Grande, but in reliance on a constitutional provision construed as granting the legislature exclusive power to regulate the jurisdiction of courts. See, e.g., State ex rel. Cherrington v. Hutsinpiller, 112 Ohio St. 468, 147 N.E. 647 (1925); City of Sapulpa v. Land, 101 Okla. 22, 223 Pac. 640 (1924).

149. 120 Ore. 109, 115, 251 Pac. 308, 310 (1926).

150. Ibid. See also McBarn, op. cit. supra note 114, at 195.

151. 37 Ore. 454, 111 Pac. 379, 112 Pac. 402 (1910), appeal dismissed, 223 U.S. 151 (1912).
from the legislature which, unlike the city council, is responsible for the welfare of both the city and the county. 152

In recent years there has been an increasing amount of litigation concerning the power of municipalities to apply general regulatory measures to other governmental bodies, usually school districts or counties. Since the issues posed by such litigation are not uniquely related to home rule, extended consideration is beyond the scope of this Article but some discussion is warranted insofar as the cases bear upon the limits of municipal initiative under home rule. A recent California decision, County of Los Angeles v. City of Los Angeles, 153 suggests the dimensions of the problem. Pursuant to its home rule powers the city had adopted ordinances, expressly applicable to the county, regulating the use and subdivision of land and the construction and operation of buildings within its boundaries. The county's request for a declaratory judgment that it was not bound to comply with these ordinances was granted on a ground reminiscent of La Grande: The initiative does not extend to municipal legislation directed at other governmental agencies. The only justification offered for so completely subordinating the city's interests to those of the county was that the latter, as an agency of the state, was engaged in the performance of state functions and hence was immune from interference by the city because it was inferior to the state. Although supported by the weight of authority, 154 the court's simplistic analysis is inadequate. The city, no less than the county, is a state agency charged with responsibility for performance of certain public functions. Accordingly, the court might as easily have concluded that to the extent the county's activities inter-

152. See also West Linn v. Tufts, 75 Ore. 304, 146 Pac. 986 (1915), in which the court invalidated a charter provision that required the county treasurer to pay over to the municipality road taxes collected from property within its boundaries.


154. See, e.g., Board of Regents v. City of Tempe, 88 Ariz. 293, 356 P.2d 399 (1960); Green County v. City of Monroe, 3 Wis. 2d 106, 87 N.W.2d 897 (1958). Contra, Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655 (1960); Kansas City v. School Dist., 356 Mo. 364, 201 S.W.2d 330 (1947). An early California decision, Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 134 Pac. 985 (1913), held that a school district was subject to municipal building regulations, but it was expressly overruled in Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956). (Since the existence of home rule power is irrelevant to the issues posed by attempted municipal regulation of other governmental agencies, no distinction is drawn here between cases in home rule and non-home rule jurisdictions).
fered with performance of the city's functions, the county had exceeded its power.

Interference by the city and county with the performance of their respective responsibilities is precisely what makes the issue in the Los Angeles case so difficult to resolve. Absent a basis for conclusion that one or the other governmental subdivision is protected from interference because it is "higher" in the governmental hierarchy, some effort at accommodation of the competing interests seems the most likely approach to achieving an appropriate solution. Yet, the county's request for a blanket declaration of immunity from the ordinances and its failure to bring a specific dispute before the court precluded careful assessment of either the extent of or the justification for the city's interference with the county's activities or the county's interference with the city's objectives. Without the facts upon which to base such an assessment, the court's "all-or-nothing" approach was almost inevitable. Significantly, the cases in which the municipality's power has been upheld are those in which an effort has been made to accommodate the competing interests by careful examination of the importance of the municipal regulation to the city and its effect upon the other governmental agency involved.

There are, nonetheless, limits to the competence of the judiciary. Whether, for example, priority should be given to a school board's interest in locating a school to maximize its own objectives or to the interest of the municipality in planning land use is a question with which courts have little competence to deal. Such questions require legislative action, not only because the legislature is responsible for the fragmentation of political power which creates the problem, but because it alone has general responsibility for the welfare of the state's inhabitants.

Miscellaneous

With the exception of cases in which a municipality has at-

155. Compare Kiernan v. Portland, 57 Ore. 454, 111 Pac. 379, 112 Pac. 402 (1910), discussed in text accompanying note 151 supra. In that case, the county was not engaged in activities of concern to the municipality. The latter could not, as in the Los Angeles case, justify its interference with the county as necessary to protect itself from incursions by the county.


157. See cases cited note 154 supra.

158. See State v. Ferriss, 304 S.W.2d 896 (Mo. 1957).

159. See, e.g., Cal. Gov't Code §§ 53090-95, enacted after the decision in Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956), which subjects certain state agencies to municipal building and land use regulations.
tempted to legislate extraterritorially\textsuperscript{160} or in a manner seriously prejudicial to the flow of commerce with a state,\textsuperscript{161} there remain only a very few instances in which the initiative has been limited by the judiciary. A recent Rhode Island decision\textsuperscript{162} holds, contrary to every other case in which the issue has been presented,\textsuperscript{163} that a home rule municipality does not possess licensing power. Relying on cases in non-home rule jurisdictions, the court reasoned that the power to license was an attribute of sovereignty which could not be implied as incidental to a grant of power to enact "local laws relating to [a municipality's] property, affairs, and government."\textsuperscript{164} The decision can be explained only as a failure by the court to comprehend the effect of the home rule amendment to the constitution, which had been adopted only several years earlier.\textsuperscript{165} The experience of other states suggests that a decision so restrictive of municipal power may not be long-lived.\textsuperscript{166} Thus, an early Missouri decision, \textit{State ex rel. Garner v. Missouri & Kan. Tel. Co.},\textsuperscript{167} held that a home rule municipality lacked power to regulate the rates of a local telephone company solely on the ground that such regulation did not pertain to municipal government.\textsuperscript{168} Although the decision has not been over-

\textsuperscript{160}. See text accompanying notes 191--220 infra.
\textsuperscript{161}. See text accompanying notes 221--56 infra.
\textsuperscript{162}. Newport Amusement Co. v. Maher, 166 A.2d 216 (R.I. 1960).
\textsuperscript{163}. See, e.g., Gardenhire v. State, 26 Ariz. 14, 221 Pac. 228 (1928); \textit{In re Hitchcock}, 34 Cal. App. 111, 166 Pac. 849 (1917); Sherman, Clay & Co. v. Brown, 142 Wash. 37, 252 Pac. 137 (1927).
\textsuperscript{164}. R.I. Const. amend. XXVIII, § 2.
\textsuperscript{165}. The court apparently believed that recognition of the licensing power as within municipal initiative would permit municipalities "to enact licensing laws for their localities inconsistent with those enacted by the legislature on the same matters for the rest of the state . . . ." Newport Amusement Co. v. Maher, 166 A.2d 216, 219 (R.I. 1960). The home rule amendment, however, expressly limits municipalities to the enactment of "local laws . . . not inconsistent with . . . laws enacted by the general assembly . . . ." R.I. Const. amend. XXVIII, § 2. In consequence, recognition of the power asserted by the municipality would have carried no implication that the legislature lacked power to supersede the licensing ordinance.
\textsuperscript{166}. See cases discussed notes 106--07 supra.
\textsuperscript{167}. 189 Mo. 83, 88 S.W. 41 (1905).
\textsuperscript{168}. Professor McGoldrick has written that "few matters . . . have been more conclusively determined than that a general grant of power over municipal or local affairs does not include the right to control the rates and services of public utilities." \textit{McGoldrick, Law and Practice of Municipal Home Rule 1916--1930}, at 326 (1933). The cases on which he relies, however, involve a conflict between municipal and state regulation. Accordingly, they do not stand for the proposition that utility regulation is beyond the scope of municipal initiative under home rule. Except in \textit{Garner}, where that question has arisen unembarrassed by other considerations, municipal power has
ruled, it is patently inconsistent with other Missouri decisions and appears to have had no influence in determining the scope of powers of home rule municipalities in that state. 169

Only two other cases restrictive of municipal initiative have been found. 170 Since each provides an excellent illustration of the proper role of the judiciary in determining the extent of municipal power under home rule, discussion of these cases is deferred until consideration of that subject.

PROPOSED LIMITATIONS ON THE INITIATIVE

Analysis of Recent Proposals

Judicially imposed limitations on municipal initiative under a grant of home rule power have not, as the preceding discussion demonstrates, been frequent or unduly restrictive of municipal power. Nevertheless, such limitations have occasionally been imposed. In recent years, commencing with Dean Fordham's draft of Model Constitutional Provisions for Municipal Home Rule, efforts have been made to formulate the grant of home rule powers in terms sufficiently comprehensive to extinguish, or at least considerably narrow, the opportunities for judicial limitation. 171 Dean Fordham's proposal is that a home rule municipality be permitted to "exercise any power or perform any function which the legislature has power to devolve upon a non-home rule" municipality. 172 The sixth edition of the National Municipal...
League's Model State Constitution goes even further; it would authorize a municipality to "exercise any legislative power or perform any function . . . ." Except for the recent Alaska constitution these proposals provide greater power than is granted in any state.

Two primary assumptions underlie the proposals. The first, which has been discussed previously, involves the undesirability of fragmenting governmental power. Responsibility for the general welfare cannot, as appears to have been assumed in drafting the traditional home rule provisions, be neatly divided into areas of local and general concern. Fulfillment of municipal responsibility toward the local citizenry requires a broad range of powers. Specification is not only unwieldy, it ignores the obvious truth that constantly changing conditions require flexibility, a need which can best be met by permitting municipalities to assume new powers whenever, in the judgment of those most familiar

173. NATIONAL MUNICIPAL LEAGUE, op. cit. supra note 171, art. VIII, § 8.02. The limitations upon the enactment of private and criminal law are the same as those provided in Dean Fordham's draft.

The broad grant of power is apparently intended only for cities that adopt a charter in accordance with the provisions of § 8.01(3), but the matter is not entirely free from doubt. Unlike Dean Fordham's draft, which explicitly confers power only upon "a municipal corporation which adopts a home rule charter," AMERICAN MUNICIPAL ASS'N, op. cit. supra note 128, § 6, the Model State Constitution states, § 8.02, only that "a . . . city may exercise" the powers conferred. The comment to the section indicates, however, that it is intended to deal only with home rule cities. NATIONAL MUNICIPAL LEAGUE, op. cit. supra art. VIII, § 8.02.

174. ALASKA CONST. art. X, § 11. Experience under this section has been too limited to determine whether, ultimately, it will be construed as broadly as its language seems to require.

175. It has been asserted that the Texas Supreme Court has interpreted that state's home rule provisions as embodying the formulation proposed by Dean Fordham and the National Municipal League. See NATIONAL MUNICIPAL LEAGUE, op. cit. supra note 171, at 98; Fordham, supra note 171, at 140. Since the two proposals differ, as will be seen shortly, both claims cannot be correct. In fact, neither is correct, since the Texas Supreme Court has had occasion to limit municipal initiative in situations in which it would not have been permitted to do so under either of the proposals. See City of Arlington v. Lillard, 116 Tex. 446, 294 S.W. 829 (1927); City of Fort Worth v. Lillard, 116 Tex. 509, 294 S.W. 831 (1927); cf. City of El Paso v. El Paso City Lines, 227 S.W.2d 278 (Tex. Civ. App. 1949); Genuss v. City of Houston, 10 S.W.2d 772 (Tex. Civ. App. 1928).

Dicta in several opinions suggest adoption of the formulation in other states. See cases cited note 68 supra. The language is, however, inconsistent with other decisions in these jurisdictions. See City of La Grande v. Municipal Court, 120 Ore. 109, 261 Pac. 308 (1929); McBAIN, op. cit. supra note 169, at 355-59.

176. See text accompanying notes 56-59 supra.
with local problems, the necessity arises. The second assumption rests upon the indisputable premise that the allocation of governmental power is a political question. Judicial participation in the resolution of such political questions has, through the years, been the target of frequent criticism by commentators. Judges, it has been argued, lack both the training and experience requisite to wise judgment in such matters. Moreover, the critics continue, the adjudicative process is not adapted to the solution of such problems; it places too much reliance upon concept and precedent and not enough on administrative and practical implications.

Both assumptions would argue more convincingly for the necessity of a reformulation of the grant of home rule power if experience with judicial limitations upon municipal initiative was as the critics assume. Experience, however, is quite to the contrary. Home rule municipalities have not been narrowly limited to the exercise of power in a preconceived and rigid area of "local concern." The broad scope which the courts have given municipal initiative has tended to minimize the policy-making function of the courts. By and large, there has been judicial acceptance of policy decisions made at the local level. If the reformulations served merely to confirm and make explicit the course of judicial decisions under traditional provisions, they would, of course, be unobjectionable. More affirmatively, they would serve the useful purpose of decreasing the risk of aberrant decisions. Closer analysis suggests, however, that the proposals may go too far in broadening the scope of municipal initiative and removing the courts from participation in the process of curbing possible abuses of municipal power.

Recognition that governmental responsibilities are not divisible into areas of "local" and "general" or "statewide" concern does not compel a conclusion that the municipal council is as competent as the state legislature with respect to all matters which may be of concern to the municipality. One might readily acknowledge the desirability of granting municipal government the power to govern generally, without conceding that the pro-


178. See text accompanying notes 77-80 supra.

179. Excluding, presumably, at least certain functions such as defense which by general agreement should be exercised only at "higher" levels of government. See Ylvisaker, SOME CRITERIA FOR A "PROPER" AREAL DIVISION OF GOVERNMENTAL POWERS, in AREA AND POWER 27, 35 (Maass ed. 1959). See also note 172 supra.
priety of every exercise of the power is appropriate for decision at the local level. Awareness of this is reflected in both of the model home rule provisions, in part by the limitations imposed upon the enactment of private and criminal law and more pervasively by the broad power which each grants the legislature to supersede decisions made by municipal governments.\(^{180}\) The basic question, therefore, involves the role, if any, of the judiciary in the ongoing process of determining the propriety of municipal action. Proceeding from the premise that such decisions are political, both Dean Fordham and the National Municipal League have attempted to remove the courts from participation in the process. The premise does not, however, necessarily lead to that conclusion. Characterization of the issues as political, upon which all can agree, does not establish the wisdom or the necessity of denying the judiciary a role. The question to be answered is not whether an issue is political, for courts are regularly charged with the responsibility of deciding political issues,\(^{181}\) but whether it is the type of political issue toward the resolution of which the courts can make a contribution.

Reference has previously been made to the fact that a grant to home rule municipalities of all powers which the legislature might confer upon non-home rule municipalities fails to provide any greater clarity or guidance to the courts than the traditional formulations of home rule power.\(^{182}\) The limitations on legislative power are phrased in essentially the same terms as have usually been employed to describe the scope of municipal initiative. Under Dean Fordham's proposal, accordingly, the courts would retain some power to limit municipal initiative. Nevertheless, the proposed grant would substantially alter the function of the courts in distributing power between state and municipality. Even though limitations upon legislative power to delegate authority to municipalities have been phrased in terms similar to those employed in describing the limits of municipal initiative

\(^{180}\) Under Dean Fordham's proposal the legislature retains complete authority over home rule municipalities, subject only to the classification requirements that § 3 imposes on legislation relating to municipal corporations, except "with respect to municipal executive, legislative, and administrative structure, organization, personnel and procedure . . . ." AMERICAN MUNICIPAL ASS'N, op. cit. supra note 128, § 6.

The National Municipal League's draft limits the legislature's power only by a requirement that it act by "general law." NATIONAL MUNICIPAL LEAGUE, op. cit. supra note 171, § 8.02.


\(^{182}\) See text accompanying notes 68–70 infra.
under home rule, it has generally been understood that a decision limiting municipal initiative does not preclude a subsequent legislative delegation of the necessary authority.\textsuperscript{183} Dean Fordham's proposal would merge these heretofore distinct questions. Determination of the limits of municipal initiative would turn not upon the merits of the problem actually before the court, but upon the resolution of other issues which, in that case, are only hypothetical.

The implications of the hypothetical question which the courts would be required to decide, whether the legislature might delegate the power to a municipality, are vastly different than the implications of a decision under traditional home rule provisions that a municipality has exceeded the bounds of municipal initiative. In the latter context, the court's decision amounts to no more than a suspensive veto. The holding that authority for the power asserted by the municipality is lacking can be overcome by the legislature. Under Dean Fordham's proposal, by contrast, a judicial decision limiting municipal initiative requires a determination of the limits of governmental power generally. Only a constitutional amendment would suffice to permit exercise of the power by the municipality. In a sense, consequently, the proposed reformulation of municipal power increases the importance of the courts in the process of allocating functions between state and local government. Although the frequency of judicial limitation might be somewhat curbed by the clear intention to permit virtually unlimited municipal initiative, judicial intervention would occur at a far more critical point in the process. The role of the court would shift from one of providing an opportunity for consideration of the problem by the legislature to that of final arbiter. While there is ample reason, as subsequent discussion attempts to demonstrate,\textsuperscript{184} to permit courts to exercise a suspensive veto over municipal assertions of power, the customary criticisms of judicial participation in the process of distributing power between state and local governments are surely persuasive that final decision ought not to rest with the courts.

It is true, of course, that under existing law courts are occasionally required to determine the limits of legislative power to delegate authority to municipalities, but there is a substantial


\textsuperscript{184} See text accompanying notes 221–93 infra.
difference between the cases in which the issue may now arise and those in which it would arise under Dean Fordham's proposal. Currently, courts are required to make such a decision only against the background of an actual legislative determination. Speculation concerning the conditions which might lead a legislature to devolve the power in question upon a municipality is unnecessary. The propriety of the delegation is determined in the light of a prior determination by a legislative body responsible to the entire state and more representative than the municipal council\(^8\) that the particular power in question may appropriately be exercised by a municipality.\(^6\) Adjudication under Dean Fordham's proposal would be required even though these conditions have not been satisfied. Although it would be required to determine the limits of the legislature's power, a court would in fact sit in judgment only upon the decision of a municipal council. Yet because of the differing constituencies of the two legislative bodies, as the model provisions recognize in the power granted the legislature to overrule decisions made at the municipal level, the legislature's judgment should be accorded more weight than that of the council.

The home rule provision of the Model State Constitution creates essentially the same problems. Although its formulation of municipal initiative would not require the courts to decide a hypothetical question in determining the limits of municipal authority, it does equate municipal and legislative power by granting municipalities power to exercise "any legislative power or perform any function. . . ." As in the Fordham proposal, upon which it is based,\(^7\) reliance is placed exclusively upon the legislature to curb possible abuses of municipal power. A court could not limit municipal power without limiting the power of the legislature even though the considerations relevant to a determination of whether the limitations should be imposed may be quite different in the two situations. Both model provisions thus tend to force the courts to the adjudication of major constitutional questions — limitations on legislative power — rather than permitting decision of minor constitutional questions — limitations on municipal power — which minimize the extent of judicial circum-

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\(^8\) The importance of responsibility to the entire state seems self-evident. See text accompanying note 194 infra. For the meaning of "representative" in this context, see text accompanying notes 282-68 infra.

\(^6\) See generally Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

\(^7\) National Municipal League, op. cit. supra note 171, at 97.
scription of legislative power.  

Conversely, both of the model provisions tend to deny the judiciary power to curb abuse of municipal authority. A court sensitive to the limitation on its own competence that is postulated by the separation of powers, would rarely, if ever, hold that a particular power, however inappropriate for exercise at the local level, exceeded municipal initiative. To do so would require, under Dean Fordham’s formulation, that the court also be prepared to hold that the legislature could not confer the power upon a municipality; under the National Municipal League’s provision, the court would be required to go even further and determine that the power not only was not delegable but that it would exceed the authority of the legislature as well. The apparent theory of the proposals is that the legislature can be relied upon to protect the broader public interest against possible incursions by municipalities, an assumption which is made explicit in a recent report of the U.S. Advisory Commission on Intergovernmental Relations. The Commission recommends a constitutional grant of municipal power essentially similar to that suggested by Dean Fordham and the National Municipal League, but to mitigate the “problems [which] would arise out of a lack of responsibility and prudence or from placing local decision above the general interest” it urges that the grant “should be preceded by a careful review of affirmative limitations upon the powers of local government within a State. Such delegation should occur simultaneously with the enactment of a local code, by which the State legislature places necessary limitations upon local powers and reserves other powers for the State.” The question is whether legislation can carry so large a burden. To answer the question requires not only an analysis of the areas to which municipal power would extend under the proposals but a comparative assessment of the ability of the courts and the legislature to cope with the various problems. The wisdom of dealing with possible abuse of municipal power exclusively by legislation is largely academic if there is no other feasible alternative, i.e., if the kinds of issues presented are such that the courts can make no contribution to their solution. If, on the other hand, there is a role which courts are equipped to play, the decision to rely exclusively

190. Id. at 72–73.
on legislation deserves closer scrutiny. Analysis of the areas to which municipal power would extend under the proposals provides, in addition, a convenient framework for consideration of the limitations which, under existing constitutional provisions, ought to be placed upon municipal action by the courts in the absence of legislation.

**Extraterritorial Powers**

Students of urban government have frequently and severely criticized the extreme territorial division of government at the local level which currently prevails in the United States.\(^{191}\) Fragmentation of the tax base, inefficiency in the provision of services, inability to regulate land use rationally, and failure to provide meaningful and effective political processes constitute only a few items from the list of adverse consequences which flow from the current pattern of government organization at the local level. Inevitably, proposals have been forthcoming to remedy or at least mitigate these evils. Of particular interest here are the proposals to extend municipal power beyond the territorial limits of the city.

The authority of the legislature to confer extraterritorial power upon municipalities is extensive. Legislatures have successfully granted municipalities unilateral annexation power, authority to purchase and condemn land or render services beyond their boundaries, and even extraterritorial police power.\(^{192}\) Prima facie, consequently, a grant of power to “exercise any legislative power” or to “exercise any power . . . which the legislature has power to devolve upon a non-home rule charter municipal corporation” confers substantial extraterritorial power.\(^{193}\) Although different

\(^{191}\) See, e.g., Council of State Governments, The States and the Metropolitan Problem (1956); Fordham, A Larger Concept of Community 3–40 (1956); Wood, A Division of Powers in Metropolitan Areas, in Area and Power 53 (Maass ed. 1959).

\(^{192}\) See generally 1 Antieau, Municipal Corporation Law §§ 1.14(1), 5.09–10 (1962); Sengstock, Extraterritorial Powers in the Metropolitan Area (1962); Anderson, The Extraterritorial Power of Cities, 10 Minn. L. Rev. 475, 564 (1926).

\(^{193}\) The Comment to § 8.02 of the Model State Constitution states that the power which may be exercised by a municipality under that section is “limited by its territorial jurisdiction.” National Municipal League, op. cit. supra note 171, at 97. There appears to be no textual justification for this limitation, unless reliance is placed upon § 8.01(9), which requires the enactment of legislation under which a city may adopt a charter “for its own government.” The question is whether the quoted phrase implies the limitation stated in the comment to § 8.02. Identical language in existing constitutional provisions has not prevented the exercise of at least certain extrater-
facets of the power suggest different problems, every extraterritorial exercise of power involves the risk that the interests of the area affected may not coincide with those of the municipality. Since the residents of the affected area have no voice in the municipal decision, there is the obvious danger that inadequate attention may be given to their interests. Where the assertion of extraterritorial power involves an exercise of governmental power, as in the subjection of the adjacent territory to municipal police regulations, there is the added factor of collision with the fundamental principle of government with the consent of the governed. Although these considerations need not result in a denial of extraterritorial power in all circumstances, they do suggest the wisdom of a cautious approach to the grant of such powers, however useful they may be to the municipality.

The broadest extension of municipal power, since it encompasses all other extraterritorial exercise of power, would be authorization to annex surrounding territory by action of the municipality alone. In view of the legislature's undoubted power to confer such authority upon a municipality, both Dean Fordham's and the National Municipal League's home rule provisions might be construed as a constitutional grant of unilateral annexation power to every home rule municipality. However, a closer reading of the model provisions indicates that the entire question of boundary adjustment is reserved for legislative control, at least in the first instance. Section 2 of Dean Fordham's draft states that "the legislature shall provide by law . . . the methods by which municipal boundaries may be altered . . . ." Somewhat similar language is contained in Section 8.01 of the Model State Constitution. If the grant of charter-making authority is construed in the light of these provisions, it seems fairly clear that municipalities would not, under the model provisions, be permitted to acquire extraterritorial powers. See, e.g., Allison v. City of Phoenix, 44 Ariz. 66, 33 P.2d 927 (1934) (acquisition of land); Fellows v. City of Los Angeles, 151 Cal. 52, 90 Pac. 137 (1907) (acquisition of utility and rendering service).

There may, of course, be devices other than participation in the initial decision through which the residents of the affected area may be heard and obtain a degree of protection. For example, the power of Missouri home rule municipalities to annex adjacent unincorporated territory without the consent of the residents of the latter area, see note 198 infra, is subject to a judicial determination of "reasonableness." State v. North Kansas City, 360 Mo. 374, 228 S.W.2d 762 (1950). Similarly, a municipality's acquisition and development of land beyond its boundaries may be subject to a degree of control by the affected area. See text accompanying notes 216-19 infra. Still another possibility is legislative reversal of the municipal decision.

195. SENGSTOCK, op. cit. supra note 192, at 72.

196. See text accompanying notes 91-95 supra.
ted to exercise unilateral annexation power without prior legislative authorization. The decision to deny such power, which accords with judicial interpretations of existing constitutional home rule provisions, seems unassailable as a matter of policy. Three distinct interests are directly affected by annexation: the municipality, the territory to be annexed, and the larger area from which the annexed territory is taken. Unilateral annexation subordinates the latter two to the former, depriving them not only of an opportunity to participate in the decision but of any assurance that consideration has been given to their welfare. Other difficulties may also arise if the constitutional grant of charter-making

197. This construction is supported by the comment to § 2 of the Fordham draft which states: "there is ground for hesitancy over leaving the subject to municipal control by a direct constitutional devolution of power." AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 14 (1953).

198. Since annexation is everywhere governed by statute, the cases in which home rule is claimed to provide authority for annexation do not clearly raise the question of the extent of municipal power in the absence of statute. Consequently, the language of the following decisions, that annexation does not come within the scope of municipal initiative under home rule, is dicta: Amish v. City of Phoenix, 36 Ariz. 21, 282 Pac. 42 (1929); People v. City of Long Beach, 155 Cal. 604, 102 Pac. 664 (1909); Schultz v. City of Upper Arlington, 88 Ohio App. 281, 97 N.E.2d 218 (1950); Barton v. Stuckey, 121 Okla. 226, 248 Pac. 592 (1916); Thurbey v. McMinnville, 63 Ore. 410, 126 Pac. 43 (1912); State ex rel. Snell v. Warner, 4 Wash. 773, 31 Pac. 25 (1892).

In Missouri and Texas home rule does constitute the source of municipal annexation power. In both states, however, the power is expressly conferred by statute, Mo. REV. STAT. § 82.090 (1959); Tex. REV. CIV. STAT. art. 1175 (1963), and the courts have not, consequently, been required to decide whether municipalities might exercise the power without legislative authorization. Two commentators, in reliance on State v. North Kansas City, 380 Mo. 374, 228 S.W.2d 762 (1950), have concluded that in Missouri the constitutional grant of initiative authorizes annexation without consent of the area to be annexed even absent a statute. LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE 23 (1962); Comment, 19 U. KAN. CITY L. REV. 186, 187 (1961). Neither the North Kansas City decision nor earlier Missouri cases support this conclusion. They merely establish that the legislature cannot alter the method of charter amendment specified in the constitution. In none was the court faced with the issue of whether, in the absence of authorizing legislation, charter amendment is a permissible means of annexing territory. See Mc Bain, op. cit. supra note 169, at 146-49. Professor Mc Bain concludes that "it would be little short of ridiculous to hold that the grant of authority to frame a charter included any such power." Id. at 149.

199. Although the assertion of extraterritorial power is less obvious, the same analysis applies to detachment. Accordingly, there is no greater justification for extension of the initiative to detachment than there is to annexation. See Village of Beachwood v. Board of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958) (dictum). Contra, Flavel Land Co. v. Leinenweber, 81 Ore. 353, 158 Pac. 945 (1916).
authority is recognized as a source of annexation power. The alteration of boundaries necessarily involves some adjustment of the assets and liabilities of the affected areas. Unless the municipality is permitted to determine these questions also, the imposing task of adjusting these financial relationships must fall upon the courts. Related judicially evolved doctrines do not instill confidence in the likelihood of an equitable solution. 200

The undesirability of treating annexation as an incident of a general constitutional grant of charter-making authority does not automatically lead to the conclusion that legislative delegation of such power to municipalities is unwise. The primary argument against the former is that it fails to take account of relevant interests other than those of the municipality. Legislative consideration of whether to delegate such power to municipalities, on the other hand, necessarily involves at least a generalized resolution of the potentially competing interests by a broadly representative body responsible to and responsible for both the municipality and the adjacent area. 201 And while recognition of the self-executing power in no way interferes with the legislature’s power to provide a statutory scheme governing the adjustment of financial relationships, enactment of such legislation seems more likely to occur if municipalities are required to look to legislation as the source of annexation power. 202

Similar considerations militate against treating extraterritorial police power as an incident of a general grant of charter-making authority. Unilateral annexation at least brings the residents of the annexed area within the political community of the municipality. Consequently, though more encompassing, it is less of a deviation from generally accepted democratic principles than subjection of the adjacent area to the municipality’s police regulations. Exercise of the latter power involves, in addition, a substantial risk of conflict with regulations of either another municipality

200. It is generally held that, in the absence of statute, the annexing municipality acquires all real property owned by the diminished governmental subdivision in the annexed territory. The latter, however, is left with all the liabilities notwithstanding its diminished tax base. 1 ANTEAU, op. cit. supra note 192, § 1.16; SENGSTOCK, ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM 85–88 (1960).

201. Since the wisdom of such legislation is not unique to home rule, extended discussion is beyond the scope of this Article. The arguments advanced in the text do, however, have an obvious bearing upon the question. See generally COUNCIL OF STATE GOVERNMENTS, op. cit. supra note 191, at 25–52; SENGSTOCK, op. cit. supra note 200, at 19–25 passim.

202. Candor compels the admission that neither the Texas nor Missouri legislature has adopted such legislation.
exercising extraterritorial power or the political subdivision in which the adjacent area is located. Protection of the adjacent area from abuse of municipal power and resolution of conflicting local regulations might, of course, be accomplished by legislation, notwithstanding recognition of extraterritorial power flowing from the grant of home rule. The question, consequently, is whether the burden of seeking legislation should rest upon the municipality seeking to exercise extraterritorial power or whether it should rest upon the residents of the adjacent area. Under existing constitutional provisions, the burden is upon the municipality. The model provisions would impose the burden upon the residents of the adjacent areas (since only boundary adjustments are excluded from the extraterritorial power implicit in the authority conferred upon municipalities). On balance, the former approach seems preferable. Although the relatively limited use which municipalities have made of statutory grants of extraterritorial police power indicates that the risk of abuse is not great, the departure from fundamental principles involved in the exercise of extraterritorial police power suggests the desirability of requiring municipalities to justify the necessity for such a departure. The scope of potential extraterritorial regulation is extremely wide, ranging from matters in which a municipality has an obvious and direct interest, say, land use in the area immediately adjacent to its boundaries, to matters in which its interest is likely to be minimal, as, for example, conduct which may be offensive to public morality. Differences may also exist in the impact of various regulations upon the adjacent area. If the residents of the latter area are to be denied participation in the establishment of the controls to which they are subject, they are at least entitled to a reasonably particularized judgment as to the necessity for the denial by a legislative body which bears responsibility for their welfare.

Although the model provisions appear to contemplate that extraterritorial police power might be exercised by a municipality under the direct authority of the constitutional grant of power, the traditional approach could easily be achieved under those circumstances.

203. In four states the constitutional grant of police power to municipalities is explicitly declared to be exercisable only within their limits. Cal. Const. art. XI, § 11; Idaho Const. art. XII, § 2; Ohio Const. art. XVIII, § 3; Utah Const. art. XI, § 5. Even in the absence of such language, the attempted extraterritorial exercise of police power has been invalidated. City of Duluth v. Orr, 115 Minn. 267, 132 N.W. 265 (1911).

204. Sengstock, op. cit. supra note 192, at 55.

205. The range of potential exercise of power is indicated by the compilation of statutory grants of extraterritorial police power in id., at 52–54.
provisions by enactment of legislation denying municipalities power to adopt extraterritorial regulations except as specifically authorized by statute.206 Whichever approach is adopted, however, it seems fairly clear that in this instance the decision to rely exclusively upon the legislature to define the limits of municipal power is a correct one. The choices which must be made in determining the scope of permissible extraterritorial regulation, involving primarily considerations of expediency rather than of principle, are beyond the competence of judges,207 and in this instance, unlike others to be examined below, reliance upon the legislature is a feasible alternative.208

Another aspect of the problem of extraterritorial power is the authority of home rule municipalities to acquire property, by purchase or condemnation, or to render services beyond their boundaries. In a number of home rule jurisdictions the power is expressly conferred by statute209 or constitutional provision.210 Municipal power in such states is, of course, beyond question.211 The issue is whether the power should be inferred from a general grant of charter-making authority. The weight of judicial authority accords with the position adopted in the model provisions, i.e., the power may be exercised even in the absence of a specific statutory grant of authority.212 Preliminary analysis supports this

206. Both model provisions authorize the legislature to define the limits within which home rule powers may be exercised. See note 180 supra.


208. See text accompanying notes 224–27 & 276–77 infra. See also text accompanying notes 141–44 supra concerning the feasibility of reliance on the legislature to deal with the problem of municipal enactment of private law. The latter problem is primarily one of fitting municipal enactments into the body of the law, requiring resolution of a myriad of minor issues that are virtually impossible to anticipate in advance of particular controversies. The problems associated with extraterritorial exercise of power, by contrast, fall into a limited number of categories and their disposition is substantially less likely to interfere with legal relationships created in other contexts.


210. See, e.g., Ohio Const. art. XVIII, § 4.

211. See, e.g., City of Pontiac v. Ducharme, 278 Mich. 474, 270 N.W. 754 (1937); City of White Bear Lake v. Leuthold, 172 Minn. 255, 214 N.W. 930 (1927); Cameron v. City of Waco, 8 S.W.2d 249 (Tex. Civ. App. 1928).

212. See, e.g., Allison v. City of Phoenix, 44 Ariz. 66, 33 P.2d 927 (1934); City & County of Denver v. Board of Comm’rs, 118 Colo. 150, 156 P.2d 101 (1945); City of McMinville v. Howenstine, 56 Ore. 451, 109 Pac. 81 (1910) (alternative holding). The authority of Howenstine has been somewhat weakened by later decisions, City of La Grande v. Municipal Court, 120 Ore. 109, 251 Pac. 308 (1926); State v. Port of Astoria, 79 Ore. 1, 154 Pac. 399 (1910), but the case appears never to have been overruled with respect to the limited
result. The exercise of such power is frequently of substantial importance to the municipality\textsuperscript{213} and the frequency with which it has been conferred by legislatures does indicate a general acceptance of municipal action beyond their boundaries by a politically responsible agency which must be deemed to have a wider perspective than is necessarily to be assumed for the municipality. Nevertheless, these arguments equally support recognition of extraterritorial police power as an incident of a general grant of charter-making authority, a conclusion which has previously been rejected. There is, however, an important difference in the impact of the municipality's action upon the adjacent area. Subjection of the adjacent area to municipal police regulation involves the exercise of uniquely governmental power. The impact upon the adjacent area resulting from municipal land acquisition or rendition of services, on the other hand, is no different than would be the impact of similar activities engaged in by private parties\textsuperscript{214} General principles of democratic theory are, therefore, of little relevance with respect to this aspect of extraterritorial power\textsuperscript{215}.

Extraterritorial acquisition of property or rendition of services may, nevertheless, raise a quite different problem: the possibility of conflict with the policies of the local government exercising general jurisdiction over the area in which the municipality is engaged in extraterritorial activity.\textsuperscript{216} If the adjacent area is

\hspace{1em} issue of whether a charter city may condemn land lying beyond its boundaries without statutory authority. \textit{But cf.} Riggs v. Grants Pass, 66 Ore. 226, 134 Pac. 776 (1913).

The Michigan Supreme Court held prior to the enactment of the authorizing legislation cited in note 209 \textit{supra} that home rule cities lacked extraterritorial condemnation power. City of Detroit v. Oakland Circuit Judge, 237 Mich. 446, 212 N.W. 207 (1927). This decision may be reconciled with the contrary decisions discussed in the previous paragraph by reference to the Michigan theory of home rule. See text accompanying note 106 \textit{supra}.


\textsuperscript{214} It should be apparent that no effort is being made to introduce the governmental-proprietary distinction as a tool for the resolution of these problems. The impact of a municipal activity on the adjacent area obviously has no relationship to the factors that might lead to placing it in one or the other category for purposes of determining tort liability.

\textsuperscript{215} Exercise of the power of eminent domain extraterritorially, since it does involve a power uniquely dependent upon governmental authority, may raise some problems in this connection. But the frequency with which the power has been delegated, not only to municipalities but to private enterprises, suggests that there is not the same necessity for caution as exists with respect to extraterritorial police power. \textit{Cf.} McBAIN, \textit{THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE} 480–81 (1916).

\textsuperscript{216} The problem was posed by Professor McGoldrick in discussion of
permitted to regulate the activity to the same degree as it might regulate similar private activity, recognition of extraterritorial power creates no special problems for the adjacent area. Literal application of the model provisions would, however, appear to preclude such regulation, at least in the absence of explicit legislative authorization.\textsuperscript{217} And although no cases directly in point have been found, the prevailing rule in an analogous situation is that, absent legislative authorization, one agency of local government does not have power to regulate the activities of another.\textsuperscript{218} In this context, consequently, the grant of virtually unlimited initiative to home rule municipalities means that, in the absence of legislation, there is a complete subordination of the interests of the adjacent area to those of the municipality. If, on the other hand, municipalities are, in the absence of enabling legislation, to be denied power to engage in extraterritorial activity or are permitted to engage in such activity only subject to regulation by the adjacent area, the interests of the municipality are subordinated to those of the adjacent area. It seems unlikely that any one of the three rules will necessarily yield the best result with respect to all of the potential conflicts. What is required, as was argued in the previous discussion involving the similar problem of the power of a home rule municipality to regulate the activities of other governmental agencies within its boundaries, is an accommodation of the competing interests.\textsuperscript{219}

For the reasons advanced at that point, problems such as these call for solution by the legislature, but if the legislature has failed to deal with the problem, as is reasonably to be anticipated with the decision in City of McMinnville v. Howenstine, 56 Ore. 451, 109 Pac. 81 (1910), which upheld the power of a home rule city, in the absence of statutory authority, to condemn certain springs lying beyond its borders. “In the instant case it may well be, from all that appears, that the extramural condemnation affected individuals and not a community. In the populous East it is hard to imagine a situation where a community would not be involved. In which case may we pose the query: When shall the right of one community to work out its own existence yield to the desires, or, shall we say, necessity of a neighboring community?” McGoldrick, Law and Practice of Municipal Home Rule 1916–1950, at 180 (1933).

\textsuperscript{217} In other words, if a home rule municipality may exercise any power which the legislature might delegate to a non-home rule municipality, then presumably it can engage in extraterritorial activity free of regulation, since that might have been authorized by the legislature. The formula leads to a logical impasse when the adjacent area is also entitled to exercise home rule powers, since it is plain that the legislature might have authorized extraterritorial activity either free of regulation by the adjacent area or only subject to such regulation.

\textsuperscript{218} See text accompanying note 154 \textit{supra}.

\textsuperscript{219} See text accompanying notes 155–59 \textit{supra}.
respect to at least some of the conflicts which may arise, there
seems little justification for forcing upon the courts a mecha-
nistic solution which fails to take account of the intensity of the
competing interests.220

Extraterritorial Impact of Intramural Legislation

Recent reevaluation of municipal home rule is primarily a re-
sult of increasing awareness that the powers exercised by munici-
pal governments wholly within their boundaries may have con-
sequences in surrounding areas. Although the problem is not
unique to metropolitan areas, it is most acute there, and the
growth of such areas has tended to focus attention on the need
for an institutional framework in which decisions concerning the
exercise of governmental power are likely to be based upon a
consideration of all of the affected interests. Recognition of this
need is reflected in the model home rule provisions by the mini-
mal restrictions imposed upon the legislature's power to limit
municipal initiative. The effect of these provisions is to confer
upon the legislature primary responsibility for the distribution
of power between the state and its political subdivisions or among
the subdivisions, much as recent constitutional doctrines have im-
posed upon Congress primary responsibility for managing the
federal system.221 Unlike Congressional responsibility, however,
the legislature's responsibility under the model provisions is ex-
clusive.222 State courts are denied the power historically exercised
both by them and by the United States Supreme Court of invali-
dating local action which, although not in conflict with legislation
enacted by the "higher" level of government, appears to the court

220. Other, perhaps less important, problems of extraterritorial power
may also arise. See, e.g., Alquist v. City of Biwabik, 224 Minn. 508, 28
N.W.2d 744 (1947) (whether charter can provide that municipality and sur-
rounding town may constitute a single election and assessment district); City
of Collinsville v. Brickey, 115 Okla. 264, 242 Pac. 249 (1925) (validity of
charter provision affecting municipal tort liability when applied to damages
sustained beyond municipal boundaries). The difficulty of anticipating such
cases brings to mind the admonition of Professor Oliphant, which, although
made in another context, has an obvious relevance in assessing the wisdom
of the broad principles laid down in the model provisions: "The decision of
a particular case by a thoughtful scholar is to be preferred to that by a
poorly trained judge, but the decision of such a judge in a particular case is
infinitely to be preferred to a decision of it preordained by some broad 'prin-
ciple' laid down by the scholar when this and a host of other concrete cases
had never even occurred to him." Oliphant, A Return to Stare Decisis, 14
A.B.A.J. 159 (1928).

221. See Henkin, Some Reflections on Current Constitutional Controversy,

222. See text accompanying notes 171-73 supra.
inconsistent with the welfare of the larger political community.\textsuperscript{223}

Exclusive reliance upon the legislature to control intramural municipal legislation adversely affecting surrounding communities poses several difficulties which are not involved in exclusive reliance upon the legislature to control the exercise of extraterritorial power. The problems associated with extraterritorial exercise of power fall into a limited number of categories. Accordingly, they can, for the most part, be foreseen by the legislature, thus making it possible to comply with the cautionary recommendation of the U.S. Advisory Commission on Intergovernmental Relations.\textsuperscript{224} A similar degree of foresight seems unattainable in connection with the extraterritorial impact of intramural legislation. Virtually every substantive power exercised by municipalities—there is a temptation to say every power without qualification\textsuperscript{225}—may, under appropriate circumstances, have an impact upon surrounding areas. Legislative review of the possible uses of such power with a view toward imposition of limitations necessary to protect the general welfare is, of course, desirable. But in view of the broad range of powers exercised by municipalities, the various ways in which they are exercised, and the continuously changing circumstances which affect the extent of extraterritorial impact, the ability of the legislature to foresee all of the potential problems is extremely doubtful. A related consideration is that the relatively narrow impact of many local measures incompatible with the general welfare makes it difficult for the legislature to assume the primary responsibility for policing local action. Such measures do not arouse sufficient general interest to overcome legislative inertia.\textsuperscript{226}

Lack of foresight and legislative inertia are not the only obstacles to exclusive reliance upon the legislature for protection of the general welfare against possible incursions by municipalities. The literature of local government has been so largely concerned with freeing municipalities of legislative control that little attention has been given to pressures creating a local bias in the legislature. Nevertheless, there is strong evidence that legislative control has not, by and large, resulted in subordinating local interests to the interests of the larger community, be it the state, the region, or the metropolitan area. Imposition of a requirement

\textsuperscript{223} Dean Fordham's draft, as noted previously, creates an undefined area in which power may be exercised by the legislature but not by a municipality. See text accompanying notes 182–83 supra.

\textsuperscript{224} See text accompanying note 190 supra.

\textsuperscript{225} See note 259 infra.

\textsuperscript{226} Bickel, The Least Dangerous Branch 230 (1962).
of concurrent majorities in annexation proceedings and authorization of land-use planning by each little hamlet in total disregard of the general welfare, both too common to require the citation of particular statutes, are perhaps the most familiar examples of the legislature’s local bias, but other examples abound. The reason for the local bias of the legislators is not difficult to determine: It is inherent in an areal basis of representation. The legislature may have responsibility for the welfare of the entire state, but each legislator is responsible only to his own constituency. When the interests of the larger community conflict with the interests or desires of his constituents, there is inevitable pressure for the legislator to favor the latter.\(^\text{227}\)

The inherent limitations of legislative oversight suggest that there may be a role for the courts in the protection of the larger community against municipal parochialism. Although the ad hoc and limited character of judicial intervention precludes any possibility that over-all “solutions” can be achieved through this device alone, partial reliance upon the courts does offer several advantages. The institution of lawsuits by individuals disadvantaged by municipal legislation provides an opportunity for continuous, if nonetheless episodic, review of such legislation to determine its consistency with the welfare of the larger community. In discharging this responsibility, the courts have the advantage of comparative freedom from local pressures. Equally important, issues almost invariably come before the courts in relatively concrete circumstances, permitting somewhat more particularized judgments than are likely to be made by the legislature.\(^\text{228}\) In the long run, this may permit greater flexibility and adaptability to changing circumstances — a dominant purpose of the model provisions\(^\text{229}\) — than would reliance upon the legislature for the formulation of statutory limitations upon municipal initiative.

Generalized concepts such as “the welfare of the larger community” or “the general welfare” are of little help in deciding particular cases. Subprinciples are obviously required if the courts are to make an intelligible contribution to resolution of the myriad issues raised by a broad — though not unlimited — grant of initiative to municipalities. Strangely — particularly in view of the


\(^{228}\) See text accompanying notes 141–44 supra.

\(^{229}\) AMERICAN MUNICIPAL ASS’N, op. cit. supra note 197, at 20–21.
close analogy to the commerce clause\textsuperscript{230} — state courts have done little to formulate such principles or to limit municipal initiative in the interests of the larger community, even though under virtually all existing home rule provisions the courts do have power to invalidate municipal legislation quite apart from a conflict with state statutes.\textsuperscript{231} The reports do, nevertheless, contain several cases in which the courts have limited municipal initiative for this reason and a somewhat larger number in which they ought to have done so or at least have given consideration to that possibility.

The analogy to the commerce clause suggests an obvious starting point for the development of principles by which the courts may limit municipal initiative which is exercised in a manner inconsistent with the interests of the larger community. In \emph{City of Arlington v. Lillard},\textsuperscript{232} for example, the Texas Supreme Court invalidated an ordinance enacted by a home rule municipality which, in effect, prohibited "vehicles for hire" from passing through the city. Although the decision rests in part upon the inconsistency of the ordinance with state legislation, it appears to rest also upon the principle that the grant of home rule power may not be used to obstruct the flow of commerce within the state.\textsuperscript{233} Similarly, municipal legislation which discriminates

\textsuperscript{230} See Dowling, \emph{Interstate Commerce and State Power—Revised Version}, \textit{47 Colum. L. Rev.} 547 (1947).

\textsuperscript{231} The language of the home rule provisions, except in Alaska where the exercise of "all legislative powers" is authorized, \emph{Alaska Const.} art. X, § 11, is generally well adapted to permitting the courts to consider the impact of municipal legislation on the welfare of the state as a whole. See text accompanying notes 65–76 \textit{supra}.

\textsuperscript{232} 116 Tex. 446, 294 S.W. 889 (1927).

\textsuperscript{233} See also \emph{City of Fort Worth v. Lillard}, 116 Tex. 509, 294 S.W. 831 (1927); \emph{City of Fort Worth v. McCaslin}, 116 Tex. 513, 294 S.W. 834 (1927) both invalidating an ordinance requiring "vehicles for hire" to obtain a certificate of public convenience and necessity as a condition precedent to use of the streets and highways within the municipality. Cf. \emph{Buck v. Kuykendall}, 207 U.S. 307 (1907).

In \emph{Village of Perrysburg v. Ridgway}, 108 Ohio St. 245, 140 N.E. 595 (1923), the court, in reliance on the home rule amendment to the Ohio constitution, upheld an ordinance which, although not barring through traffic, prohibited motor buses from starting or stopping within the municipal limits. The extraterritorial impact of the ordinance was ignored by a majority of the court, but three judges dissented on precisely that ground:

The minority of this court do not deny the right of a municipality to control the use of its streets, or to license motor buses, where these regulations are reasonable and not arbitrarily adopted; but we do deny the right of a municipality to extend its powers beyond municipal limits, to throttle state functions, or to prohibit the use of the state highways for general commerce.

\textit{Id.} at 260–61, 140 N.E. at 599. The \emph{Perrysburg} and subsequent related Ohio
against nonresidents would appear to be beyond the permissible scope of home rule power. Licensing regulations, although they frequently serve a legitimate purpose and undoubtedly come within a grant of home rule power, are particularly susceptible to such abuse. The City of Palo Alto, for example, imposed a license fee upon every laundry doing business within its limits, the amount of the fee varying with the number of persons employed at the plant. In Ferran v. City of Palo Alto, a suit to restrain enforcement of the licensing ordinance was commenced by the owner of a laundry located in an adjacent city. The plaintiff asserted that since less than two percent of his gross receipts were obtained from business within Palo Alto, the effect of the ordinance was to impose a tax upon him for business outside the city and to place him at a competitive disadvantage with laundries primarily engaged in soliciting business within the city. Judgment for the plaintiff was granted on these grounds. The implicit premise underlying the decision is that a municipality may not enact a protective tariff for the benefit of local business. Unless home rule is to become the vehicle for "balkanizing" the economy of the state, that principle and the principle underlying Lillard seem beyond dispute.

More difficult problems are posed when municipal parochialism is less blatant. Thirty years ago McGoldrick could write that "the regulation of building and of the use of urban real estate is a phase of the police power which is of particular interest to cities and one which would seem to be peculiarly local and intramural in operation and effect." Whatever validity that view may once decisions are discussed in Fordham, Home Rule Powers in Theory and Practice, 9 Ohio St. L.J. 18, 55–57 (1958).

234. See text accompanying notes 162–65 supra.


237. See also In re Blois, 179 Cal. 291, 176 Pac. 449 (1918), in which the court invalidated a licensing ordinance imposing an inspection fee computed by reference to the distance of the laundry plant from the inspector's office. Since the mileage allowance was disproportionately high in comparison to the inspector's travel expenses, the court found that the effect of the ordinance was to discriminate unreasonably against laundries located at a distance from the city. The court rested its decision on a provision of the state constitution prohibiting the grant of "privileges or immunities which, upon the same terms, shall not be granted to all citizens," but that ground seems less persuasive than the one adopted in Ferran.


239. McGOLDRICK, op. cit. supra note 216, at 334.
have had at the present time there is an increasing awareness that municipal land use policies, particularly in metropolitan areas, do have a substantial impact upon surrounding communities. With rare exception, however, judges have not explicitly considered that impact in determining the validity of a particular exercise of power. One consequence of this omission has been the general failure to separate the question of whether a particular regulation exceeds municipal power from the quite different question of whether the regulation exceeds the power of government generally. Yet, as Professor Mishkin has pointed out in a related context, the justification for judicial deference to legislative judgments is far less compelling in connection with the former question than it is in connection with the latter: "The rationale behind the presumption of validity generally is that political processes are adequate to assure representation of affected interests in the legislature and that, therefore, the court should not 'substitute its judgment' for that of the democratically chosen and responsible body." By hypothesis the rationale is not equally applicable to the category of municipal legislation under discussion at this point.

Awareness that affected interests often are not represented


The problem is not, of course, unique to home rule municipalities. Traditions of local autonomy have combined with broad enabling legislation to permit counties, townships, and the smallest villages to exercise a degree of initiative virtually coextensive with that which, in the absence of such legislation, would have been possessed only by home rule municipalities. One consequence of the legislation is that the courts have not generally been required to determine whether the power of home rule municipalities to enact land-use regulations is derived from the grant of home rule or from the enabling legislation. In principle, the grant of home rule, which includes the police power and the power of eminent domain, should suffice; and the cases, so far as they go, generally support that conclusion. See McGoldrick, op. cit. supra note 216, at 524-33; Crawford, Home Rule and Land Use Control, 13 W. Res. L. Rev. 702 (1962). But see note 270 infra.

242. See Babcock & Bosselman, supra note 241, at 1079-91; Haar, supra note 241.


244. Id. at 3. See also Thayer, supra note 186, at 28; Williams, Planning Law and Democratic Living, 20 Law & Contemp. Prob. 317, 346 (1955).
in the municipal council and, consequently, that courts may justifiably limit municipal initiative in situations where identical state legislation would be upheld, obviously does not provide a simple solution for the manifold problems which may be brought before the courts. Other factors must also be considered. Ultimately, a judgment must be made as to relative weights of the municipality's interest and other affected interests. Concededly, such judgments are difficult for courts. Frequently they lack the information necessary to a fully informed decision. There may be insufficient consensus as to the scale on which interests are to be weighed. Nevertheless, guides to decision are not entirely wanting. Some guidance may be obtained by reference to enabling legislation for non-home rule municipalities. The absence of legislation authorizing exercise of a power cannot, of course, be treated as conclusive without depriving home rule of all its meaning, but if the legislature has authorized exercise of the power in question or similar powers by non-home rule municipalities that would seem to settle the matter in favor of home rule municipalities.

Similarly, some weight may be given to the permissibility vel non of a state exercising the power under the federal constitution. If the national interest precludes exercise of the power by a state, it is difficult to conceive of circumstances in which a municipality would nonetheless be permitted to exercise the power under its home rule authority.

245. State legislation might take either of two forms: directly imposing the regulation or specifically authorizing municipalities to do so. In either event, a balancing of municipal and other interests would be effected by a representative body responsible to the affected interests. Of course, legislative concern with a particular municipal exercise of power will vary inversely with the breadth of the authorization. The court will then face the issue of whether it may justifiably determine that the legislation in question does not authorize that use. See Mishkin, supra note 243.


247. See text accompanying note 105 supra.

248. Dean Fordham's draft recognizes this principle by providing that "a home rule charter municipal corporation shall, in addition to its home rule powers and except as otherwise provided in its charter, have all the powers conferred by general law upon municipal corporations of its population class." AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (1953); see Fordham, HOME RULE—AMA MODEL, 44 NAT'L MUNIC. REV. 137 (1955).


250. Of course, if the adverse effect of the municipal regulation extends beyond the boundaries of the state, the regulation would fall under the com-
In the absence of such guides there is no escape from the necessity of attempting to weigh the competing interests. Taxation of nonresidents on the basis of income earned within the municipality, as the Michigan Supreme Court recently held, is permissible because it “is not unreasonable to assume that ... [it] fairly reflects the extent to which municipal services and protection are enjoyed by the taxpayer.” In other contexts, the interest of the municipality may be entitled to less weight. As others have demonstrated, municipal regulations establishing minimum dwelling size unrelated to health, unreasonably low density regulations, the total exclusion of trailers from a municipality, and a host of other familiar regulations do have an adverse impact upon surrounding communities which is not adequately balanced by legitimate municipal interests. The inevitable element of judicial discretion involved in allowing courts to thus limit municipal initiative plainly involves the risk that courts may lay down rules which are too restrictive. An assessment of the risk must, however, take into account the reluctance which courts have thus far displayed to limit municipal initiative and the possibility of recourse to the legislature for restoration of the power denied by the courts. Some account must also be taken of Justice Holmes’ warning:

I do not think the United States would come to an end if we lost the power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

merce clause, whether or not it was permissible under state law. See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); International Motor Transit Co. v. City of Seattle, 141 Wash. 194, 251 Pac. 120 (1928).


Protection of Basic Values

The demand for local autonomy has been most insistent with respect to those matters as to which the impact of municipal action is thought to be confined to local residents. Witness the lament of one municipal official:

What I cannot understand is why the people of any city should not be permitted to govern themselves and experiment as they choose with plans or projects consistent with our form of government, when such action will not affect other cities or towns but only themselves.257

Any attempt to respond to the question confronts as an initial obstacle the further question of whether there are any municipal activities which affect only local residents. Reference has already been made to the difficulty of defining an area of municipal power which lacks any extraterritorial impact.258 Under appropriate circumstances even local government structure and personnel policies may be of concern to nonresidents.259 Plenary legislative power to limit municipal initiative may, perhaps, be justified on this ground alone. The problem here, however, is to determine the circumstances in which a court may justifiably limit municipal initiative. Even though every municipal ordinance or charter provision may have some adverse impact on nonresidents, there

258. See text accompanying note 225 supra.
259. The structure of municipal government has generally been regarded as a matter of uniquely local concern. The idea is so deeply imbedded that even Dean Fordham's draft provides that "charter provisions with respect to municipal executive, legislative and administrative structure...are of superior authority to statute...." AMERICAN MUNICIPAL ASS'N, op. cit. supra note 248, § 6. Yet, there may be circumstances in which the surrounding area has an important interest in the structure of municipal government. Commentators have emphasized, for example, the critical role of the central city mayor in the solution of metropolitan area problems. BANFIELD & GRODZINS, GOVERNMENT AND HOUSING IN METROPOLITAN AREAS 158-66 (1958). Adoption of a weak mayor form of government may have an important effect upon the ability of the mayor to fulfill this role.

Similarly, one commentator, in urging "that local standards should be set locally for those things which are of local concern" has argued that the proper function of state or regional standards is to set "minimum standards, rather than...preventing a local jurisdiction from setting standards too high. The need is for a floor, not a ceiling!" O'Harrow, Comments, Municipal L. Service Letter, Jan. 1960, p. 6. But in the context of the problem to which these comments were addressed, that of local power to establish minimum lot size, municipal freedom to determine the "ceiling" may have repercussions in the entire region. See notes 252–55 supra.
are numerous areas in which the impact is so remote or is sufficiently counterbalanced by the interests of the municipality that a court could not justifiably invalidate the ordinance or charter provision on that ground alone. Since the discussion thus far has attempted to justify judicial limitation of municipal initiative on the basis of the inadequacy of political processes to protect interests not represented in the municipal council, the question may fairly be raised whether the courts should not be excluded from the process of defining the scope of municipal power under home rule when the power asserted has such limited extraterritorial impact.

It may be helpful to recognize at the outset that the case for municipal freedom from judicial supervision is most persuasive when the impact of local programs is confined to local residents. The desirability of enabling municipalities to govern generally, the consequent inability of courts to define subjects of insufficient local interest to permit exercise of the initiative, and the political responsibility of the municipal governing body to affected interests combine to suggest that the municipal council should be as free as the state legislature — i.e., subject only to constitutional restrictions upon the exercise of all government power — to identify problems and experiment with solutions. And yet, the relatively greater freedom with which courts traditionally have examined the propriety of an exercise of municipal power suggests at least that there is need for more careful consideration of the wisdom of equating the municipal council with the state legislature so far as judicial review is concerned.

The plea for unlimited municipal initiative (so long as there is no extraterritorial impact and general constitutional limitations are observed) conjures up visions of local democracy deeply rooted in American political ideology. From Jefferson to Eisenhower it has been argued that local citizens, with first-hand

260. See text accompanying notes 34–62 supra.
261. A variety of legal doctrines have developed over the years which tend to permit courts to exercise greater control over municipal action than is customarily exercised over action of the state legislature. On the substantive level, and in the absence of home rule, Dillon's rule and the doctrine of reasonableness, both of which are applicable only to municipalities, serve this purpose. See notes 26, 37, & 117 supra. Existing home rule provisions have narrowed the opportunities for judicial review of municipal legislation, but since the grant of power is commonly confined to "local" or "municipal" affairs, an area of judicial discretion still exists. See text at notes 68–76 supra. In both traditional and home rule jurisdictions, procedural doctrines, such as liberal "standing" requirements, also serve to increase the role of the courts. See Jaffe, Standing To Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961).
knowledge of local conditions and directly concerned with local problems, are best able to determine local needs and devise workable solutions. Other values are also associated with the “grassroots” ideology: opportunity for citizen participation in government and avoidance of the threats to liberty posed by “big government.” At least since Madison, however, there have been warnings that local democracy may also be destructive of important values. The municipal council is not necessarily the equivalent of the state legislature even though the impact of its actions is wholly intramural.

The argument of Federalist X is of particular relevance, for it suggests that a power which might be exercised by the legislature may reasonably be denied a municipal council because, for certain purposes, the municipality’s political processes are less adequate than those at the state level. In particular, majority excesses may pose a greater danger at the local level than at “higher” levels of government where the larger number of persons and hence the greater number of interests makes it less likely that a group actuated by a single interest will be able to run roughshod over a minority. Numbers, moreover, are not the only protection provided by a reservation of certain decisions for “higher” levels of government. The risk of precipitate majority action is increased by the existence of homogeneous population groupings, the likelihood of which is, of course, greater at the local level. There may, accordingly, be compelling reasons why

262. The Federalist No. 10, at 60–61 (Modern Library ed.) (Madison). Although directed primarily at the advantages of the Constitution over the Articles of Confederacy, the argument is plainly relevant to the distribution of power within a state and was so applied by Madison. Id. at 62. See generally Huntington, op. cit. supra note 233, at 179–200.

263. “Population is tending to be increasingly distributed within metropolitan areas along economic and racial lines.” Advisory Comm’n on Intergovernmental Relations, Government Structure, Organization and Planning in Metropolitan Areas 7 (1961). Central cities have increasingly become the place of residence of non-whites, lower income workers, the elderly and younger couples. Ibid. In suburbia, there is a tendency toward differentiation among communities on the basis of income, race, ethnic origins and a variety of other factors. See Wood, op. cit. supra note 233, at 114–25.

There are, obviously, important differences among municipalities which are submerged by general reference to a term which describes only a legal status and, consequently, lumps together all entities which share that status. The risk of precipitate majority action by a homogeneous group motivated by a single interest is far greater in a small municipality than it is in the large urban center with a population in excess of that of many states. If home rule were limited to the latter municipalities, the problems dealt with in this section of the Article might be substantially eliminated.

Additional arguments may also be made for limiting home rule to larger
a court should not be required to pay the same degree of deference to ordinances or charter provisions as to statutes enacted by the state legislature. The issue is not, as Professor Walker has attempted to pose it, whether local citizens are assumed to be less wise when acting locally than when they are acting at the state level;\(^{264}\) rather, it is whether political processes at the local level are adequate to achieve or protect the basic community values\(^ {265}\) which determine the appropriate distribution of governmental power within the state.\(^ {266}\) To the extent that local political processes are inadequate to secure these values, the courts may be able to maximize community values by shifting the level of decision from municipal to state government. It is for this reason that a court, contrary to Mr. Mott's suggestion,\(^ {267}\) may justifiably deny a municipality power to enact "higher"—i.e., more restrictive—moral-standards than are established by state law. Although the state may have no "interest in lowering the moral tone of any area,"\(^ {268}\) there is a community interest in maximizing liberty cities. Experience demonstrates that there is a direct relationship between the size of municipalities and the likelihood that they will avail themselves of the power conferred by a grant of home rule, the larger the municipality the greater the chance that it will have made use of the authority. See Morr, op. cit. supra note 241, at 27; Fordham, supra note 239, at 20. The failure of most smaller municipalities to exercise their charter-making authority reflects the fact that they are less likely than larger municipalities to need such power; their problems are not as likely to be unique and thus are more susceptible of handling by general legislation. Smaller municipalities, moreover, are likely to have greater difficulty in marshalling the human and material resources necessary to framing a charter. See Fordham, The West Virginia Municipal Home Rule Proposal, 38 W. Va. L.Q. 235, 246-47 (1932). Nevertheless, a majority of the constitutional provisions do not limit charter-making authority to municipalities of a specified size, and only two states, New Mexico and Washington, limit such authority to municipalities with a population in excess of 20,000.

265. There is an obvious lack of precision in the phrase "basic community values" and in similar phrases employed hereafter. An approach to the identification of these values is set forth in the text accompanying notes 286-93 infra.

266. See Maass, Division of Powers: An Areal Analysis, in Area and Power 9 (Maass ed. 1959): "It is to help realize the basic objectives or values of a political community that governmental power is divided. Thus, division of powers, like government institutions generally, is instrumental of community values; and the form of division at any time should, and likely will, reflect the values of that time." But cf. Ylvisaker, Some Criteria for a "Proper" Areal Division of Governmental Powers, in Area and Power 27, 29-30, 33-34 (Maass ed. 1959).


268. Ibid. Similarly, Mr. Mott has argued that "to suggest that the people of a locality are not good judges of the services they need is to reject
which may be threatened by allowing local majorities to impose their own conception of morality upon local dissidents.

The argument is occasionally made that the existence of constitutional guarantees, enforceable by the courts, is adequate to protect individuals or minorities against the oppressive use of local power. Some measure of protection is, of course, provided by constitutional restrictions upon the power of all government, but exclusive reliance upon these guarantees poses troublesome questions. Is it wise to increase the risk of constitutional decisions restrictive of individual freedom or contrary to minority interests solely at the instance of a local majority which well may not be representative of the larger community? Conversely, is there not a danger that if courts are limited to general constitutional guarantees in protecting individuals or minorities from local majorities, precedent will be established which may impede governmental action if the time comes that the larger community, as represented in the state legislature, determines that the general welfare requires the interference with individual or minority interests? There is, of course, a possibility that courts might adopt a variable standard of constitutional interpretation under which the weight accorded a legislative judgment would be partially dependent upon the size (and presumptively, therefore, the diversity) of the population represented. Whatever the merits of the entire concept of democracy.” Id. at 45. The argument ignores the role played by a host of anti-majoritarian devices in managing conflict among various groups in the society. The “people of a locality” are not, after all, the monolithic entity which the phrase implies. See Lucas, Book Review, 27 U. Chi. L. Rev. 791 (1960).

269. See, e.g., CHICAGO HOME RULE COMM’N, MODERNIZING A CITY GOVERNMENT 282–83 (1954). The argument that general limitations upon governmental power are adequate protection against majority excesses at the local level rests on the assumption that all important community values are embodied in the constitution. Thus, the Chicago Home Rule Commission has urged that in view of the constitutional guarantees which surround the police power, there is little justification for a legislative policy narrowly defining the scope of municipal licensing power. Ibid. Excessive use of the licensing power, however, represents a threat not only to individual freedom, for which there may be constitutional protection, but also to the maintenance of commercial competition, a generally accepted and important community value for which constitutional protection is lacking.

270. Cf. Mishkin, supra note 249, at 4. I am unaware of any decisions which explicitly adopt such an analysis, although there are occasional indications that courts are influenced by such considerations. E.g., compare State ex rel. Penrose Investment Co. v. McKelvey, 301 Mo. 1, 256 S.W. 474 (1923), with Oliver Cadillac Co. v. Christopher, 317 Mo. 1179, 298 S.W. 720 (1927). In the former case, the court invalidated a municipal zoning ordinance enacted pursuant to home rule powers as a “taking” of private property with-
such an approach in other contexts, it seems to offer no advantages over a formulation of home rule powers which permits courts to deny municipalities certain powers in the absence of enabling legislation.

The questions stated in the previous paragraph suggest a more basic inquiry, whether it is desirable, by a broad grant of power to municipalities, to permit local majorities to press hard against fundamental values. Constitutional limitations, after all, are normally considered to mark only the outer limits of government power, not to define its optimum degree of exercise. The “common-law” doctrine that municipalities are limited to the exercise of delegated power appears to be grounded on just such considerations. Judge Dillon, for example, defended the “common-law” doctrine by reliance upon the opinion of Chief Justice Shaw in Spaulding v. City of Lowell:

In aggregate corporations, as a general rule, the act and will of a majority is deemed in law the act and will of the whole,—as the act of the corporate body. The consequence is that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty, to pay money to an unlimited amount, to perform services,—to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz., that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects.

out just compensation. The latter decision, only four years later, upheld against an identical attack a similar ordinance enacted pursuant to state enabling legislation. Bassett concludes that cities were in the main unsuccessful in their efforts to base zoning upon home rule powers and that the power to zone was confirmed only after the adoption of state enabling legislation. BASSETT, ZONING 14–17 (1940).

271. See note 284 infra.


273. 40 Mass. (23 Pick.) 71, 75 (1839). (Emphasis added in 1 Dillon, op. cit, supra note 272, § 238, at 451.)

Additional insight into the purpose of limiting municipal power is provided by a generally ignored portion of Judge Dillon’s discussion of the construction of delegated municipal powers. “The rule of strict construction,” according to Judge Dillon, “is . . . [primarily] applicable to grants of powers to municipal and public bodies which are out of the usual range, or which grant franchises, or rights of that nature, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property, or as it may be compendiously expressed, any common-law right of the citizen or inhabitant.” 1 Dillon, op, cit, supra note 272, § 239, at 452–53. One need not agree with the desirability of strict construction with respect to each of
Quite obviously, these considerations collide with the persuasive arguments previously examined for conferring home rule powers in broad terms. On the one hand, municipalities require a broad range of powers and a flexibility which cannot be achieved through frequent trips to the state capitol for precise enabling legislation. On the other hand, the possession of such power by local majorities may threaten fundamental values. The dilemma is not likely ever to be fully resolved. The ultimate values of the modern democratic society, as Ylvisaker has written, "are compatible, but only if tempered, not maximized."275

One method of accommodating these competing values is that recommended by the Advisory Commission on Intergovernmental Relations and adopted in the model provisions: a constitutional grant of municipal initiative coextensive with the power of the legislature, but subject to legislative limitation.276 This method provides the broad range of powers required by municipalities, yet permits the legislature to guard against local action inconsistent with basic community values. Nevertheless, exclusive reliance upon the legislature is no more satisfactory here than it is in providing protection against the extraterritorial impact of intramural legislation. The area of possible municipal action is so broad, the range of potential experimentation so great, that the ability of the legislature to foresee all of the problems which may arise is highly improbable. Nor can reliance be placed upon legislative action after the exercise of municipal initiative. The relatively narrow impact of many local measures may not arouse sufficient general interest to overcome legislative inertia. Exclusive reliance upon the legislature also involves the twin risks suggested previously: On the one hand, a local majority, not representative of the larger community, may force constitutional decisions restrictive of individual freedom or contrary to minority interests; on the other hand, precedent may be established which will impede governmental action if the time comes that the legislature determines the necessity for the interference with individual or minority interests.

the powers listed. During the past half century there have been marked changes in the responsibilities of municipalities and in public and judicial acceptance of governmental power. The critical point is the implicit rejection of the municipal council as an appropriate agency for experimentation with deeply rooted values and the explicit use of judicial authority to limit municipal power as a device for protecting such values against threatening municipal action.

274. See text accompanying notes 34-62 supra.
275. Ylvisaker, supra note 266, at 38.
276. See text accompanying notes 172-73 & 189-90 supra.
A more satisfactory accommodation of the competing values might be achieved by a broad but not unlimited grant of municipal initiative, in terms similar to those currently employed in most state constitutions. Such a formulation of municipal power would permit the courts to consider the appropriate limits of municipal power without simultaneously defining the boundaries of governmental power generally. A decision limiting municipal power would operate only as a suspensive veto, providing an opportunity for legislative consideration. The desirability of this approach turns, of course, upon the tests employed by the courts in determining the limits of municipal power in the absence of express legislative delegation. If municipal power is too narrowly restricted, the benefits of judicial review may not be worth the price. Similarly, determination of the limits of municipal initiative on the basis of an artificial "local affairs-general concern" test, even if "local affairs" are broadly construed, is of questionable value, not only because of its failure to recognize the necessity for municipal power to govern generally, but also because it is not responsive to the underlying reasons for judicial participation in the process of defining the scope of municipal power, the potential inadequacy of political processes at the municipal level to protect basic community values.

A more useful approach — one which recognizes the essential policy components of the issue before the courts — is suggested by an early Minnesota decision, State ex rel. Peers v. Fitzgerald. Acting under its home rule charter, the city of Virginia held Peers in contempt for refusal to produce certain documents which the council had subpoenaed in the course of an investigation. On appeal from an order discharging a writ of habeas corpus, the Minnesota Supreme Court invalidated a provision in the city's charter which authorized the council to punish for contempt. That power, the court reasoned, was subject to serious abuse and might be "readily converted into an instrument of oppression." It was, in addition, in potential conflict with traditional guarantees of fair procedure, particularly in the hands of "persons of limited legal knowledge and experience." The dangers posed by the contempt power were sufficiently great that courts in other jurisdictions were divided even on the question of whether the legislature could validly delegate the power to a municipal council.

277. See text accompanying notes 63-76 supra.
278. See text accompanying notes 34-62 supra.
279. 131 Minn. 116, 154 N.W. 750 (1915).
280. Id. at 120, 154 N.W. at 752.
281. Ibid.
In Minnesota, the legislature had carefully circumscribed both its own and the judiciary's contempt power by prescribing what conduct constituted contempt, the procedure to be employed in adjudicating contempt, and maximum punishments. Accordingly, the court held that even after the grant of home rule the power of a municipal council to punish for contempt continued to be dependent upon express authorization by the legislature. 282

The Peers decision obviously involved judicial interference in the "internal" affairs of a municipality. Justification for that interference is to be found in the protection of values deeply imbedded in the legal system and, in this instance, in legislative policies embodied in statutes which, although not directly applicable to the case at hand, were plainly relevant to a determination of the propriety of the power asserted by the municipality. Since the charter-making power of Minnesota municipalities was based upon a statute, the court was able to rest its decision upon

282. The Peers decision has been criticized, with some justification, because of the court's failure to take account of relevant state legislation. Anderson, Municipal Home Rule in Minnesota, 7 Minn. L. Rev. 306, 816-18 (1923). Professor Anderson points out that the statute conferring home rule power upon Minnesota municipalities stated that charters might "provide for the establishment and administration of all departments of a city government and for the regulation of all local municipal functions, as fully as the legislature might have done" prior to adoption of the home rule amendment to the state constitution. Minn. Laws 1895, ch. 8, at 124. The statute is ambiguous, however, in failing to make clear whether the legislature intended that home rule municipalities be permitted to exercise any power which a legislature might delegate to a non-home rule municipality or only that home rule municipalities were to have such freedom with respect to "local municipal functions," with the courts free to determine which functions were not "local" and "municipal." Professor Anderson's apparent approval of the alternative ground of decision in Peers, that it is not a municipal function to aid in the enforcement of state anti-monopoly legislation, indicates his acceptance of the latter interpretation. Other Minnesota decisions suggest that the state supreme court has implicitly adopted the same interpretation. See cases cited note 76 supra. On the assumption that the legislation did leave the court free to determine which functions are "local" and "municipal," there was ample justification, as the text attempts to demonstrate, for a conclusion that the council's power to punish for contempt in aid of an investigation was not within the initiative.

Other legislation ignored by the court casts more serious doubt on the correctness of the court's conclusion. Professor Anderson notes that the legislature expressly conferred the power to punish for contempt upon city councils in a general act for the incorporation of cities enacted some years earlier. A legislative judgment that the power might appropriately be conferred upon municipalities, although not directly applicable to the municipality involved, should have led the court to hold the power within the initiative conferred by the grant of home rule. See text accompanying note 285 infra. The Peers court seems, however, to have been unaware of the enabling legislation.
the presumed "intent" of the legislature. In jurisdictions where charter-making authority flows directly from the constitution, judicial reliance upon the "intent" of the legislature is not possible. Except in Alaska, however, there appears to be no textual obstacle to reading the constitutional provisions as permitting the courts to limit municipal initiative so as to preclude a use of municipal power which threatens fundamental community values or established state policies. Either in terms or by construction constitutional home rule provisions authorize municipal action only with respect to "local" or "municipal" affairs. A use of governmental power which threatens fundamental values or established state policies might not be deemed a "local" or "municipal" affair for much the same reason that municipal regulations with too great an extraterritorial impact are not considered to be "local" or "municipal" affairs, the inadequacy of political processes at the municipal level to cope with such problems.

Judicial power to invalidate municipal legislation inconsistent with deeply rooted community values may be objected to on the ground that, in practice, it is likely to prove too restrictive of municipal power. Several arguments may be advanced in support of this position: First, the role suggested for the courts places too heavy reliance on the ability of judges to identify those

283. See text accompanying note 174 supra.

284. If courts are to base limitation of the initiative on such considerations, it seems desirable to recognize that not all municipalities entitled to exercise home rule powers are the same size. A generation ago, Professor McGoldrick objected to the failure of courts to distinguish between large and small municipalities. See McGoldrick, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916–1930, at 311 (1983). Although his statement accurately describes what courts have done, there appears to be no inherent reason, as McGoldrick seems to have believed, why courts should not take population into account when it is a relevant consideration. The argument that judicial limitation of the initiative is necessary because of the greater risk of majority excesses at the local level is obviously far less persuasive when applied to New York, Philadelphia, Los Angeles, and other major cities than it is in connection with smaller municipalities. Courts might, accordingly, adopt a variable standard in determining the limits of municipal initiative under which the weight given a legislative judgment would be partially dependent upon the size (and presumptively, therefore, the diversity) of the population represented. Cf. Mishkin, supra note 249, at 4. Charter provisions or ordinances adopted by the largest cities, with a population in excess of that of many states, should arguably be tested only by the same constitutional standards which limit the power of the legislature. On the other hand, even the largest cities do not contain a cross-section of the entire population. See note 263 supra. If, as I have argued, experimentation with basic values ought to be based upon a consensus among the widest population possible, an equivalence should not be drawn between even such cities and the state legislature.
community values which are so fundamental that they ought to be protected against inconsistent local action. Secondly, almost every controversial exercise of municipal power, including many generally accepted municipal powers, will to some extent threaten important community values. If the municipal council is not permitted to choose between the values furthered by its attempted exercise of power and other values arguably threatened by it, there is little substance to the grant of municipal initiative. Finally, the fundamental values of the community are not static; they are in a process of evolution. Unlimited municipal initiative permits experimentation in the accommodation of competing values without committing the entire state to a particular choice.

Each of these arguments has merit, but the second seems less persuasive than either of the others. If the courts give appropriate recognition to the reasons for judicial participation in the process of defining the scope of municipal initiative, there is not likely to be a substantial curtailment of municipal power. Municipalities should retain a wide latitude of choice, since the justification for permitting courts to limit municipal initiative more narrowly than legislative initiative, that precipitate majority action inconsistent with basic values is more likely to occur in less populous and diversified communities, suggests an obvious limitation on the power of the courts to limit municipal initiative: Judicial power should be exercised only to invalidate a novel exercise of municipal power inconsistent with basic community values. If the power asserted by the municipality has, for example, been conferred upon other municipalities by the legislature or if a large number of other municipalities has exercised the initiative in a similar manner, there is little justification for judicial intervention (except, of course, on constitutional grounds). In these situations, there is somewhat greater assurance of effective representation of a variety of interests; accordingly, there is less danger that minority interests will have been ignored by a majority motivated by a single interest.  

285. Early attempts to base zoning upon home rule power, as indicated in note 270 supra, were generally rebuffed by the courts. There is some evidence that judicial unwillingness to permit municipalities to employ the initiative as authority for novel legislation threatening to basic values contributed to the result. Thus, in Clements v. McCabe, 210 Mich. 207, 177 N.W. 722 (1920), the court refused to sustain a zoning ordinance as an exercise of home rule power. The grant could not, the court said, be extended to a power of "such unusual scope and far-reaching possibilities as the yet in many respects debatable police power sought to be exercised in the proposed zoning plan." Id. at 217, 177 N.W. at 725. The analysis in the text suggests that the widespread acceptance of zoning in the year following the decision in Clements v.
The exercise of judicial power to invalidate novel uses of municipal power which threaten important values does, however, necessarily collide with the "little laboratory" argument for unlimited municipal initiative, the argument that it is desirable to permit experimentation at the local level, thereby avoiding the necessity of involving the welfare of the entire state. Perhaps a sufficient answer to this argument is that enabling legislation would also permit experimentation, but with the added benefit of increased political safeguards for those whose interests may be adversely affected by the experiment. In any event, the proposal is not that all experimentation via the initiative be invalidated, but only such novel uses of municipal power as seriously threaten important values. That should leave municipalities a good deal of freedom. To the extent that it limits municipal freedom, a choice must be made between the benefits which are likely to accrue from such experimentation and the dangers which it poses. The choice cannot, obviously, be made in the abstract. Each of the constitutional restrictions on the power of all government represents a choice against experimentation, yet few would argue that municipalities ought to be exempt from their coverage. It follows that the conclusion that home rule municipalities should be allowed to exercise unlimited initiative rests primarily on the argument that courts ought not to be entrusted with the responsibility of identifying those values which are so basic that legislation inconsistent with them ought to be based on a consensus among a broader segment of the community than is found at the local level. Where agreement as to basic values exists, as with the constitutional restrictions upon the power of all government, municipal experimentation is prohibited.

Although judges empowered to invalidate an assertion of municipal power on the ground of its inconsistency with basic values would have considerable leeway, meaningful standards to guide decisions are not lacking. The analogy to constitutional restrictions on the power of all government suggests a starting point for the identification of those values which ought to be held beyond municipal initiative. Novel municipal legislation which seriously threatens the values embodied in the constitutional restrictions should be invalidated on the ground that such legislation is beyond the scope of municipal initiative. A decision that the legislation would be unconstitutional if enacted or au-

McCabe should lead the courts to conclude that authority to zone (but not necessarily every use made of the authority) may now be based on the grant of home rule. Recent decisions appear to support that conclusion. See note 247 supra.
authorized by the legislature is, of course, unnecessary. Indeed, avoidance of constitutional questions is a primary purpose of permitting courts to invalidate an exercise of municipal power on the ground that it goes beyond the initiative conferred by a grant of home rule. If the power asserted by the municipality raises a substantial constitutional question, there is adequate basis for concluding that it has exceeded the permissible range of municipal power in the absence of enabling legislation. Even if the constitutional question is not substantial — in the sense of being debatable — a serious threat to constitutional values might reasonably serve as a basis for limitation of the initiative. Notwithstanding the Supreme Court's decision in Times Film Corp. v. City of Chicago, for example, a court might distinguish between a motion picture licensing ordinance and an ordinance imposing a penalty upon the exhibition of obscene motion pictures. The relative infrequency of the former type of ordinance, historical aversion to licensing as a technique for controlling expression, and the major threat to values embodied in constitutional guarantees of free expression might lead a court to conclude that power to enact such an ordinance should depend upon a consensus among the most representative body in the state. Although an ordinance imposing penalties upon the exhibition of obscene motion pictures may also threaten the policy of free expression, the greater procedural safeguards of such a provision and the comparatively lesser threat which, consequently, it poses to constitutional values should lead a court to permit its adoption as an exercise of the initiative, particularly since the frequency of such legislation indicates a broad consensus that it represents an appropriate balance of the competing community interests in controlling obscenity and freedom of expression.

In the absence of a threat to values identified in the constitution, judicial participation in the process of defining the scope of municipal initiative should be extremely limited. Not all community values are constitutionally protected, of course, but it seems reasonable to assume that the values which are so identified are those to which the community accords the highest priority. Judicial intervention on their behalf, consequently, has a stronger justification than exists for judicial protection of values which are not so identified. Nevertheless, cases may arise in which judicial protection of these latter values is warranted. Municipal enactment of private law, for example, may seriously

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286. See text accompanying note 269 supra.
288. See Brief for the Motion Picture Ass'n of America, Inc. as Amicus Curiae, p. 4, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).
disturb legal relationships created by general law without materially advancing the interests of the municipality.289 The self-interest of a municipality may lead to adoption of regulations governing its liability which are substantially at variance with commonly accepted standards of fairness.290 No purpose would be served by an attempt to list all of the situations in which judicial intervention would be warranted; inability to foresee all of the situations is the major justification for judicial review of the exercise of municipal power. Nor does it seem feasible to define precise standards for determining those values which are sufficiently important that novel municipal legislation which seriously threatens them should be invalidated as beyond the initiative. Identification of those values would require the courts to draw on the sources which courts customarily employ in fashioning legal doctrines. As in Peers, substantial guidance might be provided by state legislation which, though not controlling, identifies the values and indicates the weight accorded them by the legislature.291

Inevitably, the role suggested for the courts requires the exercise of judgment — and self-restraint — on their part. The argument that judges ought not to be entrusted with the responsibility of identifying basic values, however, is not lacking in irony in view of their generally accepted power to invalidate legislation on constitutional grounds. A community which trusts its judges to review all legislation for consistency with the constitution confers no greater power on them by authorizing the invalidation of novel municipal powers inconsistent with basic values, whatever the ambiguity of that phrase. True, the power of constitutional adjudication is to some extent circumscribed by the language of the constitution and the course of constitutional history, but most lawyers recognize that in determining the validity of legislation courts exercise a wider latitude of choice than is implied in Justice Robert's dictum that courts need only "lay the article of the Constitution which is invoked beside the statute which is challenged and ... decide whether the latter squares with the former."292 Moreover, if the range of judicial choice is narrower in constitutional adjudication than in the suggested judicial review of municipal initiative, it is also true that the consequences of a decision limiting legislative power are far greater than the consequences of a limitation of municipal initiative.293

289. See text accompanying notes 122–44 supra.
290. See text accompanying notes 115–21 supra.
293. See text accompanying notes 188–88 supra.