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A CRITICAL APPRAISAL OF HOME RULE

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I. The Home Rule Ideal

Definition

The concept of home rule in its broadest sense is the power of local self-government. It signifies a relationship between cities and the states in which they are located whereby the cities enjoy the fullest authority to determine (1) substantive powers, (2) governmental organization and administration, and (3) the geographical reach of governmental authority. (Tollenaar 1961, p. 412)

Home rule does not mean that the municipalities are granted authority to govern themselves completely free from all state control. The state legislature remains dominant over all matters deemed to be of state-wide concern and may continue to enact general laws that are of uniform application to all communities. Local autonomy (home rule) does, however, imply that through either constitutional amendment or statute the initiative, control, and responsibility for local governmental functions and services is passed to the municipal corporation *(Iowa Law Review,* 1964, p. 826).

Objectives of Home Rule

To Prevent Legislative Interference

One of the major objectives of home rule is to prevent legislative interference with local government. During a large part of the nineteenth century, under the dominant theory of legislative supremacy, cities were considered to be merely creatures of the state legislature. Charters were granted, amended, and revoked solely by the state lawmakers (Mott 1949, p. 11).

However, government by remote control is seldom satisfactory government, and when the government agency is a legislature in which cities have but minority representation, the evils are even greater. Legi-

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slative control of cities is fully as bad for the legislature as it is for municipalities themselves. The system of special legislation opens the door to special privileges which legislators find it hard to refuse. The sheer volume of these demands tends to swamp the lawmakers and prevent deliberation on the major issues of state policy. These local and special bills sometimes comprise half of the bills introduced in each session. Legislative interference with cities tends to turn state legislatures into spasmodic city councils (Mott 1949, p. 11).

To Permit Local Self-government

A second objective of home rule is to enable cities to adopt the kind of government they desire. The home rule concept has provided for variations in the structure of local government. The growth in the number, variety, and complexity of our cities has made it highly desirable to have a form of government that can adjust itself to local circumstances. This freedom to experiment with the form and structure of local government has been a major factor in the evolution of our contemporary process of local government (Schaller 1961, p. 402).

It is hard to arouse citizen interest in city hall when the important decisions are made at the state capitol. If local initiative is crushed and democratic participation in local government stifled, the widespread civic indifference often results, experience shows, in inefficiency and corruption (Mott 1949, p. 12). Moreover, home rule has been, in practice, responsible for the creation of a climate favorable to the growth of municipal government. It encourages cities to attempt solutions to their problems without continually running to the state legislature (Schaller 1961, p. 404).

To Give Cities Adequate Powers

A third objective of home rule is to provide cities with a sufficient amount of power to meet the increasing needs for local services. Local autonomy permits cities to take prompt action in dealing with local problems and needs as they arise, without having to petition the legislature for authority to act on matters not previously authorized by state law. Lacking home rule, municipalities with various day-to-day problems but without statutory power to solve them often refrain from taking action due to the expense, delay, and uncertainty involved in attempting to obtain legislative authorization (*Iowa Law Review*, 1964, p. 827).

If cities are to be able to meet the needs of their citizens promptly, it is essential that they be given the authority to determine those needs for themselves.

Complexity of Home Rule

Home rule for cities developed when it was recognized that the inferior

status of cities under state laws and the difficulty of obtaining needed legislation rendered them incapable of fulfilling their primary purpose of providing adequate services to their citizens. The resultant development fostered a system under which home rule citie sare creatures of the state, as are all local entities, but they enjoy a semi-independent status. They are subject to state laws in those matters which affect all the people of the state rather than the people of individual cities, yet they have a freedom and authority to act in respect to their internal affairs which is given to them and protected by the state constitution.

The theory of home rule is at variance with earlier concepts of municipal law. Therefore, because it was difficult to reconcile the respective roles of the state and its cities under home rule, there was a period when many courts failed to recognize the new relationship (Bolan 1960, p. 7).

Since home rule does not convey equal powers in every state, the real effectiveness of home rule is difficult to assess in general terms. The effect of home rule upon the powers of a state legislature with respect to local governments, and conversely upon the powers of the city with respect to area problems, will depend upon the type of home rule practiced in the particular state. Further, it must be emphasized that a particular theory of home rule will depend upon both the wording of the home rule provisions of the state constitution and the judicial interpretative gloss imparted by the courts of the state. It is quite often the case that the attitude of the judiciary towards the underlying principles of local self-government will exert a stronger influence in shaping a theory of home rule in a particular state than will the words of the constitutional provisions (Littlefield 1962, p. 14).

II. Politics of Home Rule

Nature of Home Rule Politics

Home rule is, as we have seen, a modification of the traditional relationship between the subordinate municipality and the sovereign state. Home rule, in effect, abridges the sweeping authority of the legislature, granting to the municipality certain powers and certain rights such as the authorrity to draft its own charter and decide its own procedures. Home rule provisions in a constitution do not, however, grant autonomy or anything like it. On the contrary, home rule grants but limited powers and rights, and local exercise of those powers and rights is in some degree subject to control and regulation by the legislature, the judiciary, and even the executive of the state (Lockard 1963, p. 122).

The modification of the traditional relationship between the state and the municipality cannot be brought about without causing a number of changes in the established power structure in which the traditional re-

lationship has been created and supported. The changes involve a long process of political rearrangement. Politicians on both sides—the advocates and the opponents of home rule—will exert themselves to attain more powers in a changing structure. They lobby, write articles appear before hearings, and otherwise promote the cause of their mutual or individual goals. Duane Lockard views the politics of home rule as follows:

> In some cases the zeal and interest become so strong that they relinquish their amateur standing and become professional pleaders attached to some reform organization. Contestants with heavy stakes in the operation of city governments may be less conspicuous than the reformers, but they respond because their interests are, for them, vitally important. It is true that the battlers may have a wrong conception of the proposals being made, and that they may be quite wrong in their assessment of the probable consequences of proposals on, for example, home rule, but the wrongness of their evaluation of a situation does nothing to diminish the fervor with which they fight. Their fears—of higher taxes, burdensome debt, irresponsible political machines, elimination of party activities, loss of patronage—are real and must therefore be put into the scale of evaluation of any contest over local powers (Lockard 1963, pp. 126–27).

In spite of the enormous efforts put forth by the home rule supporters in many states, the record shows that the compliance with home rule provisions was only a gesture while the action consisted of evasion, confusion, temporizing, and delay. The latter course resulted from the fear of the influential political elements in the states of the uncertain consequences that home rule might bring. Many politicians in both parties are skeptical of home rule because they are apprehensive of opening up a new source of power, interference with patronage, and any disturbance of the status quo (Lockard 1963, pp. 129–30).

The intricacies of contests over home rule are many and the battles are highly complicated, involving numerous technical aspects of legality, public finance, and administration. The following separation of the areas in which the contestants meet over home rule is used only for convenience of discussion.

Charter-Making

The structure, procedures, and powers of all municipalities are in varying degrees set by forces beyond municipal control. The city must not only conform to laws passed by the state legislature and the provisions of the federal and state constitutions, it also is subject to varying degrees of supervision by state administrative agencies. The courts also invariably have broad powers to weigh the validity of local actions (Lockard 1963, p. 117).

There are three major ways by which the states provide for home rule constitutionally: (1) self-executing, (2) mandatory, and (3) permissive.

Self-executing—A few states have enacted constitutional provisions in sufficient detail to enable cities to frame and adopt their own charters even though the legislature fails to pass implementing legislation. The constitution of Ohio, for example, provides that "any municipality may frame and adopt or amend a charter for its government. . . . " (Smith 1962, p. 19).

Mandatory—The majority of constitutional home rule provisions are mandatory in the sense that the legislature is directed to grant powers of self-government to the localities. These provisions generally confer home rule powers on the cities and authorize the legislature to implement those powers by supplementary legislation (Mott 1949, p. 18).

Permissive—The permissive constitutional provisions state that the legislature may grant home rule, leaving wholly to the legislature exactly what, when, and how. Although this eliminates any doubts concerning the constitutional power of the legislature to grant home rule to the cities, it has the fatal weakness that the opportunity thus given may be completely ignored (Smith 1962, p. 19).

Although not based on constitutional authority, the legislature may in some cases grant cities self-government; that is, "legislative home rule." States such as Connecticut provide home rule through legislative enactments.

Thus, the state constitution may permit or even command the legislature to enact home rule legislation, but it does not follow that the legislature will comply. The legislatures of Georgia, Nevada, and for many years Pennsylvania, ignored constitutional authorization of home rule. In Georgia, for example, after much confusing legislation and litigation over a mandatory home rule provision, the State Supreme Court held the provisions unconstitutional. A new permissive home rule constitutional amendment was then passed, in 1954, but an implementing statute has not yet been enacted. Although the Pennsylvania home rule provision went into the constitution in 1922, not until recently was anything done to effectuate it (Lockard 1963, p. 123).

As seen in the above, the process of charter-making provides a battleground in itself. The different stakes attached to a proposal lead to a battle regardless of the merit of the issue itself. There is nothing spared to gain the advantage in the war among the contestants with the accompaniment of articulate lobbying and devices to settle the question of legality.

Grants of Power

The concept of home rule is challenged in terms of the division of powers. There are involved two questions: first, is the governmental function completely separable? and second, do the states successfully define the demarcation line between the state and local functions?

Much of the theory of home rule assumes that there can be a clear-cut

separation of governmental functions as between the state and local governments. Eugene C. Lee has a somewhat different view:

> In the textbooks a chart is set forth depicting the triple layer cake of government in the United States, each layer clearly defined. But what we now appreciate is that government is not a layer cake. Instead, it is a marble cake analogy we should use, with almost every public program we might name—even including defense and foreign policy on the one hand and garbage collection on the other—involving allthree levels of government in a crazy, patchwork quilt of fluid intergovernmental relationships (Lee 1962, p. 486).

Another development of major importance for the appraisal of this concept has been the changing nature of the problems along with the passage of time. Highways, public health, water pollution abatement, and urban renewal, for example, are problems of state-wide concern. That these are matters of more than local significance has been recognized not only by the courts and state legislatures, but also by the municipalities that have sought both statutory and financial support from the state (Schaller 1961, p. 409).

In practice, the states have not established any clear pattern proving that any particular definition of the function of "local affairs" is precise.

The substantive powers that home rule may confer upon a municipality under its charter may either be defined broadly in the constitutional home rule provision or in the enabling acts, or in addition to this broad grant, certain powers may be specifically enumerated in the grants of power. Although a broad grant of powers produces flexibility, it tends to create also uncertainty over the scope of the municipality's substantive power, which is usually resolved only by litigation.

A few state constitutions attempt to spell out the scope of municipal home rule powers, but the preferred approach has been to leave the constitutional language broad and general except when dealing with the procedures for charter adoption. Thus, the job of defining home rule has been left largely to the courts. And what has been held to be a home rule power in a given circumstance may be held to be a state perrogative in another state or at another time (Tollenaar 1961, p. 411).

For instance, under the common law of Iowa municipalities possessed no inherent power but derived all of their authority from the state legislature which created them. As a result of the first tenet of the Dillon Rule, the municipalities were held to have only those powers expressly granted by the legislature. Therefore, except as qualified by the second and third tenets of the Rule, cities and towns could not exercise any authority unless expressly conferred by statute and the scope of the express authority granted by specific legislation was limited because such statutes were strictly construed under the Dillon Rule. The courts consistently held that

if there was any uncertainty or reasonable doubt as to whether a statute conferred a particular power upon a municipality, the doubt was to be resolved against the municipal corporation and the power denied (*Iowa Law Review* 1964, p. 835).

On the other hand, the Minnesota Supreme Court has upheld the position that since the constitution required the legislature to prescribe the limits beyond which the charter may not go, and since the legislature had prescribed such limits, it was not for the court to say that other and further limits or restrictions should have been imposed. The exercise of particular municipal powers, however, continued to be challenged in subsequent cases. As a result of such litigation, the Minnesota Supreme Court has, to a large extent, defined the scope of substantive power granted under Section 36 of the state constitution (*Minnesota Law Review* 1963, p. 632).

In determining whether a particular exercise of municipal power is within the scope of substantive powers granted by the constitution and the enabling act, the Minnesota court applies three tests. First, the power must not be "expressly or impliedly" withheld by the constitution or laws of the statute. Second, the power must be exercised within the territorial limits of the municipality. Third, the exercise of the power must be over a matter of municipal concern (*Minnesota Law Review,* p. 632).

Thus, the above two states place the judiciary in the most powerful position, next to the constitution itself, in defining the scope of proper exericse of functions of home rule municipalities.

In Iowa, the inevitable result of adherence to the Dillon Rule is that the chapters of Iowa's Code which prescribe municipal powers and procedures are voluminous with express grants of necessary powers. There are at least 2,700 sections pertaining to municipalities in the 1950 Code. Every legislature since the Constitution of 1857 has enacted some municipal legislation. Yet many of the specific grants are ridiculous. Many of the laws are also hastily and poorly drafted since the legislature does not have either adequate time to spend on, or knowledge regarding, matters of purely local concern (*Iowa Law Reviews* 1964, p. 836).

In response to the pressure from municipal officials, the fifty-third General Assembly in Iowa passed a resolution in 1949 establishing a Municipal Statutes Study Committee. After a through investigation, Committee concluded that the statutes applicable to cities and towns were complicated and often confusing, contradictory, and obscure. Furthermore, involved technical procedures often penalized the public due to delays and uncertainties resulting. The Committee argued that it was impossible for the General Assembly to anticipate all of the local problems resulting from the changing conditions and to grant specific authority to municipalities to enable them to cope successfully with such problems. Therefore, it was recommended that municipalities should be given broader powers of self-determination. No further action was taken by the legislature for thirteen

years, despite the fact that the General Assembly itself had initiated such a recommendation (*Iowa Law Review,* p. 838).

Metropolitan Area Problems

Legal Provisions

If home rule is to be developed and applied at the metropolitan level, then careful consideration must be given to the present distribution of home rule powers among municipalities and to adjustments in the theory and practice of municipal home rule which will be needed to accomodate new concepts.

It might seem that home rule powers would end at the boundaries of a municipal corporation and that, therefore, absent express constitutional provisions, home rule would not affect the annexation or consolidation powers in a particular jurisdiction. Such is not the case. The problem can be treated in three parts—namely, (1) what is the power of a home rule city with respect to annexation of contiguous territory? (2) What is the power of the state legislature to provide general laws controlling the manner and validity of annexation procedures? (3) What limits may be placed upon the possibility of a home rule city being annexed or consolidated with another municipality or county? (Littlefield 1962, p. 22)

The power which any city may have to annex adjacent territory is ordinarily determined by general statutes upon that subject. This rule will be applied to home rule cities unless the constitution grants annexation powers to a charter city. In most states having home rule provisions, however, the courts have held that home rule powers do not add anything to a city's power to annex territory. General laws must still be looked to for such power. The reasoning of these courts is that the power to annex territory is not a municipal affair, nor is such a power properly "for its own government."

However, a few courts have found annexation powers included within home rule powers, and these exceptions must be noted. Under the Missouri Constitution, the government and charter of St. Louis is fixed with respect to the methods and the manner of annexing territory to the City of St. Louis. Also, under the authority of the Home Rule Act, Texas home rule cities may include in their charters provision for annexation of contiguous territory (Littlefield, pp. 22–25)

In most home rule states, as in all other states, annexation is properly a subject for state legislation. While most of the home rule states do not treat matters of annexation and consolidation of municipal territory as the proper subject of local self-government alone, on the other hand, home rule as properly interpreted protects the home rule city itself from non-consensual annexation or consolidation as well. It is obvious that in most home rule states if some approach to area government is taken which anticipates

implementation on the state level without local approval, constitutional provisions will have to be adopted. This is not true, of course, in non-home rule states.

The theory that once a city becomes a home rule city under the constitution, nothing short of a constitutional amendment can change its status is undoubtedly subject to criticism as an absurd result (Littlefied 1962, p. 32).

Practices

The act of incorporating a municipality may of itself be regarded as an exercise of home rule power to determine the geographic reach of governmental authority. Some state constitutions expressly prohibit the legislature from enacting a municipal charter. Home rule, moreover, involves protection of existing municipal boundaries as against an attempt by the state legislature to change them by special act. It also involves, at least by implication, the insularity of such boundaries agains annexation by another home rule municipality.

In the metropolitan area situation, this concept would be severely restricted in any event by its inapplicability to territory already incorporated in another home rule municipality, even though one such municipality may be only a small fraction of the size of the other. Thus, home rule is frequently invoked in these situations as a means of defending minority rights. This has a pleasing sound, even though in reality a suburban minority may merely be claiming as rights certain advantages which are really privileges that can be granted only at the expense of the community at large (Tollenaar 1961, p. 415).

A celebrated case was introduced by Lyle Schaller in his September, 1961, *Political Science Quarterly* article previously cited. In Wisconsin, approximately one-half of the state income tax paid by an individual is returned to the municipality of his residence. A very small community, almost entirely surrounded by the city of Madison, included the residences of a large number of Madison's welathiest businessman. By incorporating as a village, this community became a separate municipality and thus cannot be annexed to the central city. The returned income tax makes it possible for the village to support itself with a general property tax rate about one-tenth that of Madison. In addition, the residents become exempt from the financial burden of such metropolitan problems as urban renewal, highways, and a growing school population. Any attempt to eliminate this "tax colony" is met by cries of "home rule (Schaller 1961, p. 409)." This overemphasis on the isolationist aspects of home rule has been a major factor in the inability of our metropolitan communities to develop solutions to pressing problems.

With the exception of Miami, every community that has tried to develop some type of metropolitan area-wide government has failed to

overcome this home rule fixation.

Much of the blame for the failure of regional planning can be attributed to the community isolationism fostered by excessive stress on home rule. As urban growth spilled over beyond the boundaries of the central city, the need for comprehensive metropolitan or regional planning became obvious to nearly everyone—including many staunch advocates of home rule. However, experience has demonstrated that effective planning cannot be carried out on a purely voluntary basis. Effective regional planning and complete home rule are necessarily incompatible goals.

Metropolitan conditions tend to limit significantly the amount of true municipal autonomy in the determination of substantive powers and the limits of governmental areas. The point is that the proper limits of home rule in metropolitan areas need to be understood and accepted, and that, if possible, constitutional provisions and statutes should so qualify home rule powers that they do not impede or prevent area-wide solutions to area-wide problems.

Indeed, many incorporations of municipalities, as in the Wisconsin case, are conceived and carried out with the express purpose of attaining home rule protection for municipal boundaries as against the annexation plans of a neighboring municipality, thus stymying efficient development of the area involved. If annexation is to be used at all in efforts to integrate the government of metropolitan areas, restrictions will have to be placed on the home rule cloaked rights to incorporate.

Yet such restrictions will not solve the problem of municipalities which already exist, and it is difficult to conceive of any workable scheme whereby the annexation powers of some municipalities could be ranked as superior to those of others. Voluntary cooperation is far from immune to the distruptive effects of metropolitan municipal home rule. The effectiveness of a joint study, agency, or facility often depends upon participation by all municipalities which are in a geographically or financially strategic position.

III. Home Rule Reconsidered

Since the time that the State of Missouri became the first to adapt the home rule idea into constitutional form in 1875, slightly more than one-half of all the states in the United States have adopted some form of home rule. The basic idea of Missouri's plan was to prevent legislative tinkering by empowering cities to frame a charter for their own government, the charter to be consistent with and subject to the laws and constitution of the state.

When home rule was taken up by California four years later, its provisions were broadened by granting cities not only charter-making authority but also the authority to legislate on certain subjects without the necessity of deriving specific authority from legislative enabling acts. As

other states joined the home rule movement, they contributed numerous other variations to the basic theme in attempts to adapt the home rule concept to local conditions and to overcome difficulties in applying the basic home rule doctrine to specific conditions (Smith 1962, p. 17).

The purposes or objectives of home rule have been altered as well since the inception of the original plan. According to Professor McBain, the purose of home rule is to specify an area of power for the cities in which they can act with complete freedom, much like the division of areas of action for the state and federal governments specified in the Federal Constitution (McBain 1913, pp. 109–110). His views were stated in 1913. In contrast, current thinking tends to place more emphasis on the idea of interdependence among cities, such as those in a metropolitan area. Proponents of this concept argue that it is unrealistic to promote a system of separation and independence among governmental units. They view home rule more as an integrating than a separating device (Tollenaar 1961, pp. 411–16).

The notion that home rule prevents the legislature from interfering on "local matters", thus relieving the legislature from unconsummateable demands for enactments on these matters, is challenged. The assumption that the state legislature is tinkering with the local government frequently stems from justifiable beliefs on the part of home rule advocates. They believe that the legislature, which is predominant rural in representation as compared to urban, is not in favor of satisfying the needs of the cities for which the home rule movement is initiated and toward which it is directed. Thus, they do not trust the state legislature to act in their behalf (Mott 1949, p. 11).

Schaller brings an interesting view to the belief that legislatures are rural dominated and less interested in urban affairs:

> The expressed willingness of cities to "go it alone" has been in notable contrast to the relationship of rural areas to the state government. An outstanding example is the matter of state-supported research. During the past decades agriculture has been declining and cities have been growing, both at a rapid speed. Only very recently have states been appropriating money for studies of urban problems, but many states have long had elaborate and expensive research programs devoted to the problems of agriculture (Schaller 1961, p. 406).

Thus, he preferred to attribute the situation to the cities' failure to develop and maintain better and closer relations with the state legislatures. In retrospect, it appears that some have overestimated the oppressiveness of legislative control and underestimated the state's interest in urban affairs.

The rapid urbanization of the nation should have resulted in closer cooperation between the states and cities. Instead, the states have re-

tained a rural orientation and the cities have continued their plea for greater freedom from state control. This division has left many problems unsolved and has found cities going more and more to Washington for help in such matters as urban renewal, mass transit, and sewage disposal.

Critics of home rule also argue that its theoretical justification is very limited in scope. It attributes to municipalities a kind of independence they do not possess. The state-municipal relationship is not that of a federation. Too often the perpetuation of a political subdivision's existence completely overshadows all other questions, including the fundamental one of service to its public (Schaller 1961, p. 408).

As another factor, the hope that the state legislature would be relieved of the overvoluminous duty of local legislation by the implementation of home rule has proved an illusion, due primarily to the fact that the insufficient constitutional or statutory provisions for home rule lead to endless requests for implementing legislation.

IV. Conclusion

With the passage of time, the original concept of home rule has, necessarily, been subject to revision for adaptation to existing cricumstances. The hostility and distrust of the state legislatures toward the cities and its problems seemed lessened, but the kind of home rule provided by the states has never been completely satisfactory. It is not only ill-equipped to cope with the changing and complex problems of municipalities of today, but also has helped little in relieving the state legislatures of almost impossible demands for special enactments to supplement the poorly designed home rule provisions.

In other words, the present system of home rule seems an unhappy product of political compromise, due in part to the fact that the process of making home rule effective has been too often superseded by oppsoing efforts of contestants in the political arena—efforts directed to achieving stakes attached to the kind of system of government they like in terms of both tangible gain and invisible social status or satisfactions which rank superior to the merits or "goodness" of reform ideas.

On the other hand, the changing nature of the problems the state as well as local governments face today is not necessarily conducive to a system of comprehensive home rule. The integration rather than division of government seems in order for the better solution to the problems to be tackled for years to come.

Therefore, it seems fair to say that the most acceptable system presently possible has evolved through all political battles and contests to date, but that it is doubtful that this system is the most workable that could be devised.

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