

MUNICIPAL HOME RULE IN MISSOURI

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In 1875, Missouri introduced to the science of American politics the then "startling" innovation of constitutional home rule¹—a device that has been described as exemplifying "something of the pioneer's daring originality of spirit in the matter of political institutions."² Home rule, or the privilege granted to local communities to frame, adopt, and amend their own charters, was not in itself novel since a few states had previously permitted certain of their cities to enjoy some freedom in this respect. In all such cases, however, the authorization had emanated from the legislature and hence had been entirely under the control and at the mercy of that body. The Missouri plan, for the first time in American political history, established municipal home rule by constitutional grant, so that theoretically at least the device was placed beyond the pale of legislative encroachment or annulment. As incorporated in the constitution of 1875, the home rule privilege was extended only to St. Louis and to such other cities as might attain a population of more than 100,000.³ The 1945 constitution liberalized this provision by granting similar authority to all cities of over 10,000 population.⁴

Municipal home rule in Missouri, especially for the larger communities, continues to be a problem of vital and important concern. The great demands placed upon the resources and ingenuity of urban areas in a period marked by the rapid expansion of municipal services have made it well-nigh imperative for local governments to enjoy a maximum degree of freedom and discretion in both legislative and administrative matters. The theory of home rule is founded on the belief that the communities themselves, since they are closer and more familiar with local problems, are generally in a better position than any higher echelon of government to understand and to deal sympathetically

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1. MO. CONST. Art. IX, §§ 16, 20 (1875).

2. MCBAIN, *THE LAW PRACTICE OF MUNICIPAL HOME RULE* 133 (1916).

3. See note 1 *supra*.

4. MO. CONST. Art. VI, § 19. To date, five (St. Louis, Kansas City, University City, Springfield, and Columbia) of the twenty-two cities in Missouri now eligible to adopt home rule charters have availed themselves of this privilege. Three others, Joplin, Webster Groves, and Ferguson, are presently engaged in the process of drafting such constitutional charters.

with them. This is in accord with the sound Anglo-Saxon tradition of strong and self-reliant local government. The chief goals of home rule have therefore been: (1) to prevent or minimize legislative interference in matters that are primarily of local concern; (2) to permit the local communities to adopt the type and form of government they desire; (3) to provide the cities with sufficient powers to meet the increasing needs for local services without the necessity of repeatedly seeking new authority from the legislature as they are compelled to do when the charters are legislative enactments.⁵

These basic aims of municipal home rule have seldom been looked upon by the courts with any degree of enthusiasm or even favor. As was frequently the case, the members of the judiciary were equipped neither by temperament nor training to deal with this new concept of city government, so that they tended to look upon home rule as an attempt by the cities to usurp legislative power and to set themselves up as independent communities free from state control. Such an attitude seems to have been particularly prevalent in Missouri where the history of local rule is heavily weighted with the judicial decisions that have attempted to define the position of self-chartered municipalities and their relationship *vis a vis* the state.⁶ The role that the judiciary has played in determining the fate of home rule both in Missouri and elsewhere has been greatly magnified not only because of the difficulties which are inherent in the interpretation of any grant of power to political entities, but also because of the unwillingness of constitution makers to define more clearly the status of self-chartered communities. While the present article is concerned primarily with the contemporary legal status.

5. For a recent analysis of the objectives of home rule see MOTT, HOME RULE FOR AMERICA'S CITIES (1949).

6. This attitude of suspicion was overtly evident as late as 1928, when a member of the court in *State ex rel. Hussman v. St. Louis*, 319 Mo. 497, 5 S.W.2d 1080 (1928), exclaimed:

There is much in some of the writings upon this case [*Ewing* case, text supported by note 12 *infra*] that smacks strongly of the "*imperium in imperio*" doctrine as to matters of local government for St. Louis. . . . [S]ad will be the day when such a view . . . shall ever become law in this State. Up to this good hour our court has stood with a firm face against it, with only an occasional muttering to the effect that such a charter is to the city what the Constitution is to the State. These mutterings are without foundation. They would establish home rule for such cities by ordinances rather than by state laws.

Id. at 529, 5 S.W.2d at 1093.

of the home rule municipality in Missouri, a brief recounting of the judicial background and of the major trends that have manifested themselves in earlier court pronouncements is unavoidable.⁷

Home rule in Missouri was unfortunately born with serious congenital defects. When the constitution makers of 1875 were prevailed upon to accept the plan for local autonomy proposed by the St. Louis delegation, their uncertainty as to the significance of the new device and their fear that the sovereignty of the state might in some wise be impaired caused them to surround the enabling grant with such restrictive phraseology that they left the matter of home rule in a state of ambiguity. In the constitution as finally drafted they provided that charters adopted pursuant to the grant "shall always be in harmony with and subject to the Constitution and laws of Missouri,"⁸ and the additional safeguard that "the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this state."⁹ This latter clause was deleted in the new constitution adopted in 1945, but the former proviso has been retained virtually unchanged.¹⁰ Taken at face value, this language would appear to indicate that what the state gave with one hand it took away with the other. For if the charter must conform to statutory law as well as to the organic document, how could a *constitutionally* guaranteed sphere of local autonomy exist? The legislature under such circumstances could at will render any charter provision inoperative simply by passing a

7. For a more comprehensive treatment of the earlier decisions see MCBAIN, *op. cit. supra* note 2; MCGOLDRICK, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE* (1933); and SCHMANDT, *HISTORY OF MUNICIPAL HOME RULE IN ST. LOUIS* (1948).

8. Mo. CONST. Art. IX, § 23 (1875).

9. *Id.* § 25. There were two separate grants incorporated into the Missouri Constitution, one pertaining to St. Louis, § 20, and the second to cities of more than 100,000 inhabitants, § 16. Both required the charters adopted pursuant thereto to be in harmony with state law. Section 25, on the other hand, was directed solely at St. Louis. It was probably inserted in the basic law because of the constitutional authorization that was also given to the city of St. Louis to separate itself from the county; and the Convention members, uncertain as to the effects of this additional innovation, wanted to make doubly sure that they were not giving away any of the lawmaking authority of the General Assembly insofar as St. Louis was concerned.

10. Mo. CONST. Art. VI, § 19, the pertinent provision of which states: "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state. . . ."

contrary or conflicting statute. And if the General Assembly had the same power over St. Louis that it had over any other city in the state, what possible meaning could home rule have for the only municipality eligible at that time to adopt it?

Such was the situation that confronted the Missouri courts when they were called upon to decide cases involving questions of home rule. Not only were they forced to deal with a new and untried scheme of municipal government but, what was even more perplexing, they were faced with the necessity of reading some semblance of meaning into the vague and apparently contradictory provisions of the organic law which created the device. That the judicial effort in this regard has met with little success is readily apparent to the student or the lawyer who attempts, as the high state tribunal itself once described it, to tread "... the mazes of adjudication, perhaps to become lost in the labyrinth of the ingenious and divergent reasons which pervade the cases in respect to the power . . . of municipalities to adopt charters . . ." ¹¹ To the credit of the court, however, it must be said that no concerted effort was made to judicially emasculate home rule *in toto* as a literal reading of the organic provisions might have warranted. At the same time, the court's obvious failure to deal with the problem understandingly and with some degree of consistency has left a legacy of ambiguous and even conflicting decisions which still rise to haunt the tribunal in present day cases.

The first opinions of the Missouri Supreme Court in the interpretation of the constitutional home rule provisions made unmistakably clear the supremacy of the General Assembly over cities adopting such charters. In *Ewing v. Hoblitzelle*,¹² a case which involved a conflict between a state statute and a provision of the St. Louis charter prescribing the manner of appointing local election judges, the court held that the statute governed, declaring that when the legislature has acted

... by a general law and such law is, in any of its provisions, in conflict with a charter provision that the law prevails over the charter in obedience to the mandates of the constitution that "such charter and amendments shall always be in harmony with and subject to the Constitution and laws of the state."¹³

11. State *ex rel.* Goodnow v. Police Commissioners, 184 Mo. 109, 132, 71 S.W. 215, 220 (1902).

12. 85. Mo. 64 (1884).

13. *Id.* at 78.

The specification that only a general law (in contradistinction to a special law, or one which is made applicable only to a particular municipality) would take precedence over the charter offered little consolation to the proponents of home rule. By classifying cities according to population, legislative bodies have been able to successfully evade the prohibition against special laws. The General Assembly in Missouri has consistently done this by passing statutes applicable only to municipalities within a certain population range, thereby excluding all cities but the one or several it desired to single out.¹⁴

The *Ewing* decision demonstrated that the measure of local autonomy to be enjoyed by the cities was almost entirely dependent upon the pleasure and self-restraint of the state lawmakers. As time passed, the court realized that a more intelligent basis than this absolute and rigid criterion for resolving conflicts between state enactments and charter provisions had to be found if the home rule sections of the constitution were not to be completely nullified. A new approach toward the solution of this dilemma was evident by the turn of the century. In *State ex rel. Kansas City v. Field*,¹⁵ the court held that the freeholders' charter of Kansas City operated to repeal a prior state statute in respect to street opening proceedings since the subject matter "naturally falls within the domain of municipal government."¹⁶ And in *Kansas City ex rel. North Park District v. Scarritt*,¹⁷ the high tribunal stated that the decision in the *Ewing* case should

14. For a brief time the court held that the legislature could not single out St. Louis by a population classification outside of the four classes established by law (and limited by the constitution to that number), and thereby legislate specially for it: *St. Louis v. Dorr*, 145 Mo. 466, 41 S.W. 1094 (1898); *Murnane v. St. Louis*, 123 Mo. 479, 27 S.W. 711 (1894). A contrary position, without specific reference to the two earlier decisions, was taken in *Kansas City v. Stegmiller*, 151 Mo. 189, 52 S.W. 723 (1899), and in *State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S.W. 524 (1899). In these latter two cases, the court held that the constitutional provision directing the General Assembly to provide for no more than four classes of cities and towns (MO. CONST. Art. IX, § 7 (1875) did not apply to municipalities adopting home rule charters, but that such cities constituted an additional class distinct from those chartered and classified by the legislature. This meant that the General Assembly might legislate directly for such cities without infringing the constitution. Although this was the rule followed in subsequent cases, it was not until 1928 in *State ex rel. Carpenter v. St. Louis*, 318 Mo. 870, 2 S.W.2d 713 (1928), that the classification doctrine announced in the *Murnane* and *Dorr* cases was expressly overruled.

15. 99 Mo. 352, 12 S.W. 802 (1889).

16. *Id.* at 356, 12 S.W. at 803.

17. 127 Mo. 642, 29 S.W. 845 (1895).

not be held to warrant the exercise of state legislative power over home rule charters so far as relates to the government of subjects of merely local and municipal concern. Finally, in *St. Louis v. Meyer*,¹⁸ the court expressly declared that home rule charters need be in harmony with and subject to only those laws of the state which are of general as distinguished from local concern. This was the very same criterion that Joseph Pulitzer of St. Louis, an ardent home rule advocate, had insisted upon at the constitutional convention almost thirty years before but which that body had not seen fit to incorporate into the organic document.¹⁹ Had it done so, much of the previous litigation might have been avoided and home rule established on a more solid foundation.

The validity of this state-local or primary interest test was thrown into doubt after a brief period of use by the decision in *State ex rel. Garner v. Missouri and Kansas Telephone Company*,²⁰ in which it was held that the City of St. Louis had no authority to set the rates for local telephone service even though such action conflicted in no way with state laws or regulations. Indicating its disapproval of the state-local criterion, the court said:

. . . [I]t is extremely unfortunate that this Court ever attempted to solve the problem by drawing a distinction between matters of mere local concern and matters of state concern, and to say that as to matters of mere local concern the municipality has power to legislate. To my mind no fixed, certain, general or intelligible rule can be formulated upon such a distinction, which will answer or solve the questions that will arise.²¹

The court then declared that a home rule city had no authority to exercise a function that was of a governmental as distinguished from a proprietary nature without an express grant from the legislature regardless of whether the matters covered by such function were essentially of local concern or not. A strict application of this doctrine would obviously leave a home rule city helpless in the absence of statutory authorization to pass any ordinance involving the exercise of its taxing or police

18. 185 Mo. 583, 84 S.W. 914 (1904).

19. 12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 461 (Loeb & Shoemaker ed. 1930).

20. 189 Mo. 83, 88 S.W. 41 (1905).

21. *Id.* at 104, 88 S.W. at 44.

powers. The only discretion that a self-chartered municipality could exercise under such an interpretation would be in respect to its purely corporate or proprietary activities such as the maintenance of streets and sewers, and the furnishing of water, electricity, or other utilities. Fortunately for the cause of home rule, this construction was overlooked for the next twenty-five years as the court returned to the doctrine of state-local interests in determining the powers of home rule cities and in resolving conflicts between statutory enactments and charter provisions.²² The *Garner* doctrine, however, proved to be of more than historical or academic interest since it has recently reappeared in modified form, as will presently be shown.

A further development in the judicial position toward home rule occurred in 1928, when the court held that both the zoo²³ and the public library system of St. Louis²⁴ were educational institutions and as such fell within the category of governmental rather than proprietary functions. The court was most likely influenced by its desire to keep these institutions out of political control,²⁵ but in doing so it was compelled to interpret the dis-

22. While the acceptance of the state-local interest test was significant, it proved to be of limited advantage to the home rule cities, for in almost every instance in which a charter provision came into conflict with a state statute, the latter was upheld by the court: *St. Louis v. Tielkmeyer*, 226 Mo. 130, 125 S.W. 1123 (1910) (regulation of liquor sales); *St. Louis v. Meyer*, 185 Mo. 583, 84 S.W. 914 (1904) (licensing of peddlers). On the other hand, when there was no conflict with state statutes, the power of the city was readily upheld: *St. Louis v. Bernard*, 249 Mo. 51, 155 S.W. 394 (1912) (regulating the hours of opening and closing grocery shops); *St. Louis v. DeLassus*, 205 Mo. 578, 104 S.W. 12 (1907) (prohibiting the sale of meat on Sunday); *St. Louis v. Liessing*, 190 Mo. 464, 89 S.W. 611 (1905) (setting up standards for milk purity). The only significant exceptions to this pattern of judicial action have been in matters pertaining to the opening and grading of streets, the construction of sewers, and the establishment of parks. In several of these instances, charter provisions have been held to supersede contrary state laws. See *In re East Bottom Drainage & Levee District v. Kansas City*, 305 Mo. 577, 259 S.W. 89 (1924); *Kansas City ex rel. North Park District v. Scarritt*, 127 Mo. 642, 29 S.W. 845 (1895); *Kansas City v. Field*, 99 Mo. 352, 12 S.W. 802 (1888).

23. *State ex rel. Zoological Board v. St. Louis*, 318 Mo. 910, 1 S.W.2d 1021 (1928).

24. *State ex rel. Carpenter v. St. Louis*, 318 Mo. 870, 2 S.W.2d 713 (1928).

25. The library and the zoo had been established under legislative enabling acts which provided for an independent governing board and which required the city to levy and collect annually a fixed mill tax for the support of these institutions. The city's attempt in 1927 to assert control over the appropriation to the library and zoo on the grounds that their operation and maintenance were matters of municipal concern over which the General Assembly could exercise no authority (such as specifying the tax rate for their support) brought on the suits in question.

inction between functions of local and those of state concern in such a way as to further narrow the home rule zone. For if such an institution as a zoo is not a matter of purely local concern in which a charter provision would take precedence over a legislative act, then it is difficult to conceive of any matter which theoretically could not be controlled by state action. What was more significant, however, than the meaning given to matters of state-local interest in these specific instances was the strong suggestion that the General Assembly could assume jurisdiction over any function of a home rule city except its *municipal corporate* concerns. In *State ex rel. Carpenter v. St. Louis*,²⁶ it was stated that:

. . . [A] municipal corporation may be considered in two aspects: that which relates to its corporate functions only, and that in which it discharges certain governmental functions, police powers delegated to it. Matters of purely municipal corporate concern a special charter may control. . . .²⁷

The emphasis here was not on the state-local interest standard but on the governmental-proprietary function concept as the determining test of municipal authority. While the exercise of all proprietary activities is essentially a matter of local concern, there are many functions performed by the city in its non-corporate or governmental capacity that are primarily of a local nature such as fire protection, traffic control, and the licensing of businesses. To apply the criterion implicit in the *Carpenter* case in preference to the traditional rule of primary interest would deny local autonomy over these vital activities. Furthermore, as the numerous cases pertaining to municipal liability show, the distinction between governmental and corporate functions is as much a subject of dispute and uncertainty as is that between general and local interests.

If there were any doubts as to the judicial acceptance of the governmental-proprietary function rule, they were unequivocally resolved in *Coleman v. Kansas City*,²⁸ a case which dealt with a conflict between the provisions of a state statute and the Kansas City charter pertaining to the salaries of the local license collector. In holding that the statute prevailed, the court declared:

. . . [A]s to matters pertaining to private, local corporate func-

26. 318 Mo. 870, 2 S.W.2d 713 (1928).

27. *Id.* at 893, 2 S.W.2d at 720.

28. 353 Mo. 150, 182 S.W.2d 74 (1946).

tions the city holds its power independent of control by the General Assembly, but as to governmental functions the State retains control. On this point the city's argument is wholly based on the fact that the license taxes are used exclusively for municipal purposes. That fact is not determinative. *The distinction is not between local and general concern, but between corporate and governmental functions. The power of taxation is a governmental function. . . .*²⁹ [Italics added.]

It should be observed that the *Carpenter* and *Coleman* cases did not constitute a complete return to the *Garner* doctrine insofar as that ruling would deny a home rule city control over any governmental function in the absence of statutory delegation. The two later cases would permit a self-chartered municipality to exercise jurisdiction and control over such activities without legislative authorization if they were primarily of local concern and if there was no contrary or conflicting enactment of the General Assembly in existence. This was the rule that was emphasized in a comprehensive summation of the powers of a home rule city which the court undertook in *Kansas City v. J. I. Case Threshing Machine Company*.³⁰ Admitting that its prior decisions were by no means harmonious, the court defined the significance of local rule, saying:

It is an essential element of all constitutional provisions establishing the principle of municipal home rule that the Constitution and general laws of the State shall continue in force within the municipalities which have framed their own charters, and that *the power of the municipality to legislate shall be confined to municipal affairs*. On the other hand, after the adoption of a home rule charter by a municipal corporation, *the Legislature cannot, even by a general law, affect the powers of the municipality with respect to matters of municipal and local concern*.³¹

Although this passage would seem to adhere to the state-local interest test, the court went on to interpret what it meant by municipal affairs in terms of the governmental-proprietary function doctrine, thereby compounding the confusion rather than clarifying the issue as it had set out to do:

. . . [A]s to its form of organization and as to its private, local corporate functions, and the manner of exercising

29. *Id.* at 161, 182 S.W.2d at 77.

30. 337 Mo. 913, 87 S.W.2d 195 (1935).

31. *Id.* at 923, 87 S.W.2d at 200.

them, the Constitutional provision grants to the people of the cities designated, part of the legislative power of the State for the purpose of determining such matters and incorporating them in their charter as they see fit, free from the control of the General Assembly. . . . [I]n matters, which are governmental functions, the State retains control and as to such matters, the provisions of a city charter, although adopted under the constitutional provision therefor, must be and remain consistent with and subject to the statutes of the State enacted by the Legislature.

It is . . . sometimes difficult to determine the border line between governmental and corporate functions. . . . However, certain functions have, by this court, definitely been determined governmental, the control of which remains in the State. The police power is one. . . . Some of the other matters, which are purely governmental functions, are those pertaining to suffrage and elections, education, regulation of public utilities and administration of justice. . . . These may be delegated to or taken away from the city in whole or in part, within the wisdom of the Legislature.³²

Despite the court's patent inconsistency and lack of preciseness in terminology, it now appeared from this series of cases that the constitutional ambiguities of the home rule provisions had finally been resolved in favor of the governmental-corporate functions doctrine, with the problem of distinguishing between the activities which fall into these respective categories remaining.

As might be anticipated, the question of revenue is the most important single issue facing home rule municipalities today. The inability or unwillingness of the rural dominated legislatures to understand the financial plight of the larger urban areas has underscored the demand of the municipalities for a substantial measure of freedom in working out their local tax problems. The subject of taxation as an incident of local autonomy has involved two aspects: one, the extent to which a self-chartered city can levy taxes without specific authorization from the legislature; and two, the extent, if any, to which such a municipality can exercise that power free from legislative interference. As to the first problem, the Missouri courts have generally sustained the right of home rule cities to levy taxes without statutory delegation in those instances where the tax was not in conflict or already appropriated for state use by the General Assembly. At an early date, the supreme court of the state declared:

32. *Id.* at 926, 927, 87 S.W.2d at 202, 203.

... [I]t must be presumed that the framers of the constitution had in their minds the fact that it was wholly impossible to conduct city government in a city like St. Louis without the power of taxation being vested in those charged with conducting such government. The right to adopt a charter necessarily implied the right to put in it such provisions as would enable the city to maintain its government.³³

So also in 1928, the levy of a city tax by St. Louis on cigarettes sold in packages was upheld,³⁴ and in 1930 the right of the city to impose a license tax on the sale of gasoline was affirmed.³⁵ In neither case was there any statutory authority for such levies. With respect to the second aspect, there existed for a time some indication that the court would protect a home rule city from legislative interference if the tax was one of strictly municipal concern.³⁶ By the time of the *Coleman* case, with its reiteration of the governmental-corporate function test, any such hope had vanished and it had become settled law that enactments of the General Assembly involving taxation always prevail over inconsistent charter provisions.

This leaves one question as to taxation not fully determined. If the state has pre-empted to itself a tax source but has not specifically prohibited the cities from imposing a similar tax, would the imposition of such a tax by a home rule municipality be contrary to law? In *Kansas City v. Frogge*,³⁷ a 1943 decision, a Kansas City ordinance imposing a compensating use tax on all tangible personal property purchased for use in the city upon which no sales tax had been paid was held invalid. The court said that the tax did not regulate within Kansas City a competitive condition which was local or municipal in character but one which obtained throughout the state due to the statewide application of the Sales Tax Act. Since the legislature had not attempted to deal with this situation in the Sales Tax Act and had not delegated the power to the city to do so, the court concluded that the use tax ordinance was void. While the decision is not too explicit in this point, it seems to infer that when the legislature has appropriated a specific tax source, the cities are thereby forbid-

33. *St. Louis v. Sternberg*, 69 Mo. 289, 298, 299 (1879).

34. *Ex Parte Asotsky*, 319 Mo. 810, 5 S.W.2d 22 (1928).

35. *Automobile Gasoline Co. v. St. Louis*, 326 Mo. 435, 32 S.W.2d 281 (1930).

36. *St. Louis v. Bircher*, 76 Mo. 431 (1882).

37. 352 Mo. 233, 176 S.W.2d 498 (1943).

den not only to duplicate the tax but to levy any other tax that might be complementary or closely associated with the one provided for by statute. And in a later case, the court indicated by obiter dictum that a municipal income tax would be invalid even though not specifically forbidden by law since it would "diminish *pro tanto* the State's revenue from the State income tax."³⁸ These indications plus the general attitude of the judiciary toward local autonomy make it reasonably certain that the pre-emption of a tax source by the General Assembly precludes the home rule municipality from levying a similar tax without legislative authorization.

The experience of the City of St. Louis with an earnings tax is illustrative of the difficulties that surround the whole question of taxation and home rule. To meet its increasing need for revenue, in 1946 the city enacted a tax on all salaries and corporate profits earned within its municipal boundaries.³⁹ The validity of the tax was promptly attacked on the basis, among other things, that there was no state law permitting St. Louis to impose a tax of this nature.⁴⁰ The *Garner* case was, of course, cited in support of this position. The city, on the other hand, insisted, and it would seem correctly so in view of the *Carpenter* and *Coleman* decisions, that no statutory authority for the imposition of the tax was necessary since the matter was one of essentially local concern and since there was no question of conflict with any existing state law. The court, while paying lip service to the doctrine enunciated by the city, avoided the real issues in the case by holding that the provisions of the charter were not specific enough to authorize the levying of a tax of this

38. *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 658, 203 S.W.2d 438, 443 (1947). A somewhat more favorable view was taken in *Ploch v. St. Louis*, 345 Mo. 1069, 138 S.W.2d 1020 (1940), in which the court sustained the cigarette tax ordinance of St. Louis as against the objection that it contravened the state Sales Tax Act prohibiting municipalities from imposing taxes on sales of personal property subject to the sales tax. The court held that since the sales tax was paid by the purchaser and the cigarette tax was an "occupation" tax on the merchant, the two were not conflicting. Another instance of a more liberal attitude on the part of the court occurred in *State ex inf. Taylor ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 228 S.W.2d 762 (1950), in which the power of Kansas City under its home rule charter to extend its municipal boundaries by annexing territory was upheld, although there was no existing legislative enabling act authorizing it to do so.

39. *CITY OF ST. LOUIS ORDINANCE 43783* (1946).

40. *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 203 S.W.2d 438 (1947).

nature. The particular clause of the charter at issue stated that the city shall have power “. . . to assess, levy and collect taxes for all general and special purposes on all subjects or objects of taxation.”⁴¹ In its opinion, the court declared that constitutional home rule is a grant of power to the people of a municipality who may then delegate to the local government whatever portion of that authority they deem desirable.⁴² Since the court felt that the charter provision just cited gave no clear indication that the people of St. Louis intended to give its Board of Aldermen the power to impose an earnings tax, the attempted levy was nullified for want of organic validity. It seems strange that twenty years before, the court had ruled that the same section of the St. Louis charter was “. . . sufficiently broad to authorize the city to levy any kind of a tax which is not inhibited by some other provision of the charter or by some constitutional or statutory provision.”⁴³

Another interesting issue in the earnings tax case was discussed by the court and left unanswered. Did the applicability of the tax to non-residents employed within St. Louis make the measure one of general or state rather than local concern, so that even with definite charter authorization the levy would have been unlawful? In this connection, the court said :

41. CITY OF ST. LOUIS CHARTER Art. I, § 1 (1) (1946).

42. The Court based its decision on *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W.2d 498 (1943), in which it was stated:

The people of a city which has been granted the right by the people of the state to frame and adopt a charter may not deem it desirable or needful to delegate under the charter of their city all of those powers which may be delegated by the legislature to cities organized under general law. So the powers which plaintiff city may exercise, through the constitutional grant of the right to frame and adopt a charter, are those powers which the people of the city delegate to it under its charter, if unrestrained by constitutional limitation.

Id. at 241, 176 S.W.2d at 501. In some states, home rule charters like state constitutions are considered limitations on the powers of the government rather than grants of authority. Under this view, the city would have the power to impose a tax (assuming it was not contrary to the constitution or general state laws) unless it was *prohibited* by the charter. See *Trebilcox v. Sacramento*, 91 Cal. App. 257, 266 Pac. 1015 (1928). Such a rule is more favorable to the cause of local autonomy, but it does not represent the majority viewpoint. As one authority on municipal government has observed.

Unlike the state, which may undertake anything not prohibited by the state or federal constitution, the cities labor under two handicaps: they can do nothing which is prohibited to them, and they can only do what is specifically permitted.

MOTT, *op. cit. supra*, note 3 at 10.

43. *State ex rel. People's Motorbus Co. v. Blaine*, 332 Mo. 582, 587, 58 S.W.2d 975, 977 (1932).

The impact of the "earnings" tax contemplated by the ordinance under adjudication here would fall on nonresidents of the City who might be residents of any and every county and city of the State—and other States. And if there be now or hereafter other cities in the State with charters containing a provision as broad as Sec. 1, Art. 1, Par. 1 of the St. Louis charter, they could retaliate with a corresponding ordinance which would equally bind citizens of St. Louis and all other like cities. Certainly such ordinances would not be matters of purely local concern, from the viewpoint of the State government.⁴⁴

The court then went on to make a nebulous if not illogical distinction between tax measures that are primarily for regulatory purposes and those that are solely for revenue, saying:

It is true that as regards the police regulations of a city, all who go there must obey them. So too, perhaps, of some excise taxes, especially if they are pseudo-regulatory and therefore partake of the police power. One who buys gasoline in St. Louis must pay the tax thereon, and one who purchases cigarettes must pay the stamp tax. But in general such taxes are imposed only on citizens or residents of the jurisdiction. That is true of our State income tax, Sec. 11343, R.S. 1939—Mo. R.S.A. And the tax considered in the Frogge case, *supra*, was imposed on the *use* of property in the City, and was evidently aimed at residents. The same was true of the tax on the *storage* of gasoline in the People's Motorbus case, *supra*. But in the instant case a pure revenue tax is imposed on non-residents who perform work or services within the City. *We are not holding the ordinance that far invalid*, but are ruling merely that it is not authorized by the abstract provisions of Art. 1, Sec. 1, Par. 1 of the charter.⁴⁵ [Latter italics added.]

The Attorney-General in an opinion issued on July 9, 1953, construed this language to imply that the power to authorize the imposition of a tax on income earned by residents of St. Louis and by non-residents employed in St. Louis could be accomplished by an amendment to the city charter and that a legislative enabling act would be unnecessary.⁴⁶ To many of us it would seem that the implication in such holding points in the opposite direction.

The earnings tax decision left the city with two alternatives:

44. *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 659, 203 S.W.2d 438, 444 (1943).

45. *Id.* at 659, 660, 203 S.W.2d at 444.

46. Unpublished.

either to amend the charter or to seek the passage of an enabling act in the General Assembly. Although the latter course was chosen with successful results,⁴⁷ the danger that is implicit in such reliance on the understanding and cooperation of the legislature has now become evident. The enabling statute under which the city is presently imposing the earnings tax expires by its own terms in April, 1954.⁴⁸ Despite this fact and heedless of the earnest pleas of St. Louis officials, the current 1953-54 session of the General Assembly has now been adjourned *sine die* without any action being taken to renew or extend the grant. Since the next regular session does not convene until January, 1955, the city will be deprived of a vital and necessary source of revenue unless the Governor calls a special session of the General Assembly and that body reverses its previous position on the tax, or unless the city takes steps to amend its charter. Even if the latter course were adopted, it is still doubtful as to how the court would look upon the tax in view of the state-local interest issue which was left unanswered in the earnings tax opinion. Home rule becomes somewhat of a mockery when the mayor of a large municipality is forced to tour the entire state (as Mayor Tucker of St. Louis has recently done) in order to canvass the support of rural groups and rural legislators for a tax program that is applicable solely to that one city.

The basic issue involved in the earnings tax case, that of the right of a home rule city to levy taxes without statutory authorization, again came before the court in 1950.⁴⁹ University City, a self-chartered municipality, had established sewer districts within its corporate limits and had issued special tax bills to pay for the construction costs. The validity of these assessments was attacked by an affected property owner who contended that the city had been given no statutory authority to establish sewer districts. Unlike the situation that St. Louis had faced in the earnings tax case, the University City charter contained a specific grant of power to make public improvements including the construction of sewers. In upholding the validity of the tax, the court pointed out that while the power to tax is a function inher-

47. MO. REV. STAT. §§ 92.110-92.200 (Supp. 1951).

48. *Ibid.*

49. *Giers Improvement Corp. v. Investment Service, Inc.*, 361 Mo. 504, 235 S.W.2d 355 (1950).

ent in the state, there are matters governmental in character, including taxation, over which a city may exercise authority delegated to it. In the case of a city organized under general law, delegation is by *statute*; in the case of a home rule municipality, the city may exercise such powers of local self-government as the people of the community have delegated to it by *charter*. This is because, the court stated, "the sovereign people of the State by their Constitution have set over, transferred, or granted to the people of the city, a part of the state legislative power."⁵⁰ Hence, charter provisions "consistent with and subject to the Constitution and laws of the States"⁵¹ have the force and effect of enactments of the General Assembly. This was a reasonable and logical opinion, and one which could give no cause for complaint to the proponents of local autonomy. The simplicity and clear-cut nature of the issue involved, the orthodox character of the tax, and the freedom from any conflict of state-local interests were undoubtedly contributing factors to the result attained.

At this point, the basis for judicial determination of the powers of home rule municipalities would seem to have acquired some degree of certainty were it not for the disturbing language found in *Turner v. Kansas City*⁵²—language which once again raised the ghost of the old *Garner* case doctrine. In upholding a Kansas City ordinance which prohibited fortune telling for pay, the court observed that the *Garner* opinion (upon which the defendant relied) was too broad in requiring an express legislative delegation *in every instance of governmental functions* to municipalities operating under a constitutional charter. The court then explained that establishing charges for telephone service (the function that had been at issue in the *Garner* case) "is such a *high governmental prerogative* as to require an express and specific delegation to vest such power in a municipality."⁵³ Did this mean, as the language patently indicated, that if the regulation of fortune telling had been considered as the exercise of a high governmental prerogative, the Kansas City ordinance would have been declared invalid? Did the court, in other words, intend that this be another element for judicial ascertainment in determining the powers of self-chartered municipalities? If so,

50. *Id.* at 510, 235 S.W.2d at 358.

51. *Ibid.*

52. 354 Mo. 857, 191 S.W.2d 612 (1945).

53. *Id.* at 864, 191 S.W.2d at 615. (Italics added.)

whenever a city assumed an activity of a governmental nature, such function would not only have to conform to the constitution and laws of the state and be primarily of local rather than general concern, but it would also have to be a power that would not fall into the category of a "high governmental function." To modify the test of local authority in this way would create chaos where confusion already existed. It would be conceivable, for example, that under such a doctrine the court might well hold in some future case that the levying of an earnings tax involved a high governmental prerogative which could not be exercised without a legislative enabling act, no matter how specific the city charter might be.

Actually, the language of the *Turner* case constituted little more than a rationalization of the position that the court had been taking for many years. Whenever it had been confronted with the exercise of a novel or other-than-ordinary power by a home rule municipality, it had usually found some basis for denying that authority until the legislature had acted. The matter of zoning by a self-chartered city is a case in point in this respect. In 1918, when zoning was still regarded as an innovation and there were no statutory enactments dealing with it, the City of St. Louis had passed a comprehensive zoning ordinance dividing the city into residential, commercial, and industrial districts, and regulating the type of buildings that could be constructed in each area.⁵⁴ The validity of the ordinance was promptly attacked by the owner of a lot in a residential district who had been denied permission to erect an industrial plant on his property.⁵⁵ The court held that since the ordinance made no provision to compensate the owner for damages resulting from the restriction, it constituted a taking of property without due process of law. Four years later, after the General Assembly had passed an enabling act authorizing the cities to adopt comprehensive zoning regulations,⁵⁶ the same type of zoning ordinance for St. Louis was sustained as a valid exercise of the city's police power.⁵⁷ If

54. CITY OF ST. LOUIS ORDINANCE 30199 (1918).

55. *State ex rel. Penrose Investment Co. v. McKelvey*, 301 Mo. 1, 256 S.W. 474 (1923).

56. MO. LAWS 1925, pp. 307-313, as modified in MO. REV. STAT. §§ 89. 010 *et seq.* (1949).

57. *State ex rel. Cadillac v. Christopher*, 317 Mo. 1179, 298 S.W. 720 (1927).

the old ordinance was unconstitutional because it deprived people of their property without due process of law, it is difficult to understand how a legislative enabling act could correct that defect.

This kind of thinking—the unwillingness to recognize any municipal authority not of a purely orthodox nature until such power is first brought under legislative control—might well have been an influencing factor in the earnings tax case despite the different basis on which the decision was rested. There is some indication of this, for in one opinion the court remarked that the “charter provision relied on by appellants is too indefinite to support the tax, *which is novel in this State.*”⁵⁸ It is also interesting to note that after the General Assembly had given statutory authorization to St. Louis to levy an earnings tax,⁵⁹ the court found little difficulty in sustaining the ordinance enacted pursuant to the enabling grant.⁶⁰ While the language of the *Turner* case probably did nothing more than give articulation to an attitude that has on occasions been predominant in the court, it certainly did nothing to relieve any of the uncertainty that surrounds the scope of home rule powers. There has been no explicit mention of the “high governmental prerogative” standard in cases subsequent to the *Turner* decision. It is possible that it may be completely overlooked or disregarded in the future, but it is still too early to venture an opinion in this respect.

A much more liberal attitude on the part of the judiciary toward home rule appeared at first glance to have been taken in one of the latest Missouri cases involving a conflict between a state statute and a local charter.⁶¹ The validity of a Kansas City ordinance that provided for a panel of six jurors to assess damages for property taken in local condemnation proceedings was attacked by a group of property owners who demanded trial by a common law jury of twelve as specified by a general statute. The defendant owners contended that the state law superseded or in effect repealed the contrary provisions of the charter, while the city maintained that the statute did not apply or control be-

58. *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 658, 203 S.W.2d 438, 444 (1943). (Italics added.)

59. MO. REV. STAT. §§ 99.110-92.200 (Supp. 1951).

60. *Walters v. St. Louis*, 259 S.W.2d 377 (Mo. 1953).

61. *In re East Park District of Kansas City*, 231 S.W.2d 849 (Mo. App. 1950), *aff'd on other grounds*, 361 Mo. 829, 237 S.W.2d 118 (1950).

cause the right of eminent domain is a matter of municipal corporate concern. The Kansas City Court of Appeals upheld the city's position, quoting with approval an earlier decision to the effect that "it is settled beyond question that the condemnation of property in municipalities for the use as public streets, is a matter pertaining to local municipal government as contradistinguished from such as belong to the domain of general state control. . . ."⁶² The decision was affirmed by the supreme court on certiorari,⁶³ but on an entirely different basis than that used by the court of appeals. Three of the members of the higher tribunal construed the statute in such a way that there was no conflict with the charter provisions, and four of the justices concurred in the result only because the defendants, even if their position were sustained, would no longer be entitled to a trial before a common law jury because of a subsequent amendment to the statute in question. No reference or mention of the proprietary-governmental function test was made in any of the affirming opinions. The court seemed to take it for granted that if an actual conflict between the statute and the charter had existed, the former would have prevailed.

A general survey of the many home rule decisions would reveal that the Missouri Supreme Court has been more favorably inclined toward local autonomy in matters pertaining to the police power of the city than in any other functional area. Not only has it consistently upheld the regulatory ordinances of the self-chartered municipalities in this area when no conflicting statute was involved, but it has also permitted such cities to enlarge on the provisions of state law when higher standards than those provided by statute were desired. This tendency has become quite evident in recent cases. In *Vest v. Kansas City*,⁶⁴ an ordinance requiring barbers to undergo a physical examination every six months was held to be not in conflict with a state law specifying annual examinations. The same result was reached in *Breddeck v. Board of Education*,⁶⁵ in which the right of the City of St. Louis to inspect and regulate public school cafeterias as to

62. *Id.* at 850, citing language from State *ex rel.* Graham v. Seehorn, 246 Mo. 541, 557, 151 S.W. 716, 720 (1912).

63. *In re* East Park District of Kansas City, 361 Mo. 829, 237 S.W.2d 118 (1950).

64. 355 Mo. 1, 194 S.W.2d 38 (1946).

65. 213 S.W.2d 889 (Mo. App. 1948).

health standards was upheld. The court stated that since the statute authorizing school districts to establish restaurants for the children contained no specifications for sanitary measures, the city's action in requiring conformance to its restaurant inspection ordinance was not contrary to the state law. And in *Brotherhood of Stationary Engineers v. St. Louis*,⁶⁶ an ordinance enlarging on the provisions of a state law dealing with the qualifications and licensing of stationary engineers was sustained. The court observed:

. . . [E]ven though there is a state law on a given subject, a city is not thereby prohibited from enacting a supplemental ordinance in relation to the same subject, so long as there is no conflict between the ordinance and the state law. Thus the fact that the state may have enacted regulations covering the pursuit of a particular occupation, trade, or calling, will not prevent a city from exacting additional requirements, assuming, always, that there is no conflict in the provisions, and provided, of course, that the statute has not limited the requirements to its own prescriptions.⁶⁷

The court's approach in these cases is in decided contrast to the position it has customarily taken in issues pertaining to local autonomy, especially those involving tax matters. It seems clear, and this was expressly stated in *Kansas City v. School District of Kansas City*,⁶⁸ that the taxing power will be strictly construed against the city while the police power will receive a more liberal interpretation. Missouri does not stand alone in this respect since similar views are held in a majority of the other home rule states.⁶⁹ Whether there is a rational justification for a distinction of this kind seems doubtful.

As matters now stand, certain tentative conclusions might be drawn concerning the present legal status of the self-chartered municipality in Missouri, although the decisions continue to be ambiguous and even conflicting in some instances. First of all, a home rule city may assume any function of a purely corporate or proprietary nature without legislative interference. What

66. 212 S.W.2d 454 (Mo. App. 1948).

67. *Id.* at 458, 459.

68. 356 Mo. 364, 201 S.W.2d 930 (1947). See also *State ex rel. Hewlett v. Womack*, 355 Mo. 486, 196 S.W.2d 809 (1946), in which a city ordinance restricting the number of liquor licenses was upheld as a regulatory measure which merely enlarged the requirements of the state liquor control act.

69. 16 MCQUILLAN, MUNICIPAL CORPORATIONS § 44.13 (3d ed. 1950).

constitutes such a function will, however, be narrowly and rigidly construed against the city especially when there is a question of conflict with a state statute. Secondly, a home rule city has power to assume functions of a governmental character without legislative authorization, provided: (a) no conflicting constitutional or statutory impediment exists; (b) the matters covered by such function are of primarily local concern; (c) the city charter embodies the proper and specific authorization; (d) the function is not one that may be considered a matter of "high governmental prerogative." These are admittedly broad generalizations, but they can be little else in view of the wide diversity of judicial decisions which defy categorical treatment.

Two further questions call for consideration: first, what advantages accrue to a home rule city in Missouri that cannot be obtained under a legislative charter; and second, what steps, if any, might be taken to clear up some of the ambiguity and confusion that surrounds the legal aspects of home rule so as to make more definite and certain the status and powers of a self-chartered municipality. Eighteen states now have effective municipal home rule provisions in their constitutions.⁷⁰ That there is revived interest in the device nationally is evidenced by the fact that after a lapse of fifteen years without a single adoption, two states, Rhode Island⁷¹ and Louisiana,⁷² enacted such provisions into their organic law in 1951 and 1952, and similar movements are afoot elsewhere. To date, more than 600 cities and towns in the United States have taken advantage of constitutional grants to frame and adopt their own charters, and the number is increasing substantially every year.⁷³ These figures demonstrate the vitality of home rule and raise a strong presumption that it must possess intrinsic merit despite its impediments.

In Missouri, and this is generally true in other jurisdictions, the home rule device offers the cities both negative and positive advantages. Negatively, it serves as a barrier to legislative interference in local corporate affairs and enables the municipal-

70. BROMAGE, INTRODUCTION TO MUNICIPAL GOVERNMENT AND ADMINISTRATION 148 (1950). Rhode Island and Louisiana have enacted such provisions since this publication.

71. R.I. CONST. Amend. 28 (1951).

72. LA. CONST. Art. XIV, § 40 (1952).

73. OGG & RAY, INTRODUCTION TO AMERICAN GOVERNMENT 953 (10th ed. 1951).

ity to operate its airport, waterworks, power plant, and similar undertakings free from the direction of the General Assembly. On the positive side, it possesses several distinctive advantages which would seem to justify the labor and cost of drafting and adopting a charter. For one thing, it gives the city a much wider range of choice and considerably more discretion in its local governmental and administrative arrangements. Under the legislative charter, although there is now some option as to the type of government the cities in each class may adopt, the organizational setup including the number of appointive and elective officials, their salaries and terms of office, their qualifications, and their powers are carefully provided for by law. With a home rule charter, the city is free to set up the administrative system and to organize the departments in the manner it thinks feasible, to create or abolish elective municipal offices, to adopt the city manager or commission type government, and to increase or decrease the size of the common council. It also has authority ". . . to prescribe the manner in which nominations shall be made for municipal offices . . . and the form of ballot to be used . . ." for their election.⁷⁴ The powers of the self-chartered municipality over its own government are strengthened by the constitution which expressly prohibits the General Assembly from enacting any law ". . . creating or fixing the powers, duties or compensation of any municipal office or employment for any city framing or adopting its own charter."⁷⁵ By giving the city full control over its governmental machinery, the responsibility for efficient administration is placed directly in the hands of the local community where it properly belongs.

Another advantage enjoyed by the city under home rule is the authority it possesses to make more extensive use of its police powers, particularly when it desires to establish higher health or safety standards than those set by state law. As previously noted, the Missouri courts have interpreted this phase of local autonomy in a surprisingly liberal fashion. And finally, the self-chartered municipality may assume new powers to meet changing conditions if the matter is primarily of local concern and the state has not already occupied the field. Under a legislative charter, the city would have to seek a change in

74. MO. REV. STAT. § 82.180 (1949).

75. MO. CONST. Art. VI, § 22 (1945).

the general laws governing cities of its class before it would be cloaked with authority to assume such function. This is one of the most important advantages of home rule, but unfortunately it is the one surrounded by the most uncertainty, as the earnings tax situation well shows. Charter drafting commissions, for their part, can help to avoid some of the difficulty that arises in connection with the assumption of new powers by keeping in mind that municipal charters in Missouri are considered *grants* of authority to the city government, and that it is therefore necessary for them to contain a full, complete, and specific enumeration of powers. The narrow construction which the judiciary tends to place on charter provisions further emphasizes the importance of explicitly stating the powers. Attention might also be called to a Missouri statute of long standing which provides that:

No municipal corporation . . . shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is *specially named as taxable in the charter* of such municipal corporation, or unless such power be conferred by statute.⁷⁶

Careful draftsmanship may help to assure the city of a larger measure of local rule, but it cannot solve the basic difficulty that arises from the nature of the constitutional grant and its interpretation by the courts. This can be accomplished only by a more progressive approach than that which Missouri constitution makers have heretofore been willing to take. The 1943-44 Constitutional Convention afforded an excellent opportunity for a re-examination of the entire home rule question in the light of seventy years experience and for correcting its organic weaknesses. The results, however, were most disappointing. In addition to extending the grant to all cities of over 10,000, and to all counties of over 85,000 inhabitants⁷⁷ the new document contained three improvements. It omitted the meaningless section which specified that the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties in the state, and it included two new provisions: Section 21 endowing a home rule city with power to undertake slum clearance projects, and Section 22,

76. MO. REV. STAT. 71.610 (1949). (Italics added.)

77. MO. CONST. Art. VI, § 18(a).

previously referred to, assuring the city a free hand in regard to the form and organization of its own government. But the real issue pertaining to the scope of local autonomy was left untouched, and the old clause around which so much litigation had revolved—that the charter shall be in harmony with the constitution and laws of the state—was written into the new constitution without change. As one member of the Convention has explained: “since the recent convention did not wish to disturb the court decisions affecting St. Louis and Kansas City, it did not change the provision requiring charters to conform with state laws.”⁷⁸ It was precisely because of these decisions and the uncertainty which they had created over the sphere of home rule powers that the constitution-makers should have endeavored to clarify the question, if possible, by organic means.

The experience of other states indicates that while there is no magic formula for solving the problem of city-state relations, some of the uncertainty as to the authority of a home rule city can be removed by proper constitutional phraseology. Three different forms of incorporating the home rule grant into the fundamental law have been used: (1) the older and more prevalent type which includes a single broad grant of local autonomy subject to the laws of the state; (2) a general grant of authority followed by an enumeration of certain matters as definitely falling under the jurisdiction of the city; (3) a broad conveyance of power over local affairs subject to statutory enactments which affect every city and town in the state. Missouri and originally California fell within the first category. When the latter state adopted home rule in 1879, it copied the language of the Missouri constitution almost verbatim.⁷⁹ The literal interpretation which the California courts placed on the grant by holding *all* charter provisions subject to state law led to the enactment of a constitutional amendment specifying that such charters were to be subject to and controlled by general laws “except in municipal affairs.”⁸⁰ This is, of course, the same result that the Missouri courts eventually arrived at without a change in the organic law, so that even had the last convention added a clause of this nature

78. Bradshaw, *Home Rule for Missouri Cities*, MISSOURI MUNICIPAL REVIEW, April 1946, p. 52.

79. CALIF. CONST. Art. XI, § 6 (1879).

80. CALIF. CONST. Art. XI, § 6 (Amendment of 1896).

to the new document, little difference in the existing situation would have been effected.

In several jurisdictions, notably Colorado and Utah, the general grant of home rule powers is accompanied by a partial definition of local affairs.⁸¹ The Colorado constitution lists certain powers as essentially local, such as the levying of taxes and special assessments, and the control of municipal elections; it then concludes with the statement “. . . and all other powers necessary, requisite, or proper for the government and administration of its local and municipal matters.”⁸² There is much to be said for a plan of this kind, since the greatest difficulties in home rule states have resulted from the use of general or vague terms in the organic grants. This is why it has been necessary to call upon the courts so frequently for clarification. As the report of the Committee on State-Local Relations of the Council of State Governments pointed out:

It is difficult . . . to separate state from local functions. A complete specific enumeration of powers to be exercised by home rule cities is therefore impossible. Nevertheless, it seems both possible and highly desirable that some specified powers be given to localities in addition to the general grant of authority over local affairs. Rather than leaving the entire field of home rule powers to the definition of the courts, there seems no valid reason why an enumeration of powers cannot be conferred upon cities in every home rule state. In the process of this enumeration, those powers which have been the cause of the greatest litigation in the past could be carefully considered. As a matter of public policy, they can be granted or denied to home rule localities.⁸³

It is true that a too detailed listing of powers would be undesirable because of the rigidity which it might introduce, but if care is exercised to include therein only those matters which are considered likely to remain within the realm of essentially local affairs, the enumeration would undoubtedly be advantageous. There is another strong reason for this procedure. The actual scope of local autonomy that the cities should enjoy is primarily a question of policy; and it is wholly illogical to impose this function upon the judicial branch of the government. Yet this is

81. COLO. CONST. Art. XX, § 6; UTAH CONST. Art. XI, § 5 (1895).

82. COLO. CONST. Art. XX, § 6.

83. THE COUNCIL OF STATE GOVERNMENT, STATE—LOCAL RELATIONS 171, 172 (1946).

exactly what is done when the grant is phrased in broad and indefinite terms, and the courts are consequently called upon to determine what concrete powers the city may actually exercise. Since experience has shown that it is undesirable to leave matters of policy as to state-city relations completely in the hands of the legislature, the determination should be made with as much exactness as possible by the terms of the fundamental law itself.

A third form of grant presently in use is that employed in Wisconsin and New York.⁸⁴ The constitutions of these states make a partial enumeration of municipal powers, but also provide that *genuine* general law supersedes both the sphere of undefined and that of enumerated local powers. The Wisconsin constitution empowers self-chartered cities to ". . . determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village."⁸⁵ The *Model State Constitution* drafted by the National Municipal League follows this method in its specification that both the general and the enumerated grant or authority to the cities ". . . shall not be deemed to limit or restrict the power of the legislature to enact laws of state-wide concern uniformly applicable to every city."⁸⁶

Of the three types of provisions considered, the Wisconsin and New York system has proved to be the most effective safeguard for home rule. By recognizing the primacy of the state when that primacy is exercised through general laws undiluted by classification, the grant of local autonomy has elicited more sympathetic treatment from both the legislature and the judi-

84. N.Y. CONST. Art. IX, §§ 12, 16; WIS. CONST. Art. XI, § 3.

85. WIS. CONST. Art. XI, § 3.

86. MODEL STATE CONST. § 804 (5th ed. 1946). A somewhat novel approach to the problem of constitutional provisions for home rule is contained in the recently published report of the American Municipal Association's Committee on Home Rule. The recommended clause drafted by the Committee attempts to avoid the familiar distinction between general and local affairs by providing:

. . . [A] municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute.

FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 19 (1953).

ary. The requirement that a legislative enactment must apply uniformly to all cities and towns before it can supersede the local powers has acted as an adequate check on legislative interference in the field of the enumerated powers; and in the undefined area of "local or municipal concern," the courts have been inclined to construe the phrase broadly knowing that the state can assert its supremacy at any time the need arises by a general law. In Colorado, on the other hand, where the legislature is completely barred from the undefined as well as the specifically defined sphere of municipal affairs, the courts have given a more restricted interpretation to the general grant. In either case, the home rule enabling provisions in both the Colorado and the Wisconsin type constitutions have helped to assure a larger measure of local autonomy in those states than in Missouri.⁸⁷ It is unfortunate that the constitution-makers of 1943-44 did not see fit to incorporate similar provisions into the new constitution. Should home rule continue to spread in Missouri without a diminution in the litigation surrounding it, serious consideration may have to be given to the question of securing an amendment to the basic law by popular initiative. In the meantime, the home rule cities of the state might cooperate in an effort to supplement the constitutional grant by securing a legislative enabling act which, like the Colorado constitution, would specifically set out those powers which the cities deem essential for local autonomy, coupled with the proviso that the enumeration was in no way intended as complete. Such a procedure would still leave the powers at the mercy of the General Assembly, but it would at least eliminate some of the uncertainty and a large portion of the litigation that continues to plague the home rule cities over the scope of their authority.

In discussing home rule, there is a tendency on the part of some of its advocates to place undue emphasis upon the right of municipalities to govern themselves, thereby losing sight of the fact that the city is an agent of the state as well as an organization for the satisfaction of local needs. Home rule does not, and

87. The constitutional provisions for home rule in Wisconsin have been accompanied by a body of exceedingly liberal legislation, so that the measure of local autonomy enjoyed by Wisconsin municipalities is probably unsurpassed in any other state. This once again illustrates how important the legislative attitude is to the success of local self-government. A hostile legislature, as distinguished from an indifferent legislature, can cripple even the most technically perfect constitutional system of home rule.

certainly should not, imply complete freedom from state interference. It recognizes that in matters which affect the entire state, the legislature should be supreme. The state-local interest doctrine and the corporate-governmental standard are criteria which the courts have employed in their attempts to define the relationship between the state and the self-chartered community. While it is easy to make a general distinction between affairs of municipal and state interest, it is extremely difficult to select a single function of city government and to argue convincingly that it is an affair of purely local concern. The real and decisive test should be whether the matter involved is of such concern to the state as a whole that legislative interference is justified at the expense of local autonomy. The successful application of such a test obviously requires more than legal acumen. It calls for a sympathetic understanding of the nature and objectives of local rule and of the problems confronting municipal administration. Only through such an approach can an adequate solution be found to the dilemma of urban rule and the cities be assured of a desirable modicum of governmental autonomy. Constitutional home rule, despite its defects and mechanical imperfections, still offers the greatest measure of local self-government possible under the American political system.