RESOLVING STATE/LOCAL GOVERNMENTAL CONFLICT—A TALE OF THREE CITIES

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I. INTRODUCTION

In the history of American local government, there has been continuous tension between local and state law-making bodies.[1] Conventional theory regards municipalities as mere creatures of state governments, without inherent powers of their own. Logically, conflict should not exist between a creature and its parent. The long-standing struggle between cities and state legislatures, however, suggests that the creature theory of local government does not always square with the perceptions of the actors in the battle.

The conflict between municipalities and states involves subtle blends of the state legislative and constitutional provisions by which state and local government powers are expanded or restricted. State statutes represent one primary source of municipal power. Statutes can be drafted and interpreted narrowly or broadly. The rule of statutory construction known as the Dillon Rule, for example, provides that courts strictly construe grants of municipal power, recognizing no power unless expressly granted by the state legislature or unless it must exist by reason of necessary implication from powers expresssly

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1. A. SYED, POLITICAL THEORY OF AMERICAN LOCAL GOVERNMENT (1966).

granted.[2]

Another source of municipal power is the state constitution. A constitutional grant can be in relatively specific terms or generic. As with statutes, judicial interpretation of constitutional grants may be strict or generous.

The phrase "home rule" describes a third type of municipal power.[3] The term covers a variety of constitutional and statutory approaches to conferring broad powers upon local governments. In addition, home rule grants can have a second important function. When plenary authority is granted to a municipality by constitutional grant through home rule, the possibility exists that in addition to *granting* power to the municipality, the constitutional provision may also be treated as *limiting* the power of the state legislature. Constitutional home rule provisions sometimes expressly provide for this limit on state power.[4] Other times the result is achieved through judicial interpretation.[5] In some states, such as Washington, the limit does not exist in any form.[6]

Clear analysis of state and local conflict requires that the legal functions of home rule be kept distinct. Borrowing some labels from Hohfeld,[7] it is possible to say that a constitutional home rule grant may confer a *power* on the municipality which permits the municipality to act in the described area without further legislative grants. This function of home rule represents a significant advance over the conventional Dillon's Rule approach to conferring local municipal competency. The home rule grant permits cities to respond to problems promptly, without the delay, uncertaintly and sometimes inappropriate opposition which characterize a system requiring explicit state legislative authority for each municipal action.[8]

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2. The rule, pervasive in all local government law cases, is stated in J. DILLON, MUNICIPAL CORPORATIONS 448-55 (5th ed. 1911).

3. *See* MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE (1933); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

4. *See, e.g.*, the Colorado constitution quoted in the text at note 64 *infra*.

5. F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 350 (1970).

6. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 WASH. L. REV. 743 (1963).

7. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

8. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role For the Courts*, 48 MINN. L. REV. 643, 652-58 (1964).

The role of a home rule grant operating as a limit on the state legislature is quite different. In the states where home rule has this effect, the home rule grant can be viewed as having conferred on municipalities what Hohfeld would have called an *immunity* from state interference. The result of this immunity is to permit the city to act in the face of an inconsistent state statute. It is critical to note that a home rule *immunity* can be expanded or contracted without necessarily affecting the breadth of the home rule grant considered as a *power*.

Despite the importance of distinguishing the two functions of the home rule grant, there is ample evidence in judicial opinions that this separation has not occurred. Instead, court discussions slip from one meaning to the other with a consequent loss of analytic clarity. In this Article, an effort will be made to keep the home rule functions separate and to use the word "power" to refer to the grant of an ability of the local government to act, and the word "immunity" to refer to the area of freedom from state interference which the constitutional grant may also have conferred.

A final introductory observation: the literature of state and local governmental law is highly localized, reflecting a conscious assessment that local variations in constitutional and statutory provisions—as well as differences in judicial attitudes—limit the utility of articulating general legal principles. Although there are a few impressive exceptions to this phenomenon,[9] this tendency is pervasive. Nevertheless, there is no reason to suppose that local variations in this field are significantly different from those in other areas of the law, or that the benefits of a search for general principles are less substantial. Indeed, in most judicial resolutions of state-local conflict, the relevant statutory and constitutional provisions are so general that there is usually significant room for the exercise of judicial discretion and judgment. Hence, comparative analysis may be of value in the search for underlying principles.

II. THREE CURRENT DECISIONS

Three recent state supreme court decisions provide an opportunity to examine current judicial attitudes toward this complex of legal issues.[10] In *Weekes v. City of Oakland*,[11] the Supreme Court of Cali-

9. *Id.*

10. The three cases to be discussed are: Weekes v. City of Oakland, 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978); City of La Grande Public Employees

fornia faced the issue of whether a city could impose an "employee license fee." The California Constitution authorizes a home rule city to

> make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this constitution shall . . . with respect to municipal affairs . . . supersede all laws inconsistent therewith.[12]

To the extent this provision serves as a grant of power to impose the tax in question, a majority of the court was persuaded that this provision was adequate, citing a number of cases holding the power to impose taxes for revenue purposes, including license taxes, within the power of municipal corporations.[13] Two dissenting judges observed that all the modern cases cited for the proposition were decided in the absence of a conflicting or prohibitory state statute and therefore did not represent authority for municipal imposition of such a tax in the face of a conflicting state enactment. Had they been using the terminology employed here, the dissenting judges could have said that the California Constitution conferred a *power* to enact a tax but conferred no *immunity* from state interference with the exercise of the power.

The action of the state legislature was ambiguous. Pursuant to a constitutional grant,[14] the state had enacted its own personal income tax. One of the provisions of that Act expressed a clear intent to preempt at least some part of the "field" of income taxes. Section 17041.5 of the California Code prohibits a city from levying "a tax upon the income . . . of any person." On the other hand, the provision expressly permits a municipal "license tax upon a business measured by or according to gross receipts."[15]

The Oakland ordinance,[16] adopted in 1974, provided that as of July 1976 a license fee would be imposed for the privilege of engag-

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Retirement Bd., 281 Or. 137, 576 P.2d 1204, *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978); Thornton v. Farmers' Reservoir & Irrigation Co., 575 P.2d 382 (Colo. 1978).

11. 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978).
12. CAL. CONST. art. 11, § 5.
13. 21 Cal. 3d at 393, 579 P.2d at 452, 146 Cal. Rptr. at 561.
14. CAL. CONST. art. 13.
15. CAL. REV. & TAX CODE § 17041.5 (Deering 1975).
16. The relevant portions of the Ordinance are set out in the court of appeals

ing in any business, trade or occupation, the fee to be measured by one percent of the gross receipts in excess of $1,625 for each quarterly period. The ordinance covered any business, trade, occupation or profession and, with the exception of domestic servants employed in private homes, it seemed to reach each kind of calling, whether or not carried on for profit and including offices and positions filled by election or by appointment. The term "gross receipts" included the total amount of all salaries, wages, commissions, bonuses, or other money payments of any kind or any other considerations having monetary value which a person receives or becomes entitled to receive for any work done or services rendered. Employers were required to withhold employee license fees and both the employer and the employee filed regular returns.

The trial court held that the state had effectively prohibited the municipal measure and therefore declared it invalid. The court of appeals upheld the measure, reasoning that the statute quoted did not preclude the particular sort of measure Oakland had enacted, which was said to have some of the characteristics of both a permitted occupational license tax and a prohibited personal income tax.[17] The California Supreme Court agreed. The majority characterized the measure as an occupational tax which the Code expressly permitted, thus finding no conflict between the ordinance and the statute. With this characterization, there was no need for the court to consider whether the constitution conferred any immunity on cities from state prohibitions of local income taxes. The state simply did not prohibit what the municipality had enacted.

Justice Richardson, in a concurring opinion, urged that the underlying constitutional immunity ought to be clarified to provide guidance to the cities and the legislature and to forestall further litigation. He believed that the home rule amendment conferred an immunity on California cities such that "the legislature lacks power to proscribe municipal income taxes."[18]

Justice Richardson first disposed of the argument that the constitutional grant of authority to the state legislature to enact an income tax should be regarded as an exclusive grant depriving cities of any similar power. After examining the legislative history, the jurist con-

opinion at 64 Cal. App. 3d 907, — (case omitted from reporter), 134 Cal. Rptr. 858, 861-63 (1976).

17. 64 Cal. App. 3d 907, 134 Cal. Rptr. 858 (1976).

18. 21 Cal. 3d at 399, 579 P.2d at 456, 146 Cal. Rptr. at 565.

cluded that when the home rule amendment was adopted seventeen years after the constitutional provision in question, it conferred upon the municipalities an independent power of taxation concurrent with, but not dependent upon, any legislative grant.

Secondly, Justice Richardson examined the question of whether the state pre-empted the municipal income tax, or whether, phrased slightly differently, the income tax question had become something other than a "municipal affair"—that category of matters which the constitution protects from state legislative interference.

Justice Richardson did not doubt the vagueness of the "municipal affairs" concept. Nevertheless, he regarded it as the duty of the court[19] to "weigh, in each case, the city's interest against the state's need to require uniformity, or to prohibit, control or coordinate the extraterritorial impact of the challenged municipal activity."[20] Moreover, giving full weight to the values reflected in the home rule amendment required that state pre-emption be limited to its least restrictive form.

Applying this standard to the tax in the case, Justice Richardson concluded that the legitimate state interests in preventing "a network of municipal income taxes that vary in their structure and comprehensiveness from city to city"[21] could be met by state action short of flat prohibition of municipal income taxes. For example, the matter of interjurisdictional conflicts could be resolved as it was with the local sales tax by a mandatory credit and allocation system. Or the state could design a model municipal income tax with a standard rate and exemptions which could be adopted at the option of the municipality. The Richardson view, then, posits that the state lacked power to prohibit such a tax, though it could impose some regulation on the form of such taxes in the interest of statewide uniformity and nondiscrimination.

Two dissenting justices also faced the question of the state's power to proscribe municipal income taxes. They urged that the city's "fee" was obviously an income tax and the state had just as obviously prohibited it. Justice Mosk was concerned that the majority and concurring opinions gave a green light to all the tax-hungry municipalities in the state by implying that they could avoid the strictures of the income tax prohibition by adopting an income tax in this disguised

19. *Id.* at 405, 579 P.2d at 459, 146 Cal. Rptr. at 568.

20. *Id.* at 407-08, 579 P.2d at 461, 146 Cal. Rptr. at 570.

21. *Id.*

form.[22] Justice Thompson, in a long dissent tracing the history of municipal income taxes in California, believed that the Richardson balancing test was inapt. In his view, the question was simply whether a statewide concern was present. If so, there is no authority for balancing the state's interest against that of the city; the state simply must prevail.

The California result, as illustrated by *Weekes*, is one in which the role of the courts will be significant. If the view of the concurring justice prevails in subsequent cases where the conflict issue cannot be finessed, as it was by the majority here, the courts must attempt to balance the interest of the state with that of the municipality. The mere expression of the state in an explicitly prohibitory statute, for example, will not preclude a judicial finding that the subject of the statute is nevertheless a "municipal affair" beyond the power of the state to affect.

On what grounds should such a balance be struck? The Richardson opinion reviewed the content given the term "municipal affair" by the California courts and found that matters which are *regulatory* are less likely to be within the protected area of municipal affairs. On the other hand, courts have regularly held matters of taxation for *revenue* purposes to be municipal affairs.[23] The Richardson analysis makes clear that the categories are not fixed: "Matters once entirely local in nature may, in a society rapidly increasing in both complexity and interdependence, lose their 'strictly local' character and become 'matters of statewide concern.' "[24]

Further, the Richardson opinion indicated something of the weights to be assigned in the process of balancing. It is not enough that some state interest is present; even in this case, Richardson conceded, the state has an interest that was not "wholly fictitious."[25] The "wholly fictitious" standard, however, is insufficient; it would trivialize the idea of a local government immunity. Under the Richardson view, the interest of the state must reach some unstated level of substantiality. The character of the state interest is also limited; that is, not every sort of state concern for the matter under scrutiny will be put into the balance. The interests that will be given significant weight are essentially interests in statewide uniformity and in mini-

22. *See* 19 SANTA CLARA L. REV. 259 (1979) (Oakland has repealed the "fee").

23 21 Cal. 3d at 406, 579 P.2d at 460, 146 Cal. Rptr. at 569.

24. *Id.*

25. *Id.* at 407, 579 P.2d at 461, 146 Cal. Rptr. at 570.

mizing the extraterritorial impact of the challenged municipal activity.[26]

In applying these standards to the tax in question, Richardson found that the legitimate state interests could be protected without resort to outright prohibition. This suggests, as well, that the state interests given weight in the balancing process will be only those interests which cannot be protected by less restrictive means.

The California court battles over the meaning of the municipal affairs immunity suggest the need for a clarifying principle. Professor Sato, who has closely analyzed the cases, proposes that the reach of the municipal affairs immunity be determined by reference to three standards.[27] First, an otherwise authorized (and constitutional) municipal act should be protected by a municipal affairs immunity if it generates no significant external impacts on those not represented by the acting government. Second, absent the sort of external effects mentioned above, a municipal act would prevail over a conflicting state act applicable only to the public sector. The principle is that when a state policy is so pervasive that it has been applied by the state to both private and public sectors (*e.g.*, workmen's compensation), local governments should not be able to thwart the policy by promulgating a different rule. On the other hand, when the state policy is less pervasive and applies only to the public sector (*e.g.*, salaries and pensions of public officers), local preferences should be allowed to prevail. Third, a municipal act should be protected by a municipal affairs immunity when it is a matter of structure or process designed to insure that the local government is efficient, responsive and responsible. Sato argues that such questions—dealing with how and by whom corporate powers shall be exercised—generally will not have external effects. He recognizes, though, that some matters which appear structural, such as municipal tort claims procedures, are so integrally a part of a state policy (*e.g.*, prompt payment of claims against the government) that they require some state control.[28]

Professor Sato observes[29] that this approach does not eliminate judicial intervention; judgments will remain in the process of identifying and weighing the substantiality of externalities, assessing the

26. *Id.*

27. Sato, *"Municipal Affairs" in California*, 60 CALIF. L. REV. 1055, 1075-78 (1972).

28. *Id.* at 1084.

29. *Id.* at 1078.

degree of pervasiveness of various state policies and the like. But he believes that such an approach will be more focused and presumably more predictable. His review of the California cases shows that many of them can be fitted, at least roughly, into this analysis.[30] Sato concedes the analysis may be overly ambitious, that the "difficulties inherent in the problem may defy reduction in this fashion."[31]

A central concern with the doctrine under consideration is whether the courts are the best instrumentalities to make judgments about the appropriate reach of local government powers.[32] Even if one agrees with Professor Sato on the occasions when municipal activities ought to be immunized from state interference, there remains the question whether the difficult characterizations required in his analysis are appropriately made by the courts. A 1978 ruling by the Oregon Supreme Court in *City of La Grande v. Public Employees Retirement Board*[33] squarely confronted the question about the appropriate judicial role in this area.

Home rule in Oregon, as in California, is constitutionally rooted. Each of the components of the device—the grant of power to cities and the immunity from state interference—is provided for separately. The grant of power occurs in article XI, section 2: "the legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon."[34] Additionally, article IV, section 1(5), "further reserved to the qualified voters of each municipality and district," the initiative and referendum powers "as to all local, special and municipal legislation of every character in or for their municipality or district."[35]

The immunity conferred on Oregon local governments appears in article XI, section 2: "the legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town."[36] The reach of the immunity, prior to the instant case,

30. *Id.* at 1078-1105.

31. *Id.* at 1109.

32. *See* Sandalow, *supra* note 6; Sato, *supra* note 24 for the two most thorough examinations of this aspect of the problem.

33. 281 Or. 137, 576 P.2d 1204, *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978).

34. OR. CONST. art. 11, § 2.

35. OR. CONST. art. 4, § 1(5).

36. OR. CONST. art. 11, § 2.

was best described in *Heinig v. Milwaukee*,[37] which declared unconstitutional a state law requiring a city to establish a civil service system. The court held that the state did not have power under article XI, section 2 to so intrude in local matters. The court stated:

> the legislative assembly does not have the authority to enact a law relating to city government even though it is of general applicability to all cities in the state unless the subject matter of the enactment is of general concern to the state as a whole, that is to say that it is a matter of more than local concern to each of the municipalities purported to be regulated by the enactment. . . . [W]e hold that the people of the city are not 'subject to the will of the legislature in the management of purely local municipal business in which the state at large is not interested, and which is not of any interest to any outside the local municipality.'[38]
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> [The reason for the immunity was] to make operative the concept that the closer those who make and execute the laws are to the citizens they represent the better are those citizens represented and governed in accordance with democratic ideals. That objective would not be served if we should decide that the legislative assembly preempts the field each time it makes a statute applicable to all cities alike.[39]

Of course, the *Heinig* test was not self-applying. Some weighing of state and local interests was required. The *Heinig* court held that the test to be applied in determining whether a particular matter was one of local or state concern is "not whether the state or the city has an interest in the matter, for usually they both have, but whether the state's interest or that of the city is paramount."[40] The court said that "[e]ach case requires a weighing of the state's interest against the interest of the municipality."[41] Finally, as to the appropriate instrumentality for making these critical decisions, the *Heinig* court was clear: "Under the theory of home rule which we have adopted there are involved two political agencies making conflicting claims to sovereignty and the resolution of that conflict must be made by the courts."[42]

The statute challenged in *La Grande* was a 1971 enactment requir-

37. 373 P.2d 680 (Or. 1962).
38. *Id.* at 683-84.
39. *Id.* at 685.
40. *Id.*
41. *Id.* at 688.
42. *Id.* at 686.

ing all city police and firemen to be brought within the state retirement system within a two-year period unless the cities employing them provided an equal or better system.[43] In addition, the statute required cities to pay premiums on life insurance policies for these employees. The cities challenged the provision as having invaded matters of local discretion protected by the state constitutional provisions. The lower courts, relying on *Heinig*, agreed with the cities. In granting review, the Oregon Supreme Court specifically asked the parties to discuss the question of whether the *Heinig* test should be refined or reconsidered and, if so, what criteria might apply to define areas of state or local concern in the context of employee relations and employee benefits.[44] After receiving briefs from the parties and several amicus briefs, the court by a narrow majority decided to cut back substantially on the scope of local government immunity as stated in the *Heinig* opinion. *La Grande* limits the local immunity to certain "structural and organizational arrangements,"[45] the majority opinion disapproving of any reading of the *Heinig* opinion that extends beyond the proposition that a state law governing "the process of city government" could not be imposed on an unwilling city.

The *La Grande* rationale essentially has more to do with the judicial process than with the municipal process. In the majority opinion, Justice Linde stated that any broader reading of the *Heinig* opinion inevitably would require the courts to resolve issues of conflicting substantive policies and that such a function is ultimately a political and not a judicial task. Under a broad reading of *Heinig*, the court must determine by a process of balancing whether a matter is one of predominantly local or of state concern. Yet Justice Linde felt there were no ascertainable standards to use in that process. The judicial act therefore could be nothing other than a choice from among the competing values. A truly judicial decision, by contrast, "must be derived from a constitutional standard, not from the court's own view of competing public policies."[46] A court should not be placed in a position of having to choose, for example, between the virtues of an aesthetic environment and those of commerical profit,[47] or between the importance of the prevention of cavities and the strongly felt ob-

43. OR. REV. STAT. §§ 237.610-640, 243.005-055 (1977).

44 The court's request is set out at 576 P.2d at 1223.

45. 576 P.2d 1204, 1208.

46. *Id.* at 1210.

47. *Id.* at 1211, *citing* Oregon City v. Hartke, 400 P.2d 255 (Or. 1965).

jections to fluoridation of the water supply.[48] Moreover, urged Justice Linde, the entire doctrinal apparatus for dealing with state and local conflict is unworkable. A court cannot in any principled way divide the universe of municipal measures into those of state or local concern, or identify which "fields" or "subjects" are in some sense "occupied" or "preempted" or have some special state or local import.[49]

The constitution, however, provides for some area of local immunity from state interference and Justice Linde's task was to identify the scope of that immunity in terms that judges can use without departing from the conventional judicial role. Justice Linde formulated such a limitation: the constitutional immunity is conferred only for matters having to do with processes, procedures or organizational matters. Where a state law concerns "the structure and procedures of local agencies," Justice Linde asserted that the statute would fall before the conflicting local ordinance unless it was "justified by a need to safeguard the interests of persons or entities affected by the procedures of local government."[50] On the other hand, if the state enactment were "addressed primarily to substantive social, economic or other regulatory objectives," it

> prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the local community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.[51]

On that premise, Justice Linde then turned to the state laws in question and found that they were substantive and, accordingly, not within an area of municipal immunity.

> The provisions for financial security for police officers and firemen and their dependents in the event of retirement, disability, or death address a social concern with the living standards of these classes or workers, not with local governments as such; . . . While the statewide retirement and insurance plans do displace other plans that local agencies have made, or might make, for these objectives, they are not irreconcilable with the freedom to charter their own governmental structures that are reserved to

48. 576 P.2d at 1211, *citing* Baer v. City of Bend, 292 P.2d 134 (Or. 1956).

49. 576 P.2d at 1213.

50. *Id.* at 1215.

51. *Id.*

> the citizens . . . by Article XI, section 2. Accordingly, the statutes are constitutional.[52]

What generosity is left in the judicial response to questions of local autonomy is only that implied by a presumption *against* conflict which Justice Linde believes is appropriate. In comparing state and local enactments to determine whether a conflict between them can be said to exist, the Justice states that "it is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a state-wide law unless that intention is apparent."[53] Thus, in the companion case of *Haley v. City of Troutdale*,[54] the same narrow majority of the court upheld a local building code that was more stringent than the corresponding regulations promulgated by the state agency. Although the building code was presumably substantive and therefore not protected by any immunity, the court expressed reluctance

> to assume that the legislature meant to confine the protection of Oregon residents exclusively to construction standards [as promulgated by the state agency] and to place these beyond the power of local communities to provide additional safeguards for themselves. Certainly that intention is not unambiguously expressed. Until it is, we conclude that local requirements . . . are not preempted by [state statute].[55]

It is ironic to find a self-denying statement of judicial modesty announced in a case where the resulting doctrine was unnecessary to the decision, unsolicited by any of the litigants, and represented a far-reaching break with the past.[56] The irony was not lost on the dissent. The vigorous opinions of Justices Tounge, Howell and Bryson argued that the ultimate effect of the Linde principle would be to allow state legislatures to make any decisions they desired, no matter how local the impact, provided the subject is regarded as a matter of substance rather than process or procedure. Not only was this a departure from a long history of shared state/local governance, stated the dissent, but also it was not required by any judicial inability to perform under the old doctrine, or by any judicial incapacity to deal with issues having

52. *Id.*

53. *Id.* at 1211.

54 576 P.2d 1238 (Or. 1978).

55 *Id.* at 1242-43.

56 *See* Note, 1979 WILLAMETTE L. REV. 311, 324.

political or social overtones. The kind of total legislative supremacy produced by the majority opinion, argued Justice Bryson, was consistent with the law prior to adoption of the home rule amendment. Elimination of this total legislative power was the very purpose of the home rule amendments. Moreover, to the extent the majority permits some area of local immunity, the dissent found no principled justification for drawing the immunity line on the basis of organization, structure or procedure. Indeed, the dissent feared that the majority principle might even permit the state to mandate expensive state programs that must be funded by municipal treasuries.

The majority opinion, while in many respects unusual in its analytical clarity,[57] leaves much unanswered. Perhaps the central question is why areas of process and procedure are alone entitled to immunity. Is it likely that this is what the drafters of the home rule amendments had in mind?[58] Can a case be made that the courts have plotted out such a line and the people have ratified it by inaction over a long period of years? Can one suggest with assurance that the line drawn will always correspond with the likelihood of extraterritorial effects? In all cases the answer seems likely to be negative.

What is the policy basis for the conclusion that local choice should extend only to procedural questions? Professor Sato would more freely permit local immunity from state interference on matters of structure or process because such matters are unlikely to have significant extraterritorial effects. Of course, the Sato analysis would also have extended the immunity to substative matters regulated in the public sector only and thus might have produced a different result in this case. But there is some feeling in both these approaches that there is a stronger claim for local choice on matters that are procedu-

57. The court is one of the few to make unmistakably clear the dual function of the home rule grant, for example. *See* 576 P.2d 1204, 1215 n.30 and the opinion on rehearing at 586 P.2d 765, 767, 770-71 (1978).

58. Justice Linde relies on the fact that the constitutional language seems to limit the state only with respect to municipal "charters," a form of language they would not have used, he argues, had they intended the immunity to extend to ordinances on substantive matters. *See* 586 P.2d 765, 767-68 (1978) (the opinion on rehearing). Linde perceives that structural and procedural matters only deserve immunity from state interference. Moreover, he finds in the history of the home rule amendments a special concern of the drafters for structure and organization as the components of local government most in need of protection from state interference. *See* 576 P.2d at 1207-10. However much one may applaud the clarity of this opinion, or even the result, these seem relatively slender reeds upon which to erect the edifice Linde is building, especially in light of the long history of the opposite interpretation.

ral.[59] The National League of Cities model home rule provisions seem to provide broader local immunity for matters of structural organization and procedure.[60]

The real justification for confining the immunity to matters of process may be that the doctrine describes a division that can be made by courts with little intrusion into the substantive issue involved. This would be consistent with Justice Linde's premise, although the dissent made a forceful argument that the separation may not be as easy to establish as Linde suggests. The difficulty that arises in the application of such a test is illustrated by a recent Colorado case.

In 1978, the Colorado Supreme Court was asked to resolve a difficult state/local conflict in *Thornton v. Farmer's Reservoir & Irrigation Co.*[61] The dispute in *Thornton* was not over access to revenue sources as in *Weekes*, or over control of public employment compensation as in *La Grande*, but over the allocation among competing claimants of Colorado's most scarce natural resource: water. In the early 1970's, the City of Thornton felt that it needed additional water resources to meet the present and future demands of its citizens. After reviewing the existing opportunities for acquiring water by purchase or lease, the city decided it should acquire the water rights of the Standley Lake Division of the Farmers' Reservoir and Irrigation Company. After an appraisal of the value of the water rights and related property, the city extended a written offer of $9,300,000 for the property. After a series of meetings with the officials of the Reservoir Company and meetings with the stockholders of the company, it became clear to the city that the majority of stockholders did not wish to sell.

In March 1975, while these negotiations between the city and the company were proceeding, the Colorado State Legislature enacted the Water Rights Condemnation Act.[62] That Act was an effort to limit the reach of municipal condemnation proceedings with respect to water rights. The Act provides for the appointment of three com-

59. *Cf.* F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 368 (1970).

60. NATIONAL LEAGUE OF CITIES, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6. The history of the model and its effects are reviewed in Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975).

61 — Colo. —, 575 P.2d 382 (1978).

62. COLO. REV. STAT. § 38-6-201 to 216 (1976 Supp.).

missioners "to deterimine the issue of the necessity of exercising eminent domain as proposed in the petition." The Act states that no municipality shall be allowed to condemn water rights for any anticipated or future needs in excess of fifteen years. It further requires that each city prepare a "Community Growth Development Plan" and a detailed statement concerning the proposed condemnation of water rights and the effect of the taking of those rights on community growth. This plan was to be presented to the three commissioners who would then determine the necessity of the condemnation.

The City of Thornton, unable to acquire the water rights by purchase, began condemnation proceedings in November 1975. The city did not comply with the procedures required by the 1975 Act in filing and serving its condemnation petition, but rather followed another statutorily authorized procedure. In a proceeding to determine whether the district court had jurisdiction to hear Thornton's condemnation action, the district court ruled that the city's petition should be dismissed for failure to comply with the 1975 Act.

Several legal issues could have been explored on appeal. First, the power of the city to condemn water rights outside the city would have to be established. Absent some constitutional or statutory grant of power, the city simply would be unable to act; no issue of home rule immunity would arise. Secondly, a determination would have to be made as to whether the state statute was intended to apply to home rule cities. The court would then have to determine whether some immunity shielded the city from the operation of the state enactment. It is in connection with this last question that the issues raised in the *Weekes* concurrence and in the *La Grande* case would have to be confronted.

The power of the City of Thornton to condemn water rights is granted, first of all, by article XX, section 1 of the Colorado Constitution, which provides that home rule cities in the state

> shall have the power, within or without its territorial limits, to construct, condemn and purchase, . . . water works, . . . and any other public utilities . . . required . . . for the use of said city and county and the inhabitants thereof and any such systems, plants or works or ways . . . which said city . . . may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city . . . which may enforce such purchase by proceedings and law as in taking land for public use

by right of eminent domain.[63]

While this lanquage does not expressly confer power to condemn water rights, the court concluded that it should be so interpreted.[64]

In addition to this constitutional grant, there are several statutory grants under which Colorado cities can exercise eminent domain powers. The City of Thornton elected to proceed under, and had fully complied with, section 38-1-101 of the Colorado Revised Statute,[65] generally governing eminent domain proceedings. The 1975 Water Rights Act mandated a different set of procedures for cities seeking to acquire water rights through the eminent domain process. As indicated, this statute required a number of additional procedural steps, including securing the permission of a special three-member commission to determine the necessity for the condemnation. It also imposed limits on the scope of a city's justification for the condemnation by providing that cities could not condemn water rights for any anticipated or future needs in excess of fifteen years.

Home rule immunity from state interference is provided by article XX, section 6 of the Colorado Constitution which states that home rule charters and ordinances pursuant thereto regarding "local and municipal matters . . . shall supersede within the . . . jurisdiction of [the city] any law of the state in conflict therewith."[66]

In addition to these constitutional and statutory provisions, the charter of the City of Thornton expressly provided authority "to acquire within or without its corporate limits . . . water, water rights and water storage rights . . . and may take the same upon paying just compensation to the owner as provided by law."[67]

The Colorado Supreme Court did not follow the conventional analysis outlined above for resolving state and local conflicts. Like the majority in *Weekes*, the court in *Thornton* found a simpler means for permitting the city to act. The court began by characterizing the constitutional grant of eminent domain power as one in which the people in the State of Colorado delegated to home rule cities "full power to exercise eminent domain in the effectuation of any lawful,

63. COLO. CONST. art. XX, § 1, made applicable to all home rule cities by art. XX, § 6.

64. The court stated "We hold that the term 'water works' as used in the constitutional provision includes water and water rights." — Colo. at —, 575 P.2d at 390.

65. COLO. REV. STAT. § 38-1-101 (1973).

66 COLO. CONST. art. XX, § 6.

67. THORNTON, COLO., CHARTER, § 16.7.

public and municipal purpose, including particularly the acquisition of water rights."[68] The court next stated the conventional rule that

> generally, the legislative powers of the home rule municipality are superior with respect to local and municipal matters; and that, in cases of conflict between the statute and the ordinance of the home rule city related to a matter of statewide concern, the statute must govern.[69]

On that premise, it would be arguable that the statute must prevail here since the issue at hand—the relative merits of competing claims on the state's water resources—is surely a matter of more than local concern. The court, however, permitted the city to act, carving out an exception to the general principle, said to apply when the city is acting pursuant to a narrowly defined constitutional grant:

> Here, however, there is involved a specific constitutional power granted to home rule municipalities and, even though the matter may be of statewide concern, the General Assembly has no power to enact any law that denies the right specifically granted by the Colorado constitution.[70]

How might the California and Oregon courts have treated this issue? Would the balancing approach of Justice Richardson of the California court have been preferable? That approach would have required determining the relative weights of the state and the local interest, and on that premise, there could be little doubt that the state power would prevail. Not only are the extraterritorial impacts of local choice obvious on these facts, but also the state statute setting up a commission to consider a broad range of factors strongly suggests a recognition of the extra-municipal effects.

The analysis of the California cases by Professor Sato does not clearly point in one direction. On the one hand, it is possible to characterize the Colorado statute as one governing matters of procedure, hence presumptively within the area of local immunity under Sato's third standard. Similarly, the grant of eminent domain power is largely reserved to the public sector; hence, under Sato's second standard, this grant of power should be protected from state interference. On the other hand, it is arguable that while the Colorado legislature has prescribed a procedure in the Water Rights Condemnation Act, it was one of those procedural matters Sato would have excepted from

68. — Colo. at —, 575 P.2d at 389.

69. *Id.*

70. *Id.*

his general analysis and left as a statewide concern: that is, a procedure inseparable from an underlying state substantive policy, here, the protection of non-municipal water users. Moreover, the extraterritorial effects of eminent domain grants in this setting are obvious, suggesting that under Sato's first standard the matter might be more sensibly classified as of statewide concern.

The analysis of the Oregon court in *La Grande* is also difficult to predict on these facts. Justice Linde would have asked if the power in question involved the organization, procedure or structure of the local government. If so, the power was at least presumptively beyond the reach of state interference. How does one classify the power in this case? The state appears to interfere in a procedural matter. That is, the state statute mandates a special forum for the consideration of municipal water right condemnations. Yet, the procedure here was intended to have a distinctly substantive effect: either to make municipal condemnation of extraterritorial water rights impossible or at least to insure that considerations broader than those likely to be perceived by the acting municipality be weighed in the decision. Is Justice Linde's analysis helpful with respect to "procedures" such as these? Much the same question could be asked of Linde's analysis in regard to other procedural arrangements with obvious and intentional substantive implications, such as environmental protection statutes or state land use planning codes.[71]

The Linde analysis allows room for state control of procedure needed "to safeguard the interests of persons or entities affected by the procedures of local government."[72] Would this permit state action in such areas as land use and environmental procedures? If so, this further reduction in the scope of the local immunity may leave little of real consequence for decision at the local level. When one eliminates all matters of policy or substance, and also all structural or procedural matters which may have external impacts or important substantive effects, the area of protected local immunity is small. While it may still contain matters of significance, there is little doubt that its scope is much smaller than that which led to the original enthusiasm for home rule at the turn of the century[73] or which has sur-

71. *Cf.* National Environmental Policy Act, 42 U.S.C.A. §§ 4321-61 (West 1977); ALI, MODEL LAND DEV. CODE.

72. — Colo. at —, 576 P.2d at 1215.

73. *See generally* H. MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE (1916).

faced more recently in the renewed interest in citizen participation and neighborhood government.[74]

This is not, of course, to prove that the result of the Linde approach is undesirable. His concerns for the judicial process are important. Moreover, the concept of home rule may be ready for substantial alteration. At least since Madison, commentators have observed that there are special risks in placing important substantive powers in relatively smaller and more homogenous governments,[75] and the concern is very much alive today.[76] Moreover, students of home rule have long recognized that the increasing interdependence of local governments makes it more difficult to justify the sort of parochial decision making home rule may entail.[77] What one does wish for, however, is some concession in the Linde analysis that the idea of home rule has indeed outlived some of its historic usefulness and in today's setting may need significant limitation. Such a concession may be difficult to make in a judicial opinion (especially an opinion abjuring judicial policy-making). A more frank statement of the matter, however, would at the least insure that the usual play of critical analysis would be brought to bear on the notion and that its further refinement would continue.

Finally, how helpful is the approach actually taken by the Colorado court in *Thornton*? One wonders whether it is particularly useful to focus on the degree of specificity with which the local power was granted. In the first place, it does not seem likely from the language employed in the constitution that such a result could have been intended. A Colorado home rule city operating under section 6 of article XX has its immunity limited by the "local and municipal matters" language of that section. When it acts under a section 1 provision incorporated by reference in section 6, it is doubtful that the drafters intended to free the city from the section 6 limiting language. Moreover, such a result would be at variance with all other judicial considerations of the matter.[78] The court comes close to suggesting

74. *See* SCHMANDT, DECENTRALIZATION: A STRUCTURAL IMPERATIVE, IN NEIGHBORHOOD CONTROL IN THE 1970'S (Frederickson ed. 1973).

75. *See, e.g.*, THE FEDERALIST No. 10 (J. Madison).

76. *See, e.g.*, Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978).

77. MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930 vii (1933).

78. More likely, the court is concerned that the state limitation imposed was ill-advised or more intrusive than necessary. The court seems to have made a choice

that whenever the constitution confers a power on a home-rule municipality with some degree of specificity, the state legislature lacks the power to deal with the matter. Even courts that regard constitutional home-rule grants as conferring immunities on cities always read some limitation into the scope of the immunity granted. Finally, on policy grounds the court's rationale does not seem sound. If a Colorado home-rule city attempts to exercise its power to condemn water rights in a manner plainly at odds with credible, statewide interests, there can be little doubt that a court should intervene. The analysis in *Thornton*, however, leaves the court with little in the way of an acceptable premise for intervention. Presumably, the court could only intervene by establishing that the constitutional grant being considered was not specific enough to require the *Thornton* result. If that could not be done, the state interests would be frustrated. If *La Grande* suggests the risks of abolishing the local immunity even for matters which are purely local (because "substantive"), *Thornton* suggests the opposite risks of extending the immunity to matters of obvious state-wide concern.

III. CONCLUSION

When a court confronts a conflict between state and local competencies, the doctrinal lines for resolution need to be carefully tended in aid of both predictability and intelligibility. In all the models so far examined, the result seems to thrust a court into the position of making some substantive assessment of the relative importance of the interests at stake. The concurring opinion in *Weekes* expressly invites such judicial balancing. In the *La Grande* analysis, although Justice Linde attempted to minimize the policy-making role of the courts, cases remain where the distinction between substance and procedure is not clear, as in *Thornton*, or where this distinction does not discriminate between those places where a local immunity should or should not exist. In this latter situation, as the Justice recognized, some account must be made of procedural matters having important substantive consequences or having significant effects on those living

about the relative importance of municipal condemnations of water rights and state efforts to protect agricultural interests. It is impossible to evaluate this choice without knowing more, especially about the composition of the Colorado State legislature. In any event, to the extent the opinion does rest on any such calculus, this would appear to be precisely the sort of judicial activity for which Justice Linde believes courts are not suited.

outside the boundaries of the acting government. In either event, the assessments will require judicial power. Similarly, a strict following of Professor Sato's scheme necessitates a separation of public and private sector allocations which, as *Thornton* shows, may be ineffective in distinguishing those occasions when the immunity is justified from those where it is not. Where, as in *Thornton*, the power in question is conferred only on actors in the public sector but the exercise of the power nevertheless has dramatic allocational effects on the private sector, including effects of those living outside the acting government, the analysis is not dispositive.

If, as is suggested, each of these doctrines requires some judicial appraisal of the relative importance of the municipal and state powers asserted, that fact should not be masked by the proliferation of more refined doctrinal distinctions (substance v. procedure, policy v. process, etc.) even if the effect in some cases is to reduce somewhat the judicial scrutiny required by past doctrine. Confronting the matter more frankly would seem preferable. Two possibilities may be suggested. First, the respective competencies of state and local governments may be expressly assigned, as is sometimes now done in state constitutions and elsewhere. For example, the Colorado Constitution, article XX, section 6, includes a detailed list of powers granted local government. Although the exclusive nature of these powers is present only for "municipal matters,"—a term needing judicial interpretation—the enumeration of specific powers can reduce the judicial role a substantial degree. A more elaborate example of the assigned competencies approach is found in the Toronto metropolitan governmental system in which the various governmental tasks are specifically allocated to the respective central and the local area governments.[79]

Second, the courts might employ something of the presumptive approach used elsewhere in this and other fields when judgments must turn on an inquiry which is critical yet beyond the technical or institutional competence of the courts. Indeed, the use of a presumptive approach may better fit the American reluctance to specify governmental relationships in great detail. In the local government law field, one example of a role-altering presumption already exists: the

79. *See* J. BOLLENS & H. SCHANDT, THE METROPOLIS 282-88 (3rd ed. 1975); Rose, *A Decade of Metropolitan Government in Toronto*, 13 BUFFALO L. REV. 539 (1964) (reviews the earlier history of the Toronto developments). *See also* H. KAPLAN, URBAN POLITICAL SYSTEMS: A FUNCTIONAL ANALYSIS OF METRO TORONTO (1967).

rule of interpretation known as the Dillon Rule.[80] One consequence of the rule is to limit the judicial role in determining local government powers. In providing that local governments have no powers not expressly granted, the rule precludes judicial creation of local governmental powers not considered by the legislature. Without proposing a return to the Dillon Rule, one might inquire how the respective judicial and legislative roles might be altered by a similar presumption. What would be the likely effect of a presumption favoring the state legislative enactment in any case of conflict? Suppose, for example, that a court adopted the principle that whenever the state enacted a measure clearly providing a different result from that provided for under a local ordinance, the matter by definition would be regarded as being of statewide concern and hence outside the area of any local immunity. What would be the consequence of such a rule?

First it is critical to note that there need be *no* reduction in the degree of local governmental power to act in areas where the state had not clearly acted in a contrary fashion. That is, the presumption under consideration could reduce the municipal *immunity* provided by home rule without affecting the use of home rule as a grant of *power*. Home rule cities could continue to operate without express state delegations, could continue to innovate and experiment and adapt to special local conditions. So long as the state had not acted in a clearly applicable and clearly inconsistent way, the presumption here being considered would not limit in any way the initiative power of local governments.

Second, the presumption that the state usually wins in case of clear conflict would mean that most decisions about the relative importance of local as against state preferences would be made in the state legislature—a forum which at least potentially can consider a broader range of factors and values than typically would be considered by the acting municipality. Due to growing interdependence in our urban regions, such broader perspective is of increasing importance and the risks of parochial decisions are increasing. In *Thornton*, for example, one cannot avoid the feeling that decisions concerning the relative priorities for water as between the city and the agricultural interests are not most fairly made within the Thornton City Council. And despite all the statutory variations, *Weekes* leaves some lingering doubt that a decision about the statewide consequences of municipal

80. *See* note 2 and accompanying text *supra*.

income taxes may not best be made by the Oakland City Council. Moreover, and *Thornton* is again an example, permitting wider state control would permit the use of administrative mechanisms which could with sensitivity, represent specially affected interests, develop data, plan coordination and clarify issues. Remaining fears of state interference with local government might adequately be reached by existing constitutional limitations on the state legislature, such as those familiar limits on special and local legislation or on state taxes for local purposes.[81]

The third likely consequence of a presumption in favor of state power in cases of state/local conflict would be a substantial reduction of the troubled judicial role. When a distinguished student of the question is forced to conclude that seventy-five years of litigation in one state has produced only "confusion, uncertainty, and unpredictability"[82] it is time to accept the implication that the problem will not succumb to formalistic distinctions and further doctrinal refinement. Of course, such a presumption would not eliminate the judicial role entirely. There remains the difficult, but judicially appropriate, task of determining when the legislature intended to override local choice. The preemption cases suggest that this area will remain challenging and complex.[83]

The presumption would leave to the state legislative branch the accommodation of state and local conflict. That branch, while perhaps not structurally suited to serve as a detailed delegator of municipal powers—hence the use of home rule as a grant of power remains justified—is probably better suited to accommodate state and local interests in areas of conflict, subject to some limited constitutional protections as noted above. To those who lack confidence in the competence or fairness of state legislatures, it can be said that the judicial record in this particular has not been unblemished, that difficulties with legislatures are not necessarily good arguments for imposing unsuitable tasks on courts and that, in any event, we appear to have precisely the quality of state legislatures we deserve.

81. For a general description and analysis of these techniques, see WINTERS, STATE CONSTITUTIONAL LIMITATIONS 14-31 (1961); F. MICHELMAN & T. SANDALOW, *supra* note 5, at 334-39.

82. Sato, *'Municipal Affairs' in California*, 60 CALIF. L. REV. 1055, 1061 (1972).

83. *See, e.g.*, Developments-Zoning, 91 HARV. L. REV. 1427, 1625-59 (1976) (developments in state court attacks on exclusionary zoning).