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Paths to Constitutional Home Rule for Municipalities

Wallace Mendelson

PATHS TO CONSTITUTIONAL HOME RULE FOR MUNICIPALITIES

WALLACE MENDELSON*

"It is not by the consolidation or concentration of powers, but by their distribution, that good government is effected. Were not this country already divided into states, that division must be made, that each might do for itself what concerns itself directly, and what it can so much better do than a distant authority. Each state again is divided into counties [and municipalities], each to take care of what lies within its local bounds. . . . It is by this partition of cares, descending in gradation from general to particular, that the mass of human affairs may best be managed for the good and prosperity of all."

—THOMAS JEFFERSON.

A basic American tradition is that problems which are national in scope (*i.e.*, which "affect more states than one") shall be handled by the national government, while problems of merely state-wide concern are left for state government. Municipal home rule is the application of this basic principal in the relationship of the state to its towns and cities. To put the matter in the most simple and direct terms — nothing should be done at the national level that can be done efficiently by the states and nothing should be handled at the state level that can be dealt with effectively by the local community. It is by such subdivision of governmental power and responsibility that we in America have sought to solve "the inherent difficulty which [bigness] begets — whether in the government of industry, university or nation — namely, the task of getting things done, consistently with that large regard for individual variations which is the essence of democracy."[1]

Home rule does not merely free cities from irksome control of purely local affairs by outsiders. It also relieves the already overburdened state legislature from the time consuming and thankless task of serving as city council for hundreds of communities whose special problems it cannot reasonably be expected to comprehend. In short, home rule benefits both state and local government. It is, after all, only another aspect of that division of labor which is the rule of modern life.

But while the principle of local self-government for towns and cities is clear, experience *in some states* has shown that it is sometimes difficult to achieve in practice. *To come at once to the heart*

* Associate Professor of Political Science, The University of Tennessee. The author desires that the following statement preface his article: "I speak here for myself alone and not for any group or institution with which I am, or have been associated."

1. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 68 (1939).

of the matter — in those states where home rule has failed, failure has resulted primarily from the attitude of the state courts.[2]

In some instances judges have displayed what can only be described as hostility toward the idea of home rule. The result has been a gradual whittling away of municipal powers until little or nothing remains of local self-government.[3] For such a situation there is, of course, no easy or immediate remedy. No form of constitutional language can be devised to give what a hostile court sees fit to withhold.

Another stumbling block has been not so much a hostile attitude, as an apparent lack of judicial enthusiasm, an attachment for the old, customary way of doing things. In fairness to the judges it should be added that this attitude often has been merely a by-product of inadequate and poorly drawn constitutional guides.[4] For problems of this type there is, of course, a remedy — constitutional provisions that will supply the judiciary with something more than pious wishes for their guidance. What follows is an effort to indicate some paths to this goal. Part I deals with the relatively simple matter of authorizing municipalities to adopt and amend their own charters. Part II deals with the far more difficult problem of the allocation of functions as between the state and the municipality. The first concerns *forms* of government; the second the *powers* of government.

PART I. THE ADOPTION AND AMENDMENT OF MUNICIPAL CHARTERS

A primary element of home rule is the provision for adoption or amendment by each individual municipality of its own city charter. As a matter of experience, this aspect of home rule has not been the source of any great difficulty. The chief problem here is to devise a simple and workable procedure for ascertaining the wishes of the community with respect to its basic governmental organization and machinery. In some cases the state constitution itself provides these procedures; in others the constitution merely provides that the state legislature shall by general law supply them. The former may be made "self-executing" in order to free home rule from possible frustration by a dilatory or unfriendly state legislature. On the other hand leaving the matter to the legislatures may provide greater flexibility in the face of experience and changing conditions. As Rodney Mott has said, "in its zeal to insure local autonomy, regardless of the attitude

2. Compare KNEIER, CITY GOVERNMENT IN THE UNITED STATES 85-109 (1947); MCDONALD, AMERICAN CITY GOVERNMENT AND ADMINISTRATION 78-82 (1941); MCGOLDRICK, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-1930 299-351 (1933); 2 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 4.85-4.113 (1949); MOTT, HOME RULE FOR AMERICA'S CITIES 51-52 (1949); THE COUNCIL OF STATE GOVERNMENTS, STATE-LOCAL RELATIONS, REPORT OF THE COMMITTEE ON STATE-LOCAL RELATIONS 169-70 (1941).

3. Compare Fordham and Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18 (1948); Merrill, *Constitutional Home Rule for Cities, Oklahoma Version,* 5 OKLA. L. REV. 139 (1952).

4. MCQUILLIN, *op. cit. supra* note 2, § 10.19.

of the legislature toward it, a state may set up such a cumbersome procedure . . . as to preclude its actual use. If the details of charter-making are too complex, the citizens may be discouraged from undertaking it. Even if they are courageous enough to make the attempt, the courts may declare the new [charter or amendment] illegal because of a failure to conform to some obscure technical point. A prescription of the details of charter-making may place a city on a procedural tight rope. The cities need a practical home rule procedure rather than a theoretical right which it may be difficult to use."[5]

In view of these considerations it would seem desirable to "require" the state legislature by general law to provide charter-making and amending procedures *and also* to provide an alternative, self-executing procedure in the constitution itself. The latter should be in broad outline form as in the constitutions of Colorado (Constitution, Art. XX, Sec. 5) and Texas (Constitution, Art. XI, Sec. 5). For "the fewer details which can be included and still enable the cities to proceed regardless of legislative inaction, the better. . . . It is more in accordance with the spirit of home rule to permit a city to work out its own procedure through the local council or charter commission than to prescribe it by constitutional or legislative fiat."[6]

The following proposed constitutional provisions have been prepared in the light of these considerations:

SECTION 1: Provision shall be made by general law, which may provide optional plans, for the organization and government of municipalities which do not secure charters in accordance with the provisions of Section 2 of this Article. But no plan or charter of organization and government shall become operative in any municipality until submitted to the qualified voters thereof in accordance with the election procedures outlined in Section 2 of this Article and approved by a majority of the qualified voters voting thereon.

SECTION 2: Subject only to the Declaration of Rights of this Constitution, the provisions of this Article[7] and general laws of the state which [do not deal with matters of purely or essentially local concern and which] in terms and effect apply alike to all municipalities, any municipality may adopt or amend a charter for its own organization and government in the following manner: upon publication of a proposed charter or charter amendment either by the legislative body of a municipality or by a charter commission of five members, chosen in a municipal election pursuant to petition for such election signed by ten per cent of the qualified voters of a municipality, the municipality shall submit such proposal to its qualified voters at a general or special election, not later than the first general election which shall be held at least

5. MOTT, *op. cit. supra* note 2, at 23.
6. *Ibid.*
7. Some or all of the other provisions of the state constitution might be added here. In its present form Section 2 imposes upon municipalities only civil liberty restraints, those provided in the home rule article itself and such others as may be imposed by existing and future *general* laws of the state (dealing with matters not of purely or essentially local concern).

sixty days after such publication. Any number of amendments may be so submitted for approval or disapproval at any election, but each amendment shall be voted upon separately. Subject to the other provisions of this Article, proposals submitted in reasonable conformity with the procedures herein outlined shall be immediately effective upon approval by a majority of the qualified voters voting thereon.

SECTION 3: Municipalities are hereby authorized to appropriate money and to make rules and regulations for the conduct of elections authorized by Sections 1 and 2 of this Article.

PART II. THE ALLOCATION OF POWERS BETWEEN STATE AND MUNICIPALITY

In those states in which home rule has failed, the stumbling block has always been the difficulty of locating a line between local and state affairs. Indeed, the Supreme Court of Wisconsin with disarming frankness has confessed that, "We find no answer to this [problem] in any decision of any court in this country."[8] In some cases the language of home rule provisions has been ambiguous.[9] Often the difficulty has sprung from the inability of human foresight and language to anticipate the problems that time and change present. Sometimes judges have been hostile, sometimes merely unfriendly. All too frequently they have been compelled to make decisions without the aid of adequate legislative or constitutional guideposts. To make matters worse we often want both local autonomy and the uniformity or improved standards which in practice come most easily from central supervision.[10] Finally there are those among us whose enthusiasm switches back and forth between local and state autonomy according to their selfish interests or prejudices in each particular case.

A. *The Concurrent Power Approach*

To state the problem in the thoroughly orthodox manner in which it has just been stated assumes that there is a sharp line of demarcation between state and local affairs and that the difficulty lies in locating it. But experience teaches that categories distinct at their cores merge into one another at their peripheries. And matters that are purely local for some purposes are of state-wide concern for other purposes. Moreover, what concerns only towns and cities today may well have broader implications tomorrow. For example, as the Supreme Court of California has observed,

"Until the advent of the automobile, interurban traffic was so small as to be negligible, and, as a result, traffic regulations were a matter of concern only to the inhabitants of the city. But when autos and motor trucks invaded our highways and streets in tens and hundreds of thousands, a matter that yester-

8. Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25, 28, *aff'd on rehearing*, 222 Wis. 58, 268 N.W. 108, 105 A.L.R. 244 (1936).
9. MCQUILLIN, *op. cit. supra* note 2, §§ 4.85-4.86.
10. MCGOLDRICK, *op. cit. supra* note 2, at 101.

day was local has become of state and nationwide importance today. . . . The term "municipal affairs" is not a fixed quantity but fluctuates with every change in the conditions upon which it is to operate."[11]

Judge Marshall of Missouri put the problem in a nutshell when he declared "it 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. . . . [N]o fixed, certain, general or intelligible rule can be formulated upon such a distinction. . . . [for] There are many matters which are in a sense local but in which the state at large has a direct interest."[12] The fundamental difficulty is that governmental powers cannot be neatly compartmentalized into national, state and local categories. To expect courts to do so is to expect the impossible. Judges must be painfully aware that in making a constitutional decision they are deciding far more than the case immediately before them. When called upon to allocate governmental powers on an either-or basis they must inevitably favor the larger, more comprehensive level of government. For those upon whom such responsibility falls must be constantly aware that there is far greater danger in depriving a larger, rather than a smaller, unit of government of any given power. Thus at the very least in cases of doubt or controversy the judicial tendency must be — and quite properly is — against home rule. This is the curse of a system that assumes any given power is either national, state or local in essence. In short if the orthodox demarcation approach is used, the problem is essentially insolvable — for it assumes conditions that do not exist. The result is "built in" uncertainty, controversy and litigation.

The solution then is to cut the Gordian knot — to recognize, for example, that the public school system is in some of its aspects and in some contexts both local and super-local. This entails (1) making the powers of the state and city concurrent, (2) outlawing all special legislation in the municipal field, and (3) recognizing that in case of conflict, *general* state legislation shall take precedence over local charters and ordinances. Item (1) faces reality by recognizing that there is no sharp demarcation line between city and state affairs and thus eliminates the basic cause of home rule failures. Item (2) takes account of the historical fact that it is special legislation that has been the curse of municipal government. All too often such legislation in fact is not legislation by the state legislature. It is in practice simply the dictate of one or a handful of legislators from a particular city. As such, of course, it circumvents the inherent, democratic safeguard against unwise legislation. "What happens," as Dean Fordham has observed, "is casual, unstudied enactment of almost any local measure

11. Quoted in KNEIER, *op cit. supra* note 2, at 101.
12. State *ex rel.* Garner v. Missouri & Kansas Tel. Co., 189 Mo. 83, 88 S.W. 41, 44 (1905) (concurring opinion).

if sought or approved by the representatives from the district concerned. At the 1947 regular session of the General Assembly of Tennessee the process reached the nadir of legislative irresponsibility. Local bills were passed in blocs.

The following is quoted from the Nashville Tennessean for February 22, 1947:

'In the House, [the] Speaker . . . and Chief Clerk . . . were more interested in actual experiments with speed up devices than in ascertaining membership attitudes toward speed up plans.

'Passage of local bills traditionally has been an abbreviated procedure. But nobody ever kicks. The process calls for the clerk to mumble the first five names on the roll call and then sing out "65 ayes and no noes." This is done for each local bill.

'Friday [the Speaker and Chief Clerk] tried the same procedure on whole blocks of bills. It worked. There were no kicks.' "[13]

Finally, item (3) recognizes the historical fact that general legislation has not been a serious danger to legitimate city interests; that the requirement of generality provides inherent safeguards against legislative abuses; and that inevitably in case of real difference of opinion between state and city on any specific matter the former must and will prevail. Home rule does not mean anarchy.[14] It recognizes that in matters affecting the general welfare of the state the part must yield to the whole. In case of disagreement as to what is local and what is of state-wide importance, certainly a local view must give way when most citizens of the state, acting through their responsible representatives at the state capitol, are in agreement upon the need for *uniform,* general state action. To hold otherwise is to deny the basic democratic premise that in community affairs the views of the many shall prevail over the views of the few.

The following proposed constitutional provisions are offered as embodying the foregoing principles:[15]

SECTION 4: Subject only to the Declaration of Rights, the provisions of this Article,[16] the provisions of its charter and general laws of the state which [do not deal with matters of purely or essentially local concern and which] in terms and effect apply alike to all municipalities, each municipality shall

13. FORDHAM, LOCAL GOVERNMENT LAW 75 (1949).

14. "Every constitutional amendment granting home rule powers to cities contains some saving clause, some words to insure the continued dominance of the state legislature in matters of state interest." McDONALD, *op. cit. supra* note 2, at 78-79.

15. These sections are numbered to follow in consecutive order the sections proposed in Part I, above, dealing with the adoption and amendment of charters.

16. Some or all of the other provisions of the state constitution might be added here. In its present form Section 4 imposes upon municipalities only civil liberty restraints and such others as may be provided by existing or future *general* legislation of the state (dealing with matters that are not of purely or essentially local concern). Of course, both states and municipalities are subject to the restrictions of the Constitution of the United States.

have full power to tax, regulate and otherwise govern within its territorial jurisdiction; and both within and beyond its territorial jurisdiction to borrow money and acquire real or personal property by condemnation or otherwise for community welfare purposes, and to dispose thereof.

For purposes of zoning and other regulations of land use the term "territorial jurisdiction" as used in this section includes all areas within five miles beyond each municipality's corporate limits in the case of municipalities of less than 25,000 inhabitants, and ten miles in the case of larger municipalities, excepting any area within the corporate limits of another municipality. Where there is not enough distance between two municipalities to give each the full zoning area to which it would otherwise be entitled, the zoning power of each shall extend to a point midway between the two.

SECTION 5: Any municipal charter, ordinance or regulation adopted pursuant to the terms of this Article shall supersede any conflicting special legislation of the state. The state shall not hereafter enact any special legislation with respect to any municipality or any matter within the territorial jurisdiction of any municipality [nor any legislation whatsoever dealing with matters of purely or essentially local concern.]

SECTION 6: No state legislation [dealing with municipal salaries and wages] that would directly and substantially increase the fiscal burdens of any municipality shall become effective in such municipality until approved by the legislative body thereof. But nothing in this Article shall be deemed to restrict the power of the state to give fiscal aid to municipalities for the purpose of improving their facilities or services.

The geographical restriction that Section 4 imposes on the *governmental* power of cities is nothing more than the territorial limitation that applies to all governments. In short except for zoning purposes the concurrent power of the city under this provision runs only to the city limits, just as national competence runs only to the nation's boundaries. The zoning power has been extended further to enable cities to protect themselves from strangulation by conditions over which they would otherwise have no control short of annexation. It would ease municipal growing pains by providing the foundation for orderly, planned expansion. Too many of our cities are now paying an unconscionable price for having in the past "just growed."

But, it will be noted, Section 4 puts welfare rather than territorial limitations upon a city's *proprietary* powers, because, for example, cities often need outside property for such things as water and sewage systems. This, of course, means that under Section 4 municipal proprietary power would be subject to a qualitative limitation ("community welfare"). This is in effect a return to the old demarcation approach. Clearly such a limitation is much less objective than the territorial type and thus more susceptible to judicial "manipulation" or misunderstanding. But, if cities are to have at least some authority outside of their boundaries, this seems to be the most effective way to provide for it.

Section 4 imposes two limitations upon the power of the state to

enact general legislation. The first, confining general legislation to matters of more than "purely or essentially local concern" is optional and would not appear in a strictly concurrent power system. But it might be included to throw weight on the side of municipal freedom. Such a limitation, of course, would invite judicial interpretation, *but only in case of attacks upon state laws deemed unduly to impinge upon local affairs and not vice versa.* For the territorial restriction is the only corresponding limit on city governmental powers.[17]

The second restraint on the general legislative powers of the state imposes the requirement that laws must "in terms and effect apply alike to all municipalities." This clause comes from the New York Constitution[18] and has been construed by Chief Judge Cardozo in a leading case[19] to mean that classification of cities for legislative purposes is permissible, but only if it is not in fact a subterfuge for special legislation:

> "We are no longer confined to the inquiry whether an act is general or local 'in its terms'. We must go farther and inquire whether it is general or local 'in its effect'. . . . If the class in its formation is so unnatural and wayward that only by the rarest coincidence can the range of its extension include more than one locality, and at best but two or three, the act so hedged and circumscribed is local [i.e., special] in effect. If the same limits are apparent upon the face of the act, unaided by extrinsic evidence, or are so notorious or obvious as to be the subject of judicial notice, it is also local [i.e., not general] in its terms.
>
> "The statute now before us cannot survive these tests. All the stigmata of arbitrary selection, of forced and unnatural classification, appear upon its face. By its terms a new burden has been laid, despite its pretense of generality, but upon one city or a few."[20]

These limited quotations hardly do Chief Judge Cardozo justice, but a full reading of the opinion and a subsequent case[21] based thereon makes it quite clear that under the clause in question special legislation disguised by classification is outlawed.[22]

The Section 5 restriction upon all legislation, general or special, "of purely or essentially local concern" is optional, being merely a negative counterpart of the same restraint that appears in Section 4.

The "fiscal burden" restriction in Section 6 is designed to put a check upon state legislators who (often at the instance of pressure

17. See note 16 *supra.*
18. Formerly, Art. XII, § 2; now Art. IX, § 11.
19. *In re* Elm Street in the City of New York, 246 N.Y. 72, 158 N.E. 24 (1927).
20. *Id.* at 25-26.
21. Osborn v. Cohen, 272 N.Y. 55, 4 N.E.2d 289 (1936).
22. A state that adopts a law of another state is deemed to adopt also the adoptee state's judicial construction thereof. See Part II, D, below. If it should seem desirable to limit general legislative powers even further, Section 4 might be expanded to include a clause that would prohibit all forms of classification except that based on population and/or a proviso to the effect that no law applicable to a class which includes less than four municipalities shall become operative in a municipality until approved by the legislative body thereof.

groups) find it easy to vote "improvements" which not they, but city councils, will have to find a way to finance. This restriction, of course, would not imperial state financed improvements. It would mean simply that, if the state legislature wanted to require higher standards than municipalities saw fit to provide, the state would have to pay for them either wholly or by a grant-in-aid system.

But such a provision entails a serious danger. It might encourage cities to hold back needed improvements in the hope that the state would thus be compelled to provide them. We certainly should not encourage local communities to lag behind the times. Indeed it is precisely their failure to keep up with modern developments that has brought about a good part of the present state "interference" in local affairs.

B. *The Model State Constitution Approach*

For those who prefer the demarcation line approach, the Model State Constitution of the National Municipal League provides an excellent solution.[23] Drawing upon experience in all home rule states over a long period of years, the League has devised the following composite of what it considers the most desirable features of a number of different state constitutions:

> SECTION 4: Each municipality is hereby granted full power and authority to pass laws and ordinances relating to its local affairs, property and government; and no enumeration of powers in this constitution shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not be deemed to limit or restrict the power of the legislature to enact laws of state-wide concern uniformly applicable to every municipality.
>
> The following shall be deemed to be a part of the powers conferred upon municipalities by this Section when not inconsistent with general law:
>
> (a) To adopt and enforce within their limits local police, sanitary and other similar regulations.
>
> (b) To levy, assess and collect taxes, and to borrow money and issue bonds, and to levy and collect special assessments for benefits conferred.
>
> (c) To furnish all local public services; and to acquire and maintain, either within or without its corporate limits, cemeteries, hospitals, infirmaries, parks, and boulevards, water supplies, and all works which involve the public health and safety.
>
> (d) To maintain art institutes, museums, theatres, operas, or orchestras, and to make any other provision for the cultural needs of the residents.
>
> (e) To establish and alter the location of streets, to make local public improvements, and to acquire, by condemnation or otherwise, property within its corporate limits necessary for such improvements, and also to acquire additional property in order to preserve and protect such improvements, and to

23. THE COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 16 (1948).

lease or sell such additional property, with restrictions to preserve and protect the improvements.

(f) To acquire, construct, hire, maintain and operate or lease local public utilities; to acquire, by condemnation or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and regulate the exercise thereof.

(g) To issue and sell bonds, outside of any general debt limit imposed by law, on the security in whole or in part of any public utility or property owned by the city, or of the revenues thereof, or of both, including in the case of a public utility, if deemed desirable by the city, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.

(h) To organize and administer public schools and libraries.

(i) To provide for slum clearance, the rehabilitation of blighted areas, and safe and sanitary housing for families of low income, and for recreational and other facilities incidental or appurtenant thereto; and gifts of money or property, or loans of money or credit for such purposes, shall be deemed to be for a city purpose.[24]

It will be noted that this proposal begins with a division of power predicated on a distinction between "local affairs, property and government" and affairs "of state-wide concern."

Then, as Arthur Bromage observes, it faces the problem of possible unfriendly judicial interpretation "by specifically enumerating large segments of municipal authority. . . . Further definition of municipal authority over local affairs, property and government depends, of course, on the legislature and the courts. In this way [Section 4] avoids the broad grant without any enumeration and also avoids constitutional language leaving the determination of municipal powers entirely to the vagaries of legislative action.

"When all is said and done, it must be recognized that the ultimate success of the home rule section of the Model State Constitution, like many of the home rule articles now in existence among the states, rests upon a wiser and broader sweep of judicial interpretation."[25] If Mr. Bromage is right in suggesting that judicial interpretation is home rule's greatest danger, then clearly there is more risk involved in the model than in the concurrent power proposal. For, in addition to the dangers which Mr. Bromage admits, the special enumeration of local powers in sub-sections (a) to (i) itself presents problems of, or at least is susceptible to unfriendly, interpretation. The purely concurrent power approach undertakes to remove allocation entirely from judicial hands. But it would leave to the courts — in addition to their jurisdiction with respect to conflicts between local and state law — the problem of enforcing the constitutional prohibition upon special legislation with respect to cities and upon attempts at evasion via specious

24. This section is numbered to follow in consecutive order the sections proposed in Part I, above, dealing with the adoption and amendment of charters.
25. MODEL STATE CONSTITUTION, *supra* note 22, at 47.

classification. And, of course, if the optional restraints upon state powers are used, the courts would have something to say about the scope of state power — thus giving home rule a second line of defense.

It should be noted that the Model Constitution adopts the Wisconsin Constitution's treatment of the classification problem — home rule powers with respect to local matters "shall not be deemed to limit or restrict the power of the legislature to enact laws of state-wide concern uniformly applicable to every municipality." This has been held by the Wisconsin Supreme Court to mean that:

> "If in dealing with the local affairs of a city the Legislature classifies cities so that the act does not apply with uniformity to every city, that act is subordinate to a charter ordinance relating to the same matter.... When the Legislature deals with matters which are primarily matters of state-wide concern, it may deal with them free from any restriction contained in the home rule amendment.... The power of the Legislature to classify cities when it deals with local affairs of a city is impaired by the amendment. Its power to classify cities when it deals with matters of state-wide concern which are not also local affairs is unimpaired."[26]

C. *The Leave-it-to-the-Courts Approach*

As indicated above the concensus of informed opinion is that judicial efforts to determine the boundary between state and local affairs has not in practice been conducive to effective home rule. Still there are some who, all things considered, may prefer the judicial to the political processes for the solution of such problems. This attitude is the more appealing because it leaves final decision to the typically most conservative branch of the state government and the branch least likely to be encumbered with "politics." Certainly, passing thorny political bucks to the judiciary for solution is a deeply ingrained tradition in this country. Indeed, this is exactly what has been done, consciously or unconsciously, in those home rule constitutions which purport to allocate powers between state and city by the use of ambiguous phrases which in the nature of things can have no intrinsic meaning. To authorize municipalities, for example, to regulate all "local," or "municipal" affairs is in effect to delegate policy making power to the courts — to give them a form of *administrative* power to decide issues which for one reason or another the constitutional convention itself found it inexpedient to decide. Those who consider such "judicial home rule" desirable might obtain it by a constitutional provision in the following terms:[27]

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26. Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25, 35-36, *aff'd on rehearing*, 222 Wis. 58, 268 N.W. 108, 105 A.L.R. 244 (1936). See also Martin v. City of Juneau, 238 Wis. 564., 300 N.W. 187 (1941); Barth v. Village of Shorewood, 229 Wis. 151, 282 N.W. 89 (1938).

27. This section is numbered to follow in consecutive order the sections proposed in Part I, above, dealing with the adoption and amendment of charters.

SECTION 4: Each municipality is hereby granted full power and authority to regulate its own local affairs subject only to the provisions of this Constitution and the general [and special] laws of the state.

But as experience and Mr. McGoldrick have shown, "our judges are no better qualified to establish the rules of the relationship of municipalities to the state than are our legislators, unless we deem them men of greater sense and experience. This must be quite apart from their legal training *per se,* which would, if anything, unfit them for the task. Secondly, the judicial process has rather less to commend it for the solution of municipal problems than the legislative process. The former is deeply concerned with precedent and overly interested in analysis. The latter admits of practical discussion by laymen conversant with the problem and is free to consider the widest possible implications of the policy to be decided upon. The judicial process is not only cumbersome, costly and slow, but it produces a scant product. Legislation permits a more complete and thorough job and permits matters to be considered in relation to a coordinated programme. Lastly, the judicial decision is all but riveted into the constitution which it interprets. Judicial mis-steps are not easy to retrace. They are likely to lead to further wandering before they return to the path of wisdom. Legislative errors are far more readily retrieved."[28] Moreover, "judicial home rule" may be and has been unsatisfactory from the courts' point of view. For it has a tendency to involve them in political controversies and thus weaken their effectiveness in more clearly judicial work.

D. *The Adopted System Approach*

A well-know and generally recognized canon of construction is that,

"When provisions have been adopted into the constitution of the state, which are identical with or similar to those of other states, it will be presumed that the framers of such constitution were conversant with, and designed to adopt also, any construction previously placed on such provisions in such other states."[29]

This means that by adopting the constitutional provisions under which home rule has flourished in another state, the adopting state in effect — if the contrary is not indicated — adopts also the other state's past judicial interpretations of those provisions. The problem then is reduced to one of drawing in full measure upon the constitutional language of a state whose experience is deemed satisfactory. Tastes vary[30] and there are about a score of different home rule systems to choose from, plus hundreds of interpretative court decisions. We will not here attempt the detailed analysis that would be required to make

28. MCGOLDRICK, *op. cit. supra* note 2, at 311-12.
29. 12 C.J., *Constitutional Law* § 70 (1917). See also 16 C.J.S., *Constitutional Law* § 34 (1939).
30. Compare FORDHAM, *op. cit. supra* note 13, at 78.

an intelligent choice as between the existing systems. But it will be appropriate to mention some of the problems which the adoption approach presents.

Assuming, as we reasonably may, that the courts of the adopting state will honor the above mentioned canon of construction, it is possible that in some cases they will find that conditions in their state are sufficiently "different" to justify ignoring the outside precedents. Also it is just possible that upon some issues there will be no outside interpretative decisions to draw upon. Probably these difficulties are not in themselves sufficiently serious to be considered as substantial objections. In any case, they may be anticipated and circumvented by appropriate constitutional language after careful examination of the relevant decisions before adopting any particular home rule scheme from a sister state.

But a serious objection to the adoption approach is that laymen, *i.e.*, the voting public, cannot reasonably be expected to know and understand a multitude of court decisions of the state whose system they are asked to adopt. Thus, in effect, they will have to vote their approval or disapproval in the dark, or on the basis of someone's interpretation of the relevant judicial interpretations. This is hardly consonant with the ideals of democracy.

E. *The Illinois Plan*

The extremely difficult relationship between the metropolis of Chicago and the state of Illinois has resulted in a provision that no special state law with respect to Chicago can become effective until approved at the polls by the voters of that city. Such a negative approach certainly is not genuine home rule, but it does help to eliminate some of the abuses of the old system. This device could be expanded for more general use in other situations as indeed it was for a time in Michigan and New York before they obtained real local self-government.[31]

Under an expanded Illinois plan the state would retain its customary power to enact general and special legislation concerning municipalities but no *special* law would go into effect until it had been approved by the voters (or the city council) of the community involved. This device might be used alone or in conjunction with more orthodox, positive home rule provisions.

Negative home rule of this type might be obtained through a constitutional provision in the following terms:

> No special or local law, enactment or provision of this state shall become effective with respect to any municipality or any matter of municipal interest unless approved by resolution of the legislative body of the municipality concerned, but nothing herein shall be deemed to limit the power of the legislature to enact general laws uniformly applicable to all municipalities.[32]

31. MCDONALD, *op. cit. supra* note 2, at 87.
32. See paragraphs 10 and 11, Art. IV, § 7 of the New Jersey Constitution of 1947.