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MUNICIPAL HOME RULE: AN EVALUATION OF THE MISSOURI EXPERIENCE

JAMES E. WESTBROOK*

I. INTRODUCTION

Following the lead established by Missouri in 1875, constitutional home rule provisions have been enacted in more than half of the states.¹ Despite repeated statements that home rule has failed to accomplish its avowed purposes,² it has shown a continuing vitality. Since 1950, home rule provisions have been adopted in Rhode Island, Louisiana, Tennessee, Alaska, Hawaii, Kansas, South Dakota, Connecticut, and Massachusetts.³ The voters of New York approved a comprehensive revision of that state's home rule provision in 1963.⁴ Fifteen Missouri municipalities with a total 1960 population of approximately 1,743,542 operate under home rule charters.⁵ This is considerably more than half of Missouri's urban population.⁶

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1. ALASKA CONST. art. X, § 9; ARIZ. CONST. art. XIII, § 2; CAL. CONST. art. XI, § 8; COLO. CONST. art. XX, §§ 1, 6; CONN. CONST. art. X, § 1; FLA. CONST. art. VIII, § 11; GA. CONST. art. XV, ch. 2-83; HAWAII CONST. art. VII, § 2; KAN. CONST. art. XII, § 5; LA. CONST. art. XIV, § 40; MASS. CONST. art. II, § 6; MD. CONST. art. XI-E, § 3; MICH. CONST. art. VIII, § 21; MINN. CONST. art. XI, § 3; MO. CONST. art. VI, §§ 18(a), 19, 31; NEB. CONST. art. XI, § 2; NEV. CONST. art. VIII, § 8; N.M. CONST. art. X, § 4; N.Y. CONST. art. IX, §§ 1, 2; OHIO CONST. art. XVIII, § 7; OKLA. CONST. art. XVIII, § 3(a); ORE. CONST. art. XI, § 2; PA. CONST. art. XV, § 1; R.I. CONST. amend. XXVIII, § 2; S.D. CONST. art. X, §§ 4, 5; TENN. CONST. art. XI, § 9; TEX. CONST. art. XI, § 5; UTAH CONST. art. XI, § 5; WASH. CONST. art. XI, § 10; W.VA. CONST. art. VI, § 39(a); WISC. CONST. art. XI, § 3.

2. *E.g.*, CHICAGO'S GOVERNMENT—REPORT OF THE CHICAGO HOME RULE COMMISSION (1954); Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U.L. REV. 27 (1956); Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571 (1955).

3. Rhode Island (1951); Louisiana (1952); Tennessee (1953); Alaska and Hawaii (1959); Kansas (1960); South Dakota (1963); Connecticut (1965); Massachusetts (1966).

4. An amendment comprising art. IX, § 1-3 was adopted Nov. 5, 1963, and went into effect Jan. 1, 1964. Former art. IX, except sections 5, 6, and 8 was repealed at the same time.

5. The municipalities, their 1960 population, and the year in which their charter was first adopted are as follows: Berkeley (18,676)(1957); Bridgeton (just over 10,000 as result of special census)(1966); Clayton (15,245)(1957); Columbia (36,650)(1949); Ferguson (22,149)(1954); Florissant (38,166)(1963);

Only St. Louis and Kansas City adopted their charters prior to 1947. This in itself is some evidence of the continuing vitality of the home rule concept in Missouri.

The term home rule serves as both a political symbol and a legal concept.⁷ As a political symbol it serves as a rallying point for those who support local autonomy without undue interference by the state government. As a legal concept its basic function is to distribute power between the state and local governments.⁸ Home rule lacks exact meaning when it is used as a political symbol. Failing to achieve a consensus on specifics, its proponents have tended to describe their goals in general terms. Since the advocates of local autonomy usually have not given detailed content to their program, most constitutional provisions drafted in response to their urging have not provided precise answers to the complex questions which arise when they are applied to concrete fact situations.⁹ This failure to develop clear goals and to translate them into constitutional provisions capable of precise application is probably the chief cause of the failure of home rule to live up to the expectations of its supporters, though the courts have received most of the blame.¹⁰

This article will deal with home rule as a legal concept and will focus on the experience in Missouri. In order to understand and evaluate the manner in which the Missouri home rule provisions distribute power between the state and home rule municipalities, it will be necessary to consider three basic issues: (1) the scope of power of a home rule city in the absence of an express constitutional or statutory prohibition or authorization; (2) whether statutes or local enactments prevail when there is a conflict; and (3) the legal status of the home rule charter. Since the first two issues are frequently confused, it will be helpful to distinguish between them at the outset.

The first goal of home rule proponents has been to provide municipalities with the power to act without prior authorization by the state legis-

Hannibal (20,028) (1957); Independence (62,328) (1961); Joplin (38,958) (1954); Kansas City (475,539) (1889); St. Joseph (79,673) (1961); St. Louis (750,026) (1876); Springfield (95,865) (1953); University City (51,249) (1947); Webster Groves (28,990) (1954).

6. Missouri's total population in 1960 was 4,319,813; its urban population was 2,876,557. 1965-1966 OFFICIAL MANUAL, STATE OF MISSOURI, 1466.

7. Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEX. L. REV. 682 (1959); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (1964).

8. Sandalow, *supra* note 7, at 645.

9. *Id.* at 658.

10. Cohn, *supra* note 2, at 30.

lature. They have thus sought to alter the traditional rule that municipalities have no power except that which is delegated to them by the state legislature.¹¹ Is this grant of power unlimited in the absence of conflicting provisions in the constitution or statutes? If there are additional limitations, what are they? In other words, what does the city attorney tell the municipal governing body when it asks him what powers the city can exercise when there is no express authorization and no express prohibition.

Because legislatures have not hesitated to enact laws affecting matters which local officials have thought were of primary concern to municipalities, these officials have also sought through home rule to impose limits on the legislature's power to deal with home rule municipalities. This issue arises in the courts when a charter or ordinance conflicts with a statute. When the courts have held that the legislature's power with respect to home rule cities is limited by the home rule provision in the state constitution, they have tended to rely on general formulas such as the state-local or governmental-proprietary tests in delineating the boundaries of the constitutional limitations.¹² The municipal enactment will prevail if the activity or function is labeled as "local," "inherently municipal" or "proprietary." The statute will prevail when the activity or function is said to be "governmental" or of "statewide concern."¹³

Both of these issues are important and must be dealt with by those concerned with city-state relationships. They can be analyzed and evaluated with more clarity if they are considered as two distinct problems. It is apparent that different considerations are relevant in the resolution of these two issues. It is one thing to argue that there should be no limit on municipal power in the absence of an express prohibition; it is quite another thing to argue that some municipal enactments should prevail over conflicting statutes. There is a tendency on the part of both courts and commentators to fail to observe this distinction,¹⁴ and the Missouri courts are no exception.

11. 1 ANTIEAU, *MUNICIPAL CORPORATION LAW* § 2.00 (1958). The concept of an inherent right to local self-government never made serious inroads upon the doctrine of legislative supremacy over local government. Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948); McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COL. L. REV. 190 (1916).

12. See Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385 (1953) for a discussion of the treatment of this issue by the Missouri courts.

13. See 1 Antieau, *op. cit. supra* note 11, at § 3.17.

14. Sandalow, *supra* note 7, at 650-652, 661-668.

II. THE SCOPE OF MUNICIPAL POWER IN THE ABSENCE OF A CONSTITUTIONAL OR STATUTORY AUTHORIZATION OR PROHIBITION

A. Construction of the Home Rule Provision

The Missouri Constitution states that "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state . . ."¹⁵ Commentators have referred to this language as confusing¹⁶ and as leaving the matter of home rule in a state of ambiguity.¹⁷ Taken literally, the only limits on municipal initiative imposed by this language are those found in the constitution and in enactments of the state legislature. While it could be construed to devolve powers upon home rule cities which are coextensive with those of the legislature itself as long as the legislature does not take positive steps to deny the power, it has not been construed this broadly. Those commentators who have studied the court decisions construing this language have concluded that not only must municipal enactments be compatible with the constitution and laws of the state, but that the initiative of home rule municipalities is limited to proprietary functions and to governmental functions which "are of primarily local concern"¹⁸ or "paramountly concern local matters."¹⁹ Such a reading of the scope of municipal power is warranted by dicta in several opinions of the Missouri Supreme Court, but there is justification for asserting that the power of Missouri municipalities is broader than this. This assertion can be substantiated by reference to the debates of the 1875 Constitutional Convention, the actual holdings in several home rule decisions, and dicta in other home rule decisions. It is more difficult, however, to suggest an alternative formulation of the outermost reaches of municipal power in the absence of a constitutional or statutory prohibition.

15. Art. VI, § 19. This language is substantially the same as that found in art. IX, § 16 of the 1875 Constitution, except that the figure 10,000 replaced the words "one hundred thousand." The power to frame a home rule charter was granted to St. Louis in substantially the same terms in art. IX, §§ 20-23 of the 1875 Constitution. The St. Louis charter adopted pursuant to the authority granted in the 1875 Constitution is expressly recognized in art. VI, §§ 31-33 of the present Constitution.

16. MCBAIN, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE* 124 (1916).

17. Schmandt, *supra* note 12, at 387. McBain and Schmandt were troubled by the ambiguity of the Missouri provision both as to the scope of municipal initiative and as to its effect as a limitation on the legislature.

18. *Id.* at 405.

19. NICKOLAUS, *CONSTITUTIONAL HOME RULE IN MISSOURI*, 6 (Missouri Municipal League 1966). The difference in phraseology between Professor Schmandt and Mr. Nickolaus results because *City of Joplin v. Industrial Commission of Missouri*, 329 S.W.2d 687 (1959), which laid down the "paramount interest" rule, was decided after Professor Schmandt wrote his article. . . .

B. *The 1875 Constitutional Convention*

The delegates to the 1875 Constitutional Convention did not explicitly discuss the scope of municipal initiative, probably because they were uncertain as to the full significance of this new technique for dividing power between the state and municipalities.²⁰ Since Missouri was the first state to adopt a home rule provision, it would be surprising if the delegates had anticipated all of the questions which have subsequently arisen. Some insight can be obtained, however, by examining the situation which gave rise to the home rule provision and the reaction of the convention delegates to this situation.

The impetus for home rule came from the St. Louis convention delegates. Between 1865 and 1875, fifty-one special laws applicable to St. Louis were enacted by the Missouri legislature, and additional special legislation applicable to St. Louis County affected the city.²¹ The result, when added to the special legislation enacted prior to this time, was a patchwork of approximately one-hundred statutes directly or indirectly pertaining to the city.²² A leading advocate of home rule complained that "our charter was the creature of the St. Louis delegation in the legislature, and was subject to constant tinkering at the request of individuals."²³

The St. Louis delegation's suggested solution to this state of legal anarchy was a constitutional grant to the city of legislative power previously exercised by the state legislature. They chose language which imposed no limit on the exercise of power except the requirement of consistency with the constitution and laws of the state. That they specified these limitations is some indication that implied limitations, such as the requirement that the power "paramountly concern local matters," was not intended.²⁴ When the courts read implied limitations on municipal power into the constitution and phrase these limitations in general terms, they take upon themselves the power to decide whether the exercise of specific powers is to be permitted. However, by subjecting home rule charters to the laws of the state, the draftsmen indicated that they were entrusting the legislature with primary responsibility for curbing unwarranted municipal activity. The

20. See Sandalow, *supra* note 7, at 658, fn. 63.

21. BARCLAY, *THE ST. LOUIS HOME RULE CHARTER OF 1876*, 2 (1962).

22. *Id.* at 3, 4.

23. *Id.* at 4.

24. The rule of construction that the expression of some powers implies the exclusion of other powers was relied on in *Carter Carburetor Corp. v. City of St. Louis*, 356 Mo. 646, 203 S.W.2d 438 (1947); and *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S.W. 1097. (1888).

convention delegates sought to avoid the necessity for special legislation for municipalities by transferring the initial responsibility for developing a framework of municipal government from the legislature to the city.²⁵ The existence of implied limitations is inconsistent with this avowed purpose because implied limits create uncertainty. This, in turn, makes it necessary for local officials to petition the legislature more frequently for legislation providing authority in these areas of uncertainty.

The major concern of the delegates to the convention was not the scope of the initial grant of power. They were more interested in insuring that this grant of power did not insulate St. Louis from legislative control. Despite assurances from St. Louis delegates that the words "in harmony with and subject to the Constitution and laws of Missouri" protected against this eventuality,²⁶ some delegates even wanted to go so far as to authorize the general assembly to amend or repeal the St. Louis charter by special legislation rather than by general law.²⁷ The Convention was persuaded to accept in lieu of this proposal a statement that the General Assembly retained the same power over the city and county of St. Louis that it had over other cities and counties of the state.²⁸ The point to be made here is that the delegates were not worried about the initial exercise of power by home rule cities. They seemed to feel that if they could establish the power of the legislature to step in and legislate generally to correct abuses, this would provide adequate protection against ill-advised action. This was an unspoken assumption of most of the delegates, but delegate Johnson articulated this sentiment expressly:

. . . the *only limitation* there [sic] is placed upon the city of St. Louis *having all the powers of a free and independent government* is that their charter which is their constitution, with their ordinances which are their laws shall not come in conflict with an *express* provision of the Constitutions or some *general law* of the State.²⁹ (Emphasis supplied.)

25. XII DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 449, 450, 462, 463, 467 (1944).

26. *Id.* at 451, 457.

27. *Id.* at 448-455. Subsequent decisions of the Supreme Court of Missouri construing the constitutional prohibition against special legislation have, as a practical matter, permitted the legislature to do just this in most situations. See e.g. Lebanon v. Schneider, 349 Mo. 712, 163 S.W.2d 588 (1942); State v. City of St. Louis, 318 Mo. 870, 1 S.W.2d 1021 (1928); State *ex rel.* Hawes v. Mason, 153 Mo. 23, 54 S.W. 524 (1899); and City of St. Louis v. Dorr, 145 Mo. 466, 41 S.W. 1094 (1897).

28. Mo. CONST. art. IX, § 25 (1875). XII DEBATES, *op cit. supra* note 25, at 481, 482.

29. XII DEBATES, *op cit. supra* note 25, at 478, 479.

Lest the case be put too strongly, it should be said that some implied limitations on the grant of home rule power in the Missouri Constitution must be conceded.³⁰ For example, it is commonly understood that municipalities may not enact rules of law governing matters such as domestic relations, wills, and other areas of private law. Although the convention delegates did not discuss these matters, it seems obvious that they would have denied any intent to vest such powers in municipalities if the question had arisen. The exercise of extraterritorial powers by municipalities is another questionable area.³¹ While this much may be conceded, the whole thrust of the convention's efforts does cast doubt upon a construction of the constitution that limits municipal legislative power to proprietary functions and governmental functions "of primarily local concern" or which "paramountly concern local matters."

The Constitution of 1945 does not modify the basic grant of home rule power contained in the 1875 Constitution.³² It does extend the right to frame a charter to all cities of more than 10,000 population. It also prohibits the legislature from enacting laws "creating or fixing the powers, duties or compensation of any municipal office or employment, . . ." in a home rule city.³³ Since the 1945 Convention did not address itself to the scope of the basic grant of power, the debates provide no significant insights on this issue.

C. *The Case Law*

From the adoption of the 1875 Constitution until 1905, the Missouri Supreme Court approved every exercise of municipal initiative by a home rule city which was authorized by charter, did not conflict with a statute, and did not run afoul of a constitutional prohibition. *St. Louis v. Sternberg*,³⁴ decided in 1879, upheld the imposition of a license tax on attorneys without prior legislative authorization. In rejecting an argument that the taxing power of the state had not been delegated to St. Louis, the court said that:

30. See the discussion of this problem in FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE, 21, Comment 5 (American Municipal Association 1953).

31. See Sandalow, *supra* note 7, at 674-679, 692-700, for a discussion of the enactment of private law and the exercise of extraterritorial powers by municipalities.

32. The language of art. VI, § 19 of the 1945 Constitution is substantially the same as art. IX, § 16 of the 1875 Constitution.

33. MO. CONST. art. VI, § 22.

34. 69 Mo. 289 (1879).

As neither state, county nor municipal government can be maintained without revenue, and as revenue cannot be raised without the exercise of the taxing power in some form, it would follow as the logical result of defendant's theory that St. Louis would be practically left without any government.³⁵

The court later approved the levy of license taxes on hotels³⁶ and sewing machine salesmen³⁷ without prior legislative authorization. It is significant that these cases involved the taxing power, a power which many courts have been reluctant to concede to municipalities in the absence of authorization by the state legislature.³⁸ Municipal enactments were struck down or overridden during this period, but this occurred in cases in which there were (1) conflicts with statutes,³⁹ (2) the ordinance was held to violate due process,⁴⁰ or (3) the municipal charter did not authorize the enactment of the ordinance.⁴¹ There was no suggestion that some areas of activity were forbidden unless they were "of primary local concern."

The opinion in the 1904 decision of *St. Louis v. Meyer*⁴² distinguished between matters of local and statewide concern, and suggested that statutes would override ordinances only when they dealt with matters of statewide concern. The issue in *Meyer* was whether home rule imposed limits on the legislature's power over municipalities. But the idea that some areas of activity were reserved for municipal action and other areas for state action was developed in *State ex rel. Garner v. Missouri & Kansas Telephone Co.*⁴³ so as to limit the scope of municipal initiative even in the absence of a conflicting statute. The supreme court held in *Garner* that Kansas City had no authority to impose maximum rates for telephone service within the city. There was no mention in the opinion of legisla-

35. *St. Louis v. Sternberg*, *supra* note 34.

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

37. *St. Louis v. Bowler*, 94 Mo. 630, 7 S.W. 434 (1888).

38. See Cohn, *supra* note 2, at 32-41.

39. *St. Louis v. Meyer*, 185 Mo. 583, 84 S.W. 914 (1904) (license tax on peddlers and hawkers); *State v. Bell*, 119 Mo. 70, 24 S.W. 765 (1893) (issuance of dramshop licenses); *State v. St. Louis and S. F. Ry. Co.*, 117 Mo. 1, 22 S.W. 910 (1893) (procedure for extending railroad taxes); *Ewing v. Hoblitzelle*, 85 Mo. 64 (1884) (appointment of election judges and clerks).

40. *St. Louis v. Dorr*, 145 Mo. 466, 41 S.W. 1094 (1897) (zoning).

41. *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S.W. 197 (1888) (setting maximum phone rates).

42. 185 Mo. 583, 84 S.W. 914 (1904). The issue posed by this case—whether home rule imposed limits on the legislature's power over municipalities—is discussed in the text accompanying notes 68-129 *infra*.

43. 189 Mo. 83, 88 S.W. 41 (1905).

tion which preempted the field or prohibited such regulation. The court conceded that the charter and the ordinance authorized the city to set maximum phone rates. It asserted, however, that the constitution conferred on the city “. . . only powers incident to its municipality, . . .”⁴⁴ The opinion went on to say that:

There are *governmental powers*, the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, and *until so delegated they are reserved*.⁴⁵ (Emphasis supplied.)

Thus certain “governmental powers” could not be exercised without prior authorization by the legislature. Before the *Garner* decision, home rule cities were justified in assuming they could embark upon activity not forbidden by provisions in the constitution or statutes. After *Garner*, municipalities had to go further and ascertain whether the activity was “incident to its municipality.” New limitations were imposed on municipal initiative, and they were couched in terms so general as to afford almost no help to the cities in deciding what was permitted in the absence of a delegation of power from the legislature. Moreover, the court formulated this new rule without citing authority or even indicating where it obtained the idea for this construction of the constitution.

Fortunately for Missouri municipalities, the supreme court did not limit their powers as strictly as a literal reading of *Garner* would have warranted. In 1912, the court held that the Kansas City charter could grant jurisdiction to the city’s municipal courts without legislative authorization.⁴⁶ In 1928, the court quoted the *Garner* rule with approval in rejecting an argument by St. Louis that the home rule provision limited the legislature’s power to legislate regarding a municipal zoo.⁴⁷ Later in the same year, however, the opinion in *State ex rel. Carpenter v. City of St. Louis*⁴⁸ expressly limited the *Garner* rule. The court in this case rejected an argument that a statute requiring a tax levy for the St. Louis public library was void because it conflicted with the city charter. The court

44. *State ex rel. Garner v. Missouri & Kansas Telephone Co.*, *supra* note 43 at 99, 88 S.W. at 43.

45. *State ex rel. Garner v. Missouri & Kansas Telephone Co.*, 189 Mo. 83, 99, 100, 88 S.W.41 at 43 (Mo. 1905).

46. *State v. Seehorn*, 246 Mo. 451, 151 S.W. 716 (1912).

47. *State ex rel. Zoological Board v. St. Louis*, 318 Mo. 870, 1 S.W.2d 1021 (1928).

48. 318 Mo. 870, 2 S.W.2d 713 (1928).

relied on *Garner* in reaching its decision, but it limited the rule laid down in *Garner* by distinguishing between the use of the government-proprietary distinction in dealing with conflicts between statutes and charters, and the use of the distinction in setting the boundaries of municipal initiative in the absence of a conflict. The court used the following language in qualifying *Garner*:

That broad statement, however, may be qualified. The city's charter powers *are not limited to its mere corporate functions*. Between that narrow field and territory occupied by general legislation is ground upon which the city under its charter powers may venture if it sees fit, but not contrary to general law, even though its action is only local in its effect.⁴⁹ (Emphasis supplied.)

This is one of the few Missouri cases in which the opinion indicated an awareness of this distinction.

Even though the *Carpenter* opinion pointed out the necessity of qualifying the broad language of *Garner*, the same language first used in *Garner* was used again without qualification in the 1943 case of *Kansas City v. Frogge*.⁵⁰ Its use in this case did not create any real difficulty because the decisive issues were whether the charter authorized a compensating use tax and whether the state sales tax preempted this field of taxation. While the court held against the city on both issues, it did concede that the city had the power to levy taxes that were authorized by its charter and were not prohibited by statute or constitution.⁵¹ There was no real need to rely on the language from the *Garner* opinion in order to reach the result desired.

In *Turner v. Kansas City*,⁵² decided in 1945, the court upheld an ordinance prohibiting fortunetelling for pay. Since there was no statute authorizing the enactment of such an ordinance, the *Garner* case was relied on to substantiate a request for an injunction against enforcement of the ordinance. The court reviewed the Missouri decisions and concluded on the basis of this review that “. . . the language used in the *Garner* opinion

49. State *ex rel.* *Carpenter v. City of St. Louis*, *supra* note 48 at 892, 2 S.W.2d at 719.

50. 352 Mo. 233, 243, 176 S.W.2d 498, 503 (1943).

51. *Kansas City v. Frogge*, *supra* note 50 at 241, 176 S.W.2d at 502.

The Plaintiff city's power to impose taxes is . . . the power to impose those taxes which has been delegated by the General Assembly under statute or by its people under its charter, if unrestrained by constitutional limitation. (Emphasis supplied.)

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

is too broad,”⁵³ The court also distinguished the *Garner* case from the case before the court by pointing out that *Garner* involved the regulation of rates for telephone service. It said that this area of activity had such a “high governmental prerogative”⁵⁴ as to require a specific delegation of power from the legislature.

Thus the test for finding the outer reaches of municipal power under home rule was reformulated. Cities were not helpless in the absence of legislative authorization in areas of activity labeled as governmental or of state-wide concern. They could act on their own initiative as long as they were not prohibited from doing so by constitution and statute and they did not undertake a matter of high governmental prerogative. Inasmuch as the word “high” implies that something is important, one would not expect the court to curtail municipal initiative by use of this test unless the function in question is considered important. If the word “governmental” refers to the test developed by the court to decide whether ordinances or statutes prevail in the event of a conflict,⁵⁵ one would expect the test to be applied only to those municipal enactments which may be overridden by a state statute. The high governmental prerogative test is as vague and general as the other tests developed to deal with issues of home rule. The experience in Missouri suggests that such word formulas do not provide a great deal of help in deciding specific questions. On the other hand, the words used and the fact that the test was formulated to limit the *Garner* case indicate that the test should be used to limit municipal initiative only in exceptional cases. That the test has not been used since its formulation in *Turner* is some evidence that it is appropriate only in unusual cases. If this interpretation of the high governmental prerogative test is correct, it is superior to the test laid down in the *Garner* case.

In the cases following *Turner*, the Missouri Supreme Court has shown no inclination unduly to limit municipal initiative in the absence of a constitutional or statutory prohibition. The court has reaffirmed its early holdings that municipalities may impose taxes without legislative authorization as long as the taxing power is not denied or preempted by the legislature.⁵⁶ In holding that the constitution grants power to home rule cities

53. *Turner v. Kansas City*, *supra* note 52 at 865, 191 S.W.2d at 616.

54. *Turner v. Kansas City*, 191 S.W.2d 612, 615 (1945).

55. See *e.g.* *Kansas City v. J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195 (1935).

56. *General Installation Co. v. University City*, 379 S.W.2d 601, 603, 604 (Mo. 1964) (occupation license fee); *Giers Imp. Corp. v. Investment Service*, 361 Mo. 504, 510, 235 S.W.2d 355, 358 (1950) (assessment for sewer improvements); *Carter Carburetor Corp. v. City of St. Louis*, 356 Mo. 646, 655, 203 S.W.2d 438,

to annex territory, the court stated that "[S]pecific legislative authority to extend relator's limits is unnecessary."⁵⁷ The court has approved the enactment without legislative authorization of a Kansas City ordinance making it unlawful for restaurants, hotels and motels to refuse to serve persons because of their race or color.⁵⁸

In recent years, there have been occasional statements in opinions that the power of a municipality to legislate is confined to municipal affairs.⁵⁹ These remarks are similar to those made in earlier years in cases such as *Kansas City v. J. I. Case Threshing Mach. Co.*, where the following statement was quoted with approval: ". . . the power of the municipality to legislate shall be confined to municipal affairs."⁶⁰ Observations such as these seem to be the basis for assertions by commentators that Missouri home rule cities may legislate only as to proprietary matters and as to governmental matters which "are of primary local concern" or "paramountly concern local matters."⁶¹ With the exception of the *Garner* case, which was subsequently restricted, these statements were made in cases

442 (1947) (St. Louis earnings tax invalidated because it was not authorized by the charter). Cohn *supra* note 2 at 45, 46 has summarized the power of Missouri Home rule cities to impose taxes in the following language:

If specific charter authorization can be secured from the local electorate and if the legislature neither excludes nor pre-empts the tax source, the cities can determine their own tax powers without the necessity of resorting to the legislature for authorization.

It should be noted, however, that the court has been unwilling to find authority in a charter to levy a tax unless the tax is specifically named. Text accompanying notes 144-147 *infra*.

57. State *ex inf.* Taylor *ex rel.* Kansas City v. North Kansas City, 360 Mo. 374, 393, 228 S.W.2d 762, 771 (1950). *Accord*, City of Hannibal v. Winchester, 391 S.W.2d 279, 283 (Mo. 1965). Professor Sandalow considers the language quoted from the Taylor case to be dictum because the power to annex is conferred by statute. Sandalow, *op. cit.* *supra* note 7, at 694, fn. 198.

58. Marshall v. Kansas City, 355 S.W.2d 877 (Mo. 1962).

59. Hannibal v. Winchester, 391 S.W.2d 279, 293 (Mo. 1965) (dissenting opinion); McDonnell Aircraft Corporation v. City of Berkeley, 367 S.W.2d 498, 501 (Mo. 1963). The most recent statement was in *St. Louis v. Golden Gate Corporation*, No. 52,568, Supreme Court of Missouri, November 13, 1967, where the following statement was made:

Moreover, such proposed expansion of the power and jurisdiction of the Circuit Court . . . would surely be considered a matter of state interest, not authorized by the grant of charter powers for local government under the provisions of Art. VI, Secs. 31-33 Const.

This statement was dictum since the city did not argue that its ordinance authorized the Circuit Court to appoint a receiver. It argued instead that the ordinance authorized the city to seek equitable relief to abate conditions created by continued violation of its Housing Code. The basis of the decision was the Court's conclusion that the appointment of a receiver as contemplated in the ordinance was beyond the general powers of a court of equity.

60. 337 Mo. 913, 923, 87 S.W.2d 195, 200 (1935).

61. Schmandt, *supra* note 12, at 405; Nickolaus, *supra* note 19, at 6.

which did not raise the issue of municipal power in the absence of express authorization, and must be considered dicta. The opinions in these cases made no attempt to point out the distinction between state-local conflicts and the question of the scope of municipal power in the absence of such a conflict.

D. Observations

Several observations can be made on the basis of this review of cases and convention debates. It is obvious that municipal charters and ordinances in conflict with the constitution will be invalidated when challenged. In a few instances the Missouri Supreme Court has relied on the governmental-proprietary or state-local dichotomy to hold that a charter prevails over a conflicting statute, but in the great majority of cases the conflicting statute has prevailed.⁶² While municipalities may not embark upon a matter of high governmental prerogative without legislative authorization, experience indicates that this concept is not a serious impediment to municipal initiative. Beyond this, the court has not provided a workable general test for ascertaining the outer boundaries of municipal power in the absence of legislative authorization. Although the distinction between governmental and proprietary functions is important in deciding whether a statute or municipal enactment prevails in the event of a conflict, its only use in determining the scope of municipal power should be as an aid in ascertaining the applicability of the high governmental prerogative concept.⁶³ Statements in the cases that home rule cities have legislative power only with respect to municipal or local affairs or matters of primarily local concern cannot be squared with the decisions discussed which have approved municipal taxation, annexation, and civil rights regulation in the absence of legislative authorization. Municipal taxation, annexation, and civil rights regulation have been classified

62. The writer analyzed 55 cases decided by the Missouri Supreme Court between 1879 and 1965 which involved municipal home rule. In 21 cases no conflict was found; in the 22 cases in which a conflict was found, the statute prevailed in 18 cases, and the ordinance prevailed in 4 cases. The decision in the remaining cases was based upon lack of authority in the charter; the unconstitutionality of the local enactment; in the *Garner* case, upon a lack of power in the city in the absence of legislative authorization; and in several annexation cases, upon a conflict between a state statute and the procedure for charter amendment set forth in the state constitution.

63. *Contra*, Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385, 404, 405, (1953).

by the court as governmental.⁶⁴ When the court has classified something as governmental in home rule cases, it has assumed that it is of statewide concern. Matters of state-wide concern are, a fortiori, not matters of primarily local concern.

One way of explaining the decisions would be to suggest that terms such as proprietary, municipal, and local have one meaning if there is no conflicting statute and another meaning if there is such a statute. While the court has not stated that these terms have such a double meaning, such an approach might be the only way to avoid an emasculation of the grant of home rule power to Missouri municipalities. If the court applied this limitation on municipal power consistently, and gave the same meaning to terms such as local affairs in ascertaining municipal power and in resolving state-local conflicts, municipal power in the absence of legislative authorization would be held to extend to progressively fewer subjects.⁶⁵ This result would follow because the supreme court would be required to deny state control in order to allow the exercise of a particular power by a municipality. The supreme court would deny state control in only a few instances. This is indicated because it has held that statutes are superior to local enactments in the great majority of cases in which an actual conflict was held to exist.⁶⁶

Still another possible explanation for the occasional suggestion that cities have power only with respect to municipal or local affairs is that the court is reluctant to concede sweeping municipal powers purely as an abstract proposition. Viewed in this light, these occasional disclaimers represent a hesitancy on the part of the court to commit itself to a general proposition which might make it difficult to strike down some future offensive exercise of power by a home rule city. A final possible explanation of the inconsistencies found in the opinions is that they result from an inherently ambiguous constitutional provision coupled with a judicial unwillingness to distinguish between the various issues which are raised by a constitutional home rule provision. As such, the inconsistencies may be viewed

64. *McDonnell Aircraft Corporation v. City of Berkeley*, 367 S.W.2d 498, 503 (Mo. 1963) ("annexation of additional territory is a matter of more than merely municipal affairs and concern . . ."); *General Installation Co. v. University City*, 379 S.W.2d 601, 604 (Mo. 1964) ("The power to tax is a governmental function inherent in the sovereign people of the state . . ."); *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. 1962) (treating civil rights ordinances as an exercise of the police power, traditionally labeled as governmental).

65. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 662, 663 (1964).

66. Note 62 *supra*.

simply as a manifestation of the confusion caused by a failure to draft a home rule provision capable of precise application.

III. STATE-LOCAL CONFLICTS

A. Construction of the Home Rule Provisions

The 1875 Constitution provided that home rule charters must be "consistent with and subject to the Constitution and laws of the State . . ."⁶⁷ This language was retained in the 1945 Constitution.⁶⁸ Article 9, Section 25 of the 1875 Constitution, which was omitted from the 1945 Constitution because it was considered repetitious, stated that, "the General Assembly shall have the same power over the city and county of St. Louis, that it has over other cities and counties of this State." A literal construction of these provisions would permit a valid statute to override any conflicting ordinance or charter provisions. However, the commentators who have written about the 1875 Constitution seem unwilling to believe that the framers meant what they said.⁶⁹ This reluctance seems to stem from their conception of home rule. They assume that home rule is meaningless unless it provides some areas of municipal autonomy beyond the control of the legislature. Subsequent judicial treatment of the home rule provisions indicates that this concept of home rule has also influenced the Missouri Supreme Court.⁷⁰ Yet an examination of the convention debates indicates that, with the exception of one delegate, the framers expected the home rule provisions to be applied literally.

B. The 1875 Constitutional Convention

The intention of the framers of the Constitution of 1875 can be ascertained by noting their reactions to an amendment proposed by Mr.

67. MO. CONST. art. IX, § 16 (1875). The language of the provision dealing with home rule for St. Louis was "in harmony with and subject to the Constitution and laws of Missouri, . . ." MO. CONST. art. IX, §§ 20, 23 (1875).

68. MO. CONST. art. VI, § 19. See art. VI, §§ 31-33, for the provisions dealing with the St. Louis home rule charter.

69. "The constitution thus contained, on the one hand, declarations as to the powers of home rule cities, and on the other hand, declarations as to the power of the legislature over home rule cities that were highly inconsistent." BARCLAY, *THE ST. LOUIS HOME RULE CHARTER OF 1876*, 17 (1962). "Clearly the constitutional provisions, read as to their letter, are very nearly inexplicable." MCBAIN, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE*, 126 (1916). "Taken at face value, this language would appear to indicate that what the state gave with one hand it took away with the other." Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385, 387 (1953).

70. The acceptance of the various versions of the state-local and governmental-proprietary tests described in the text accompanying notes 78-88 *infra* indicates that the Court felt that some autonomy was implicit in home rule.

Hale and a speech by Mr. Pulitzer, both on the morning of July 30, 1875. Mr. Hale sought to amend the section granting home rule powers to St. Louis by adding the following language:

provided that this section shall not be so construed as to prohibit the General Assembly from amending, altering or repealing said charter so adopted when ever it may be necessary for the public interest.⁷¹

Mr. Gantt, a delegate from St. Louis, asserted that Mr. Hale's amendment would conflict with the prohibition against special legislation. Further, it was unnecessary because the language subjecting the charter to the constitution and laws of the state would "leave our charters subject to any general law upon that subject which the General Assembly might at any time see fit to enact."⁷² A number of other delegates made comments in a similar vein.⁷³

Only Todd and Pulitzer, both from St. Louis, argued for areas of autonomy in which municipal enactments could not be affected by state statutes. Todd would have preferred that charters be subject only to the constitution rather than to the constitution and laws. He realized, however, that the proposed home rule provision would not accomplish this.⁷⁴ Pulitzer, on the other hand, seemed to feel that the proposal would insure local supremacy in some areas. After commenting on the type of general law he thought St. Louis would be subject to under the proposal, he said:

So far as the administration of purely local affairs is concerned, I hold that no General Assembly has the right, no General Assembly should have the power to say by general law whether a certain curbstone should be laid in one alley, or whether a certain sewer should be built in another. I say that the principle of local self government is violated if you leave it to those who are far away from the seat of interest . . . to determine what shall be done in a particular locality concerning anything.⁷⁵

Beginning with Mr. Broadhead, another St. Louis delegate, who said "[W]e don't claim and ask any such thing,"⁷⁶ a series of delegates rejected this

71. XII DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, —, 448 (1944).

72. *Op. cit. supra* note 71 at 452.

73. *Op. cit. supra* note 71 at 458, 460, 472, 475, 476.

74. *Op. cit. supra* note 71 at 471, 472.

75. *Op. cit. supra* note 71 at 461, 462.

76. *Op. cit. supra* note 71 at 464.

concept of home rule.⁷⁷ These two incidents indicate rather clearly that the members of the Convention felt that a charter would be subject to any otherwise valid statute that did not violate the prohibition against special legislation.

C. *The Case Law*

The early decisions of the Missouri Supreme Court dealt with this issue by applying the constitutional provisions literally. Statutes were held superior to any conflicting ordinances or charter provisions.⁷⁸ Over a period of time, however, the court developed conceptual tests which are based upon the premise that municipal enactments in some areas are superior to statutes.⁷⁹ The effect of these tests has been to limit the power of the legislature to legislate with respect to home rule municipalities. These tests do not necessarily result in the invalidation of statutes. Instead, they may simply make particular statutes inapplicable to specific home rule cities because of a conflict with a municipal enactment.⁸⁰ In deciding these cases, the court has not relied consistently upon any one formulation of the classic state-local and governmental-proprietary tests. In describing the areas in which a statute is superior to a conflicting local enactment, it has labeled the function in question as governmental,⁸¹ of statewide concern⁸² or of general concern.⁸³ In describing the areas in which charters or ordinances take precedence over state legislation, the court has used words such as proprietary,⁸⁴ corporate,⁸⁵ purely municipal,⁸⁶

77. *Op. cit. supra* note 71 at 465, 469, 474.

78. See *e.g.* *Ewing v. Hoblitzelle*, 85 Mo. 64 (1884). For cases upholding municipal power without consideration of whether the powers were local or proprietary, see *St. Louis v. Bowler*, 94 Mo. 630, 7 S.W. 434 (1888); *St. Louis v. Bircher*, 76 Mo. 431 (1882); *St. Louis v. Sternberg*, 69 Mo. 289 (1879).

79. See *e.g.* *City of Joplin v. Industrial Commission of Missouri*, 329 S.W.2d 687 (Mo. 1959); *Kansas City v. J. I. Case Threshing Machine Company*, 337 Mo. 913, 87 S.W.2d 195 (1935). Schmandt, *supra* note 69, contains a good discussion of the development of these concepts and their use in deciding cases involving conflicts between statutes and municipal enactments.

80. See *e.g. In re East Bottoms Drainage & Levee Dist.*, 305 Mo. 577, 259 S.W. 89 (1924).

81. *Coleman v. Kansas City*, 353 Mo. 150, 161, 182 S.W.2d 74, 77 (1946); *Kansas City v. J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 926, 87 S.W.2d 195, 202 (1935); *State ex rel. Carpenter v. St. Louis*, 318 Mo. 870, 893, 2 S.W.2d 713, 720 (1928).

82. *School Dist. of Kansas City v. Kansas City*, 382 S.W.2d 688, 693 (Mo. 1964).

83. *State ex rel. Zoological Board of Control v. St. Louis*, 318 Mo. 910, 924, 1 S.W.2d 1021, 1026 (1928).

84. *City of Joplin v. Industrial Commission of Missouri*, 329 S.W.2d 687, 693 (Mo. 1959).

local⁸⁷ or essentially appertaining to city government.⁸⁸

While conscientious judges have periodically attempted to reformulate these tests in an effort to bring some order out of the confusion,⁸⁹ a careful review of the cases makes it apparent that changes in phraseology rarely affect the outcome of specific cases. The latest statement of a general rule illustrates the elusive nature of the quest. The Missouri Supreme Court held in *City of Joplin v. Industrial Commission of Missouri*⁹⁰ that a state law providing for a prevailing wage was superior to a charter provision. After referring to both the governmental-proprietary and state-local tests, the court quoted with approval from McQUILLIN, MUNICIPAL CORPORATIONS, as follows:

The real test, it seems, is not whether the state or the municipality has an interest in the matter, since usually both have, but instead whether the state's interest or that of the municipality is paramount.⁹¹

This language provides a realistic insight insofar as it recognizes that both state and municipality have an interest in most matters in which a state-local conflict arises. However, it is no more helpful than its predecessors as a test to determine whether state or local enactments prevail in the event of a conflict. To say that the state or the municipality has a paramount interest is just an alternative way of stating a conclusion arrived at for other reasons. In most cases the municipality and its residents will be more concerned about and more intimately affected by a decision to apply one law rather than another to a given situation. But this is not a sufficient reason for concluding that local enactments should prevail over state law. One can assume therefore that paramount interest does not mean paramount concern. The decision in most cases which involve state-local conflicts is probably made on the basis of a judgment by the court as to whether the public interest requires that the ultimate

85. *Coleman v. Kansas City*, 353 Mo. 150, 161, 182 S.W.2d 74, 77 (1944); *State ex rel. Carpenter v. St. Louis*, 318 Mo. 870, 893, 2 S.W.2d 713, 720 (1928).

86. *Stanton v. Thompson*, 234 Mo. 7, 11, 136 S.W. 698, 699 (1911); *Kansas City v. Scarritt*, 127 Mo. 642, 653, 29 S.W. 845, 848 (1895).

87. *State v. Kemp*, 365 Mo. 368, 391, 283 S.W.2d 502, 522 (1955); *In re East Bottoms Drainage & Levee Dist.*, 305 Mo. 577, 585, 259 S.W. 89, 91 (1924).

88. *State ex rel. Garner v. Missouri & K. Telephone Company*, 189 Mo. 83, 99, 100, 88 S.W. 41, 43 (1905).

89. See e.g. *Kansas City v. J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195 (1935); *State ex rel. Carpenter v. City of St. Louis*, 318 Mo. 870, 2 S.W.2d 713 (1928).

90. 329 S.W.2d 687 (Mo. 1959).

91. *City of Joplin v. Industrial Commission of Missouri*, *supra* note 90 at 693.

decision be made by the state legislature instead of a municipal council. If this assumption is correct, paramount interest refers to paramount power and responsibility. Yet while use of words such as power is preferable to the word interest, this too is a way of stating a conclusion rather than a criterion for use in arriving at a conclusion. One commentator has suggested that decisions on this issue should be based upon the court's judgment as to whether uniform regulation throughout the state is desirable or necessary; whether the state or local governments have traditionally functioned in the field in question; and whether the municipal legislation will have an important effect on people outside the city.⁹² It is difficult to tell from opinions of the Missouri Supreme Court whether or not these factors have influenced the court.

In the absence of helpful general principles, a consideration of the decisions resolving specific state-local conflicts is important. There are specific holdings or dicta in the Missouri cases which indicate that statutes will prevail over conflicting municipal enactments with respect to the following matters: elections;⁹³ the kinds of general taxes which may be imposed, exemptions from taxation, and the manner in which taxes may be levied and collected;⁹⁴ the licensing of certain businesses;⁹⁵ the regulation of public utilities;⁹⁶ making provision for courts and their jurisdiction;⁹⁷ establishing and maintaining a zoo,⁹⁸ public library,⁹⁹ or art museum;¹⁰⁰ setting salaries for court stenographers;¹⁰¹ rates of pay and personnel policies in the Kansas City Collector's office¹⁰² and the St. Louis license collector's office;¹⁰³ the prevailing wage paid to employees of private contractors

92. 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 3.36 (1958).

93. *Ewing v. Hoblitzelle*, 85 Mo. 64 (1884).

94. *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W.2d 498 (1943); *Kansas City v. J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195 (1935); *Ex Parte Tarling*, 241 S.W. 929 (1922); *St. Louis v. Meyer*, 185 Mo. 583, 84 S.W. 914 (1904); *State v. St. Louis & S. F. Ry. Co.*, 117 Mo. 1, 20 S.W. 910 (1893).

95. *St. Louis v. Tielkemeyer*, 226 Mo. 130, 125 S.W. 1123 (1910); *State v. Bell*, 119 Mo. 70, 24 S.W. 765 (1893).

96. *Turner v. Kansas City*, 354 Mo. 857, 191 S.W.2d 612 (1945); *State ex rel. Garner v. Missouri & K. Telephone Co.*, 189 Mo. 83, 88 S.W. 41 (1905).

97. *Young v. Kansas City*, 152 Mo. 661, 54 S.W. 535 (1899); *St. Louis v. Golden Gate Corporation*, No. 52,568, Supreme Court of Missouri, November 13, 1967.

98. *State ex rel. Zoological Board of Control v. St. Louis*, 318 Mo. 870, 1 S.W.2d 1021 (1928).

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

100. *State ex rel. Bixby v. City of St. Louis*, 241 Mo. 231, 145 S.W. 801 (1912).

101. *Young v. Kansas City*, 152 Mo. 661, 54 S.W. 535 (1899).

102. *Coleman v. Kansas City*, 353 Mo. 150, 182 S.W.2d 74 (1946). The opinion in *Preisler v. Hayden*, 309 S.W.2d 645 (Mo. 1958), indicated that Art. VI, § 22 of the 1945 Constitution was enacted to overturn this decision.

103. *Preisler v. Hayden*, 309 S.W.2d 645 (Mo. 1958).

working on municipal improvements;¹⁰⁴ traffic regulation on city streets;¹⁰⁵ municipal police departments;¹⁰⁶ education;¹⁰⁷ and zoning¹⁰⁸ and other manifestations of the police power.¹⁰⁹

There are specific holdings or dicta in the Missouri cases which indicate that municipal enactments will prevail over statutes with respect to the following matters: special assessments and the procedure for their enforcement;¹¹⁰ the procedure for condemning land for municipal purposes;¹¹¹ the procedure for establishing drainage and levee districts located exclusively within a municipality;¹¹² and the opening and grading of streets.¹¹³ There is dictum in one case suggesting that municipal charters supersede statutes on the question of establishing and maintaining parks within a city.¹¹⁴ The case cited to sustain this proposition actually dealt with the condemnation procedure for taking land for parks.¹¹⁵ In a later decision the Court held that the subject of zoological parks was one of state concern.¹¹⁶ There is dictum in a 1958 decision that "the operation of parks and recreation areas . . . has to some extent been held to be a governmental function."¹¹⁷ It is doubtful therefore that parks would be considered a matter of local concern if a state-local conflict in this area should arise.

It is also possible to question the assumption that the court has held that the procedure for condemning land for municipal purposes is a matter

104. *City of Joplin v. Industrial Commission of Missouri*, 329 S.W.2d 687 (Mo. 1959).

105. *St. Louis v. Stenson*, 333 S.W.2d 529 (St. L. Mo. App. 1960).

106. *State v. Gunn*, 326 S.W.2d 314 (Mo. 1959); *State v. Kemp*, 365 Mo. 368, 283 S.W.2d 502 (Mo. 1955).

107. *Kansas City v. J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195 (1935).

108. *Wippler v. Hohn*, 341 Mo. 780, 110 S.W.2d 409 (1937).

109. *Vest v. Kansas City*, 355 Mo. 1, 194 S.W.2d 38 (1946); *Kansas City v. J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195 (1935). However, the Missouri courts have not shown an undue inclination to find a conflict between statutes and ordinances in the police power field. *Schmandt*, *supra* note 69, at 403.

110. *Good v. Johnson*, 299 Mo. 186, 252 S.W. 368 (1923); *Stanton v. Thompson*, 234 Mo. 7, 136 S.W. 698 (1911).

111. *Kansas City v. Scarritt*, 127 Mo. 642, 29 S.W. 845 (1895); *State v. Field*, 99 Mo. 352, 12 S.W. 802 (1889).

112. *In re East Bottoms Drainage & Levee Dist.*, 305 Mo. 577, 259 S.W. 89 (1924).

113. *In re East Bottoms Drainage & Levee Dist.*, *supra* note 112 at 91.

114. *In re East Bottoms Drainage & Levee Dist.*, 305 Mo. 577, 259 S.W. 89, 91 (1924).

115. *Kansas City v. Scarritt*, 127 Mo. 642; 29 S.W. 845 (1895).

116. *State ex rel. Zoological Board of Control v. St. Louis*, 318 Mo. 870, 1 S.W.2d 1021 (1928).

117. *Glidewell v. Hughey*, 314 S.W.2d 749, 755 (Mo. 1958).

of local concern. The cases usually cited as establishing this proposition are *State ex rel. Kansas City v. Field*¹¹⁸ and *Kansas City v. Scarritt*.¹¹⁹ A close reading of the *Field* case reveals that it involved a conflict between two state statutes. Moreover, the court said in that case that:

The proposition made for relator, that when any such city has adopted a charter it is out of and beyond all legislative influence, cannot be sustained. We held to the contrary in the case of *Ewing v. Hoblitzelle*, . . .¹²⁰

The opinion in *Kansas City v. Scarritt* stated that "[T]he act now in dispute deals with subjects strictly within the domain of municipal government, . . ."¹²¹ But the basis of the decision was the court's conclusion that the conflicting statute violated the constitutional prohibition against special legislation and the provision of the constitution which limits the number of classes of municipalities the legislature may recognize to four.

Annexation presents special problems. The Missouri Supreme Court has indicated that this is a governmental function.¹²² Other jurisdictions are almost unanimous in holding that state statutes dealing with annexation supersede municipal charters.¹²³ The Missouri Supreme Court has held, however, that the Sawyers Act,¹²⁴ which requires cities to file a declaratory judgment action prior to proceeding as otherwise authorized by law or charter for the annexation of territory, conflicts with the procedure for charter amendments provided for in the constitution.¹²⁵ This decision was premised on the assumption that annexation in home rule cities cannot be accomplished by ordinance but rather must be by charter amendment.¹²⁶ The court subsequently held that while a home rule city cannot be forced to follow the procedure set forth in the Sawyers Act, it can elect to do so.¹²⁷ The municipality can avoid a conflict between the Sawyers Act and the constitution by passing a resolution providing for the filing of a declaratory judgment action prior to instituting the pro-

118. 99 Mo. 352, 12 S.W. 802 (1889).

119. 127 Mo. 642, 29 S.W. 845 (1895).

120. *State ex rel. Kansas City v. Field*, 99 Mo. 352, 355, 12 S.W. 802, 803 (1889).

121. *Kansas City v. Scarritt*, 127 Mo. 642, 650, 29 S.W. 845, 847 (1895).

122. *McDonnell Aircraft Corp. v. City of Berkeley*, 367 S.W.2d 498 (Mo. 1963).

123. 1 ANTIEAU, *op cit. supra* note 92, at § 3.33.

124. Section 71.015, RSMo (1959).

125. *McConnell v. Kansas City*, 282 S.W.2d 518 (Mo. 1955).

126. See *State v. North Kansas City*, 360 Mo. 374, 228 S.W.2d 762 (1950); *City of Westport v. Kansas City*, 103 Mo. 141, 15 S.W. 68 (1891).

127. *City of Hannibal v. Winchester*, 391 S.W.2d 279 (Mo. 1965).

cedure for a charter amendment.¹²⁸ In rejecting the argument in another case that home rule charter cities are not subject to judicial review when they extend their boundaries by charter amendment, the court indicated that the standards for annexation provided by the Sawyers Act should be considered in deciding whether a proposed annexation is reasonable.¹²⁹

D. Observations

When the conceptual tests developed by the Missouri Supreme Court to deal with state-local conflicts are evaluated in the light of the results reached in specific cases, one is forced to conclude that they have not made a significant contribution to municipal autonomy. State statutes have prevailed over local enactments in the great majority of cases in which a conflict was found. Most of the powers essential to resolution of the more serious problems confronting the cities—taxation and the police power are obvious examples—have been held to be matters of statewide concern. Although home rule municipalities have considerable autonomy with respect to annexation, this has resulted from a procedural quirk rather than from substantive principle.

IV. THE HOME RULE CHARTER

A. The Legal Status of Home Rule Charters

The Missouri Constitution provides that "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government"¹³⁰ The grant of substantive home rule powers flows from the grant of power to frame and adopt the charter. Thus the acquisition of substantive home rule powers in Missouri is dependent upon the adoption of a charter. This is the traditional¹³¹ and probably most desirable¹³² approach to home rule, although the experience in Ohio shows that it is possible to draft a workable provision which grants substantive powers directly to all municipalities without requiring the adoption of a charter.¹³³

128. *City of Hannibal v. Winchester*, *supra* note 127 at 283.

129. *McDonnell Aircraft Corp. v. City of Berkeley*, 367 S.W.2d 498 (Mo. 1963).

130. MO. CONST. art. VI, § 19.

131. FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 19, 20 (American Municipal Association 1953); MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 668, 669 (1916).

132. *Ibid.*

133. See generally Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948).

There are two possible conceptions of the legal status of the charter. The charter may be thought of as an instrument which grants powers. So conceived, a municipality may exercise only those powers authorized in the charter.¹³⁴ The alternative approach is to treat the charter as an instrument of limitation.¹³⁵ Under this concept, the charter serves "merely to specify the limitations and restrictions upon the exercise of the powers so granted [by the constitution] . . . Therefore, any such power not expressly forbidden may be exercised by the municipality, . . ."¹³⁶

The Missouri Supreme Court has assumed without discussion that charters are grants of power so that municipalities may exercise only those powers delegated in the charter.¹³⁷ The following language from the opinion in *Kansas City v. Frogge* illustrates this approach:

The people of a city which has been granted the right by the people of the state to frame and adopt a charter may not deem it desirable or needful to delegate under the charter of their city all of those powers which may be delegated by the legislature to cities organized under general law. So the powers which plaintiff city may exercise, through the constitutional grant of the right to frame and adopt a charter, are those powers which the people of the city delegate to it under its charter . . .¹³⁸

B. General Welfare Clauses

A review of the construction of charters by the Missouri courts will assist in evaluating the consequences of viewing the charter as a grant of power. Most charters contain general welfare clauses which empower the city to enact all rules and regulations deemed necessary. Since it is difficult to anticipate in the charter all instances in which ordinances may be needed and under the grant concept of charters authority must be provided in the charter, a narrow construction of the general welfare clause will have important effects on the ability of a home rule city to respond quickly to its problems. The early case of *City of St. Louis v. Schoenbusch* found authority in the general welfare clause of the charter to enact an

134. 1 ANTIEAU, *op. cit. supra* note 92, at § 3.05.

135. *Ibid.*

136. *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal.2d 516, 522, 95 P.2d 138, 142 (1939). *Accord*, *Bank v. Bell*, 62 Cal. App. 320, 217 P. 538 (1923).

137. *Tietjens v. St. Louis*, 359 Mo. 439, 222 S.W.2d 70 (1949); *Carter Car-buretor Corp. v. City of St. Louis*, 356 Mo. 646, 203 S.W.2d 438 (1947); *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W.2d 498 (1943); *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S.W. 1097 (1888).

138. 352 Mo. 233, 241, 176 S.W.2d 498, 501 (1943).

ordinance prohibiting cruelty to dumb animals. The following language from the opinion in that case reveals a disposition to construe such clauses liberally:

. . . general welfare clauses are not useless appendages to the charter powers of municipal corporations. They are designed to confer other powers than those specifically named. The difficulty in making a specific enumeration of all such powers as may be properly delegated to municipal corporations renders it necessary to confer such powers in general terms.¹³⁹

In *Bluedorn v. Mo. Pacific Railroad Co.*,¹⁴⁰ the court held that the general welfare provision in the St. Louis charter authorized an ordinance limiting the speed of trains within the city. In *City of St. Louis v. Bell Telephone Co.*,¹⁴¹ however, the court held that the general welfare clause did not authorize St. Louis to enact an ordinance regulating telephone rates. The court stated that the general welfare clause may be qualified by specific provisions in the charter, and that it had been qualified in this instance because the charter gave express power to establish rates for some utilities but failed to mention telephone rates. Another significant aspect of the opinion was the court's approval of the use of the Dillon rule in construing charters: "[A]ny fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."¹⁴² In 1949, the court in effect repudiated the liberal approach of the *Schoenbusch* case when it said that, "[T]he general welfare clause of the charter may not be construed so as to enlarge the powers of a city further than is necessary to carry into effect the specific grants of power."¹⁴³

C. Municipal Taxation

Perhaps the most important cases turning on the construction of charters have been those involving taxation. In *People's Motorbus Co. v. Blaine*,¹⁴⁴ decided in 1932, the Missouri Supreme Court concluded that the broad language of the St. Louis charter authorizing the city to assess,

139. 95 Mo. 618, 622, 8 S.W. 791, 792 (1888).

140. 108 Mo. 439, 18 S.W. 1103 (1891).

141. 96 Mo. 623, 10 S.W. 197 (1888).

142. *Id.* at 628, 10 S.W. at 198.

143. *Tietjens v. City of St. Louis*, 359 Mo. 439, 445, 222 S.W.2d 70, 73 (1949). The Court invalidated an ordinance which regulated rents because neither the charter nor the statutes authorized such an ordinance.

144. 332 Mo. 582, 58 S.W.2d 975 (1932).

levy, and collect taxes for all general and specific purposes on all subjects or objects of taxation was sufficiently broad to authorize the city to levy any kind of tax not inhibited by some other provision of the charter or by some constitutional or statutory provision. This approach, if allowed to stand, would have contributed significantly to the ability of Missouri municipalities to meet their many responsibilities. Unfortunately, this approach was expressly repudiated in the 1943 case of *Kansas City v. Frogge*¹⁴⁵ and the 1947 case of *Carter Carburetor Corp. v. City of St. Louis*.¹⁴⁶

The Court invalidated Kansas City's compensating use tax in the *Frogge* case and the St. Louis earnings tax in the *Carter Carburetor* case. The charters of both Kansas City and St. Louis contained the same broad grant of taxing power relied on in *People's Motorbus*. They also had a provision stating that the enumeration of any power should not be construed to limit or impair any general grant of power. But the court decided that this was not enough. Asserting that the taxing power must be strictly construed, the court in effect imposed a requirement that any taxes levied must be specifically named in the charter. These decisions extended to all forms of taxation the limitation previously imposed by the legislature on the levy of license taxes.¹⁴⁷

D. Observations

These cases illustrate the manner in which the autonomy and flexibility of Missouri municipalities have been undermined by the conception of charters as instruments of grant rather than limitation. The restrictive approach of Dillon's rule has been applied to the construction of charters, although the philosophy which underlies home rule indicates that it is limitations on municipal power which should be strictly construed rather than grants of power.¹⁴⁸ The usefulness of general welfare clauses was severely impaired when the court stated that such clauses may not

145. 352 Mo. 233, 176 S.W.2d 498 (1943).

146. 356 Mo. 646, 203 S.W.2d 438 (1947).

147. Section 71.610, RSMo 1959, prohibits the imposition of license taxes on any business avocation, pursuit or calling, unless "such business avocation, pursuit or calling is *specialy named* as taxable in the charter . . . or unless such power be conferred by statute." (Emphasis supplied.) *General Installation Co. v. University City*, 379 S.W.2d 601 (Mo. 1964) held that this requirement may be satisfied by incorporating into the charter by reference all license taxes which cities of the first, second, third or fourth class or of any population group are now or hereafter permitted to levy.

148. *City of Grass Valley v. Walkinshaw*, 37 Cal.2d 595, 212 P.2d 894 (1949); 1 ANTIEAU, MUNICIPAL CORPORATION LAW §§ 3.05, 3.09 (1958).

enlarge municipal powers further than is necessary to carry into effect specific grants of power. The task of raising revenue—perhaps the most difficult responsibility facing the cities—was made more difficult by the *Frogge* and *Carter Carburetor* cases. One of the usual factors prompting the adoption of constitutional home rule has been the desire to free municipalities from the restrictive approach of the courts to legislative grants of power to municipalities. Yet the Missouri courts have applied the same general approach to the construction of charters. An important result of this reasoning is that municipal charters in Missouri must be written in great detail.¹⁴⁹ Since it is impossible to anticipate every eventuality, and excessive detail is itself a limiting factor under applicable rules of construction, Missouri home rule charters are less flexible and less effective than they would be if they were treated as instruments of limitation.

V. AN EVALUATION OF THE MISSOURI APPROACH TO HOME RULE

Missouri's home rule provisions and the case law construing these provisions do not provide an effective arrangement for distributing power between the state and home rule cities. With respect to the issue of scope of power, the most important shortcoming of Missouri law is its failure to indicate clearly what is and what is not a permissible exercise of power in the absence of an express authorization or an express prohibition. When a distinction is made between what the Missouri Supreme Court has said and what it has actually held, one realizes that the court has not sharply curtailed the power of home rule cities to act if there is no specific prohibition or authorization. The *Garner* case¹⁵⁰ stands alone as an example of the invalidation of a municipal enactment solely because of a lack of power to legislate in a particular field. In practically all of the cases in which the Missouri Supreme Court has invalidated an ordinance or charter provision, the decision has been based upon a conflict with the constitution or a statute or upon a finding that the charter did not authorize the ordinance. Yet because of dicta in cases involving conflicts between statutes and municipal enactments, the outer boundaries of permissible municipal action are shrouded in mists of uncertainty.¹⁵¹

149. The Kansas City charter is described as "somewhat verbose" in STASON and KAUPER, *MUNICIPAL CORPORATIONS* 105 (1959). Yet the manner in which the Missouri courts have construed charters makes such verbosity a necessary evil.

150. 189 Mo. 83, 88 S.W. 41 (1905).

151. See text accompanying notes 59-66 *supra*.

The conceptual tests developed by the Missouri Supreme Court to deal with state-local conflicts are subject to criticism on several counts. It has already been suggested that they are not compatible with the intent of the framers of the constitution,¹⁵² and that they have not made a substantial contribution to municipal autonomy.¹⁵³ Since the tests do not provide a reliable guide for determining whether a city is governed by a particular statute, many municipal attorneys play it safe and assume that home rule cities are subject to all applicable state statutes.¹⁵⁴ It has also been suggested that these tests have undermined the initial grant of power to home rule cities because of the tendency of some members of the court to look to these tests in describing the boundaries of municipal power.¹⁵⁵ The experience in Missouri is comparable to that in other states which have attempted to deal with the issues of home rule by using similar conceptual tests. It has proven almost impossible to draw a firm, clear line between local or municipal affairs and matters of statewide or general concern.¹⁵⁶ There are frequent conflicts between the courts of different states in the application of these tests to specific fact situations.¹⁵⁷ Even within a single jurisdiction, the courts are not always consistent.¹⁵⁸ An outstanding home rule scholar has said that, "it has been a fundamental difficulty with the home rule concept from the beginning that public affairs are not inherently either local or general in nature."¹⁵⁹

The case law dealing with municipal charters is a serious obstacle to flexible and imaginative municipal action. It has been pointed out that any exercise of power must be authorized in the charter, and that charters are construed in the same restrictive fashion as legislative grants of power.¹⁶⁰ This line of cases has been particularly troublesome in the field of municipal taxation.

152. See text accompanying notes 71-77 *supra*.

153. See note 62 *supra*.

154. This statement is based upon a number of conversations the writer has had with Missouri municipal attorneys.

155. See the text accompanying notes 59-66, *supra*: It should be emphasized, however, that the statements by members of the Court on this point have been dicta. As such, their chief effect has been to create uncertainty and to discourage municipalities from relying on their home rule powers.

156. See Fordham, *Home Rule—AMA Model*, 44 NAT. MUN. REV. 137, 139 (1955).

157. 1 ANTIEAU, *op. cit. supra* note 148, at § 3.17.

158. *Ibid.* The regulation of telephone rates has gone from local to state in Colorado. In California, the regulation of traffic on the city streets has gone from local to state.

159. Fordham and Asher, *supra* note 133, at 25.

160. See the text accompanying notes 137-149 *supra*.

The confluence of these three lines of cases has created a situation in which municipal officials do not believe they can rely with confidence on their home rule powers as a source of authority, particularly with respect to new or unusual situations. Part of the problem may result from a failure on the part of municipal attorneys to distinguish clearly between these three lines of cases, particularly the first two. It may also be true that some municipal attorneys are unduly cautious and perhaps overly negative in their approach to home rule powers. It is usually easier to say something cannot be done than to show how it can be accomplished. But even the most careful reasoning and a scrupulous observance of all relevant distinctions does not enable one to predict the outcome of future cases on the basis of the Missouri case law with any degree of assurance. The unfortunate consequences of this state of affairs can be illustrated by pointing out what often happens when a home rule city is faced with a problem which calls for the exercise of a power not authorized by statute. The city officials will normally request an opinion from their attorney. Unless there is a case squarely on point, he will have to tell them that there is substantial doubt as to their authority to exercise the power. Local officials who lack the courage or the desire to deal with the problem are thus provided with a plausible excuse for inaction. Those officials anxious to do something may hesitate and lose some of their original enthusiasm for action. Even when local officials remain united in their determination to initiate action, the necessity for clarifying legislation or for a test suit will delay the implementation of the program. If the decision is to seek authorization from the legislature and the legislature does not wish to provide such authorization, legal uncertainty may enable members of the legislature to argue that the city already has sufficient power to deal with the problem. A debatable point of law can be and often is used to excuse inaction or place responsibility on someone else.¹⁶¹

Municipal requests for authority often take the form of proposed legislation which is general in form but special in its effect.¹⁶² An unduly large amount of legislative time and energy is devoted to dealing with numerous requests for legislation directed towards the special problems of

161. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 656 (1964).

162. Although Missouri and most other states prohibit special legislation, the approval of over-refined classification on the basis of population or other factors permits legislation which is special in its practical effect. See Fordham, *Home Rule—AMA Model*, 44 NAT. MUN. REV. 137, 138 (1955). For a discussion of the Missouri law on this point, see 2 St. Louis L.J. 403 (1953).

specific cities.¹⁶³ This diverts legislators from their primary responsibility for the formulation of state-wide policy.¹⁶⁴ Moreover, these requests for what amounts to special legislation probably do not receive the careful attention given to bills of wider applicability. Legislators tend to defer to the local delegation on such matters. Even when the legislature is guided by the local delegation, which can be expected to have knowledge of conditions in their district, it is less likely than municipal officials to be familiar with the various ramifications of the problem which gave rise to the request for legislation.¹⁶⁵ Since the local delegation to the legislature is often elected on the basis of state-wide issues and is not charged with the day to day operations of municipal government, it does not have the same degree of responsibility to the local electorate on this type of issue as elected municipal officials. Power and responsibility are thus divided. It is at least arguable that the devotion of an inordinate amount of legislative time to dealing with special bills may cause the legislature to decline in public esteem.¹⁶⁶ The use of the statutes is made more difficult when they are unduly enlarged by the inclusion of numerous special acts, since important acts of state-wide interest are lost among acts which apply to single cities.¹⁶⁷

There are still other undesirable ramifications from the municipalities' point of view. The cities' bargaining power in the legislature is weakened by the constant need to seek authority for the exercise of new powers. In order to obtain the authority to exercise power in a new field, the municipality may have to give up its request for other important legislation.¹⁶⁸ Continually recurring requests by cities for local legislation also establish precedent in the legislature and to some extent in the courts for local legislation which is not desired by cities.¹⁶⁹ When the enactment

163. Clinton D. Summers, a third year student at the University of Missouri School of Law, estimated that from ten to eleven percent of the bills considered by the 74th General Assembly of Missouri (in the regular session extending from January 4, 1967, to July 15, 1967) dealt with specific entities of local government. He also estimated that 69 bills applied to the city of St. Louis alone. Summers, *Special Legislation in Missouri*, submitted in Seminar in Local Government Problems (1967).

164. See Sandalow, *supra* note 161, at 655.

165. *Id.* at 656.

166. See Green, *A Malaproprian Provision of State Constitutions*, 24 WASH. U.L.Q. 359, 362 (1939).

167. *Id.* at 363.

168. Professor Sandalow refers to a widely discussed rumor that Chicago once had to abandon its quest for state-wide fair employment or housing legislation in order to obtain the authority to reorganize its police department. Sandalow, *supra* note 161, at fn. 51.

169. *Id.* at 654, 655.

of laws applicable to a single city becomes commonplace, it would be surprising if the legislature did not use this technique to occasionally impose its views on particular problems upon a city. The use of special legislation frequently results in material discriminations between cities. One result of all this is that some cities obtain economic or other advantages simply because they have been more successful in their lobbying efforts.¹⁷⁰

VI. A PROPOSAL

While the Missouri Supreme Court could resolve some of the problems caused by the body of law which has developed in the home rule field, the kind of thoroughgoing change that is needed can be accomplished only through an amendment to the state constitution. Two distinct basic approaches to constitutional home rule have been debated in recent years. The more traditional approach, sometimes referred to as pure home rule, was incorporated in early Model State Constitutions recommended by the National Municipal League,¹⁷¹ and still finds some support among proponents of home rule.¹⁷² The newer approach has been advanced by the American Municipal Association (hereafter referred to as AMA),¹⁷³ the National Municipal League in the latest edition of the Model State Constitution,¹⁷⁴ and the Advisory Commission on Intergovernmental Relations (hereafter referred to as ACIR).¹⁷⁵ The newer approach has also been embodied in the Texas Constitution as judicially construed,¹⁷⁶ the Alaska Constitution,¹⁷⁷ the South Dakota Constitution¹⁷⁸ and was approved as an amendment to the Massachusetts Constitution¹⁷⁹ in November 1966.

The traditional home rule approach distinguishes between matters of municipal and statewide concern. The municipal charter supersedes the statutes of the state if there is a conflict on a matter of municipal

170. Green, *supra* note 166, at 362.

171. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 97 (6th ed. 1963).

172. Bromage, *Home Rule—NML Model*, 44 NAT. MUN. REV. 132 (1955).

173. Fordham, *op. cit. supra* note 131.

174. NATIONAL MUNICIPAL LEAGUE, *op. cit. supra* note 171, at 16, 97.

175. 1967 STATE LEGISLATIVE PROGRAM OF THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS 475, 476 (1966).

176. Art. XI, § 5; NATIONAL MUNICIPAL LEAGUE, *op. cit. supra* note 171, at 98; Keith, *Home Rule Texas Style*, 44 NAT. MUN. REV. 185 (1955). Professor Sandalow asserts, however, that the Texas Supreme Court has limited municipal initiative in situations in which it would not have been permitted to do so under the AMA proposal. Sandalow, *supra* note 161, at fn. 175.

177. Art X, § 11.

178. Art X, §§ 4, 5.

179. Art II, § 6.

concern. State statutes override the charter in case of conflict on a matter of statewide concern. The chief characteristic distinguishing this approach from the newer approach is the attempt to carve out an area of municipal autonomy in which local legislative action takes precedence over state legislative action.¹⁸⁰ The principal difference in the newer approach advanced by the AMA is that, although adoption of a home rule charter automatically makes available to a city a broad range of powers, only "municipal executive, legislative and administrative structure, organization, personnel and procedure"¹⁸¹ are beyond state legislative control. The provision recommended by the ACIR does not even attempt to insure autonomy in these areas.¹⁸² Neither the AMA nor the ACIR provisions place any substantive powers and functions beyond legislative control by general law. Their purpose is to make it unnecessary to petition the legislature for enabling legislation so long as the legislature does not expressly deny a particular power.¹⁸³

Reference has previously been made to the fact that the Missouri Supreme Court has so construed the existing home rule provisions that it is necessary to distinguish between matters of municipal and state-wide concern.¹⁸⁴ While it has used different word formulas in making this distinction, the net result has been to set aside a few areas of municipal activity which are not subject to legislative control. Although it may be doubtful whether this result is justified,¹⁸⁵ this judicial construction of the Missouri home rule provisions is consistent with the traditional approach. Consequently, the objections to Missouri's provisions, which have been previously expressed,¹⁸⁶ apply with equal force to other approaches which follow the traditional pattern. For this reason a new home rule provision along the same basic lines, while it would doubtless accomplish some constructive purposes, would nevertheless give rise to the same difficulties that accompany any effort to distribute power on the basis of distinctions which cannot be realistically or consistently applied.

The newer approach to home rule does not attempt to distribute power between state and local government by the use of labels or a fanciful characterization of the nature of the powers. Instead, it seeks to

180. See Bromage, *supra* note 172, at 133-135.

181. Fordham, *op. cit. supra* note 131, at 19.

182. *Op. cit. supra* note 175.

183. Fordham, *op. cit. supra* note 131, at 20, comment 2.

184. See text accompanying notes 78-88 *supra*.

185. See text accompanying notes 70-77 *supra*.

186. See text accompanying notes 150-170 *supra*.

reverse the old strict-constructionist presumption against the existence of municipal power. The issue of municipal power in the absence of statutory authorization or prohibition is dispatched by assuming that the municipality already has any power which the legislature could delegate to it. Thus, if the municipal attorney cannot find limitations imposed by the legislature, he may assume that the municipality can exercise the power. State-local conflicts become a matter of statutory construction since it is assumed that the legislature can override any provision in a charter or ordinance.¹⁸⁷ The emphasis, therefore, is on whether a conflict actually exists, and what was intended by the legislature, rather than whether a given function is of local or statewide concern. If the supremacy of the legislature is limited in any respect, the areas in which limitations are imposed are defined specifically and in functional terms.¹⁸⁸ A constitutional amendment along the lines of the AMA draft would go a long way toward erasing the present uncertainty concerning the scope of actual powers which currently plagues Missouri home rule cities. It would make it easier to ascertain whether the responsibility for particular problems rests with the state or the cities. It should also lessen the workload of the state legislature.

Some commentators have criticized the AMA approach because it does not protect cities from legislative inroads upon their affairs.¹⁸⁹ However, experience in Missouri indicates that the traditional approach does not achieve effective autonomy either.¹⁹⁰ The small measure of autonomy obtained is at the expense of a debilitating uncertainty which undermines municipal initiative.¹⁹¹ Moreover, many serious urban problems involve the urban fringe and intergovernmental relationships. Rigid local autonomy might impair the flexibility and adaptability needed to cope with problems which transcend municipal boundaries. Retention of ultimate power in the legislature would permit it to deal with this type of problem when necessary.¹⁹²

187. Fordham, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 20, comment 2 (American Municipal Association 1953).

188. *Id.* at 21, 22, comment 7.

189. Bromage, *supra* note 172, at 133. Compare Fordham and Asher, *supra* note 133, at 24.

190. See note 62 and text accompanying notes 93-129 *supra*.

191. See text accompanying notes 62-67, 150-151 *supra*.

192. See Four-County Metropolitan Capital Improvement District v. Board of County Commissioners, 149 Colo. 284, 369 P.2d 67 (1962) for an example of a court's reliance on home rule to invalidate a statute designed to deal with a problem which transcended municipal boundaries. See Fordham, *Home Rule—AMA Model*, 44 NAT. MUN. REV. 137, 141 (1955) for comments on home rule and metropolitan problems by the principal draftsman of the American Municipal Association's model home rule provisions.

One very important difference between the traditional approach to home rule and the approach of the AMA relates to who decides questions of distribution of power between the state and cities. When powers are divided on the basis of labels which are not capable of precise application, the courts are forced to give specific content to the labels. This means that under the traditional approach, the courts have the ultimate power to establish the appropriate spheres of influence of the state and cities.¹⁹³ Much of this power would reside in the legislature under the AMA approach, although the courts would continue to play an important role in construing statutes and applying constitutional provisions which limit municipal activity. One commentator has suggested that a constitutional provision which limits the role of the courts as the AMA draft does threatens fundamental values.¹⁹⁴ He points out that the legislature cannot be expected to foresee all of the problems which may arise, and that the relatively narrow impact of many local measures may not arouse sufficient general interest to motivate the legislature to impose limitations to meet these problems after they arise.¹⁹⁵ He recognizes that judicial power should be exercised only to invalidate a novel exercise of municipal power inconsistent with basic community values, and that these basic values are generally embodied in the state and federal constitutions.¹⁹⁶ He asserts, however, that the avoidance of constitutional questions is sufficiently important to justify the retention of power in the courts to decide borderline questions of municipal power on a non-constitutional basis.¹⁹⁷ Certainly the principle that constitutional questions should be avoided when possible is an important one. Perhaps the price paid is too great if the principle can be furthered only by perpetuating uncertainty as to the scope of municipal power. The serious problems faced by our cities can be solved only by imaginative and vigorous efforts. Uncertainty as to municipal powers has a debilitating effect upon the ability of local officials to make such efforts. This uncertainty can be minimized by shifting the responsibility for certain decisions from the courts to the legislatures. Moreover, since questions of the distribution of power are largely political,

193. See Bromage, *supra* note 172; Fordham, *supra* note 191. For criticism of judicial participation in the resolution of home rule questions, see McGoldrick, *LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-1930*, at 310-312 (1933).

194. Sandalow, *supra* note 161, at 709-714.

195. *Id.* at 714.

196. Sandalow, *supra* note 161, at 718-720.

197. *Id.* at 720.

there is something to be said for vesting responsibility in an elected body directly responsible to the electorate.

Rather than attempting to guard against the abuse of municipal power by restricting the initial grant of power to home rule cities, the newer approach to home rule focuses attention upon specific limitations imposed by the legislature. The ACIR recommends that the delegation of broad powers to municipalities be preceded by a careful review of affirmative limitations upon the powers of local government resulting in the enactment of a local code placing necessary limitations on the broad powers granted.¹⁹⁸ The local government section of the proposed constitution rejected by the voters of New York on November 7, 1967, would have required the legislature to enact such a statute of restrictions.¹⁹⁹ By focusing attention on specific limitations which would be contained in a single comprehensive code, the newer approach to home rule would result in a concentrated, comprehensive legislative review of the need for limiting municipal power. Such a review might indicate that some existing statutory limitations should be removed and that others should be added. The end product should be superior to the existing hodge-podge of statutes and decisions because it would be based upon an overall view of the whole field. At the very least, such a local code or statute of restrictions would be internally consistent and more accessible to attorneys who practice in the field of municipal law.

The model provisions representing the newer approach to home rule also deal satisfactorily with the issue of the legal status of the charter. The AMA draft, for example, provides that a municipal corporation may "exercise any power or perform any function . . . which is not denied to that municipal corporation by its home rule charter, . . ." ²⁰⁰ It is clear that such language would change the present Missouri law on this subject. While Missouri home rule cities have only those powers authorized in their charters,²⁰¹ the AMA draft provides that a city has all powers not denied to it by its charter. Charters would thus become instruments of limitation instead of instruments which grant power.

A home rule provision similar to that recommended by the AMA would provide a workable method for distributing power between the state of

198. 1967 STATE LEGISLATIVE PROGRAM OF THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS 475 (1966).

199. Art XI, § 2(b).

200. Fordham, *op. cit. supra* note 187, at 19.

201. See text accompanying notes 134-138 *supra*.

Missouri and its home rule municipalities. Of course, truly satisfactory relationships between the state and home rule cities can be attained only by continuing efforts by municipal officials and their friends before the legislature and the courts, and by the creation of a climate of public opinion sympathetic to the needs and problems of the cities. But an updated home rule provision would make an important and lasting contribution toward the achievement of this objective.