

January 1958

Home Rule in Montana—Present and Proposed

David R. Mason
Montana State University School of Law

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

David R. Mason, *Home Rule in Montana—Present and Proposed*, 19 Mont. L. Rev. 79 (1957).
Available at: <https://scholarship.law.umt.edu/mlr/vol19/iss2/1>

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

Home Rule In Montana—Present and Proposed

By DAVID R. MASON*

One who turns the pages of the Montana cases concerned with municipal corporations and their powers will witness what appears to be a basic, although often unarticulated, conflict as to the position of cities and towns in the Montana polity. The extent to which the inhabitants of a local community may control their own affairs free from legislative interference has always been a matter of some dispute. There is a theory of an inherent right to local self-government, which distinguishes "governmental" functions of a municipal corporation as an agent of the state from functions primarily or principally in the interests of the people living within the limits of the municipality. Under this theory a municipal corporation enjoys an absolute right of self-government in those matters which are of municipal concern and which can be labeled "local," "private," or "proprietary."¹ It is nurtured by some tenets of a democratic philosophy, and it is based upon an assumption that a uniform system of local self-government was well established as an Anglo-American tradition long before the American state was created, and that the principles of this system were transmitted to American municipalities through the common law and incorporated into the constitutions of the several states as an implied reservation of power to municipal corporations. As against this home rule theory, however, there is a more sophisticated legal theory, based upon a republican philosophy and the principle, or doctrine, that all legislative powers reserved to the states by the Constitution of the United States are vested in the state legislatures, except as prohibited by the state constitution.²

*Professor of Law, Montana State University. Member of the South Dakota Bar and the Montana Bar. A.B. 1926, LL.B. 1924, University of South Dakota; S.J.D., Harvard Law School, 1927.

¹This theory of local self-government applies only to true municipal corporations (cities and towns), not to quasi-municipal corporations (counties, school districts, etc.). The distinction between the two is found in the fact that quasi-municipal corporations serve only as administrative agents of the state, while true municipal corporations also perform functions of local concern. *State v. Holmes*, 100 Mont. 256, 47 P.2d 624 (1935); *Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30 (1930); *Miligan v. Miles City*, 51 Mont. 374, 153 Pac. 376, L.R.A. 1916C 395 (1915). *Cf.*, however, *Lindeen v. Montana Liquor Control Board*, 122 Mont. 549, 207 P.2d 947 (1949).

A distinction between matters of general state interest and matters of local concern is, of course, difficult to apply; in a sense any matter of local concern is also a matter of state concern. Resort to labels such as "private" or "proprietary," as distinct from "governmental," while having a basis in the long-established doctrine with respect to municipal liability in tort, does little to clarify the distinction and may result in a change of emphasis from the local character of the interest to the commercial character of the activity. Furthermore the litigation in tort cases involving the distinction between governmental and proprietary functions has resulted in confusion and inconsistency, affording a field day for law reviews. See, for instance, *Borchard, Government Liability in Tort*, 34 *YALE L.J.* 129 (1924). The arbitrary nature of the distinction is illustrated by *Griffith v. Butte*, 72 Mont. 552, 234 Pac. 829 (1925). Street cleaning and sprinkling is a proprietary function, but apparently becomes governmental when done by an employee of a health department or under a statute or ordinance declaring that it is for the protection of public health.

Although the latter theory has prevailed in most jurisdictions,³ the influence of an underlying theory of local self-government cannot be denied. By "immemorial practice" local legislative powers have been vested in the corporate authorities of municipalities, and this has never been regarded as violative of the maxim that legislative powers must not be delegated.⁴ Also, local self-government is secured by constitutional provisions of varying scope in several states. In Montana such constitutional provisions are rather limited in scope. Article V, section 36, of the Montana Constitution, provides:

The legislative assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes, or to perform any municipal functions whatever.

This prohibition upon legislative delegation refers only to those functions having to do with local self-government.⁵ It does not prevent delegations of power to regularly elected or appointed state officials,⁶ and the words "special commission" refer to a body or association of individuals which is not a department or branch of city government.⁷

³The historical basis for the theory of local self-government has been disputed; further, under our republican theory of government state legislatures have all powers not limited by the state constitution, which should be construed as a legal document the contents of which are not to be measured merely by the spirit of our institutions. However, it is not the purpose of this article to discuss the legal merits of implied reservations of municipal power. A supporting argument is found in Eaton, *The Right of Local Self-Government*, 13 HARV. L. REV. 441, 570, 638 (1900). A contrary argument is effectively presented in McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 299 (1916).

⁴STASON, *CASES ON MUNICIPAL CORPORATIONS* 4 (1946); ADRIAN, *GOVERNING URBAN AMERICA* 55 (1955). The earliest case enunciating the home rule doctrine was *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44 (1871), opinion by Justice Cooley. In addition, the courts of Iowa, Indiana, Kentucky and Oklahoma have adopted the principle. *State ex rel. White v. Barker*, 116 Iowa 96, 89 N.W. 204, 57 L.R.A. 244 (1902); *State ex rel. Jameson v. Denny*, 118 Ind. 382, 21 N.E. 252, 4 L.R.A. 79 (1889); *Lexington v. Thompson*, 113 Ky. 540, 68 S.W. 477, 57 L.R.A. 775 (1902); *Thomas v. Reed*, 142 Okla. 38, 285 Pac. 92 (1930). See also *People v. Lynch*, 51 Cal. 15 (1875); *Ex parte Lewis*, 45 Tex. Crim. 1, 73 S.W. 811 (1903).

⁵Subordinate specified powers of legislation and regulation with respect to local and internal affairs is the distinctive purpose and the distinguishing feature of a municipal corporation proper. 1 DILLON, *MUNICIPAL CORPORATIONS* § 20 (4th ed. 1890). For a review of the authorities, see McBain, *The Delegation of Legislative Power to Cities*, 32 POL. SCI. Q. 276, 391 (1917).

⁶*State ex rel. Brooks v. Cook*, 84 Mont. 478, 276 Pac. 958 (1929). See also *State ex rel. Berthot v. Gallatin County High School*, 102 Mont. 356, 58 P.2d 264 (1936).

⁷*State ex rel. Missoula v. Holmes*, 100 Mont. 256, 47 P.2d 624 (1935); *State ex rel. Normile v. Cooney*, 100 Mont. 391, 47 P.2d 637 (1935); *Public Service Commission v. Helena*, 52 Mont. 527, 159 Pac. 24 (1916).

⁸*State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940 (1908). See also *Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. 565 (1910), in which the court said that there was no objection to the legislature availing "itself of the ordinary machinery of the county government, supplemented by the appointment of one additional officer, for the purpose of carrying the law into effect."

Article XII, section 4, provides:

The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, town or municipal corporation for county, town or municipal purposes, but may by law invest in the corporate authorities thereof powers to assess and collect taxes for such purposes.

The "municipal purposes" referred to are those involved in the exercise of proprietary powers which are an incident to local self-government.⁸ "Corporate authorities," which the legislature may invest with power to assess and collect taxes for such purpose, are those municipal officers who are either directly elected by the population of the municipality, or appointed in some mode to which it has given its assent.⁹ The "levy" of taxes contemplates compulsion, and the prohibition does not extend to legislation merely authorizing the levy of taxes by political subdivisions,¹⁰ nor to legislation curing irregularities in municipal action.¹¹ According to the later decisions, only direct taxes are within this section of the Constitution, and it does not condemn legislation requiring the expenditure of money by a political subdivision which, but for the enactment of the law, it would not expend.¹² The prohibition is not applicable to license taxes required of persons doing business within the state, regardless of whether they are for regulation or revenue,¹³ nor to special assessments for local improvements.¹⁴ On the other hand, this provision is applicable not only to burdens upon property to defray general governmental expenditures, but also to taxes upon "inhabitants." A statute requiring the payment of fees by petitioners filing letters of administration or guardianship, regulated by the appraised value of the estate, to become a part of the public moneys of the

⁸State *ex rel.* Housing Authority v. City Council, 108 Mont. 347, 90 P.2d 514 (1939); State *ex rel.* Gebhardt v. City Council, 102 Mont. 27, 55 P.2d 671 (1936).

⁹State *ex rel.* Gerry v. Edwards, 42 Mont. 135, 111 Pac. 734 (1910).

¹⁰Kraus v. Riley, 107 Mont. 116, 80 P.2d 864 (1938).

¹¹Weber v. Helena, 89 Mont. 109, 297 Pac. 464 (1931).

¹²In *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L.R.A. 412 (1897), the court apparently held that legislation requiring a city to assume a burden which would require an indebtedness necessitating the imposition of taxes for its discharge was obnoxious to article XII, section 4. In *Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30 (1913), the court refused to consider whether this section would be violated by a law which increased the costs of printing, since the record did not show that costs would be increased and no such assumption was justified. Later cases have departed entirely from the position apparently taken in the *Steele* case. *Rosebud County v. Flinn*, 109 Mont. 537, 98 P.2d 330 (1940); *State ex rel. Wilson v. Weir*, 106 Mont. 526, 79 P.2d 305 (1938); *State v. Holmes*, 100 Mont. 256, 47 P.2d 624 (1935); *State ex rel. Woare v. Board of Commissioners*, 70 Mont. 252, 225 Pac. 389 (1924); *Public Service Commission v. Helena*, 52 Mont. 527, 159 Pac. 24 (1916). In the *Holmes* case, the court justified the *Steele* case on the ground that the doctrine of local self-government, applicable to true municipal corporations, independent of article XII, section 4, controlled.

¹³State v. Silver Bow County, 78 Mont. 1, 252 Pac. 301 (1926); *State v. Camp Sing*, 18 Mont. 128, 44 Pac. 516 (1896).

¹⁴*Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. 565 (1910). See also *State ex rel. Hawkins v. State Board of Examiners*, 97 Mont. 441, 35 P.2d 116 (1934), holding that no tax was levied by legislation requiring counties having indigent patients at the State Tuberculosis Sanitarium to pay that institution for their care.

political subdivision, is within the prohibition.¹⁵ Also, a per capita or poll tax is included.¹⁶ And the Supreme Court of Montana, in a three to two decision, has held that a retail sales tax is a tax upon "inhabitants."¹⁷

The Montana Constitution further provides:

The legislative assembly shall pass no law . . . which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or consideration already passed.¹⁸

No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad.¹⁹

Dissatisfied with the extent of independence of Montana cities and towns, and believing them to be burdened by insufficient freedom to make their own decisions and effectively govern themselves, the Montana Municipal League has proposed, as yet without success, a so-called home rule amendment to the Montana Constitution.²⁰ The effect which the adoption of such an amendment would have depends in part upon the extent to which a doctrine of local home rule is recognized in Montana beyond what is guaranteed by existing express constitutional provisions. Statements seeming to justify an assertion that Montana has recognized an inherent right of local self-government are to be found in the Montana cases, but there may be set off against them statements to the contrary. No appreciation of the status of cities and towns in Montana is possible without a careful consideration of what the Supreme Court of Montana has actually held, as well as what it has said.

INHERENT HOME RULE AS PROTECTION AGAINST LEGISLATIVE INTERFERENCE

Conflicting Statements

The Supreme Court of the Montana Territory, in 1887, apparently recognized that municipal corporations have no inherent right of local self-government. In *Davenport v. Kleinschmidt*,²¹ the court said:

The ordinary powers of municipal corporations are well defined and understood. It is well said by Mr. Dillon, in his work

¹⁵*Hauser v. Miller*, 37 Mont. 22, 94 Pac. 197 (1908).

¹⁶*State ex rel. Pierce v. Gowdy*, 62 Mont. 119, 203 Pac. 1115 (1922).

¹⁷*Lindeen v. Montana Liquor Control Board*, 122 Mont. 549, 207 P.2d 947 (1949). Justices Angstman and Metcalf dissented, taking the position that the tax was a license tax and not upon inhabitants or property.

¹⁸MONT. CONST. art. XV, § 13. If the legislation provides for liability dependent upon favorable vote of the taxpaying freeholders of property within a city, this constitutional provision is not violated. *Stanley v. Great Falls*, 86 Mont. 114, 132, 284 Pac. 134, 139 (1929).

¹⁹MONT. CONST. art. XV, § 12.

²⁰A home rule bill (House Bill 144) in the Thirty-Fifth Legislative Assembly was favored in the House by a vote of forty to thirty-nine, but failed because a constitutional amendment requires a two-thirds vote. The League Executive Committee has decided that home rule will be "one of the major pieces of legislation to be stressed at the next session of the state legislature." *Montana Municipal League, News Letter*, Aug., 1957.

²¹6 Mont. 502, 527, 13 Pac. 249, 253 (1887).

on Municipal Corporations, that 'it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: *First*, those granted in *express words*; *second*, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act.' 1 Dill. Mun. Corp. § 55, p. 173.

Much later, in 1950, the Supreme Court of Montana was even more specific. In *Dietrich v. Deer Lodge*,²² the court said:

This court has repeatedly stated that unless the power is vested in the municipality by express law or is necessarily implied or essential to the accomplishment of the purposes of the municipality the presumption is against the exercise by the city of any such powers. . . .

The inquiry must always be: '(1) Whether there is an express grant; (2) whether there is a grant by necessary implication; or (3) whether the power in question is indispensable to the accomplishment of the object of the corporation. . . .

. . . In this jurisdiction the municipal corporation possesses no inherent power. . . .

In the sixty-three years intervening between the pronouncements of these two cases, the same position was taken many times.

Nevertheless, eight years after the adoption of the Constitution of Montana, the Supreme Court of Montana seemingly embraced the doctrine of local self-government as conceived by the judge who first enunciated the doctrine in the United States. In *Helena Consolidated Water Co. v. Steele*,²³ the following appears:

Discussing and distinguishing the questions here involved, Judge Cooley, in *People v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 206, says:

"In *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there conceded that, when confined, as it should be, to such corporations as agencies of the state in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the state government, or to assist when called upon to suppress insurrection, or aid in the enforcement of the police laws. Upon all such subjects the state may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the

²²124 Mont. 8, 13, 218 P.2d 708, 711 (1950).

²³20 Mont. 1, 5, 49 Pac. 382, 383, 37 L.R.A. 412, 414 (1897).

purpose, or through agents or officers of its own appointment. . . .

"But we also endeavored to show in *People v. Hurlbut* that, though municipal authorities are made use of in state government, and as such are under complete state control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. * * * We also referred in *People v. Hurlbut* to several decisions in the federal supreme court and elsewhere, to show that municipal corporations considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined, it will be found that these powers and capacities, and the interests which are acquired under them are usually spoken of as private in contra-distinction to those in which the state is concerned, and which are called public, thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations." . . .

We think the two provisos of the law under discussion are in violation of the clauses of the constitution quoted and referred to above [article XII, section 4, and article XV, section 13], *as well as the spirit of our governmental system, which recognizes "that the people of every hamlet, town and city of the state are entitled to the benefits of local self-government."* (Emphasis supplied).

As late as 1935 the Supreme Court of Montana repeated this doctrine. In *State v. Holmes*,¹⁰⁰ the court said:

The powers granted to a municipal corporation are of two classes. "The first including those which are legislative, public, or governmental, and import sovereignty; the second are those which are proprietary or quasi-private, conferred for the private advantage of the inhabitants of the city itself as a legal person."

As to the first class of powers of a city enumerated above, the power of the legislature is supreme except as limited by express constitutional prohibitions; but as to the powers of the second class wherein the city is acting in a proprietary capacity, as distinguished from a governmental capacity, the theory of local government controls.

In several other cases between the announcements in *Helena Consolidated Water Co. v. Steele* and *State v. Holmes*, the Montana Supreme Court reiterated this doctrine of local self-government. Obviously, such inconsistent statements invite examination and inquiry into whether the cases may be reconciled.

Cases Stating the Legal Theory

Some of the apparent conflict disappears when the character of the functions involved is considered. In many of the cases in which the language

¹⁰⁰100 Mont. 256, 274, 47 P.2d 624, 629 (1935).

of the decision would seem to deny the existence of an inherent right of local self-government, the court was dealing with a governmental, as distinguished from a proprietary, power. *Helena v. Helena Light & Railway Co.*²⁶ involved an action by a city to enjoin a street railway company from abandoning a portion of its line. The court held that the state Public Service Commission would have power to relieve the railway company of the burden imposed by the franchise which the city had granted, but expressly pointed out that the granting of the franchise by the city was an act of government and that rights which the city might acquire in its proprietary capacity were not involved. Also, in *State ex. rel. Great Falls Housing Authority v. Great Falls*,²⁷ the court was considering the construction to be given the Housing Authority Act and referred to the act of the city in carrying out the plan contemplated by the law as public or governmental in nature.²⁷ In other cases it is reasonably clear that such was the nature of the function involved or that it could be so considered, regardless of whether the court so labeled it. Thus, *Sharkey v. Butte*,²⁸ concerned the power of a city to annex territory.²⁹ In *State ex. rel. Quintin v. Edwards*,³⁰ the court was speaking with reference to the action of a municipal corporation in reducing a police force.³¹ In *Bozeman v. Merrell*,³² the question was the authority of a city to impose a penalty of imprisonment for the possession of moonshine liquor.³³ In *Helena Light and Railway Co. v. Helena*³⁴ the court was considering the validity of an ordinance requiring a street railway to light its tracks within corporate limits.³⁵ *State v. Northern Pacific Railway Co.*³⁶ held that a city could not require a railroad to construct a subway necessitating a change of the grade of a street, without first complying with a statute requiring compensation to be paid to prop-

²⁶63 Mont. 108, 207 Pac. 337 (1922).

²⁷110 Mont. 318, 100 P.2d 915 (1940).

²⁸In *State ex. rel. Helena Housing Authority v. City Council*, 108 Mont. 347, 90 P.2d 514, the court said that the carrying out of the Housing Authority Act, involving eradication of slums and the promotion of the public welfare of all citizens of the state, constituted a public or governmental purpose, rather than a proprietary or private one.

²⁹52 Mont. 16, 155 Pac. 266 (1916). See also *Penland v. Missoula*, 318 P.2d 1089 (Mont. 1957).

³⁰As to the nature of the power of the state in establishing and changing municipal boundaries, see 1 McQUILLIN, MUNICIPAL CORPORATIONS § 284 (2d ed. 1940). An act of the legislature annexing territory to a municipal corporation does not violate the right of local self-government. *Attorney General v. Springwalls Township*, 143 Mich. 523, 107 N.W. 87 (1906).

³¹40 Mont. 287, 106 Pac. 695 (1910).

³²The organization and maintenance of municipal police departments involve the exercise of governmental functions. 1 McQUILLIN, MUNICIPAL CORPORATIONS § 203 (2d ed. 1940); *State ex. rel. Gebhardt v. City Council*, 102 Mont. 27, 55 P.2d 671 (1936); *State ex. rel. Gerry v. Edwards*, 42 Mont. 135, 151, 111 Pac. 734, 739 (1910).

³³81 Mont. 18, 261 Pac. 876 (1927).

³⁴Traffic in intoxicating liquor, gambling and prostitution have been held to be matters of state concern. *State ex. rel. Burns v. Linn*, 49 Okla. 526, 153 Pac. 826 (1915).

³⁵47 Mont. 18, 130 Pac. 446 (1913).

³⁶Authority conferred upon a municipal corporation to light its streets and other public places has been held to be governmental in character. *Bojko v. Minneapolis*, 154 Minn. 167, 191 N.W. 399 (1923).

³⁷88 Mont. 529, 295 Pac. 257 (1930).

erty owners.³⁷ In *State ex rel. Billings v. Billings Gas Co.*,³⁸ the court was considering the authority of a city to fix by contract rates for a public utility.³⁹

Several cases have involved taxation, justifying a consideration of the function as governmental.⁴⁰ *Shapard v. Missoula*⁴¹ dealt with efforts to create a special improvement district.⁴² In *Wibaux Improvement Co. v. Breitenfeldt*,⁴³ the court was speaking of the power of a municipal corporation to levy taxes, although it is true that they were for municipal purposes. In *Dietrich v. Deer Lodge*, *supra*, the question was as to the power of a city or town to issue general obligation bonds for paving and widening its streets.⁴⁴

In *Broadwater v. Kendig*,⁴⁵ the court was speaking of the controlling effect of a statute preventing a city from increasing salaries of officers during their term of office, as applied to an ordinance increasing the sal-

³⁷The court said that the state statute, whether necessary or not under article III, section 14, of the Constitution of Montana, constituted a part of the law under which the city might exercise the police power effecting a change in the grade of a street. That the city would be acting in a governmental capacity in changing the grade of a street, see *Jenkins v. City of Henderson*, 214 N.C. 244, 199 S.E. 37 (1938). But *cf.* *Northern Pacific Railway v. Duluth*, 153 Minn. 122, 189 N.W. 937 (1922); *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S.W. 943 (1897); *Salsbury v. Lincoln*, 117 Neb. 465, 220 N.W. 827 (1928).

³⁸55 Mont. 102, 173 Pac. 799 (1918).

³⁹The power to regulate rates of a public utility is within the sovereign power of the state, but is not a power appertaining to the government of a city and does not follow as an incident of the power to frame a charter for city government. *State ex rel. Garner v. Missouri & K. Tel. Co.*, 189 Mo. 83, 88 S.W. 41 (1905).

⁴⁰There has been some conflict as to whether particular functions relating to taxation are governmental, and especially whether local assessments and special taxes are governmental in nature. See 1 McQUILLIN, MUNICIPAL CORPORATIONS § 195 n. 94, § 196 n. 19; 20 (2d ed. 1940); 37 AM. JUR., *Municipal Corporations* § 108 (1941). *Cf.* Mr. Justice Adair's special concurring opinion in *Dietrich v. Deer Lodge*, 124 Mont. 8, 18, 218 P.2d 708, 713 (1940), in which he quoted from *Corpus Juris Secundum* as follows: "The right of a municipality to issue bonds is not a political or governmental power, but is rather a private corporate power conferred for local purposes. The issuance of general bonds to be paid for by general taxation is, however, recognized as a governmental act." *Cf.* also the dissent of Justice Angstman in *Weber v. Helena*, 89 Mont. 109, 146, 297 Pac. 464, 467 (1931), taking the position that the home rule doctrine was violated by an act curing the defect in and validating city water plant bonds, since the legal effect was to compel the city to issue the bonds. But *cf.* article XII, section 8, of the Constitution of Montana, providing that the legislative assembly may provide for the funding of public corporate debts by assessment and taxation of private property within the territory of the corporation, and the decision in *State ex rel. Gebhardt v. City Council*, 102 Mont. 27, 55 P.2d 671 (1936), referring to this provision as giving to the legislature jurisdiction to control the economic and financial affairs of a city.

⁴¹49 Mont. 269, 141 Pac. 544 (1914).

⁴²The court said that the mode prescribed by statute had to be substantially followed, and that this was particularly true "when it is engaged in making street improvements, the expense of which is to be a charge by assessment upon the property included in a special improvement district." *Id.* at 279, 141 Pac. at 547.

⁴³67 Mont. 206, 215 Pac. 222 (1923).

⁴⁴*Cf.* the language of the opinions in *McClintoch v. Great Falls*, 53 Mont. 221, 163 Pac. 99 (1917) (discussing the construction to be placed on the limitation of indebtedness provision of article XIII, section 6, of the Constitution of Montana), and *Gagan v. Butte*, 75 Mont. 279, 243 Pac. 1085 (1926) (holding that a city which had failed to collect taxes as required by statute was not liable on special improvement bonds).

⁴⁵80 Mont. 515, 261 Pac. 264 (1927).

Mason: Home Rule in Montana

ary of the mayor. This might be considered a governmental matter,⁴⁶ although the court did cite with approval a Delaware case⁴⁷ which refused to distinguish the dual character of a municipal corporation or recognize any theory of local self-government.

In several of these cases, furthermore, the statements of the Montana Supreme Court which would seem to deny any right of local self-government were made in construing a grant of power by the legislature, and for that reason were not necessary to the decision.⁴⁸ And there are still other cases in which statements of the more limited view of municipal power are obiter dictum. In *Davenport v. Kleinschmidt*, *supra*, the court merely held that a grant by a city of the exclusive right to sell to the city all the water required by it for sewerage and fire purposes for twenty years, at a minimum rate fixed by contract, was void because it created a monopoly contrary to the genius of free government, was for an unreasonable time and exceeded the debt limit prescribed by the city charter. Such a holding was not dependent upon rejection of a theory of local self-government. *Harris v. Polson*⁴⁹ held that a park board appointed by a city council had no authority to lease property for a purpose other than that for which it had been conveyed to the city.

State ex rel. Haley v. Dilworth,⁵⁰ dealt with a quasi-municipal corporation and stated the general rule as to such a corporation, that "a public corporation in this state has no power to act unless authority to do so is conferred by a statute or necessarily implied therefrom." The case is of interest only because it cites as authority for this statement cases dealing with true municipal corporations,⁵¹ thus perhaps suggesting that there is no distinction as to their powers.

⁴⁶Apparently whether the fixing of compensation for municipal officers is treated as a governmental, as distinct from a proprietary, function is dependent upon whether the officer is exercising a governmental or proprietary function. See *Lexington v. Thompson*, 113 Ky. 540, 68 S.W. 477, 57 L.R.A. 775 (1902), regarding compensation of officers and members of the fire department; *Board of Aldermen v. Hunt*, 284 Ky. 720, 145 S.W.2d 814 (1940), regarding salaries of city water commissioners.

Of course, a mayor, as the chief executive officer of a city or town, would have the duty to cause all ordinances to be executed, whether they related to governmental or proprietary functions. (REVISED CODES OF MONTANA, 1947, § 11-802 (Hereinafter the REVISED CODES OF MONTANA are cited R.C.M.)). Also, under the commission form of government the mayor participates in the legislative functions, regardless of the character of the legislation (R.C.M. 1947, § 11-3120), as is true under the commission-manager plan (R.C.M. 1947, § 11-3245).

Cf. State ex rel. Gebhardt v. City Council, 102 Mont. 27, 55 P.2d 671 (1936), sustaining legislation fixing salaries for policemen in cities, in which the principal dispute was over the construction of article XII, section 4, of the Constitution of Montana, prohibiting the legislature from levying taxes upon inhabitants or property for county or municipal purposes. The court referred to article V, section 26 as implying legislative power to enact general laws creating offices and prescribing the powers and duties of offices in counties, cities, townships and school districts. The obiter dictum seems to indicate that under the Montana Constitution the legislature may control the appointment and salaries of officers performing local functions.

⁴⁷*Coyle v. Gray*, 7 Houst. 44, 30 Atl. 728 (1884).

⁴⁸For a consideration of cases interpreting power delegated, see *infra* at 90-94.

⁴⁹123 Mont. 469, 215 P.2d 950 (1950).

⁵⁰80 Mont. 102, 258 Pac. 246 (1927).

⁵¹*State ex rel. Billings v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799 (1918); *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 106 Pac. 695 (1910).

Cases Enunciating the Doctrine
of Local Self-Government

Consideration of the cases enunciating the theory of local self-government discloses that all but two are inconclusive. In the first case to state the doctrine, *Helena Consolidated Water Co. v. Steele*, *supra*, it appears that a statute provided that no municipality having a water supply furnished by a private person should erect any water plant to be operated by itself, but, if it desired to acquire such a plant, should purchase that owned by such private person. This was held to be in conflict with article XII, section 4, of the Constitution, since the purchase would require the city to incur an indebtedness necessitating the imposition of taxes for its discharge; also to be in conflict with article XV, section 13, as imposing upon the people of the municipality a new liability in respect to a past transaction, since at the time of the enactment of the statute the city had a contract with the water company which reserved the right of the city to enter into contracts with and purchase water from any other person or corporation for city purposes.⁵² In *State ex rel. Gerry v. Edwards*,⁵³ the court held that a statute creating in cities of the first class boards of park commissioners, the members of which were to be appointed by the governor, and empowering them to raise by taxation such sums as they deemed necessary to carry on their work, was in conflict with article XII, section 4, of the Constitution of Montana, although the court also stated that it did violence "to the theory of local self-government which has been established in this state as one of the fundamental principles of our government." In *Lindeen v. Montana Liquor Control Board*,⁵⁴ the court quoted at length the language in *State ex rel. Gerry v. Edwards*, which stated the doctrine of local self-government. But the court merely held that an act authorizing the Montana Liquor Control Board to collect a tax on the retail selling price of all liquors sold, and to distribute the tax to the counties in proportion to the amount of liquor sold therein, was violative of article XII, section 4, of the Constitution. Since the local self-government doctrine has no application to counties, it is apparent that it was not in point.⁵⁵ In *Hersey v. Neil-*

⁵²Even the purported reliance upon the theory of local self-government would seem to be weakened by *Public Service Commission v. Helena*, 52 Mont. 527, 159 Pac. 24 (1916), holding that a city, in the management of a water supply system acquired by extending its indebtedness beyond the three per centum constitutional limit, was subject to all reasonable regulations and control by the state acting by virtue of its police power, even though the Constitution (article XIII, section 6) provides that the municipality shall "own and control" such water supply. Apparently the court considered regulation and control by the state to involve a matter of general state concern because contaminated water might spread disease; and the court said that the legislation which was in dispute and which gave supervision to the public service commission was not intended to take from the city the active management of its water plant or the authority to appoint officers and employees to operate it, or to interfere with such officers in the proper discharge of their duties. *Cf. Campbell v. Helena*, 92 Mont. 366, 16 P.2d 1 (1932), holding that a city could be held liable in an action for damages resulting from drinking contaminated water furnished by the city, since where the city operates its own water system and furnishes water on a rental basis it acts in a proprietary capacity.

⁵³42 Mont. 135, 111 Pac. 734 (1910).

⁵⁴122 Mont. 549, 207 P.2d 947 (1949).

⁵⁵Mr. Justice Angstman, in his dissent in which Mr. Justice Metcalf concurred, said that the home rule doctrine shed no light on the question of whether the "sales

son,⁶⁶ the court sustained a statute providing that county printing must be done within the state, and referred to the doctrine of local self-government in holding that it was inapplicable.⁶⁷

Thus, one finds several cases, beginning in 1897, in which the Supreme Court of Montana affirmed that an inherent right to local self-government was established in our polity, but in which the statements of the theory may be explained away as either quite beside the question decided or unnecessary to the decisions. However, in 1935 two cases were decided which seem to defy explanation on any other basis than that of acceptance of the self-government doctrine. In *State v. Holmes, supra*, there was involved an act of the legislature requiring state insurance of public buildings of the state and its political subdivisions. The court held that the act was valid as to counties and school districts but invalid as to cities and towns, because the theory of local self-government controlled as to cities and towns but not as to counties and school districts. The court rejected arguments that the act violated express constitutional limitations,⁶⁸ and based the decision on the foundation of the *Steele* case, which it said in turn was rested on the decisions of the Michigan court. It said:

When operating in its proprietary capacity a city is subject to the same burdens, responsibilities and liabilities as a private corporation or individual acting in the same capacity. . . . If the city, when acting in its proprietary capacity, is subject to the burdens, responsibilities and liabilities of others acting in such capacity, it is entitled to the rights, privileges, and immunities accorded others. . . .

Most cities have a city hall, which is the office building wherein its affairs are conducted. If the city has a water plant, there the water bills are collected and its business in connection therewith conducted. Likewise, with its other business activities. No one would assume to assert that the proprietor of a private water company who maintains an office building in which he collects water rentals from the inhabitants of the city and conducts its business affairs could be compelled under a valid exercise of the police power to insure such office building against the perils enumerated in this Act in a state insurance fund. If such concern

tax" was a tax on "inhabitants or property" within the county so as to come within the language of the constitution, and that it seemed to him that discussion of the "home rule" doctrine when dealing with the subject of intoxicating liquors might have far reaching consequences.

⁶⁶47 Mont. 132, 131 Pac. 30 (1913).

⁶⁷See also *State ex rel. Woare v. Board of Commissioners*, 70 Mont. 252, 225 Pac. 389 (1924).

⁶⁸It was argued that there was a violation of article XII, section 4, of the Constitution of Montana, in that perils to be insured against were not then ordinarily the subject of insurance and in order to secure such insurance it would be necessary for counties and school districts to expend additional sums, and that, therefore, the act indirectly levied a tax. In refusing to accept this argument the court emphasized that there was no direct levy of a tax, and the court distinguished the *Steele* case on the ground that it dealt with a true municipal corporation. See note 12, *supra*. Further, the court held that there was no violation of article V, section 36, since, if any power was delegated, it was delegated to regularly elected or appointed state officials and not to any special commission, corporation or association.

Montana Law Review, Vol. 19 [1957], Iss. 2, Art. 1

may not be compelled to insure, neither may the city, for to compel such insurance is to deprive an individual, a private corporation, or a city in its proprietary capacity of its property, namely, its money paid in premiums, *without due process of law*. (Emphasis supplied.)

In *State ex rel. Kern v. Arnold*,⁵⁰ the court held that a legislative attempt to set up a compulsory three-platoon system for municipal fire departments, and prescribe the compensation to be paid to firemen, invaded the proprietary rights⁵¹ of the city of Missoula and deprived the city of its property without due process of law. The court in its opinion did not even mention argument of counsel that there was a violation of article XII, section 4, of the Constitution of Montana, but based its decision squarely on the theory of local self-government and due process of law. The court said:

If in owning the equipment and property used in a fire department and in employing firemen the city is acting in its proprietary capacity, then the Act in question, which of necessity requires the city to employ additional firemen at additional expense and to pay others additional compensation, operates to deprive the city of property without due process of law in contravention of the provisions of section 27 of article III of the Constitution. If, on the other hand, when engaged in these activities the city is exercising a governmental function, the will of the legislature is supreme.

Cases Interpreting Powers Delegated

To the extent that a municipal corporation owes its powers to the legislature, it should make no difference in the interpretation of a legislative act whether or not a theory of home rule based upon an implied constitutional reservation of powers be adopted. This would apply to all delegations of governmental powers. So far as proprietary powers are concerned, if a court accepted such a home rule theory it might avoid interpreting a legislative act as applicable to municipal corporations, in order to avoid holding the act invalid; otherwise it would seem that acceptance or rejection of this home rule theory would be without effect on principles of interpretation.⁵²

⁵⁰100 Mont. 346, 49 P.2d 976 (1935).

⁵¹The court arrived at the conclusion that proprietary rights were involved by taking judicial notice that firemen spend a good deal of time doing something other than going to and from fires, extinguishing fires, and testing equipment. It said, "We conclude that a city operates a fire department in its proprietary capacity, except where the fire department is engaged in the extinguishment of fires, going to and from the scenes of such conflagrations, or in testing equipment for use on such occasions, etc.; then it may be said on the grounds of public policy based largely upon the grounds of necessity [the public policy of relieving cities from excessive burdens of liability or negligence of the fire department] . . . that it is exercising governmental functions." The court also said that adhering to the theory of local home rule has had the effect of classifying the functions of a municipal corporation as proprietary to a greater degree than has been observed by courts of other jurisdictions not applying this theory. It distinguished *State ex rel. Brooks v. Cook*, 84 Mont. 478, 276 Pac. 958 (1929), which held that a statute creating the office of state fire marshal with powers to maintain actions to require the condemnation of fire hazards was not unconstitutional as violating article V, section 36, of the Constitution of Montana, since "in enforcing a statute or ordinance valid as an exercise of the police power, a city is of necessity acting in behalf of the sovereign state and performing a governmental function."

⁵²*Cf. Kalamazoo v. Titus*, 208 Mich. 252, 175 N.W. 480 (1919), and *Bird, J.*, dissenting in *Bowler v. Nagel*, 228 Mich. 434, 200 N.W. 258 (1924).

In *State v. City Council*,⁶² the Supreme Court of Montana apparently was influenced by the theory of local self-government in interpreting a delegation to cities and towns of power with respect to the granting and refusing of liquor licenses. The court said that it had long been the policy of the legislature to vest in local municipal authorities the power to determine local affairs, and if the court said that any provision of the statute authorizing the Liquor Control Board to issue retail licenses conflicted with the power of the city it would "reverse and interfere with the long established policy theretofore harmoniously maintained between state and municipal authority." It is submitted that such an approach is erroneous, if it be recognized that a governmental power was involved.⁶³ In *Wiley v. District Court*,⁶⁴ the above-mentioned case was considered to have been overruled, so far as it sustained the power of the city to limit beer licenses when to do so would have the effect of nullifying the license issued by the Liquor Board.⁶⁵

In many cases concerned with what may be considered governmental powers, the court has adhered to the rule generally stated that powers conferred upon municipal corporations are to be strictly construed, and that, in case of doubt as to the existence of a power, the doubt should be resolved against the corporation. This, of course, follows from a recognition of the subordinate position of the municipal corporation. In *Wibaux Improvement District v. Breitenfeldt*, *supra*, the court, in considering the power of a municipal corporation to levy taxes, said that any doubt of the power would be resolved against the municipality and the right to exercise the power withheld, citing *Sharkey v. Butte*, *supra*, which dealt with the power of annexation. *Bozeman v. Merrell*, *supra*, held that a city had no power to prescribe by ordinance a prison sentence for the maintenance of a nuisance, under statutes delegating power to impose a fine for the maintenance of a nuisance and to impose a fine and imprisonment for the violation of a city ordinance. In *Helena Light and Railway Co. v. Helena*, *supra*, it was held that a statute granting to cities power to compel the lighting of railroad tracks within the city at the expense of the owner referred only to "commercial" as distinct from street railways. In *McGillie v. Corby*,⁶⁶ it was held that a city had no power, by virtue of a statute providing that any acting mayor performing the duties of mayor for more than sixty days should be entitled to the salary of mayor, to provide that *any* acting mayor should be entitled to the salary of the mayor. And in *State ex rel. Billings v. Billings Gas Co.*, *supra*, the court held that a statute giving power to cities to permit the use of the streets for the purpose of laying down gas mains and to make all contracts necessary to carry into effect the power thus granted and provide for the manner of executing the same, gave to the city power

⁶²107 Mont. 216, 82 P.2d 587 (1938).

⁶³See note 33, *supra*.

⁶⁴118 Mont. 50, 164 P.2d 358 (1945).

⁶⁵Mr. Justice Morris dissented; also, Mr. Justice Angstman, who wrote the opinion for the court, changed his mind and dissented from the denial of a petition for rehearing. One who studies these cases will witness an interesting conflict between basic philosophies of municipal government. Cf. *Stephens v. Great Falls*, 119 Mont. 368, 175 P.2d 408 (1946).

⁶⁶37 Mont. 249, 95 Pac. 1063 (1908).

to contract for rates with a public utility subject to the paramount authority of the state to exercise its power to regulate rates.⁶⁷

Influenced by the same view with respect to the interpretation of delegated power, the position has been taken that when the mode of exercising a power is pointed out in the statute granting it, the mode thus prescribed must be followed. Thus, in *Shapard v. Missoula*, *supra*, the court held that efforts to create a special improvement district were nugatory because the procedure specified by statute was not followed. In *Dietrich v. Deer Lodge*, *supra*, it was held that a city had no power to issue general obligation bonds for paving and widening streets, since a statute provided for special assessments and the creation of special improvement districts, while there was no grant of authority to issue general obligation bonds. And in *Mountain States Power Co. v. Forsyth*,⁶⁸ the United States District Court for Montana held that under a statute authorizing a city to acquire an electric plant upon credit of the city by borrowing money and issuing bonds, a city could not enter into a contract with a construction company for construction of such a plant for a sum payable in monthly installments out of the earnings of the plant.

The same view of powers delegated to cities accounts for holdings adverse to the municipality where the city and the state legislate with respect to the same subject matter. Again the question is one of statutory construction, and if the state regulatory act contains a proviso permitting municipal action the court has had no trouble sustaining the municipal ordinance. Thus, in *Carey v. Guest*,⁶⁹ an ordinance regulating speed, rather than a state statute, was held to control, since the statute had a proviso "that cities and towns may, by ordinance, regulate speed and traffic upon the streets within the incorporated limits."⁷⁰ In the absence of such proviso, however, there is difficulty. In *State ex rel. Butte v. District Court*,⁷¹ it appears that the legislature expressly delegated to cities the power to define and punish vagrancy, although the penal code also contained such a definition and provision for punishment. The court sustained a prosecution for violation of the municipal ordinance. But in *Bozeman v. Merrell*, *supra*, the court said that although the legislature had delegated to cities the power to define nuisances, yet this authority merely meant that the city might declare in conformity with state statutes what should constitute a

⁶⁷The court pointed out that there are three lines of cases: (1) holding that statutes of the character involved do not confer any rate making power whatever on the city; (2) holding that such a statute by necessary implication confers the power to fix rates for a definite period; and (3) holding, as does the principal case, that the statute confers powers to fix rates subject to the paramount right of the state to exercise its power to regulate rates whenever it chooses. It is interesting to note that the only case cited to support the second line of cases is a Michigan case, *Boerth v. Detroit Gas Co.*, 152 Mich. 654, 116 N.W. 628, 18 L.R.A. (n.s.) 1197 (1908). Although Michigan is the birth place of the theory of an inherent right of local self-government, reference to the Michigan case shows that this decision was not based upon that theory.

⁶⁸41 F. Supp. 389 (D. Mont. 1941), *rev'd because of want of federal jurisdiction*, 127 F.2d 583 (9th Cir. 1942).

⁶⁹78 Mont. 415, 258 Pac. 236 (1927).

⁷⁰See also *Markinovich v. Tierney*, 93 Mont. 73, 17 P.2d 92 (1932), sustaining an ordinance regulating speed and traffic within the city limits, although there was state legislation regulating traffic on public highways.

⁷¹37 Mont. 202, 95 Pac. 841 (1908).

nuisance."⁷² Even if the ordinance does conform to the state law, difficulty is present. Apparently the degree of particularity in the delegation to the municipality is of importance. In *Billings v. Herald*,⁷³ the court held that the drunken driving provisions of the state's Motor Vehicle Act prevailed over the city ordinance enacted merely by virtue of a general delegation of power to regulate traffic, motor vehicles and their speed, and to pass ordinances necessary for the government and management of the affairs of the city and the execution of the powers vested in it.⁷⁴

None of the above cases are dependent upon the acceptance or rejection of a theory of an inherent right of local self-government, nor are they particularly significant in determining whether or not such a theory exists in this state. There is one case, however, dealing with the interpretation of delegated powers which may be thought to sustain a thesis that the court has adopted the view that a municipal corporation is entitled to the protection of due process so far as its proprietary functions are concerned, just as is a private corporation, independent of any reserved rights theory. The case is *Milligan v. Miles City*.⁷⁵ In that case the court held that a city which was authorized to conduct an electric light and power plant could lay a main to heat a city building by the waste steam from the plant and incidentally furnish steam for heat to private buildings abutting on the main, since its authorization to conduct a power plant impliedly authorized it to do so in the usual manner in which such business is conducted by private persons or corporations. But this decision is dissimulating in character;⁷⁶ and, moreover, its significance becomes a matter of doubt when one considers that it is a general rule that legislative grants are to be strictly construed even when dealing with private corporations.⁷⁷ Certainly the line between the construction of a charter to determine what powers are granted and the construction of the powers which are granted to determine their scope is not easy to draw; and strict construction is a relative term

⁷²The state statute provided that a public nuisance is one which endangers public health, safety, peace or comfort of the whole community or a considerable number of people. The ordinance made possession of intoxicating liquor a nuisance. The court said that this was in conflict with the state statute, although, of course, the ordinance did not purport to make legal anything defined by state law as a nuisance.

⁷³296 P.2d 263 (Mont. 1956).

⁷⁴The 1957 legislature changed the law, by expressly authorizing cities to adopt traffic regulations not in conflict with statutory provisions. LAWS OF MONT., 1957, c. 201. Questions may arise as to what is to be regarded as in "conflict." See note 72, *supra*, and the specific authorizations of sections 39(d) and 40(c) of Chapter 201, Laws of Montana, 1957. And see *Legislative Summary*, 18 MONTANA L. REV. 121, 124 (1957), suggesting that doubt raised by the *Herald* case as to just when municipalities may exercise concurrent jurisdiction with the state in the criminal field is heightened by a suspicion arising from that case that the Supreme Court wishes to limit such concurrent jurisdiction so as to limit a second prosecution for the same alleged criminal act.

Compare *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258 (1905), dealing with the power of a city under a general delegation in the absence of state legislation upon the subject. The court sustained under the "general welfare clause" the power of a city to make it the duty of the occupant of premises to remove snow and ice from the sidewalk upon which the property abuts.

⁷⁵51 Mont. 374, 153 Pac. 276, L.R.A. 1916C 395 (1915).

⁷⁶See p. 96 *infra*.

⁷⁷13 AM. JUR., *Corporations*, § 741 (1938); 3 SUTHERLAND, *STATUTORY CONSTRUCTION* § 6502 (3d ed. 1943).

having little, if any, meaning in the abstract. It will vary in degree, according to the nature of the statute and the rights and persons affected thereby.⁷⁸ In fact, Judge Dillon's classic statement of municipal powers⁷⁹ itself contains an ambiguity as to implied powers, since it at the same time limits implied powers to those necessarily implied and permits the inclusion of those fairly implied.

It would seem, therefore, that none of the cases dealing with the interpretation of delegated powers are of much significance as bearing upon either the existence or scope of self-government in Montana.

Evaluation of Cases

It has been said that Montana has exhibited "the 'inherent right' doctrine in all of its logical perfection."⁸⁰ It also has been said that Montana has not embraced a theory of local self-government as a right reserved to the people in the Constitution, but merely has recognized that municipal corporations are protected as private corporations in the management of their proprietary or private affairs by the due process clause of the state constitution.⁸¹ Any case for an inherent right theory in Montana depends upon a satisfactory explanation or rejection of the many cases stating the legal theory of municipal powers and rights, and, it would seem, upon the *Holmes* and *Kern* cases. Certainly the *Holmes* and *Kern* cases do no more than hold that a municipal corporation is entitled to the protection of the state guarantee against taking property without due process of law when operating in a proprietary capacity.

However, such holdings would seem to be dependent upon acceptance of a theory of implied reservations of powers, rights or property in the state constitution. The Supreme Court of the United States had that problem before it in *Trenton v. New Jersey*.⁸² The City of Trenton, as successor to a grant made by New Jersey to a private corporation claimed a perpetual right, unburdened by license fee or other charge, to divert all the water that might be required for the use of the city or its inhabitants from the Delaware River, and resisted a charge imposed by state statute for water diverted. In holding that the city could not invoke the contract clause or the fourteenth amendment to the Constitution of the United States, even assuming that the private corporation might have done so if its rights had not passed to the city, the Court said:

The distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers

⁷⁸3 SUTHERLAND, *op. cit. supra* § 5501.

⁷⁹See p. 82-83 *supra*.

⁸⁰FORDHAM, LOCAL GOVERNMENT LAW 45 (1949).

⁸¹Note, *Montana Municipalities: Local Self-Government*, 13 MONTANA L. REV. 43 (1952).

⁸²262 U.S. 182 (1923).

and agents. See *Harris v. District of Columbia*, 256 U.S. 650, and cases cited. . . . Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis for the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the state in favor of its own municipalities. We hold that the city cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question. . . .⁸⁸

Of course, a state is free to interpret its own due process clause differently than the Supreme Court of the United States interprets the due process clause of the Federal Constitution, just as a state is free to find an implied reservation of powers in its own constitution. But no satisfactory explanation for the difference in interpretation of state and federal due process provisions has been suggested, other than the implied reservation upon which the doctrine of an inherent right of local self-government is based. The position of the municipality as a corporation with the right to sue and be sued, and "subject to many of the same liabilities, burdens, and responsibilities as are others acting in proprietary capacities,"⁸⁴ is not peculiar to Montana. A distinction between the management of proprietary affairs and the government of local affairs does not help. Each involves a course of action in a matter of primary interest to local inhabitants, but neither would be protected against state action if the municipality were recognized as a mere political subdivision of the state under a constitution vesting all legislative powers in the state legislature except as expressly prohibited. Furthermore, if such an interpretation of due process is possible without recognition of an implied reservation of power in the constitution, counties and cities would be entitled to like protection in Montana, since counties also are bodies corporate⁸⁵ with power to sue and be sued⁸⁶ and while engaged in proprietary functions have been held to be liable for torts committed by their agents.⁸⁷ The fact that cases holding counties liable for torts of agents and employees are based upon an interpretation of the statute giving counties power to sue and be sued⁸⁸ would not seem to be material. If due process protects the municipality from legislative deprivations because it is subject to liabilities, it would seem to do

⁸⁸See also *Newark v. New Jersey*, 262 U.S. 192 (1923); *Monaghan v. Armitage*, 218 Minn. 108, 15 N.W.2d 241 (1944), *appeal dismissed*, 323 U.S. 681 (1945).

⁸⁴See note 81, *supra*, at 45.

⁸⁵R.C.M. 1947, § 16-801.

⁸⁶R.C.M. 1947, § 16-804.

⁸⁷*Johnson v. Billings*, 101 Mont. 463, 54 P.2d 579 (1936); *Jacoby v. Choteau County*, 112 Mont. 70, 112 P.2d 1068 (1941). See also Note, *Liability of Counties for Negligent Acts and Omissions of their Employees and Officers*, 3 MONTANA L. REV. 128 (1942); Note, *State Immunity from Tort Liability*, 8 MONTANA L. REV. 45 (1947).

⁸⁸See note 81, *supra*, at 50 n. 40.

so regardless of whether the liabilities exist as the result of common law or statute.

The property of which the municipality was said to be deprived in the *Holmes* case was "money paid in premiums" for insurance on buildings. In the *Kern* case, apparently it was the money which would have to be expended to employ additional firemen at additional compensation. But the expenditure of such money would merely mean that the city would have to impose additional taxes. The city perhaps may be considered the representative of the taxpayers, but it is difficult to explain their standing to object, since the legislature could *authorize* the city to impose the tax, unless a constitutional limitation upon legislative interference with the municipality be found. And it would seem that whatever limitation upon legislative compulsion to impose a tax for local purposes was intended by the framers of the constitution was incorporated within the express provisions of article XII, section 4, which the court held in the *Holmes* case was not violated.

The reality of the situation in Montana is that the decisions are confused and conflicting. In fact, on occasion the court has embraced both the legal theory and the doctrine of an inherent right of local self-government in the same decision. Thus, in *Milligan v. Miles City, supra*, the court stated that the statute is the measure of power granted to a municipal corporation and that the inquiry must always be "(1) Whether there is an express agent; (2) whether there is a grant by necessary implication; or (3) whether the power in question is indispensable to the accomplishment of the object of the corporation." But the court then stated that a city operating a municipal light plant under legislative authority acts in a proprietary capacity and stands on the same footing as a private individual or business corporation similarly situated and cited, *inter alia, Helena Consolidated Water Co. v. Steele, supra*. Advocates of municipal home rule may well be encouraged to seek a clarifying amendment to our fundamental law.

PROPOSED CONSTITUTIONAL AMENDMENT

The home rule amendment proposed by the Montana Municipal League,⁹⁹ is patterned after the Model Constitutional Provisions for Municipal Home Rule drafted by Jefferson B. Fordham, Dean of the Law School of the University of Pennsylvania, on behalf of the Committee on Home Rule of the American Municipal Association. The proposal is to amend article XVI of the Constitution of Montana, by adding sections 9 and 10 to the present 8 sections.

Charter Making

The added section 9 would provide the method for home rule charter making as follows:

The qualified electors of any municipal corporation are granted the power to adopt a home rule charter of government and to amend or repeal the same. The adoption of a charter or the amendment or repeal of a charter shall be proposed either by

⁹⁹See note 20, *supra*.

a resolution of the governing body of a municipal corporation or by a charter commission consisting of not less than seven (7) members.

Upon resolution approved by a majority of the members of the governing body of any municipal corporation, or upon petition of ten (10) per centum of the qualified electors of a municipal corporation, as determined by the total vote cast at the last preceding annual election, the governing body of a municipal corporation shall submit the question of the election of a charter commission to the electors of the municipal corporation at any annual election or at a special election called for that purpose. An affirmative vote of a majority of the qualified electors voting on the question shall authorize the creation of a charter commission.

The resolution of the governing body or the petition to elect a charter commission may include the names of candidates for election to the charter commission and such candidates may be nominated by separate petition or by resolution of the governing body, or by both such methods. The charter commission candidates in a number equal to the number to be elected, who receive the most votes, shall constitute the commission. On the death, resignation or inability of any member of a charter commission to serve, the remaining members shall elect a successor. The qualified electors of municipal corporation may not elect a charter commission more often than once in two (2) years.

The charter commission shall have authority to propose (1) the adoption of a charter, (2) amendment of a charter or particular part or parts of a charter or (3) repeal of a charter, or any of these actions, as specified in the resolution of the governing body or in the petition as the case may be.

All proposals shall be submitted to the vote of the qualified electors at an annual or special election. Any part of a proposed home rule charter may be submitted for separate vote. Alternative sections or articles of a proposed home rule charter may be submitted and the section or article receiving the larger vote shall, in each instance, prevail if a charter is adopted. In case of proposed charter amendments, there may likewise be separate or alternative submission. The adoption of a charter, or of any part of a charter submitted for separate vote or of any charter amendment submitted for separate vote, or the repeal of a charter shall be made by majority vote of the qualified electors voting on the question. If a charter amendment is submitted in the alternative the alternative amendment receiving the most votes shall prevail provided a majority of the qualified electors voting on the question of amendment vote in favor of the same.

The Legislature shall provide by statute, not inconsistent with the provisions of this section, the procedure relating to the election and establishment of a charter commission, the duration thereof, the framing, publication and submission to the qualified electors of all proposals and questions arising under the provisions hereof, and for such other procedure as may be necessary to make this section effective, and may provide by statute for a number of charter commission members in excess of seven (7) on the basis of population. In the absence of such legislation, the governing body of a municipal corporation in which the adoption, amend-

ment or repeal of a charter is proposed, shall provide by ordinance or resolution for such procedure, and the number of charter commission members shall be seven (7). The governing body, if it defaults in the exercise of this authority, may be compelled, by judicial mandate, to exercise the same.

Thus the adoption, amendment or repeal of a home rule charter must be proposed either by the governing body of the municipal corporation or by a charter commission, and all such proposals must be submitted to the qualified voters. State legislation is not necessary to render home rule available; neither is the charter making process subject to defeat by the governing body of the municipal corporation, since mandamus is available to compel action. On the other hand, voters cannot formulate charter proposals in the first instance. As a comment to the model draft states, "This stresses the importance of the deliberative process in shaping charter provisions," but the qualified voters "constitute the municipal sovereign."⁹⁰

Charter Powers

The proposed section 10 contains the charter powers of a municipality which follows the procedure for the adoption of a home rule charter. It reads as follows:

A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to grant to a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute. This grant of power does not include the power to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power, nor does it include power to define and provide for the punishment of a crime, but this limitation shall not abridge the power of a home rule charter municipal corporation to define and provide punishment for the violation of municipal ordinances or charter provisions.

A home rule charter municipal corporation shall, in addition to its home rule powers and except as otherwise provided in its charter, have all the powers conferred by general law upon municipal corporations of its population class.

Notwithstanding anything contained in Sections 6 and 7 of Article XVI of this constitution and notwithstanding any other provisions contained herein, home rule charter provisions with respect to municipal executive, legislative and administrative structure, organization, personnel and procedure are of superior authority to statute, subject to the requirement that the members of a municipal legislative body be chosen by popular election, and except as to judicial review of administrative proceedings, which

⁹⁰In about one half of the states having constitutional home rule, the constitution merely authorizes the legislature to make the rule for framing charters. Procedures for appointment of the charter commission vary. In Minnesota the commission is appointed by the local district judge; in Oregon the city council acts as the charter commission. Sometimes state approval is required in addition to that of the voters. ADRIAN, GOVERNING URBAN AMERICA 153 (1955).

shall be subject to the superior authority of statute. It is the intention of this section to grant and confirm unto the people of every municipal corporation in this state adopting a home rule charter the right of self-government, and section Nine (9) and Ten (10) hereof shall be liberally construed in favor thereof.

The first sentence of this section departs from the classic concept of home rule, in that the charter becomes an instrument of limitation and not of grant. Under constitutional provisions for full-fledged home rule, municipalities frame their own charters as instruments of grant so far as local affairs are concerned. Such provisions leave for judicial determination the dividing line between "municipal affairs" and "state affairs," autonomy being conferred upon the municipal corporation only as to the former.⁹¹ The proposed amendment would avoid that problem, and the municipal corporation would be authorized to exercise any power (1) which the legislature has power to grant to a non-home rule charter municipal corporation, and (2) which is not denied to the municipal corporation by its home rule charter, and (3) which is not limited by general statute.

However, the limitation of "power to grant" itself introduces uncertainty as to the extent of municipal powers. There is involved the rather vague constitutional doctrine of non-delegability of legislative powers, and a broad interpretation of the clause is necessary if cities are to have the self-government which the proponents of home rule desire. The second sentence gives some content to the clause, by stating that "power to enact private or civil law governing civil relationships" is not included "except as an incident to the exercise of an independent municipal power." The significance of the language is indicated in the following comment to the model draft:

Few would want a system under which the law of contracts and of property varied from city to city. At the same time, the exercise of municipal powers has a more or less direct bearing upon private interests and relationships. This is true, for example, of tax measures, regulatory measures and various utility and service activities. It is the theory of the draft that a proper balance can be achieved by enabling cities to enact private law only as an incident to the exercise of some independent municipal power.⁹²

But the question of the extent of the constitutional limitation upon legislative delegations of "municipal power" still remains.

The rule is frequently stated that there is no violation of the constitutional doctrine of non-delegability of legislative powers by vesting in municipal corporations powers of legislation as to matters of local concern,⁹³ but the door is open for courts to adopt a rather narrow construc-

⁹¹California, Colorado, Ohio, Oklahoma, and perhaps Arizona and Nebraska have constitutions of this sort. In some states, notably Ohio, the constitution attempts to define powers that are properly those of a municipality. ADRIAN, *op. cit. supra* at 159.

⁹²AMERICAN MUNICIPAL ASSOCIATION, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 21 (1953).

⁹³11 AM. JUR., *Constitutional Law*, § 224 (1937) ; Annot., 79 L. Ed. 493, 494 (1934).

tion of what this permits. Thus, in *State ex rel. Keefe v. Schneige*,⁶⁴ the Supreme Court of Wisconsin held that the legislature did not have authority to confer upon a county board power to enact by ordinance a rule declaring drunken driving to be a misdemeanor, saying that such legislation applicable to municipalities would be invalid as an attempt to confer sovereign powers. The court said:

By definition long antedating the constitution of this state, a crime has been defined as an offense against the sovereign and a criminal action "one prosecuted by the state against a person charged with a public offense committed in violation of public law." . . . A county is not a sovereign, and to permit it to create a crime is to raise it to the dignity of a sovereign. . . . The sovereign alone can create a crime. A misdemeanor is a crime . . . , and since [the statute] . . . delegates to counties power to create a crime, it is void as an attempt to confer sovereignty upon the counties. On the other hand, the legislature may confer upon the boards of supervisors powers to create civil actions to recover fines for the violation of county ordinances. This is "the power of a local legislative and administrative character" referred to by Art. IV, Sec. 22 [of the Wisconsin Constitution]. As an adjunct to punishment by fine, "not as a part of the punishment strictly speaking, but as a means of enforcing payment of the fine and costs—that is, of making the element of punishment effective" . . . the legislature may authorize the imprisonment of defendants in such action in case of failure to pay fines imposed. . . . To authorize imprisonment in a civil action created by a county for violation of an ordinance as a punishment and not as a mere device to enforce collection of a fine cannot be sustained.

This holding of the Wisconsin court does not represent the prevailing view,⁶⁵ and it is not the view that has been taken by the Supreme Court of Montana. In *State ex rel. Marquette v. Police Court*,⁶⁶ the court held that proceedings looking to the imposition of a fine for violation of a city ordinance, requiring a license before engaging in the profession of a physician and surgeon, was criminal in nature, saying:

The legislature has expressly authorized the cities and towns to enact ordinances such as the one here involved and "to impose penalties for failure to comply with such license requirements." . . . The state has thus made the city its agent to define and punish by ordinance offenses against the municipality. This is not an unconstitutional delegation of legislative power.

In fact, it appears from the cases previously discussed herein, in which the Montana Supreme Court has considered the validity of ordinances against objections other than the power of the legislature to delegate power to enact them, that the court has adopted a liberal view of the doctrine of non-delegability of legislative powers so far as municipal corporations are concerned. And in *Butte v. Montana Independent Telephone Company*,⁶⁷ the court said:

⁶⁴251 Wis. 79, 28 N.W.2d 345, 174 A.L.R. 1338 (1947).

⁶⁵See Annot., 174 A.L.R. 1343 (1948).

⁶⁶86 Mont. 297, 283 Pac. 430 (1929).

⁶⁷50 Mont. 574, 148 Pac. 384 (1915).

It is the general rule that unless specifically restricted by the Constitution, the legislature may delegate to municipal corporations the authority to exercise the police power through the instrumentality of reasonable rules and regulations. (In re O'Brien, 29 Mont. 530, 1 Ann. Cas. 373, 75 Pac. 196; Johnson v. City of Great Falls, 38 Mont. 369, 16 Ann. Cas. 674, 99 Pac. 1059).

Support for a liberal view of the power of legislatures to delegate powers to municipal corporations is found in a recent decision of the Supreme Court of the United States interpreting the delegable powers of Congress. In *District of Columbia v. Thompson*,⁸⁸ the question concerned the power of Congress to delegate to the District of Columbia the authority to enact legislation making it a crime for owners or managers of restaurants to discriminate on account of race or color. A majority of the judges of the Court of Appeals had held that Congress had the constitutional authority to delegate "municipal" but not "general" legislative powers, and that the act of Congress involved, being in the nature of civil rights legislation, fell in the latter class. But the Supreme Court of the United States took a different view, and in doing so drew on the analogy of municipal home rule. Mr. Justice Douglas, writing the opinion of the Court, quoted from *Barnes v. District of Columbia*,⁸⁹ as follows:

A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality.

Mr. Justice Douglas then went on to say:

This is the theory which underlies the constitutional provisions of some states allowing cities to have home rule. So it is that decision after decision has held that the delegated power of municipalities is as broad as the police power of the state, except as that power may be restricted by terms of the grant or by the state constitution. . . . It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at anytime to revise, alter, or revoke the authority granted.

It is to be expected that the attitude of the Supreme Court of the United States will affect state decisions, and there is good reason to think that the Supreme Court of Montana would give the clause "power to grant" in section 10 of the proposed home rule amendment a broad interpretation, permitting expansion of municipal powers beyond those that have been considered "proprietary." The cases construing legislative delegations and the cases involving the validity of ordinances have not questioned the power of the legislature to delegate "governmental" powers. It would seem unlikely that the court would reverse its approach under

⁸⁸346 U.S. 100 (1953).

⁸⁹91 U.S. 540 (1875).

the new terminology "power to grant." In fact, it would seem that the tendency might be toward a more liberal approach to the constitutional question, since the proposed amendment does not place the substantive powers and functions of the municipal corporation beyond legislative control by general law. In truth, to the extent that the Montana Supreme Court has found an inherent right of local self-government, the proposed amendment might limit the independence of home rule charter municipal corporations, in that it permits legislative interference with respect to any municipal function, governmental or proprietary.¹⁰⁰

The dependence upon the judiciary for the accomplishment of the purpose of the proposed amendment "to grant and confirm unto the people of every municipal corporation in this state adopting a home rule charter the right of self-government," is evident in another connection. There might well be a psychological deterrent to affirmative legislative action violating the spirit of the proposed amendment. But legislative limitation might result from judicial interpretation of general legislation upon a given subject matter. A court unfavorable to municipal home rule conceivably could find legislative limitation from the mere fact that the legislature had legislated upon the subject matter, regardless of whether the municipal action conflicted in the sense of prohibiting an act which the statute permitted or permitting an act which the statute prohibited.¹⁰¹ But it would seem that a court would be less likely to construe general legislation as a limitation upon municipal power granted by the constitution than it would to construe adversely to the municipal corporation general delegations of power so far as they relate to subject matter covered by specific legislation.

The proposed amendment, however, does contain a qualification upon legislative control. With respect to governmental structure, organization, personnel, and procedure except in the judicial domain, the third paragraph of the proposed section 10 grants full autonomy to the municipal corporation. This has the effect of repealing, so far as home rule charter municipalities are concerned, the provisions of article XVI, sections 6 and 7, of the Constitution of Montana, that the legislature may prescribe the terms, qualifications, duties and methods of appointing or electing municipal officers, and the kind or form of municipal government. In addition, the terms of officers of home rule charter cities would cease to be limited to two years, as prescribed by article XVI, section 6. These are matters with respect to which local autonomy is thought to be essential to efficient municipal government.

The proposed amendment departs from the model draft in its provision with respect to power to define and provide punishments for violations of municipal ordinances, and there may be some question as to the consequence of the departure. The model draft provides that the devolution of power does not "include the power to define and provide punishment for a felony." (Emphasis supplied.) The proposed amendment to the Montana Constitution substitutes the provision that the grant of power does not

¹⁰⁰Possibly the existing inherent right of local self-government might be regarded as conferred by "general law" so as to be within the second paragraph of the proposed section 10. This would seem doubtful, however, since the reference is to power "in addition to its home rule powers." It is more likely that it would be held that the express provision for home rule supplants any implied guarantee.

¹⁰¹*Cf.* pp. 92-93 *supra*.

“include power to define and provide for the punishment of a *crime*, but this limitation shall not abridge the power of a home rule charter municipal corporation to define and provide punishment for the violation of municipal ordinances or charter provisions.” (Emphasis supplied.) The purpose of the model draft is explained in the following comment:

A city should have the power to define and provide for the punishment of offenses within its governmental purview. It has been considered desirable to make it clear that this power stops short of serious offenses which fall in the felony category.¹⁰²

Perhaps the change in language from the model draft might be interpreted as extending into the criminal field the general provisions preceding it, which are designed to make it clear that the grant does not give to municipal corporations power to enact a general code of laws governing civil relationships but only power to enact private law as an incident to an independent municipal power. But it would not seem that the language is well chosen for such a purpose. Taken literally the language prohibits the grant from being construed as a grant of power to define and provide the punishment for *any* crime, not only those that are not an incident to an independent municipal power. The consequence might be that, except where the power is separately conferred by general statute, actions for violations of municipal ordinances would have to be treated as civil in nature. This would create two classes of action to recover fines for violations of municipal ordinances, (1) criminal, if the legislature separately conferred power to define the crime and provide for its punishment, and (2) civil if the power to define and provide punishment for the violation of the municipal ordinance is found only in the constitutional grant. As to the latter, Montana would be in the Wisconsin situation described in *State ex rel. Keefe v. Schniege*,¹⁰³ *supra*.

Conclusion

It would be a mistake to think that the adoption of the proposed constitutional amendment would guarantee greater powers to home rule charter cities or give them greater independence from the state legislature.¹⁰⁴ Certainly, except as to governmental structure, organization, personnel,

¹⁰² AMERICAN MUNICIPAL ASSOCIATION, *op. cit. supra*, note 92, at 21.

¹⁰³ The proposed amendment omits a provision of the model draft, that “State legislation increasing municipal expenditures may not become effective in a municipal corporation until approved by ordinance or unless enacted by two-thirds vote of all members elected to each house of the legislature or funds sufficient to meet the increased municipal expenditure are granted. . . .” Perhaps it was thought that the omission of this provision was politically expedient; perhaps it was thought that it was unnecessary in view of the provisions of article VI, section 36, and article XII, section 4, of the Montana Constitution. But the model draft provision would seem to add to the protection afforded municipal corporations against the imposition of financial burdens by the legislature, even if the existing doctrine of an inherent right to local self-government were considered to continue by implication in spite of the express provision for home rule, in view of the position of the Montana Supreme Court that a law requiring a municipality to take action necessitating the expenditure of money is not within the condemnation of article XII, section 4, against levying taxes. See *State v. Holmes*, 100 Mont. 256, 47 P.2d 624 (1935).

¹⁰⁴ Studies indicate that constitutional home rule provisions in general have not had this effect. ADRIAN, *op. cit. supra*, note 90, at 158.

and non-judicial procedure, local autonomy is not guaranteed. With an unsympathetic legislature and judiciary, the proposed amendment would be of little significance. But with a court which has evidenced more than ordinary sympathy toward local self-government in its enunciation of the doctrine of an inherent right of local self-government, and with the implied moral obligation upon the legislature to carry out the spirit of the amendment which would follow its enactment, it is believed that greater independence of municipal corporations in the conduct of their affairs would result from the amendment. The architect of the model draft recognized that favorable political and judicial climate would be necessary to effect its spirit. He deliberately placed the substantive powers and functions under legislative control. In the language of a comment to the model draft:

The draft rejects the assumption that governmental powers and functions are inherently of either general or local concern. Times change and what may at one time be considered a clearly local problem may be as readily labeled a state concern at a later juncture. It is the theory of the draft that there should be stress upon flexibility and adaptability in our governmental arrangements and that, to that end, there should be a policy-making power in a state, short of the general electorate, competent to make the decisions as to adaptation and devolution of governmental powers and functions to serve the changing needs of society.¹⁰⁶

Movements for home rule were begun as early as the 1870's by businessmen who were cautious in their expenditure of public funds to reclaim the city from the boss and the political machine.¹⁰⁶ But as the movement has continued,¹⁰⁷ three principal reasons for desiring home rule have been advanced. First, corrupt practices have flourished at certain times and places under a system placing large local sources of revenue under the control of legislators not responsible locally; second, state legislatures are not sufficiently familiar with local governmental needs to provide adequate municipal government; and third, local governmental matters monopolize too much time of legislatures.¹⁰⁸ Although it is in large cities that home rule charters may be the most important,¹⁰⁹ size alone would not seem to control the validity of these reasons; and proponents of the home rule constitutional amendment in Montana have contended that the second and third reasons are applicable in this state.¹¹⁰ Thus, the Director of the Montana Municipal League, in the League's News Letter for August, 1957, states:

¹⁰⁶AMERICAN MUNICIPAL ASSOCIATION, *op. cit. supra*, note 92, at 20.

¹⁰⁶ADRIAN, *op. cit. supra*, note 90, at 56.

¹⁰⁷The movement, which appeared to have spent itself with the decline of the reform spirit after World War I, enjoyed a revival after World War II. In 1954, home rule was provided in the constitutions of 21 states, Rhode Island adopting such a constitutional amendment in 1951 and Tennessee in 1953; and in 8 other states home rule was provided by legislative act without constitutional authorization or safeguard. *Id.* at 154-7.

¹⁰⁸*Cf. Hynds, Home Rule in Georgia*, 8 *MERCER L. REV.* 337 (1957).

¹⁰⁹Of the cities of the United States with populations of over 200,000, some two-thirds have home rule. ADRIAN, *op. cit. supra*, note 90, at 156.

¹¹⁰In Oregon and Wisconsin home rule is available to all cities and villages. *Id.* at 152.

In many states, including Montana, legislatures are obliged to devote considerable time to purely local matters while neglecting essential state wide measures. The municipal machine just cannot operate efficiently with antiquated or makeshift parts manufactured by over-worked legislatures often unacquainted with local conditions and subject to all sorts of pressures from special interest groups.

This reflects the fact that the principal support for the home rule movement comes from the businessman who is interested in better government, and who is distrustful of the ability of political parties or politicians to afford better government and believes that the principles of efficient business management can and should be applied to city government. This is typical of movements for home rule in other states. In fact, working men and labor leaders have closely associated in their minds home rule movements with business communities and their interests, and they are frequently fearful that home rule will become a tool of large taxpayers to attack municipal taxes and minimize city services.¹³³ But it would seem that there would be more substance to such objections under a self-executing type of home rule constitutional provision which puts matters considered local in character beyond legislative control than there is under the type proposed in Montana which retains legislative control. Government, even on a local level, cannot be divorced from politics, and there should be power in the state to shape policies for a coordinated state and local system of government. The proposed amendment appears to provide an opportunity for more efficient local government while at the same time retaining political control adaptable to changing conditions.

¹³³*Id.* at 62.