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LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS IN WASHINGTON

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The purpose of this article is to examine the nature of the powers of municipal corporations in Washington in relation to the powers of the state legislature. A municipal corporation has been defined by the Washington supreme court as a body politic established by law as an agency of the state—partly to assist in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town or district.[1] Dependent upon the objective of the particular statute creating the body in question and the definition in such statute, the term "municipal corporation" may include almost any governmental body at the local level, from cities and counties to school districts, irrigation districts and port commissions. For the purposes of this paper, the term "municipal corporation" will be used to refer to cities and towns unless otherwise indicated.

The article will first examine the general governmental relationship between the legislature and municipal corporations. There will then be a detailed discussion of several specific constitutional limitations and prohibitions upon the legislature, a consideration of the judicial approach to the powers of different classes of cities and towns, and a suggested method of harmonizing complementary and conflicting state statutes and municipal ordinances.

GENERAL RELATIONSHIP OF LEGISLATURE AND MUNICIPAL CORPORATIONS

The fundamental proposition which underlies the powers of municipal corporations is the subordination of such bodies to the supremacy of the legislature. Unlike the federal constitution which constitutes a grant of power, whereby the power of Congress to act must be found to have been delegated, the state constitution is a limitation upon legislative powers. The power of the state legislature to make laws is unrestrained unless expressly or by fair inference it is prohibited by the federal or state constitutions.[2] This principle is buttressed by the rule that where the validity of a statute is assailed, there is a pre-

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[1] Lauterbach v. Centralia, 49 Wn.2d 550, 304 P.2d 656 (1956).

[2] Union High School Dist. No. 1 v. The Taxpayers of Union High School Dist. No. 1, 26 Wn.2d 1, 172 P.2d 591 (1946).

sumption of its constitutionality unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt. An application of these general principles results in municipal corporations being subject to the regulation and control of the state legislature except as prohibited and limited by constitutional provisions.[3]

This is often stated in terms that a municipal corporation, being but a creature of the state, derives its existence, powers, and duties from the legislative body of the state. The legislature may create and dissolve municipal corporations without the consent of the inhabitants;[4] municipal officers have only such powers as are conferred upon them expressly or by implication by the applicable statutes;[5] the legislature may manage the business thereof and alter or amend at will by general law any general or local law or regulation of a municipal corporation.[6]

A striking example that municipal corporations are merely creatures of legislative enactment and that the powers of their officers are subject to such limitations as the legislature may impose is offered by *Misich v. McGuire*.[7] Ordinarily courts do not undertake to direct officers of administrative tribunals or of municipal corporations as to how to perform duties involving the exercise of discretion. In the *Misich* case, however, a statute provided that a superior court might compel the performance of duties by drainage district commissioners and, in its discretion, issue a mandatory injunction for such purpose. Pursuant to the statute, the court ordered the operation of floodgates in such manner as to prevent the flooding of the plaintiff's land. Here then was an

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[3] State *ex rel.* Board of Comm'rs. v. Clausen, 95 Wash. 214, 163 Pac. 744 (1917).

[4] State *ex rel.* Board of Comm'rs. v. Clausen, *supra* note 3. For a discussion of the legislature's powers in relation to annexation, see IVERSON, *Annexation by Municipal Corporations*, 37 WASH. L. REV. 404 (1962).

[5] Othello v. Harder, 46 Wn.2d 747, 284 P.2d 1099 (1955).

[6] Gunther v. Huneke, 58 Wash. 494, 108 Pac. 1078 (1910). The application of the principles set forth in the text is well illustrated in the area of taxation. The state government has the inherent power to tax, and since taxation is a legislative process, the power to tax falls within the legislative branch of government. Love v. King County, 181 Wash. 462, 44 P.2d 175 (1935). Such is not true of municipalities. Though the power to tax is necessary to effectuate many municipal functions, municipal corporations have no inherent power to tax nor is there any grant of such power directly by the constitution. It is for the legislature to prescribe for such power by municipalities, attended by such conditions and limitations as it sees fit. A tax in excess of that authorized by the legislature is therefore invalid. Great No. Ry. v. Stevens County, 108 Wash. 238, 183 Pac. 65 (1919). Likewise, the grant of such power may be withdrawn by the legislature, even by implication and even as to home rule bodies. Great No. Ry. v. Glover, 194 Wash. 146, 77 P.2d 598 (1938). From the standpoint of duties, since the power of taxation is an incident of state sovereignty, it is also within the discretion of the legislature to compel a municipal corporation to levy taxes in aid of state purposes. This is illustrated by a statute which compelled Pierce County to levy a tax for the purpose of acquiring land for use by the federal government at Fort Lewis. State *ex rel.* Board of Comm'rs v. Clausen, 95 Wash. 214, 163 Pac. 744 (1917).

[7] 24 Wn.2d 758, 167 P.2d 462 (1946).

instance in which the supremacy of the legislature carried to the extent of subjecting the administrative and discretionary functions of the commissioners to the supervision of the superior court.

Legislative supremacy is of course subject to constitutional limitations. Other than specific prohibitions, which will be considered in detail later, there are two general limitations that have been raised from time to time in an attempt to restrain the powers of the legislature. The first is an argument for the interpretation of constitutional provisions as self-executing in favor of municipalities. Generally, this contention has not been well-received by the Washington court. To the contrary, every interpretation will be made in favor of subjecting the municipality to legislative control, and though a particular constitutional provision may be found to delegate power directly to a municipal corporation and to that extent be self-executing, it is unlikely that this will be applied to prevent further controls of the delegated power by the legislature.

This is shown by the statement of the Washington court that, "It is our view that, regardless of its language, a constitutional provision does not confer upon local units of government the power to act independently of legislative control unless it clearly appears from such language that it was intended to confer upon such local unit some measure of home rule."[8] This statement came about due to litigation involving the construction of the seventeenth amendment to the state constitution which fixes certain limits on the taxing powers of municipal corporations. The forty mill limit may be exceeded by a municipal corporation desiring to issue general obligation bonds for capital purposes if authorized to do so at an election at which the number of persons voting must be not less than forty per cent of those voting "at the last preceding general election." The legislature enacted a statute which required that the votes be based upon the number cast "at the last preceding general *state* election." It was contended that the statute was invalid in that the seventeenth amendment was a self-executing grant of power to a political subdivision of the state and that the legislature could not limit or alter the scope or extent of the power thus granted nor alter the manner in which it was to be exercised. The court concluded that the grant of power to the taxing district was not self-executing so as to preclude the legislature from imposing additional restrictions, in view of the fact that municipal corporations are creatures of the state.

[8] Union High School Dist. No. 1 v. The Taxpayers of Union High School Dist. No. 1, 26 Wn.2d 1, 10, 172 P.2d 591, 596 (1946).

An instance in which the court found a constitutional provision to be self-executing involved article 8, section 6, since amended by the twenty-seventh amendment, which provided that a municipal corporation should not become indebted in an amount exceeding one and one-half per centum of the taxable property therein without the assent of three-fifths of the voters, voting at an election conducted for the purpose. This was held sufficient, without further legislative sanction, to authorize the voters of a school district to vote in view of the fact that the legislature had made provision for organizing school districts and holding elections therein.[9] The constitutional provision constituted a direct grant of power to the district and the voters. It is to be noted that the legislature had already provided for the general exercise of the constitutional power. Further, in a later case it was held that under the provision, the legislature might impose an additional requirement, not included in the constitution, that no general bond election of a city should be valid unless the total vote cast exceeded fifty per cent of the votes cast at the last general county or state election.[10] This supports the proposition that the court will not look with favor upon a contention that a grant of power to a municipal corporation by the constitution is self-executing so as to preclude the legislature from imposing restrictions greater than those fixed by the constitution.[11]

The second general limitation raised against legislative control of municipal corporations is the doctrine of the inherent right of local self-government. In most states the doctrine can be disposed of in a few words. In Washington statements by the supreme court in several cases necessitate some clarification of the doctrine and the meaning of the statements in relation thereto.

A few states have from time to time adopted the view that municipalities by virtue of their very existence have an inherent right to regulate their local affairs free from legislative control. The great majority of state courts[12] and the United States Supreme Court[13] have rejected the

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[9] Holmes & Bull Furniture Co. v. Hedges, 13 Wash. 696, 43 Pac. 944 (1896).

[10] Robb v. Tacoma, 175 Wash. 580, 28 P.2d 327 (1933).

[11] Of course, a statute relating to municipal corporations which is directly contrary to a constitutional provision is invalid. See State ex rel. Egbert v. Blumberg, 46 Wash. 270, 89 Pac. 708 (1907), holding a statute, creating the office of county fruit inspector, to be appointed by the county commissioners, to be invalid as violating article 11, section 5 (since amended by the twelfth amendment in 1924), which required all county officers to be elected.

[12] See 1 ANTIEAU, MUNICIPAL CORPORATION LAW 64 (1962), and RHYNE, MUNICIPAL LAW 57 (1957).

[13] Trenton v. New Jersey, 262 U.S. 182 (1923).

doctrine. Washington likewise early rejected the doctrine when directly confronted with the argument.[14]

The prevailing view is that while municipal corporations have such powers of local self-government as are conferred upon them by the constitution, this does not include any implied general restraint upon the legislature; to the contrary, such bodies are subject to legislative control except as otherwise expressly provided in the constitution. The fact that the matter being regulated by the municipality might be labeled local in character rather than of state-wide concern does not aid the argument of an inherent limitation.[15]

Ingenious attempts to incorporate the doctrine into Washington law have been defeated. As an example, it was contended that the doctrine was implicit in article 1, section 32 of the state constitution, which provides that, "A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government." This was held not to be an inhibition upon the plenary powers of the legislature over its creations.[16] Another argument was made that in the interest of local self-government a city should be able to provide in its charter for a referendum by the people free from legislative restriction. This was not allowed when an attempt was made by a municipality to legalize pinball machines in conflict with a state statute prohibiting the possession of gambling devices.[17] Most recently, the statute providing for the creation of metropolitan municipal corporations was attacked on the basis that properly constituted cities and towns were thereby deprived of their constitutional powers of local self-government. This argument was evidently based upon an inherent limitation of some sort since no particular constitutional provision was cited. The court rejected the contention upon the basis that the legislature allowed for the creation of metropolitan regional corporations by the vote of the people affected.[18] In effect, the most recent pronouncement flatly rejects any claim of an implied constitutional limitation on the legislature.

The difficulty has been caused by an occasional case which upon cursory examination might lead one to conclude that the court has at times applied the doctrine. More careful treatment dispels this analysis.

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[14] State *ex rel.* Clausen v. Burr, 65 Wash. 524, 118 Pac. 639 (1911).
[15] Meehan v. Shields, 57 Wash. 617, 107 Pac. 835 (1910).
[16] Wheeler School Dist. v. Hawley, 18 Wn.2d 37, 137 P.2d 1010 (1943).
[17] Miller v. Spokane, 35 Wn.2d 113, 211 P.2d 165 (1949).
[18] Municipality of Metropolitan Seattle v. Seattle, 57 Wn.2d 446, 357 P.2d 863 (1960).

The leading case in point is *State ex rel. State Tax Comm'n v. Redd,*[19] in which the court said, "It is not within the power of the legislature to take from the people of the counties, cities and other municipal corporations, the right of local self-government secured to them by our constitution." This can be easily misread to mean that there is an inherent right of local self-government.[20] What the court meant, however, was that the legislature can legislate upon any subject not specifically inhibited by the constitution. In the particular case the constitution provided that the legislature had no power to impose taxes upon counties, cities and municipal corporations for county or municipal purposes, a concept which will be more fully explored later. The attempt to tax for such purposes was held invalid. The "right of local self-government secured to them by the constitution," about which the court was concerned, must be interpreted in light of the specific constitutional restraint.

In two other instances the court has spoken in terms which have created some confusion. In one case, mention was made of the "implied inherent power" of a city to protect its citizens, in sustaining the licensing by a city of soft drink parlors.[21] The quoted phrase had reference to the exercise of the police power under the constitution, rather than a restriction upon the legislature. In another case the court compared other jurisdictions and concluded that the state legislatures therein had greater control over the affairs of municipal corporations than is true in this state by reason of the fact that "our cities are guaranteed a large measure of local self-government by the constitution."[22] That the court had specific constitutional limitations in mind is shown by the fact that it cited *State ex rel. Clausen v. Burr,*[23] and *Meehan v. Shields,*[24] both of which clearly rejected the doctrine of inherent self-government.

CONSTITUTIONAL LIMITATIONS UPON THE LEGISLATURE

Although the principle of legislative supremacy is firmly established in Washington and although claims of general inherent limitations have been rejected, this does not mean that the legislature is completely free to act. It is true that the federal constitution has seldom

[19] 166 Wash. 132, 6 P.2d 619 (1932).
[20] For example, see the reference to the case in 2 MCQUILLAN, MUNICIPAL CORPORATIONS 57 (1949).
[21] Plumas v. Town of Cosmospolis, 128 Wash. 697, 699, 223 Pac. 1052, 1053 (1924).
[22] State *ex rel.* Case v. Howell, 85 Wash. 281, 288, 147 Pac. 1162, 1165 (1915).
[23] 65 Wash. 524, 118 Pac. 639 (1911).
[24] 57 Wash. 617, 107 Pac. 835 (1910).

been held to protect municipal corporations from legislative interference.[25] There are, however, some state constitutional provisions which require extended treatment.

Before considering those, it is to be noted that certain constitutional provisions place restrictions directly on municipal corporations. Article 7, section 2, as amended by the seventeenth amendment, limits the tax powers of municipal corporations; article 8, section 6, as amended by the twenty-seventh amendment, places limitations upon municipal indebtedness; and article 8, section 7 prohibits the loaning of its credit by a municipal corporation. In a sense these provisions indirectly limit the legislature in that they preclude it from authorizing that which the constitution restrains. However, these are not the type of direct restraints with which this article is concerned.

Mention should also be made of article 11, section 8, which provides in part that, "The salary of any county, city, town or municipal officer shall not be increased or diminished after his election, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed." This obviously places limitations upon the legislature's powers. However, the provision relates to the legislature's powers as to municipal officers rather than the municipality itself and thereby is also beyond the scope of this paper.

Imposition of Taxes by the State for Municipal Purposes

A direct restraint upon legislative power is prescribed by article 11, section 12. "The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes."

First, it is to be noted that the legislature is restrained from imposing "taxes." The term "taxes," as used in this constitutional provision, has reference to general revenues for the purpose of maintaining and carrying on the government where the benefits are enjoyed by all.[26] This is to be distinguished from a special assessment for improvements which is imposed upon property deriving special benefits from the improvements. The authorization by the legislature to some

[25] See discussion in 2 McQuillan, Municipal Corporations 27-44 (1949).
[26] Seanor v. Board of Comm'rs., 13 Wash. 48, 42 Pac. 552 (1895).

agency of the government other than the municipality to levy a special assessment upon land in the municipality according to benefits resulting to the land to be charged therewith, and not according to value as in the case of general taxes, does not violate the provision.[27]

The constitution speaks of the legislature being precluded from doing certain things. This precludes the legislature from authorizing others to do what it cannot do. The legislature cannot delegate the power of local taxation to any other than the local authorities of the locality concerned. It cannot delegate to one municipality or taxing district the power to tax another or confer upon one political subdivision the authority to levy any kind of burden upon another, unless the municipality or taxing district so burdened is a part of the territory in which the larger subdivision may levy a tax for its own purposes. More specifically, the legislature cannot authorize a state administrative agency to impose a tax for municipal purposes nor can it authorize King County, for example, to impose a tax upon persons or property in Seattle for the corporate purposes of Seattle.[28]

Many problems have arisen as to precisely what the legislature is prohibited from doing under the provision and precisely what it may empower others to do. To what does the word "impose" refer? Is it the levying of a tax, the assessment thereof, the collection thereof or what?

It was early established that while the decision to levy a tax for municipal purposes must rest with the officers of the municipality involved, the act of collection need not be executed by such officers. Thus a statute imposing upon county officers the duty of collecting a tax levied by a city was held not to violate the provision.[29] The holding rested upon the proposition that the levying of the tax rather than the machinery for its actual collection is more important to both the municipality and its inhabitants.

The matter of assessment was treated in the leading case of *State ex rel. State Tax Comm'n v. Redd*,[30] where a statute provided that the state tax commission could, upon protest and after hearing, reassess and revalue property not only for state purposes, but also for county, city and other municipal purposes. The court stated that the power to tax for local purposes rests solely with the local authorities under article 11, section 12, and this includes not only the levying of

[27] State *ex rel.* Conner v. Superior Court, 81 Wash. 480, 143 Pac. 112 (1914).
[28] See State *ex rel.* Seattle v. Carson, 6 Wash. 250, 33 Pac. 428 (1893).
[29] State *ex rel.* Seattle v. Carson, *supra* note 28.
[30] 166 Wash. 132, 6 P.2d 619 (1932).

a tax for such purposes but also the assessment of the property being taxed. The delegation by the legislature to the state tax commission was thus held unconstitutional.

Failure of the court to distinguish between assessment for taxation and levy of taxes has not gone without criticism. As a matter of fact in an earlier case, the court in dictum had spoken in terms indicating the only restriction upon the legislature was one of levying a tax for local purposes and not of assessing or collecting the tax.[31] While the court in the *Redd* case referred to the earlier decision, it did not squarely face the distinction. Failure to do so led Judge Blake to dissent in two later cases in which the *Redd* holding was applied.[32] Judge Blake convincingly argued that an authorization to the state tax commission, for example, to fix the value of property as a basis for taxation is much different from the levying of taxes for local purposes, to which article 11, section 12 is directed. In the first place, equality and uniformity are more likely to be achieved through assessment by a state commission than by a local commission. Secondly, the purpose of the constitutional provision, to keep the taxing powers within the control and consent of the persons to be taxed as much as possible, would not be infringed by allowing a state commission to assess, since the determination whether to levy or not would still rest with the local officers. Finally, the municipality could adjust its levy to any valuation fixed by any agency the legislature might designate, subject to the constitutional forty mill limit prescribed by the seventeenth amendment. These considerations constitute a strong argument that the *Redd* decision is a judicial limitation upon legislative power over municipal corporations which is unwarranted by the constitution.

Nevertheless, the *Redd* case has not been overruled, with the result that neither the legislature nor its delegate can levy or assess the designated taxes, but may provide for the collection thereof. Thus it has been held that the state tax commission cannot initiate proceedings looking to the assessment for local tax purposes of the operating property of an electric light company which is wholly intra-county;[33] that the power of the state board of equalization to fix the assessed valuations of property for state purposes does not entitle a school district to use such valuations as a basis for levying taxes for

[31] State *ex rel.* Seattle v. Carson, *supra* note 28.

[32] See dissenting opinions in Northwestern Improvement Co. v. Henneford, 184 Wash. 502, 51 P.2d 1083 (1935) and Puget Sound P & L. Co. v. King County, 10 Wn. 2d 424, 116 P.2d 827 (1941).

[33] Northwestern Improvement Co. v. Henneford, *supra* note 32.

local purposes;[34] and, in accord therewith, that a statute providing that all tax levies made by or for any school district shall be based upon the equalized valuation of the taxable property within the district as determined by the state board of equalization, rather than the assessed valuation as fixed by the proper local authorities, violates article 11, section 12.[35]

There are limits to the *Redd* doctrine. While the state cannot make an assessment for local purposes, an assessment made by the county assessor may be, and is, the basis for a valid levy by cities, towns and other municipal corporations within the county.[36] An even greater encroachment upon the *Redd* opinion is represented by *State ex rel. King County v. State Tax Comm'n,*[37] holding that a statute giving the state tax commission appellate and revisory powers in review of proceedings of county boards of equalization on appeals presented by interested parties did not violate the constitution. The *Redd* case was distinguished in that there the tax commission, upon its own motion and after the original taxing process had been completed and appeals had been taken to the courts, undertook summarily to reassess individual properties. In line with the later opinion is *Schneidmiller & Faires, Inc. v. Farr,*[38] sustaining a statute which allowed the state tax commission to require a county board of equalization to reconvene for the purpose of reassessing local property. The court stated broadly that,

> [T]he mere regulation by the tax commission of local boards of equalization in ministerial matters, which does not reduce the board to a rubber stamp by dictating the detailed results of the board's action, does not violate the spirit of the 'home rule' provision of the constitution and does not constitute taxation of local property for local purposes.[39]

The legislature is prohibited from imposing taxes for "county, city, town, or other municipal purposes." Insofar as the tax relates to a state purpose, the provision is not applicable. Thus the state in assessing and levying taxes for state purposes is not bound by the valuations as determined by county officers for local purposes.[40]

[34] State *ex rel.* Tacoma School Dist. v. Kelly, 176 Wash. 689, 30 P.2d 638 (1934).
[35] Clark v. Seiber, 48 Wn.2d 783, 296 P.2d 680 (1956).
[36] Opportunity Township v. Kingsland, 194 Wash. 229, 77 P.2d 793 (1938); Clark v. Seiber, *supra* note 35.
[37] 174 Wash. 668, 26 P.2d 80 (1933).
[38] 56 Wn.2d 891, 355 P.2d 824 (1960). This constituted an overruling of State *ex rel.* Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P.2d 759 (1937).
[39] 56 Wn.2d at 896, 355 P.2d at 827 (1960).
[40] State *ex rel.* Showalter v. Cook, 175 Wash. 364, 27 P.2d 1075 (1933).

A leading case concerning purposes falling within the prohibition is *Hindman v. Boyd*,[41] in which it was stated that the provision relates to the imposition of taxes concerning ordinary corporate affairs incidental to the existence of the organized corporation. It was held that a statute requiring municipal authorities to submit to a vote of the people a charter amendment when petitioned so to do by fifteen per cent of the qualified voters of the city, thereby compelling the city to incur the expense of such election, did not violate article 11, section 12. This was not an ordinary corporate affair and to hold to the contrary would place it within the power of the corporate officers to perpetually prevent the people from amending their own charter. A somewhat comparable statute levying a state poll tax, one-fifth of which was retained by the counties collecting the same to be applied to their current expenses, was held not to violate the constitution.[42] The tax was not imposed for county purposes. As to the four-fifths going into the state treasury, there was no question. As to the one-fifth retained by the counties, this was found to be simply reimbursement for the cost of collecting the tax.

To the extent that the municipal corporation is acting as an agent of the state, it may be compelled to tax. Municipalities are guaranteed the right to carry on their strictly domestic or municipal business in their own way without interference from the state. However, in matters which do not concern the inhabitants of the municipality alone, the municipalities are acting as agents of the state and are subject to compulsion. Thus, a statute providing for a state bureau of inspection to secure a uniform system of accounts, empowered to make examination of such local municipalities, was held not to violate the constitution.[43] The purpose of the system of accounting was to detect and prevent the commission of crime; *i.e.*, embezzlement, and the consequent loss to the public of public funds, which was found to be a matter affecting the state at large and within its police power to control. The municipality was an agent of the state in carrying out the provisions of the state policy and in apportioning the expenses thereof.

Other instances of local subdivisions acting as agents of the state so as to justify the compulsion of taxation without violating the constitution include a statute requiring Pierce County to acquire land for a federal army post, in aid of the general public defense;[44] a statute

[41] 42 Wash. 17, 84 Pac. 609 (1906).
[42] Nipges v. Thorton, 119 Wash. 464, 206 Pac. 17 (1922).
[43] State *ex rel.* Clausen v. Burr, 65 Wash. 524, 118 Pac. 639 (1911).
[44] State *ex rel.* Board of Comm'rs. v. Clausen, 95 Wash. 214, 163 Pac. 744 (1917).

requiring counties from which harmless indigent insane are committed to the state mental hospital to pay the cost of their care;[45] a statute authorizing county commissioners in counties of the first class to increase salaries of superior court judges at the sole expense of the county;[46] and a statute fixing the amount to be raised by counties for school purposes, since education is a state purpose as well as a county and local purpose.[47] However, as noted before, since school district taxes are, in part at least, imposed to pay indebtedness incurred for strictly school district purposes, the levies must be based upon the valuations fixed by the local authorities and not upon those valuations as equalized by the state board of equalization, in the absence of any attempt to segregate between state and local purposes.[48]

What types of purposes fall within the constitutional provision wherein the legislature is precluded from acting? Instances that readily come to mind are the imposition of taxes for building city halls, erecting and operating light plants or gas works, constructing sewers, and bringing water into the city. These are ordinary corporate affairs which are for the sole benefit and enjoyment of the municipality and its inhabitants. These are the areas in which the constitutional provision directs that the legislature is not to infringe in imposing taxes.

This does not mean that municipal corporations are free of all legislative control insofar as taxation for municipal purposes is concerned. To the contrary, the constitution says the legislature "may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes."[49] The constitution does not grant the power to tax to municipal corporations but leaves it to be vested by the legislature. This enables the legislature to affect municipal taxation either in withholding the power in certain instances or in granting it subject to conditions and limitations.[50] The legislature has been sustained, for example, in setting the rate of taxation and allocating the proceeds to specified funds[51] and in regulating the imposition of penalties and interest on unpaid taxes.[52] A statute authorizing tax levies already made by cities, beyond the legal limit, does not violate the provision since it does not impose a tax but validates an imposition

[45] State v. Pierce County, 132 Wash. 155, 231 Pac. 801 (1925).
[46] *In re* Salary of Superior Court Judges, 82 Wash. 623, 144 Pac. 929 (1914).
[47] Newman v. Schlarb, 184 Wash. 147, 50 P.2d 36 (1935).
[48] Clark v. Seiber, 48 Wn.2d 783, 296 P.2d 680 (1956).
[49] Art. 11, § 12.
[50] Great No. Ry. v. Stevens County, 108 Wash. 238, 183 Pac. 65 (1919).
[51] State *ex rel.* School Dist. v. Clark County, 177 Wash. 314, 31 P.2d 897 (1934).
[52] New Whatcom v. Roeder, 22 Wash. 570, 61 Pac. 767 (1900).

which has already been made by the cities themselves.[53] Here again control by the legislature is obviously present in its power to withhold validation.

The possibility of the legislature affecting municipal taxation is also illustrated by its power to authorize certain acts of a municipality upon condition that if the municipality undertakes such acts it must tax to pay for them. In such an instance it is the municipality which decides whether or not to act and thus whether or not to tax. Examples are an enactment by the legislature authorizing drainage districts to undertake investigations to determine whether to make improvements upon condition that levies be made to pay for the cost of this preliminary expense;[54] a provision authorizing the creation of metropolitan municipal corporations upon condition that a tax be imposed to carry out the purposes of the corporation;[55] and a statute authorizing municipal corporations to provide for local improvement districts in the future on condition that a local improvement guaranty fund be established to be paid for out of a general tax upon property in the municipality.[56] The critical factor in each of these cases was that the municipality was free to act and was not obligated to impose a tax. In contrast would be a statute requiring that a tax be levied upon property in a municipal corporation to establish a local improvement guaranty fund for improvements already ordered. In such an instance the municipality would have no free choice in imposing the tax and the constitution would be violated.[57]

Uniformity of Taxation

Another limitation upon the legislature's power in relation to taxation by municipal corporations is stated in article 7, section 9. "For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."[58]

Implicit in this provision, as in article 11, section 12, is the fact that

[53] Owings v. Olympia, 88 Wash. 289, 152 Pac. 1019 (1915).
[54] Northern Pac. Ry. v. Pierce County, 51 Wash. 12, 97 Pac. 1099 (1908).
[55] Municipality of Metropolitan Seattle v. Seattle, 57 Wn.2d 446, 357 P.2d 863 (1960).
[56] Hallahan v. Port Angeles, 161 Wash. 353, 297 Pac. 149 (1931).
[57] Longview Co. v. Lynn, 6 Wn.2d 507, 108 P.2d 365 (1940).
[58] Art. 7, § 9 also provides, "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of property benefited." This has created no particular problem in the sense of a limitation upon legislative power. The subject of special assessments by municipal corporations in itself is beyond the scope of this article.

municipal corporations have no inherent power of taxation nor is such power granted to them by the constitution. Rather, the power is dependent upon legislative grant, subject to certain restrictions.[59]

In the first place, any authorization to a municipal corporation to tax must be for a "corporate" purpose. In actual practice this has not severely limited either the legislature or the municipal corporations because of the broad definition given to "corporate purposes." They are,

> "such purposes as are germane to the objects of the welfare of the municipality or at least have a legitimate connection with those objects and a manifest relation thereto. . . . [A] tax for a corporate purpose is one to be expended to promote the general prosperity and welfare of the municipality which levies it."[60]

The requirement of a corporate purpose imposes the limitation that in authorizing a levy to be made, the legislature must in some manner clearly express the purpose.[61]

The second restriction stated in the provision is that an authorization must provide for "uniform" taxes. An example of the type of tax prohibited is an early case declaring unconstitutional a statute prescribing a scale of fees, based upon the valuation of the estate, to be paid to the clerk of the court upon filing the first papers in probate. The court concluded that the scale of fees had no relation to the services performed by the clerk. The fee, which was to be paid into the general fund of the county, was held to be in the nature of a property tax upon estates, which tax was not imposed upon other like property in the jurisdiction. Since a tax was placed upon some property, but not upon that of a similar character, the requirement of uniformity was held not to have been met.[62]

A better understanding of the meaning of the uniformity requirement in taxation is obtained by noting those things that do not fall within the provision. The requirement of the payment of a standard fee, not based upon the valuation of property involved, does not violate the provision if the fee is imposed to pay for services rendered, rather than for revenue.[63] Uniformity is not required as to local improvement assessments as contrasted with taxation for general

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[59] Pacific First Fed. Sav. & Loan Ass'n v. Pierce County, 27 Wn.2d 347, 178 P.2d 351 (1947); Great No. Ry. v. Stevens County, 108 Wash. 238, 183 Pac. 65 (1919).
[60] Denman v. Tacoma, 170 Wash. 406, 407, 16 P.2d 596, 597 (1932).
[61] Weyerhauser Timber Co. v. Roessler, 2 Wn.2d 304, 97 P.2d 1070 (1940).
[62] State *ex rel.* Nettleton v. Case, 39 Wash. 177, 81 Pac. 554 (1905).
[63] State *ex rel.* Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540 (1914).

corporate purposes.[64] Uniformity applies only as to taxation of persons and property. It has been held not to relate to a tax on trades, professions and occupations,[65] or a license tax under the police power,[66] or a tax on privileges such as a requirement that peddlers pay a certain fee.[67]

Even as to persons and property, there is the usual qualification that classification is permissible. In an early case the court held a statute unconstitutional which provided that cities of the third class might levy an annual street poll tax upon male inhabitants between certain ages, but exempting members of volunteer fire companies.[68] The statute, and the ordinance thereunder providing for the levy, were held to violate the uniformity requirement since the classification based upon age and sex was not reasonable. A comparable statute exempting females and minors was later sustained and the earlier case overruled.[69] The court decided that the exempted classes would often lack the ability to pay and the burden of paying the tax for the entire household would fall on the head of the family. More importantly, the tenor of the opinion suggests an allowance of considerable discretion by the legislature in providing for classification under the uniformity clause.

The conclusion may be drawn that the legislature retains much control over the tax powers of municipal corporations, subject to the broad, generally not too stringent, limitations of "corporate purposes" and "uniformity."[70]

SPECIAL LEGISLATION

Article 2, section 28, prohibits the legislature from enacting special or private laws in certain instances. Several of the subdivisions relate to the legislature's power with respect to municipal corporations. Be-

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[64] Smith v. Seattle, 25 Wash. 300, 65 Pac. 612 (1901).
[65] Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665 (1899).
[66] Pacific Tel. & Tel. Co. v. Seattle, 172 Wash. 649, 21 P.2d 721 (1933).
[67] Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502 (1923).
[68] State v. Ide, 35 Wash. 576, 77 Pac. 961 (1904).
[69] Town of Tekoa v. Reilly, 47 Wash. 202, 91 Pac. 769 (1907).
[70] Another constitutional limitation relating to taxation is set forth in the fourteenth amendment to the state constitution. "Property of ... counties, school districts and other municipal corporations ... shall be exempt from taxation." This places a restriction upon state taxation of municipal corporations. It does not, however, relate to the exercise of the tax power by the municipal corporations themselves, as do art. 11, § 12 and art. 7, § 9, and is thus beyond the scope of this paper. A leading case interpreting the provision is Puget Sound P. & L. Co. v. Cowlitz County, 38 Wn.2d 907, 234 P.2d 506 (1951), holding the exemption provision to be self-executing and applicable to real and personal property of municipal corporations.

fore considering these, a general analysis of the restriction upon special legislation is needed.

Provisions restrictive of special legislation have as their purpose preventing particular cities from being specially favored or specially discriminated against by the legislature. They may be regarded as the equivalent of the equal protection of the laws clauses which are applicable to individuals and private corporations.

The purpose of such provisions, to obtain uniformity and equality, is desirable. The difficulty is one of definition in ascertaining what is a special law and what a general law on a subject. The Washington court has stated:

> The authorities are in substantial harmony upon the rule by which a law is to be tested to determine whether it is general or special. A special law is one which relates to particular persons or things, while a general law is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions.[71]

Though the authorities may be in "substantial harmony" upon the rule, they are not so upon its application. One thing is clear, however, and that is that a prohibition of special legislation does not mean classification is not permissible. By its very nature all legislation is necessarily based on a classification of some kind since no piece of legislation can relate to all things.

In determining whether a particular classification is valid, a test of reasonableness is imposed. This is dependent upon two basic considerations. First, do the different classes established by the legislature possess different characteristics? Secondly, do the different characteristics relate to the purpose and subject matter of the legislation?[72]

As an example of the application of the two considerations, the legislature might enact a statute providing that in cities with a population of 5,000 or more there should be a fire department with personnel always on duty, while in cities under 5,000 a voluntary department would be sufficient. This classification might well be sustained on the basis that the different characteristics of the two classes; *i.e.*, size of

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[71] Young Men's Christian Ass'n of Seattle v. Parish, 89 Wash. 495, 497, 154 Pac. 785 (1916).

[72] State *ex rel.* Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540 (1914).

population, relate to the purpose of the statute; *i.e.*, obtaining adequate fire protection. In view of the cost of employing permanent firemen, the greater likelihood of fires starting and spreading more rapidly in areas of larger and more concentrated population, and the greater ease of getting to the fire station in a smaller community, the classification might well be reasonable.

On the other hand, if the legislature were to enact a statute allowing the operation of pinball machines in cities over 5,000, but prohibiting them in smaller communities, the classification might be held invalid. While the different characteristics would be present as in the preceding example; *i.e.*, size of population, they would seem to have no relevance to the subject matter of the legislation. The operation of pinball machines is not likely to be more violative of public morality or general welfare in smaller towns than in larger communities.

The allowance of a classification if based upon substantially different characteristics and if reasonably related to the purpose of the legislative enactment is usually buttressed by the recognition of a broad discretion in the legislature to classify.[73] The recognition of such discretion and the application of the tests discussed is evidenced by two Washington cases.

The legislature required the appointment of an official court stenographer in every county having a population of over 30,000 inhabitants, but excepted counties having a population of over 200,000. This was attacked as being invalid class legislation. The court first noted that differences in poulation may well justify different laws. While it is difficult, if not impossible, to distinguish between 29,999 and 30,000 or 199,999 and 200,000, the legislature must be allowed to draw a line at some point and it is the general grouping that is of consequence. The court was also able to discern that the differences in population related to the purpose of the legislation. Courts in counties of small population might be able to conduct their business without any stenographer, whereas larger counties would require such services. This justified the exception of counties under 30,000. In counties of the intermediate class, there might not be sufficient private employment to engage the attention of a competent stenographer, rendering it difficult and costly to obtain one when the necessity arose, which difficulty was overcome by providing a stenographer constant public employment. In the larger counties of over 200,000 population, competent stenographers might always be within reach thereby eliminating the necessity of permanent public employment. This was supported

[73] Campbell v. State, 12 Wn.2d 459, 122 P.2d 458 (1942).

by a recognition that other reasons might have persuaded the legislature to classify and this was within its discretion.[74]

The second case involved a statute extending the boundaries of all cities to the middle of navigable waters adjacent to their boundaries. This was held to be valid class legislation.[75] Clearly, cities bordering on water have different characteristics than those that do not. Also, the need for such cities to regulate certain activities upon the adjacent waters and thus the need to extend their boundaries, relates to the characteristics which distinguish such cities from others. Both tests are thus met. This is to be contrasted with a statute which might allow the regulation of liquor sales by cities bordering navigable water, but not by others. Such might be invalid as special legislation, for although there would be different characteristics in the two classes, they would not relate to the purposes of the legislation.

With these general considerations in mind, it is now possible to examine those subdivisions of the constitutional provision which particularly relate to municipal corporations. This is necessary since in the absence of specific constitutional prohibition, the enactment of special laws is within the power of the legislature.[76] Article 2, section 28, subdivision 6, prohibits special legislation, "For granting corporate powers or privileges." It was early decided that this subdivision relates to powers conferred upon municipal as well as private corporations.[77]

Two cases illustrate the application of the provision. A statute authorized the counties of King, Pierce and Spokane to create an indebtedness for the purpose of acquiring sites for, and the construction of, state armories. There was no attempt to specify a class, and in view of the purpose of the act, doubt was expressed that a classification could be devised which would be relevant to the subject matter. The designation of the three counties was held to be a special grant of corporate powers prohibited by the constitution.[78] A comparable case involved a statute authorizing Pierce County to incur an indebtedness for the purpose of acquiring land for use by the federal government. This was sustained on the basis that the county was acting for a state purpose rather than a county purpose. In effect, the county was

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[74] State *ex rel.* Vance v. Frater, 84 Wash. 466, 147 Pac. 25 (1915).

[75] Pacific American Fisheries v. Whatcom County, 69 Wash. 291, 124 Pac. 905 (1912).

[76] Martin v. Tollefson, 24 Wn.2d 211, 163 P.2d 594 (1945).

[77] Terry v. King County, 43 Wash. 61, 86 Pac. 210 (1906). The provision does not apply to state agencies. State *ex rel.* Tattersall v. Yelle, 52 Wn.2d 856, 329 P.2d 841 (1958); Robison v. Dwyer, 58 Wn.2d 576, 364 P.2d 521 (1961).

[78] Terry v. King County, *supra* note 77.

serving as an agent of the state and thereby was not affected by the provision.[79] But for this, the designation of the one county might have been special legislation, not because only one county was affected by the grant, but because there was no attempt at classification. That only one municipal corporation is included in a class does not necessarily make it bad; that there is no attempt at classification, but simply a designation of one municipal corporation, is violative of the provision.

Article 2, section 28, subdivision 8 prohibits special legislation "For incorporating any town or village or to amend the charter thereof." Legislation incorporating towns and villages or amending the charters thereof by special act was common prior to the adoption of the constitution.[80] By virtue of the constitutional provision, the legislature is now required to act by general laws in such matters.[81] Note that the clause applies to any "town or village." This has been held to mean that cities are not included therein. The exact line between a town or village on the one hand and a city on the other, for the purpose of this provision, has not been drawn. It is clear that the provision does not apply to a municipality having a population in excess of 100,000, and it is likely that it has no application to any municipality having more than 20,000 inhabitants.[82]

A comparable provision relating to cities is to be found, however, in article 11, section 10, which provides in part that:

> Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws . . . .[83]

This clause prevents the incorporation of cities and the amendment of the charters thereof by special laws just as the preceding section

[79] State *ex rel.* Board of Comm'rs v. Clausen, 95 Wash. 214, 163 Pac. 744 (1917).
[80] Tacoma Land Co. v. Board of County Comm'rs, 1 Wash. 482, 25 Pac. 904 (1890).
[81] Legislative provisions for incorporation proceedings are included in RCW ch. 35.02.
[82] Martin v. Tollefson, 24 Wn.2d 211, 163 P.2d 594 (1945).
[83] The twelfth amendment to the state constitution authorizes the legislature, by general law, to classify counties by population for certain purposes.

does as to towns and villages.[84] It necessitates the enactment of general laws on the subject.[85] It likewise prohibits specific legislative designation of boundaries for municipalities though it does not prevent the legislature from prescribing the procedure for determining the boundaries of newly created municipalities.[86]

One other provision of article 2, section 28 should be noted. Subdivision 10 prohibits special legislation, "Releasing or extinguishing in whole or in part, the indebtedness, liability or other obligation, of any person, or corporation to this state, or to any municipal corporation therein." The subdivision's purpose is to prohibit favoring of any debtor or group of debtors obligated to the state or any municipal corporation. It protects taxpayers from legislative action designed to shift to one group a disproportionate burden of taxation by releasing or extinguishing, by special statutes, the tax obligations of a favored group.[87] While the immediate purpose is to protect the individual or private corporation, this provision indirectly protects the municipal corporation from a type of legislation which would interfere with taxes and other indebtedness owing thereto.

Three types of problems remain which deserve individual attention. In a few states local option legislation has been held to violate special legislation limitations because some cities, or even one, might elect to function thereunder, while other cities might decline.[88] This argument has not been accepted in Washington. The fact that all but a few, or one city, might refuse to avail themselves of certain proffered powers or privileges has not led to a finding of special legislation. So long as the legislation is open to a reasonable class, that is sufficient.[89] This result is desirable, since to hold to the contrary would mean every law with respect to municipal corporations would have to be mandatory; municipal corporations could not be allowed to exercise their will in determining which powers or privileges to exercise. There is no reason to believe that the framers of the constitution had any such intention in prohibiting special legislation.

A second area of concern and one which has created problems in Washington is that of so-called closed-class legislation. As previously

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[84] Martin v. Tollefson, *supra* note 82.

[85] General provisions for the incorporation of first class cities are set forth in RCW ch. 35.03.

[86] Port of Tacoma v. Parosa, 52 Wn.2d 181, 324 P.2d 438 (1958).

[87] See State *ex rel.* Collier v. Yelle, 9 Wn.2d 317, 115 P.2d 373 (1941).

[88] See, for example, Appeal of Scranton School Dist., 113 Pa. 176, 6 Atl. 158 (1886).

[89] State *ex rel.* Hunt v. Tausick, 64 Wash. 69, 116 Pac. 651 (1911); Municipality of Metropolitan Seattle v. Seattle, 57 Wn.2d 446, 357 P.2d 863 (1960).

discussed, the fact that only one or a few municipalities are included in a class does not of itself make the classification bad. However, if a class is defined in such a way as to preclude the possibility of any other municipal corporation ever becoming a member of the class favored or regulated, there is greater likelihood of a finding of special legislation. This most often occurs when a class is defined in terms of existing conditions or circumstances. Courts often regard as special legislation, statutes which classify municipalities on the basis of conditions existing at the time of enactment and which make no provision for the entry of a municipality into a different class should conditions change in the future. Thus, while classification according to population will generally be upheld if reasonable in view of the objective of the statute, it is probable that an act will be denominated as special if applicable only to municipalities of a designated population on a designated date.

In *Nicholls v. Spokane School Dist. No. 81*,[90] a statute forbade the purchase of fuel for use in certain public institutions unless it was mined or produced within the state of Washington. There was the proviso that no institution which at the time of the passage of the act was using fuel mined or produced outside the state was compelled to comply if the cost of fuel produced within the state was over five per cent greater than the cost of fuel produced outside the state. This was held to be unconstitutional as the classification was fixed as of the date when the law became effective with no provision for, or anticipation of, future conditions. The court was unable to perceive any reasonable basis for the classification since it meant, for example, that a school district using outside coal for one day prior to the passage of the act could continue to purchase that coal while another district which had not used outside coal would be prohibited from doing so.

In another case a statute authorized the re-incorporation of municipal corporations which had originally incorporated under a statute subsequently declared void by the court. The re-incorporation statute was held to be unconstitutional as constituting the creation of municipal corporations by a special law.[91] The statute was deemed special since it was applicable solely and exclusively to existing conditions. Nothing was said about the reason for the classification or the peculiar position in which the municipal corporations affected found themselves. Similarly, a statute relating to cities having over 100,000 inhabitants

[90] 195 Wash. 310, 80 P.2d 833 (1938).
[91] Town of Denver v. Spokane Falls, 7 Wash. 226, 34 Pac. 926 (1893).

but not more than 150,000 "as shown by the 1940 census of the United States" was held to be special legislation since it was based upon certain existing conditions.[92]

In each of the above cases language exists suggesting that any time a class is closed or based upon existing conditions it is thereby per se bad. The cases should not be interpreted as having that meaning, however, and if they were intended to say that, they are much too strict. As with other special legislation, reasonableness should be the test. If closing the class is reasonable in view of the objective sought to be achieved by the legislation, there is no basis to declare it invalid.

The test is well illustrated by *Rood v. Water Dist. No. 24 of King County*.[93] In 1927 a 1913 statute permitting the organization of water districts was held to violate the due process clause in that inhabitants of the proposed districts were not given an opportunity to be heard on the questions of the property to be included or the benefits to be derived therefrom. In 1931 the legislature passed a curative act, validating such water districts as had maintained their organization since the date of their attempted incorporation under the 1913 act. This was a closed class as it was based upon existing conditions and could in no way be affected by what happened in the future. Nevertheless, the statute was sustained, the court stating that the class affected was separate from all others. This is clearly correct. There was a body of persons peculiarly in need of attention. The classification established by the legislature related to that need. There was no reason to attempt to phrase the statute to apply to future conditions. In short, the classification was reasonable in view of the different characteristics of the classes and the objective of the legislation. To apply a strict rule, that a statute based upon existing conditions is per se invalid, would have interfered unnecessarily with the legislature without furthering the objective of the special legislation clause.[94]

[92] Martin v. Tollefson, 24 Wn.2d 211, 163 P.2d 594 (1945).

[93] 183 Wash. 258, 48 P.2d 584 (1935).

[94] Other instances in which the court has sustained closed class legislation are Pullman v. Hungate, 8 Wash. 519, 36 Pac. 483 (1894), involving an act providing for the legalization of cities and towns which had attempted to incorporate under earlier unconstitutional statutes, and Campbell v. State, 12 Wn.2d 459, 122 P.2d 458 (1942), involving a statute which forbade a person to conduct a dental office in his name unless he was personally present therein a majority of the time, with the proviso that persons so conducting a dental office at the time the act took effect might continue to do so. In Baker v. Seattle, 2 Wash. 576, 27 Pac. 462 (1891) a statute empowering cities organized prior to the adoption of the constitution to extend their credit and fund their indebtedness was held not to be special legislation in view of the fact that another act passed at the same session gave like authority to cities organized after the constitution was adopted. Instead of looking only to the individual statute, the court took a broader view of inquiring into the total legislation enacted during the session. This supports the test of reasonableness set forth in the text.

A time limitation placed upon a statute can be the basis for a "special legislation" argument. The Washington court has stated flatly that a limitation on the duration of a legislative enactment does not make it a special law.[95] Just as some of the language by the court relating to curative acts has been too strict, so this language is too broad. There might be instances in which a time restriction upon an otherwise valid general law would result in special legislation. The restriction might become a characteristic of the classification and have no reasonable relation to the purpose of the statute.[96] Here again, the test should be one of reasonableness in view of the two factors previously discussed.

HOME RULE

Several states have further limited legislative supremacy over municipal corporations by adopting constitutional amendments designed to allow certain municipalities to frame their own charters and thereby determine their own powers with respect to local or municipal affairs.[97] Constitutional home rule provisions are of three basic types, those which authorize the legislature to enact statutes permitting the cities to govern themselves, those which grant power to cities to adopt charters but require enactment of enabling legislation, and those which authorize cities to adopt charters without the necessity of enabling legislation. The effect of these provisions as sources of municipal power and as limitations upon legislative control vary greatly among the home rule states. Thus, determinations in one state as to the meaning and effect of its provision must be viewed with considerable caution elsewhere.

In most of the states the principal problem to be resolved is that of delineating what constitutes a "state" affair and what a "local" or "municipal" affair. In the former the legislature retains its supremacy. In the latter, the municipal corporation may well be autonomous. While there is the expected disagreement as to the definition of the terms, there is general agreement that this is the determining factor. In Washington there is no such problem of defining terms. For that matter, there is no problem of home rule. This results from the par-

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[95] Wheeler School Dist. v. Hawley, 18 Wn.2d 37, 137 P.2d 1010 (1943).

[96] See the discussion in DeHart v. Atlantic City, 63 N.J.L. 223, 43 Atl. 742 (1899).

[97] States with home rule provisions are Missouri (1875), California (1879), Washington (1889), Idaho (1890), Utah (1895), Minnesota (1896), Colorado (1902), Oregon (1906), Oklahoma (1907), Michigan (1908), Texas (1909), Arizona (1910), Nebraska (1912), Ohio (1912), Maryland (1915), Louisiana (1921), Pennsylvania (1922), New York (1923), Nevada (1924), Wisconsin (1924), West Virginia (1935), Georgia (1945), Rhode Island (1951), Tennessee (1953).

ticular wording and interpretation of the Washington constitutional provision.[98]

Article 10, section 11 provides that any city containing a population of 20,000 inhabitants or more may frame a charter for its own government. The constitution then prescribes in considerable detail the method by which this is to be done. The legislative authority of the city is authorized to provide for an election of fifteen freeholders, who shall have been residents of the city for at least two years and who are qualified electors, to prepare a charter. The proposed charter is then submitted to the electors of the city and if a majority voting thereon ratify the same, it becomes the charter of the city. Charters may be amended by means of proposals submitted by the legislative authority of the city to the electors at an election at which a majority of those voting thereon must approve.

For the most part the court has interpreted the means provided in the constitutional provision for adopting and amending a charter in such manner as to further the purpose of encouraging local self-rule and to allow the inhabitants to adapt their charter to changing conditions of modern life. Thus it has been held that a charter may be amended by a majority of those voting upon the proposition for amendment rather than a majority of all voters voting at the election, despite an apparent provision in a city charter to the contrary;[99] that the state legislature may require the legislative authority of the city to call an election to choose fifteen freeholders to prepare a charter, upon a petition of a certain percentage of the electors;[100] and that the legislature may require the municipal authorities to submit to a vote of the people a charter amendment when petitioned to do so by a certain percentage of the voters of the city, thereby compelling the city to incur the expense of the election.[101] Each of these decisions has had the effect of promoting the principle that the adoption of a charter or an amendment thereto is an act of the people and not the corporate authorities.

Article 11, section 10 also requires that a proposed charter or amendment thereto be published in two daily newspapers for at least thirty days prior to the election. The court has been particularly strict in

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[98] See Brachtenbach, *Home Rule in Washington—At the Whim of the Legislature*, 29 WASH. L. REV. 295 (1954) for a brief discussion of home rule powers and a detailed analysis of proposed amendments to the Washington constitutional provision.

[99] State *ex rel.* Wiesenthal v. Denny, 4 Wash. 135, 29 Pac. 991 (1892).

[100] Reeves v. Anderson, 13 Wash. 17, 42 Pac. 625 (1895).

[101] Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609 (1906).

interpreting this requirement to be mandatory.[102] In the most recent case, involving an amendment to the Yakima city charter, publication occurred for twenty-seven days prior to the election. In a 5-4 decision the court held the election invalid and stated it was not at liberty to substitute some other device which might be considered more effective.[103] In two vigorous dissents it was contended that the legislature could provide for a method of charter amendment different from that in the constitution and that it was clear that the electorate of Yakima was well informed about the election in view of the widespread publicity in all news media and the large number of persons voting. In defense of the majority it may be said that its literal interpretation of the constitutional notice requirement assures that a certain minimum standard will always be met. If the local authorities wish to do more to make the electorate aware of the effect of a proposed charter amendment, they may of course do so.

These decisions relating to the machinery by which charters are to be adopted and amended have served to promote the concept of local control over local affairs, which is the purpose of the home rule provision. This purpose has at times been broadly stated by the Washington court: "to secure to all such cities complete local self-government in municipal affairs;"[104] "to give to cities of the first class, having the right to adopt their own charters, the fullest power in that respect;"[105] and to "recognize that large, growing cities should be empowered to determine for themselves, and in their own way, the many important and complex questions of local policy which arise."[106] This policy has been implemented to the extent of establishing that the inhabitants of a city containing a population of twenty thousand or more have the right to frame a charter and that the legislature may not prevent the exercise of that right. It has been said that, "There is no qualification or reservation of this right."[107]

When one reaches the point of determining what may be included in a charter, however, it is found that Washington parts company from most home rule states. While the inhabitants of cities over 20,000 may have the right to frame a charter free from legislative cur-

[102] Wade v. Tacoma, 4 Wash. 85, 29 Pac. 983 (1892); State *ex rel.* Linn v. Superior Court, 20 Wn.2d 138, 146 P.2d 543 (1944).
[103] Burns v. Alderson, 51 Wn.2d 810, 322 P.2d 359 (1958).
[104] Bussell v. Gill, 58 Wash. 468, 473, 108 Pac. 1080, 1083 (1910).
[105] State *ex rel.* Hindley v. Superior Court, 70 Wash. 352, 355, 126 Pac. 920, 921 (1912).
[106] Hilzinger v. Gillman, 56 Wash. 228, 234, 105 Pac. 471, 474 (1909).
[107] State *ex rel.* Billington v. Sinclair, 28 Wn.2d 575, 583, 183 P.2d 813, 817 (1947).

tailment, they have no right to be free from legislative control as to the contents thereof. This results from the interpretation of the clause in article 11, section 10 that a charter adopted by a city for its own government shall be "consistent with and subject to the constitution and laws of this state."

It was early established that the effect of this clause is to render home rule cities completely subject to the laws of the legislature.[108] The court has consistently adhered to that position regardless whether the matter regulated relates to purely state affairs, purely local affairs, or a subject of joint interest to the state and municipal corporation. Ordinances enacted by a city pursuant to charter provisions are subject to the supremacy of any statutes in point and it matters not whether the ordinances are promulgated by the legislative authority of the city or by referendum of the people in accordance with the city's charter.[109] The doctrine of legislative supremacy applies not only to ordinances, but to the provisions of the charter itself.[110]

The meaning of the home rule provision as interpreted by the court is well stated in the following:

> This constitutional provision, while providing for home rule within a city or town as to those matters which are local in character, does not give to the municipality, under its charter, the right to legislate exclusively on all matters which touch its existence. By authorizing municipal charters, the constitution does not take from the legislature the right to determine what shall be the law of the state, both inside and outside of municipalities.[111]

Though the interpretation of the provision is literally correct, one wonders whether it is realistically and politically correct. Why should not a municipal corporation of the first class be permitted to regulate its own local affairs, free from legislative control? Who is most familiar with the local problems and needs? Who is most concerned with their solution? Who is best qualified to determine the methods of resolving the local problems? Over which body does the local electorate have the most control? Until legislative reapportionment occurs on a statewide basis, and perhaps even thereafter, are not the legislators from rural areas able to regulate the local affairs of the larger municipalities? Are they qualified to do so, so far as understanding the problems? Should they have the power to do so? Why provide for home rule

[108] State *ex rel.* Seattle v. Carson, 6 Wash. 250, 33 Pac. 428 (1893).
[109] Miller v. Spokane, 35 Wn.2d 113, 211 P.2d 165 (1949).
[110] State *ex rel.* Lynch v. Fairley, 76 Wash. 332, 136 Pac. 374 (1913).
[111] Mosebar v. Moore, 41 Wn.2d 216, 221, 248 P.2d 385, 388 (1952).

cities in the constitution if they have no more power in relation to their local affairs than do non-home rule cities in those instances in which the legislature decides to act? Is it necessary that a constitutional clause requiring a charter to be "consistent with and subject to the . . . laws of this state" be interpreted to apply to matters of solely local concern as well as matters of solely state concern or of matters of concern to both? Is it advisable so to interpret such a clause?

As indicated, all this is academic. The fact remains that in the event of an inconsistency between a statute and a city charter or ordinance, the statute controls. In certain areas the supreme interest of the state is apparent as in the case of the creation of municipal or police courts, it being for the legislature to create additional courts,[112] or the extension of the boundaries of a first-class city, in view of the effect on surrounding areas,[113] or the exercise of the power of eminent domain.[114] In other areas there is a vital joint interest of both the state and the municipal corporation, justifying state predominance in view of the fundamental nature of our governmental structure. This is illustrated by the power of municipalities to tax,[115] the issuance of bonds to acquire public utilities,[116] and the grant of franchises to use city streets.[117] Finally, there are instances in which the matter is clearly of local concern. These include the recall of city councilmen,[118] residence requirements for city employees,[119] the fixing of working conditions, wages and pensions for city employees,[120] the determination of the time for presenting claims against the city,[121] the calling for com-

[112] In re Cloherty, 2 Wash. 137, 27 Pac. 1064 (1891).

[113] State *ex rel.* Snell v. Warner, 4 Wash. 773, 31 Pac. 25 (1892).

[114] Tacoma v. State, 4 Wash. 64, 29 Pac. 847 (1892).

[115] Great No. Ry. v. Glover, 194 Wash. 146, 77 P.2d 598 (1938); State *ex rel.* Seattle v. Carson, 6 Wash. 250, 33 Pac. 428 (1893).

[116] Shorts v. Seattle, 95 Wash. 538, 164 Pac. 241 (1917).

[117] Much litigation has arisen in this field and in each instance the statute has been held to prevail over the charter, regardless of the nature of the issue involved. See Benton v. Seattle Elec. Co., 50 Wash. 156, 96 Pac. 1033 (1908) (charter provision requiring vote of people before grant of franchise, held invalid); Ewing v. Seattle, 55 Wash. 229, 104 Pac. 259 (1909) (charter provision requiring franchises to be sold at public auction to highest bidder, held invalid); State *ex rel.* Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861 (1912) (statute authorizing state public service commission to fix rates for public service corporations, held to prevail over charter setting rates for telegraph company operating under franchise from city); Dolan v. Puget Sound Traction, Light & Power Co., 72 Wash. 343, 130 Pac. 353 (1913) (charter provision making an ordinance granting a street railway franchise subject to a referendum vote of the people, held invalid). See also State *ex rel.* Harlin v. Superior Court, 139 Wash. 282, 247 Pac. 4 (1926) and Neils v. Seattle, 185 Wash. 269, 53 P.2d 848 (1936).

[118] Hilzinger v. Gillman, 56 Wash. 228, 105 Pac. 471 (1909); State *ex rel.* Lynch v. Fairley, 76 Wash. 332, 136 Pac. 374 (1913).

[119] Mosebar v. Moore, 41 Wn.2d 216, 248 P.2d 385 (1952).

[120] State *ex rel.* Everett Fire Fighters v. Johnson, 46 Wn.2d 114, 278 P.2d 662 (1955).

[121] Scurry v. Seattle, 8 Wash. 278, 36 Pac. 145 (1894); Young v. Seattle, 30 Wn.2d 357, 191 P.2d 273 (1948).

petitive bids in conjunction with the operation of a municipally-owned transportation system,[122] and the establishment of crematories within the city limits.[123] In many home rule states the nature of the matters regulated would justify local control despite any statutes to the contrary. In Washington, in each instance the statute in point was held to prevail.

The supremacy of the legislature in Washington has also been maintained in two other comparable situations. The twenty-first amendment authorizes any county to frame a home rule charter "subject to the Constitution and laws of this state." The twenty-third amendment provides for the creation of combined city and county municipal corporations. Any such combined city and county has all rights, powers and privileges asserted in the charter, "not inconsistent with general laws." It is to be expected that these amendments will be interpreted in the same manner as the home rule provision of article 11, section 10.

Though the traditional state-local dichotomy has no place in Washington home rule matters in those instances in which a statute exists, such a distinction is important at other times, though not clearly enunciated by the court. There have been occasions upon which the court has spoken to the effect that home rule cities derive no powers from the constitution itself but that their powers are entirely dependent upon delegation from the legislature. As an example, in reference to home rule cities, the court has said, "But we must not lose sight of the elementary proposition that municipal corporations have only the powers which are specially conferred upon them by the legislature, or such other powers as by necessary implication flow therefrom."[124]

Such language is appropriate to non-home rule cities, but not to home rule cities deriving their powers from the constitution as is true in Washington. To treat home rule cities in this manner is to say they have no more powers than non-home rule cities and is to completely eliminate the effect of article 11, section 10. It is one thing to conclude that the legislature is supreme in all instances in which its acts conflict with a city charter. As noted, even that goes far beyond most home rule states. It is much more to say that every provision in a charter, to be effective, must be founded upon some power conferred by an act of the legislature.

A major purpose of the home rule doctrine is to free the locality

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[122] Dalton v. Clarke, 18 Wn.2d 322, 139 P.2d 291 (1943).
[123] Oakwood Co. v. Tacoma Mausoleum Ass'n, 22 Wn.2d 692, 157 P.2d 595 (1945).
[124] State *ex rel.* Fawcett v. Superior Court, 14 Wash. 604, 606, 45 Pac. 23, 24 (1896).

from legislative control over local affairs. That objective has not been achieved in Washington, as discussed. Certainly, however, there is no reason to conclude that a locality should not be free to run its local affairs when the legislature has said nothing. To require the municipality to wait until the legislature speaks would in many instances mean that certain areas would never be subject to regulation or only long delayed regulation. While such delay may be necessary with non-home rule cities, since without legislation there is no authority to act, there is absolutely no reason for delay in the case of the larger cities since the constitution authorizes action to be taken.

Further, the legislature would have the power without any constitutional provision to authorize cities to adopt charters for themselves. Unless the provision is interpreted to mean that the cities named therein have the power to frame their own charters and determine the contents thereof as to their local affairs, except in the event of an inconsistency with a statute, the provision is an idle ceremony without any force whatsoever. It is not reasonable so to interpret article 11, section 10.[125]

How then is one to explain the language in some of the cases suggesting that home rule cities derive no power directly from the constitution? It is to be noted that such language has been used by the court in those instances in which the mater in question has involved a subject either of sole state concern or of joint concern to the state and the municipal corporation. Thus, in the case quoted above, the question was one of whether a municipal corporation could confer jurisdiction on a superior court to hear a contested election case.[126] Clearly the matter of the jurisdiction of the superior courts of the state is to be determined by the state legislature rather than any particular city within which the court sits. Other instances in which the court has spoken in terms of the municipal corporation not being able to act because of a lack of delegated power from the legislature include the creation of courts,[127] the matter of annexation and the determination of municipal boundaries,[128] the exercise of the eminent

[125] See dissenting opinion of Hoyt, C. J., in State *ex rel.* Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23 (1896).

[126] State *ex rel.* Fawcett v. Superior Court, *supra* note 124. The same principle was later applied in State *ex rel.* Navin v. Weir, 26 Wash. 501, 67 Pac. 226 (1901) when a charter purported to confer jurisdiction upon the city council to decide contested election cases. While the city has a vital interest in its own elections, the determination of a contest thereof can be seen as a matter of state-wide interest, just as any other determination requiring the decision of an impartial body.

[127] In re Cloherty, 2 Wash. 137, 27 Pac. 1064 (1891).

[128] State *ex rel.* Snell v. Warner, 4 Wash. 773, 31 Pac. 25 (1892).

domain power,[129] and the exercise by a municipal corporation of the power to grant franchises.[130] It is to be noted that in each instance the interest of the state was paramount or joint with that of the municipal corporation. In those instances in which the matter has been one of solely local concern, the court has spoken only in terms of whether there is an inconsistency, not whether there has been a delegation of power by the legislature.

The conclusion to be drawn is that in Washington a home rule city is subordinate to the legislature as to any matter upon which the legislature has acted, whether it be regarded as of state, local, or joint concern. In the event of an inconsistency, the statute prevails. However, in those instances in which the legislature has said nothing, an analysis of interests is vital. If the subject is of paramount state concern, some delegation of power by the legislature, express or implied, to the municipal corporation must be found. This is likewise true in those instances in which there is a joint state-local problem. Since the state will be affected by any action of the municipal corporation, it is necessary that an authorization to act from the legislature be found. In those instances in which the matter is solely of local interest, however, home rule cities may act without a delegation from the legislature, express or implied.[131] To that extent the home rule provision is self-executing. Any other interpretation leaves the provision without meaning, and unless and until the court clearly decides to the contrary, there is no reason to expect such treatment.

POWERS OF MUNICIPALITIES

It is necessary to distinguish the classes of cities in Washington in order to discuss the approach taken by the court to the general powers of municipal corporations. It is to be noted initially that what is said immediately hereafter does not apply to the police power or the power of eminent domain. Because of their peculiar nature, they will be treated separately later.

In accordance with the constitutional directive in article 11, section 10, the legislature has classified cities in proportion to population.

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[129] Tacoma v. State, 4 Wash. 64, 29 Pac. 847 (1892).

[130] Neils v. Seattle, 185 Wash. 269, 53 P.2d 848 (1936).

[131] See Malette v. Spokane, 77 Wash. 205, 225, 137 Pac. 496, 504 (1913) wherein the court said "As to matters of local concern, wider powers than those conferred upon cities of the first class by the constitution and law of this state can hardly be conceived. It seems plain, therefore, that unless the ordinance in question is contrary to some public policy of the state, either expressed by statute or implied therefrom, it must be held valid."

First class cities include those having at least twenty thousand inhabitants at the time of organization or reorganization; second class, ten thousand; third class, fifteen hundred; and fourth class, three hundred.[132]

It is a common-place statement that municipal corporations possess only those powers expressly enumerated by statute, those necessarily or fairly implied in or incident to the powers expressly granted and those essential to the declared objects and purposes of the corporation.[133] It is to be noted that this refers to cities of the second, third and fourth classes, those under a population of twenty thousand. In effectuating the general proposition of the necessity of legislative authorization, the legislature has prescribed in considerable detail the powers of each class.[134] Further restricting municipal powers is the doctrine that such statutes granting powers are strictly construed and any doubt is resolved against the municipality.[135]

To be contrasted with this strict approach is the construction of powers of cities of the first class. It has been said that, "Manifestly, a different rule of construction must be applied in determining the powers of a city of the first class from that used when the powers of a city of another classification are in question."[136] Such cities have legislative powers as broad as the state unless they contravene a constitutional provision, an act of the legislature or a provision of the city charter.[137] Thus it is unnecessary to find the same enumeration of powers in statutes as is true with second, third and fourth class cities.[138]

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[132] RCW ch. 35.01.

[133] State *ex rel.* Winsor v. Mayor and Common Council, 10 Wash. 4, 38 Pac. 761 (1894); State *ex rel.* Huggins v. Bridges, 97 Wash. 553, 166 Pac. 780 (1917); Christie v. Port of Olympia, 27 Wn.2d 534, 179 P.2d 294 (1947).

[134] RCW ch. 35.23, second class cities; RCW ch. 35.24, third class cities; RCW ch. 35.27, fourth class cities or towns. In one instance the form of government under which a city is organized determines which laws are applicable. Regardless of classification, cities organized under the statutory commission form of government have all the powers of cities of the second class. They are governed by the statutes applicable to cities of the second class to the extent they are appropriate and not in conflict with provisions specifically applicable to cities organized under the commission form. See RCW 35.17.030.

[135] State *ex rel.* Hill v. Bridges, 87 Wash. 260, 151 Pac. 490 (1915); State *ex rel.* Hill v. Port of Seattle, 104 Wash. 634, 177 Pac. 671, 180 Pac. 137 (1919); Griggs v. Port of Tacoma, 150 Wash. 402, 273 Pac. 521 (1928); Pacific First Fed. Sav. & Loan Ass'n v. Pierce County, 27 Wn.2d 347, 178 P.2d 351 (1947).

[136] State *ex rel.* Ennis v. Superior Court, 153 Wash. 139, 149, 279 Pac. 601, 604 (1929).

[137] Winkenwerder v. Yakima, 52 Wn.2d 617, 328 P.2d 873 (1958).

[138] RCW ch. 35.22 relates to first class cities. In particular RCW 35.22.570 provides as follows: "Any city adopting a charter under the provisions of this chapter shall have all the powers which are conferred upon incorporated cities and towns by this title or other laws of the state, and all such powers as are usually exercised by municipal corporations of like character and degree."

The broad construction of powers of first class cities is well illustrated by *Winkenwerder v. City of Yakima.*[139] The court held that Yakima, a city of the first class, could contract with a private business, allowing such business to use the tops of city parking meters for advertising purposes. Instead of approaching the matter from the standpoint of seeking a constitutional or statutory authorization for the exercise of such power, as would be true with second, third, and fourth class cities, the court considered whether the power to pass such an ordinance was denied by the state constitution, an act of the legislature or the city charter. Finding that it was not, the ordinance was sustained.

Buttressing this broad construction of powers of first class cities is the rule that insofar as statutes relate to such cities they will be liberally interpreted. The rule of resolving doubts against municipalities does not apply to those of the first class.[140] This is of particular consequence when a statute grants power to a charter city on a matter of primary state concern or of joint state-local concern, as discussed in the preceding section on home rule.

The power of eminent domain requires separate mention. Here there is not the same necessity of distinguishing between classes, since the court gives a limited construction to the municipal eminent domain power, regardless of the class of city involved. The power can arise only from express grant or clear implication, and doubts will be resolved against the existence of the power. As there is no constitutional provision granting the power to municipalities, municipal corporations are dependent upon legislative grant.[141]

An excellent illustration of the strict construction is an early case in which the Tacoma city charter provided a method for the condemna-

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[139] *Supra* note 137. The case is commented upon in 34 WASH. L. REV. 227 (1959).

[140] Ayers v. Tacoma, 6 Wn.2d 545, 108 P.2d 348 (1940); State *ex rel.* Ennis v. Superior Court, 153 Wash. 139, 279 Pac. 601 (1929).

[141] Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991 (1909); Tepley v. Sumerlin, 46 Wn.2d 504, 282 P.2d 827 (1955). In addition to the state legislature delegating the power of eminent domain to its municipal corporations, there is the possibility of delegation of the federal eminent domain power to a municipality. For example, Congress in authorizing a municipality to make an improvement in connection with navigable waters may invest the municipality with the eminent domain power. City of Davenport v. Three-fifths of an Acre of Land, 147 F.Supp. 794 (D.C. Ill., 1957). In Washington the litigation in this area has primarily concerned the power of the Federal Power Commission in exercising its authority over navigable waters of the United States to grant a permit to a municipality authorizing the construction of hydroelectric dams and in aid of this purpose to delegate the federal eminent domain power to the municipality. See State of Washington Dep't of Game v. Federal Power Commission, 207 F.2d 391 (9th Cir. 1953); City of Tacoma v. Taxpayers of Tacoma, 49 Wn.2d 781, 307 P.2d 567 (1957), reversed in 357 U.S. 320 (1958). The litigation is discussed in 33 WASH. L. REV. 117 (1958).

tion of private property for use as a public street and a statute conferred authority upon charter cities to appropriate private property for corporate purposes.[142] The court held that this did not justify the exercise of the power of eminent domain as the statute could be construed to mean that the city was only authorized to purchase the land, not condemn it. The case is striking for several reasons. First, it appeared that the legislature had intended to provide explicitly for the power of eminent domain but had failed to get around to the matter because of its work in reorganizing the state government. Second, the effect of the decision was to leave the cities without the power to condemn for the vital purpose of public streets. Third, a charter city was involved. The court stated,

> [T]he exercise of the power of eminent domain is so high and peculiar a thing that nothing less than an act of the legislature of a state can support it, and that act must not only confer the power, but prescribe the method by which it is to be done. . . . Because the constitution permits certain cities to frame charters for their own government is no sufficient reason for their assuming a branch of the sovereignty of the state, which has no element of municipal government in it, and the provisions of the charter must therefore be held void.[143]

Also requiring separate attention are the police powers of municipalities. Here as with the power of eminent domain, all classes of cities are treated basically alike. However, whereas in the case of the power of eminent domain no city may act without legislative authorization, in the case of police powers, all cities derive authority directly from the constitution.[144] Article 11, section 11 provides, "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." This clause raises two matters requiring special treatment. What is the meaning of the phrase "within its limits"? What construction is to be given to the phrase "not in conflict with general laws"?

Extraterritorial Powers

It is a general principle that a municipal corporation cannot exercise powers beyond its own limits, except as such authority may be derived

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[142] Tacoma v. State, 4 Wash. 64, 29 Pac. 847 (1892).
[143] *Supra* note 140 at 66, 29 Pac. 847 (1892).
[144] Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 Pac. 976 (1922); Patton v. Bellingham, 179 Wash. 566, 38 P.2d 364 (1934).

from a statute which expressly or impliedly permits it.[145] Statutes relating to the exercise of extraterritorial powers are strictly construed.[146] Thus, it has been held that a statute authorizing cities to furnish water to the city and the inhabitants thereof "and any other persons" is to be construed to mean other persons of the same class; *i.e.*, persons within, and not persons without, the corporate limits.[147]

If, however, it is made clear that the extraterritorial exercise of powers is intended, a city may so act. An express provision for the sale of excess water outside the city[148] and an implied power to sell surplus electric energy for use outside the territorial limits[149] have been sustained. A common instance in which cities have been authorized to act beyond their boundaries and in which the court has allowed the delegation has been that of the exercise of the power of eminent domain.[150] It has even been held that under a statute granting cities the power to acquire waterworks within or without the corporate limits, a city has power to acquire and own property situated in another state, upon consent of that state, for the purpose of making extensions and betterments to its waterworks system.[151]

In most states the exercise of the police powers extraterritorially is treated the same as other powers. Although such exercise of power is not allowed without delegation, express legislative authorization is sufficient. Initially one would expect the same in Washington, for, as has been noted, in spite of the strict approach to the power of eminent domain in this state, if expressly provided for, that power may be exercised by municipal corporations outside their boundaries.

As to police powers, however, Washington is in a peculiar position because of the landmark case of *Brown v. Cle Elum*.[152] A statute expressly authorized a municipal corporation to pass ordinances to protect the city's water supply whether inside or outside the city limits and to provide a penalty for the pollution, obstruction, or interference therewith. The city of Cle Elum enacted an ordinance prohibiting swimming, fishing and boating in a lake outside the city from which it drew its water supply.

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[145] Edmonds Land Co. v. City of Edmonds, 66 Wash. 201, 119 Pac. 192 (1911).
[146] State *ex rel.* P.U.D. No. 1 of Skagit County v. Wylie, 28 Wn.2d 113, 182 P.2d 706 (1947).
[147] Farwell v. Seattle, 43 Wash. 141, 86 Pac. 217 (1906).
[148] Spear v. City of Bremerton, 90 Wash. 507, 156 Pac. 825 (1916).
[149] Municipal League of Bremerton v. Tacoma, 166 Wash. 82, 6 P.2d 587 (1931).
[150] See RCW 8.12.030 and Carstens v. P.U.D. No. 1 of Lincoln County, 8 Wn.2d 136, 111 P.2d 583 (1941).
[151] Langdon v. Walla Walla, 112 Wash. 446, 193 Pac. 1 (1920).
[152] 145 Wash. 588, 261 Pac. 112 (1927).

In most states the ordinance would be valid because it rested upon express statutory authorization. The Washington court, however, held the ordinance unconstitutional as violative of article 11, section 11, which provides for the exercise of the police power by a city "within its limits." Judge Fullerton in a compelling dissenting opinion argued that the constitution meant only that a municipal corporation could exercise the police power within its limits, subject to any contrary general law, without legislative authorization; it was not intended to restrict the powers of the state legislature.

There is some language at the end of the majority opinion suggesting that the decision relates only to ordinances of a penal nature. "[W]ithout a constitutional amendment, penal ordinances such as the one under consideration here cannot be given extraterritorial effect."[153] The difficulty is that the majority relied upon article 11, section 11, which says nothing about penal ordinances, but speaks only of the police power, and throughout the remainder of the opinion the court spoke in terms of the exercise of the police power. "This delegation of its *police power* by the state [in article 11, section 11] to various municipalities is strictly limited to the exercise of *that power within the limits* of such municipalities."[154] (Emphasis added, in part).

As a result of this case, in Washington the police power cannot be exercised beyond the corporate limits of a municipality even with express statutory authorization. The effect of this is far-reaching. As an example, in some states the legislatures have authorized cities to zone areas immediately surrounding the cities in order to protect the public within. It seems that this is not possible in Washington, since zoning is an exercise of the police power and under the *Brown* case, the legislature cannot authorize extraterritorial exertion of such power. Likewise, licensing for regulation purposes is restricted to the city limits since this is an exercise of the police power.[155] Doubt is also cast upon the constitutionality of other legislative provisions, such as the sanction of hot or fresh pursuit by cities of the third class[156] and first class,[157] the adoption of all needful rules, regulations and ordinances for the management, government and use of municipal airport properties under a city's control, "whether within or without the terri-

[153] 145 Wash. at 591, 261 Pac. at 113 (1927).
[154] *Id.* at 589, 261 Pac. at 112 (1927).
[155] See Bungalow Amusement Co. v. Seattle, 148 Wash. 485, 488, 269 Pac. 1043, 1044 (1928), wherein the court spoke of the police power of cities within a licensing setting as being comparable to that of the state "within their territorial boundaries."
[156] RCW 35.24.160.
[157] RCW 35.22.570.

torial limits of the municipality,"[158] and the extension of the powers and jurisdiction of all incorporated cities and towns to the middle of navigable waters adjacent to such cities and towns "for every purpose that such powers and jurisdiction could be exercised if the waters were within the city or town limits."[159] In short, any time a city is authorized or purports to exercise the police power outside its limits, it is unconstitutional under the *Brown* doctrine.[160]

One point is to be distinguished. In view of the continual increase in the number of municipalities, with the resultant overlapping of boundaries, it is possible that more than one might be functioning in a given geographical area. The rule against extraterritorial powers does not render a statute unconstitutional merely because it permits two or more municipalities to exercise the same phase of the police powers in the same area.[161] To the contrary, so long as each is operating within its own boundaries, the requirement of the *Brown* case has been met.

CONFLICT

The second phrase of article 11, section 11 of particular significance is the one that allows for police regulations "as are not in conflict with general laws." This makes explicit with respect to the police powers what is true by judicial determination of all powers of municipal corporations in this state. Subject to the constitutional limitations upon the legislature previously noted, the legislature is free to impose limitations upon municipal corporations. This is true of home rule cities as well as those deriving their powers directly from the legislature. Even the broad powers of first class cities cannot contravene a legislative enactment. In short, in Washington a statute always supersedes a conflicting ordinance. It thus becomes critical to ascertain when a statute and ordinance will be deemed to be in conflict.

Sometimes the legislature expressly states in the pertinent statute

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[158] RCW 14.08.120.

[159] RCW 35.21.160.

[160] See TUTTLE, THE LOCAL LAW MAKING POWER, 11-12. This is a mimeographed paper comprising part of the outlines of a continuing legal education series entitled "Municipal Law and Your Clients," 1960, available in the law library, University of Washington.

[161] Municipality of Metropolitan Seattle v. Seattle, 57 Wn.2d 446, 357 P.2d 863 (1960). The court has indicated, however, that it generally approves the proposition that two municipal corporations should not be found to have been empowered to exercise the same function in the same territory at the same time. The public policy against duplication of public functions normally requires statutory authorization if there is to be duplication and such authorization is examined closely. Alderwood Water Dist. v. Pope & Talbot, Inc., 162 Wash. Dec. 314, 382 P.2d 639 (1963).

whether it intends to limit the power of the municipal corporation to legislate on the same subject. In such instances the problem is lessened. If further regulation is expressly allowed, an ordinance will be sustained, barring an actual conflict with the statute.[162] If the statute expressly prohibits further regulation, an ordinance will fall regardless of any actual conflict.[163]

The more likely situation is that in which there is a legislative enactment upon a subject, but no express indication of whether further action by the municipal corporation is precluded. If the city enacts an ordinance directly contrary to the statute, as by permitting that which is expressly prohibited by statute or by prohibiting that which is expressly allowed by statute, the ordinance will fall.[164]

There are a few cases suggesting that any time the legislature has acted upon a subject, it has thereby pre-empted the field, and any additional municipal rgulation is invalid even though not in direct conflict with the statute. These cases should be restricted to their particular facts. In *Seattle Elec. Co. v. Seattle*,[165] it was held that the enactment of a statute empowering the state public service commission to regulate and control street railways precluded the city of Seattle from regulating street cars. The court spoke in terms of the state having occupied the field. It is to be noted that the statute involved a broad delegation of power to a separate state agency to control street railways. Ordinarily statutes regulating local activities are not drafted in such comprehensive terms as to remove an entire area from the control of the municipality In another instance the court spoke of municipal corporations being free to exercise the police power "until such time as the state acts."[166] This can be interpreted to mean that once the state enters an area, all municipal regulations fall. But, again, the case involved a situation in which a statute authorized an agency, the state public service commission, to control a broad area, the estab-

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[162] Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18 (1917).

[163] Van Der Creek v. Spokane, 78 Wash. 94, 138 Pac. 560 (1914).

[164] In the following cases the ordinance was held invalid. Yakima v. Gorham, 200 Wash. 564, 94 P.2d 180 (1939), an ordinance prohibiting peaceful picketing was opposed to the purpose of a state act permitting peaceful picketing; City of Airway Heights v. Schroeder, 53 Wn.2d 625, 335 P.2d 578 (1959), an ordinance modifying the speed limit on a state highway which passed through a town was invalid because approval of the state highway commission had not been secured as expressly required by statute; Fazio v. Eglitis, 54 Wn.2d 699, 344 P.2d 521 (1959), an ordinance requiring a vehicle to stop within fifteen feet of the curb lines of an arterial was held invalid because of a conflict with a statute requiring a stop at the entrance to the intersection.

[165] 78 Wash. 203, 138 Pac. 892 (1914).

[166] State *ex rel.* Webster v. Superior Court, 67 Wash. 37, 46, 120 Pac. 861, 865 (1912).

lishment of rates and charges for public service corporations. The opinion should be read in light of that fact.

One other early case requiring comment because of the possible misinterpretation of its meaning is *Tacoma Gas & Elec. Light Co. v. Tacoma.*[167] A statute authorized cities to provide for lighting the streets and furnishing the inhabitants with gas or other light "and to regulate and control the use thereof."[168] A city charter provision authorizing the enactment of ordinances fixing the price of gas was held invalid. This was an instance in which a general law had been enacted on a subject, but in which it was silent on the particular point. It was an instance in which there was no direct conflict and no comprehensive scheme of regulation. The case could be interpreted as an application of the pre-emption doctrine. A better explanation is that it simply illustrates a judicial unwillingness to allow municipal price fixing without specific delegation of such power.[169]

Rather than adopt the proposition that an entry of the state into a field precludes further municipal action, the court has more often approached the problem with the objective of harmonizing the pertinent state and local regulations.[170] The court has sustained a charter provision which prescribed qualifications for city officers in addition to those required by statute,[171] an ordinance which imposed restrictions upon parking in addition to those specified by statute,[172] an ordinance which prohibited the keeping open of theaters on Sunday when a statute prohibited other activities but made no mention of theaters,[173] an ordinance fixing the speed limit at less than that prescribed by statute,[174] an ordinance prohibiting the sale of cigarettes through automatic vending machines when a statute existed prohibiting the sale of tobacco to minors,[175] an ordinance which fixed a minimum penalty for the punishment of an offense for which a statute prescribed a maximum penalty,[176] and an ordinance prohibiting the discharge of an air gun

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[167] 14 Wash. 288, 44 Pac. 655 (1896).

[168] 14 Wash. at 293, 44 Pac. at 656 (1896).

[169] Municipal price-fixing is often looked upon with disfavor barring an express grant of such power. See STASON AND KAUPER, CASES AND MATERIALS ON THE LAW OF MUNICIPAL CORPORATIONS, 212 (3rd ed. 1959).

[170] McGill v. Hedges, 62 Wash. 274, 113 Pac. 635 (1911); Seattle v. Hewetson, 95 Wash. 612, 164 Pac. 234 (1917).

[171] State *ex rel.* Griffiths v. Superior Court, 177 Wash. 619, 33 P.2d 94 (1934).

[172] Kimmel v. Spokane, 7 Wn.2d 372, 109 P.2d 1069 (1941).

[173] *In re* Ferguson, 80 Wash. 102, 141 Pac. 322 (1914).

[174] Bellingham v. Cissna, 44 Wash. 397, 87 Pac. 481 (1906).

[175] Brennan v. Seattle, 151 Wash. 665, 276 Pac. 886 (1929).

[176] Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324 (1898).

or firearm without lawful authority though a statute already prohibited the wilful discharge of firearms.[177]

In numerous instances the court has in effect rejected the preemption doctrine in favor of the proposition that a city is not precluded from acting in an area simply because there is a prior statute relating to the subject matter. This is the proper approach. A city should be free to act so long as it does not come into actual conflict with a statute. If the legislature is silent on a particular point, the city should be allowed to regulate even though a statute already exists in the general area. If the city charter or ordinance is contrary to what the legislature desires, it may expressly repeal or amend the city's action.

It is true that the matter can be approached from the opposite side, namely that if the legislature intends for a city to have certain powers in a given area regulated by statute, it can so specify. The difficulty with this is that the legislature meets only periodically and cannot possibly foresee all the problems which may require regulation. To conclude that simply because the legislature has spoken in an area, all further municipal action is foreclosed unless there is express legislative authorization would unnecessarily interfere with newly proposed solutions to newly arising problems. On the other hand, if the municipality oversteps the legislative intent, the matter will undoubtedly be called to the attention of the legislature at a later date by those affected.

Such an approach in favor of the municipality does not unfairly treat the private parties regulated or the interests of the state. So far as private persons are concerned, it is to be remembered that all other attacks upon municipal ordinances, whether of a constitutional or statutory nature, are still available. The only thing being said is that a conflict should not be found unless it truly exists.

The purpose of the constitutional provision precluding local regulations in conflict with statutes is to assure the supremacy of the legislature. That supremacy is maintained even though the approach is in favor of the municipality on the conflict issue. The legislature can expressly make its wishes known if it does not want the municipality to act in a particular manner or if the court misconstrues the legislative intent. A construction against the municipality which is erroneous is less likely to be rectified. It would have the effect of interfering with the functioning of local government without any equivalent benefit to private parties or the state.

[177] State v. Lundquist, 60 Wn.2d 397, 374 P.2d 246 (1962).

Two cases illustrate the proper approach to the conflict issue. In *Bellingham v. Schampera,*[178] the defendant was charged and convicted in the Bellingham police court of driving while under the influence of intoxicants in violation of a city ordinance that was substantially similar to a statute. The court held that since the statute did not indicate an intent that it should be exclusive and since there was no actual conflict, the ordinance prohibiting driving while under the influence was valid. It was also contended that the city of Bellingham had no authority to provide for the suspension of a motor vehicle license. The opinion, sustaining the argument, is ambiguous as to whether the ordinance was invalid because of pre-emption by the state or simply because of a lack of delegated power to the city. It appears the latter is the true basis.[179] Interpreted in this manner, as it should be, the opinion does not detract from the suggested approach that an ordinance should be held invalid only when there is an actual conflict.

The most recent case in point is *Seattle v. Long,*[180] in which the defendant was charged in a municipal court with violation of an ordinance prohibiting operation of a motor vehicle without having in his possession a valid driver's license. The defendant contended that inasmuch as a statute existed to the same effect, the state had pre-empted the field. The court concluded that since the statute did not state that it was intended to be exclusive and since there was no actual conflict, the ordinance was valid. The result of this decision is to give full effect to the interests of the local government without impinging upon the supremacy of the state or violating any private right relating to the conflict point.

CONCLUSION

The purpose of this article has been to outline the relation of municipal corporations to the legislature in Washington. Subject to a few constitutional provisions, such as those relating to taxation and special legislation, the legislature is free to act as it desires with respect to municipalities. The home rule provision, which in some states serves as a limitation on legislative action, is of no real strength in this state. It is now too late to alter the home rule status of cities without a constitutional amendment. It is not too late, however, for the court to continue, and to strengthen, its interpretations in favor of the powers

[178] 57 Wn.2d 106, 356 P.2d 292 (1960).

[179] A comment in 36 WASH. L. REV. 161 (1961) questions whether the court's interpretation of the pertinent statutes on the delegation point is the correct one.

[180] 61 Wn.2d 737, 380 P.2d 472 (1963).

of first class cities when doubt exists and in favor of all municipal corporations when an issue of potential conflict with state statutes arises.

So far as the state-local relationship is concerned, the legislature has ample opportunity to make its wishes known and to protect its prerogatives in relation to municipalities. In those instances in which there is doubt as to legislative intent, and in which there is a local interest in the matter in question, the court's approach should be that of giving the fullest opportunity to the local government to resolve problems as it sees them and to effectuate its policies.