North Dakota Law Review

Volume 44 | Number 3 Article 4

1968

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THE SEAMLESS WEB

A Critical Analysis of the Municipal Corporations Article of the North Dakota Constitution and the Proposed Amendment of it in Light of Other Variants of the Fordham Formula for Home Rule.

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The Municipal Corporations Article of the Constitution of North Dakota, Article 6, was amended on November 8, 1966, to provide for the establishment of home rule in cities and villages. A substitute amendment to the article is to be submitted to the voters at the general election in November 1968. The purpose of the 1968 amendment, according to the North Dakota Legislative Research Committee which drafted it, is to make the constitutional method of providing for home rule "more easily comprehensible".[1] This article examines the possible defects of the 1966 and 1968 amendments in the context of a detailed discussion of the home rule formula drafted by Dean Fordham for the American Municipal Association and prominent variants of it, because these formulae reflect the new approach to state-local relations which underlies both the present and proposed home rule amendments to Article 6.

New Formula Home Rule: Its Rationale and Theory

The goal of the traditional home rule system is, ". . . a definitive constitutional distribution of governmental powers as between the state and . . . local units."[2] Dean Fordham drafted the new formula home rule provision for the American Municipal Association because he felt that traditional home rule had not realized its goal and that in any case its goal is not appropriate for today's society.[3] This criticism of the objective of traditional home rule points to the primary assumption underlying the new formula, an assumption which was articulated even before Dean Fordham drafted the home

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1. Report of North Dakota Legislative Committee 20 (1967).
2. Fordham, *Home Rule—A.M.A. Model*, 44 Nat'l Mun. Rev. 137 (1955).
3. *Id.* at 139.

rule provision for the American Municipal Association. In 1951 John P. Keith wrote:

> . . . [I]t can be categorically stated that it is impossible to rip and rend the functions that government performs in such a way that the powers of government can be neatly separated, packaged and doled out, some to the state and some to the localities. Any effort to segregate governmental functions by levels of government is doomed a failure because most of the important governmental services have been undertaken in part by the various levels of government. As a result each function has its local aspects, its state aspects, its federal aspects.[4]

The proponents of new formula home rule believe that it is unwise to fragment government power and that the object of home rule is not to divide power but to create a system where responsibility can be shared among the several levels of government. Abandoning the fallacious distinction between matters of local and state concern has a salutary effect upon local government units, because it gives them a full scope of initiative power and thus encourages them to take responsibility for the solution of problems which confront them. No longer does a municipality have to fear that it does not have authority to grapple with a difficult situation. A general grant of power, as distinct from one limited to merely local affairs, allows the locality to make a rational selection among all the alternative solutions open to the government sector including ones not yet attempted: local government units are able to experiment with new solutions to the extent that political realities permit them. Perhaps, Mr. Paul Ylvisaker most eloquently has expressed the concept being examined here. He writes that there is:

> A trend . . . away from the tradition of exclusive powers, toward a sharing (and hopefully a harmonious exercise) of common powers.
>
> And there is logic in the trend. The semantics and legal fictions of exclusive allocations of powers do not accord with the "seamless web" of governmental operations in our times. They suggest boundaries where there are no boundaries, absolute distinctions where there are only relative ones. . . .
>
> And more, if governmental action at each level is to be well conceived and effective; if a citizen is to be drawn as a whole person into participation . . . and if a system of

4. KEITH, CITY AND COUNTY HOME RULE IN TEXAS 124 (1951). For later statements of the same points, *see* COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING STATE GOVERNMENT 13 (1967) and Willbern, *The States as Components in an Areal Division of Powers*, in AREA AND POWER 72 (A. Maass ed. 1959).

> countervailing power is to have any meaning or vitality, then the concerns and the decisions which the component area can legitimately undertake ought to embrace the whole range of matters assigned to the governmental process by that society in its time.[5]

Even if one assumes that a successful constitutional division can be made between matters of local and state concern either by describing them in these terms or by specific enumeration, such a division would be invalid in a very short time because the character of governmental problems is dynamic rather than static.[6] Within a few months or a few years, changing social and economic conditions might make what is reasonably a matter of local concern today a valid object of state power.[7] If the constitutional allocation of power is affected by a general phrase rather than a specific enumeration, it can be argued that there is nothing inherently rigid or inflexible in the allocation, because the courts can redefine the realms of state and local concern to correspond with changing conditions. The rejoinder to this argument is that it is not the role of the courts to allocate governmental power, that this is a policy making function best vested in the legislature which is the policy making branch of government.[8]

The concept that localities and the state have distinct areas of competence and that localities have immunity to some extent from interference by the state in their area of competence is defective not only because these areas are impossible to define and local units need full power to function effectively, but also because there is a positive value to legislative control of home rule units, especially with respect to their boundaries and interrelationships. In many parts of this country, local governments are unable to utilize a broad grant of home rule authority successfully. In rural areas, local government units often have too small a population to render services economically and to raise adequate revenue. In metropolitan areas, units are typically smaller than the actual metropolitan region and, therefore, find it difficult to regulate problems which are area-wide. In addition, it is not uncommon for a local

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5. Ylvisaker, *Some Criteria for 'Proper Areal Division of Governmental Powers,* in AREA AND POWER 35 (A. Maass ed. 1959).

6. B. ABERNETHY, CONSTITUTIONAL LIMITATIONS ON THE LEGISLATURE 61 (1959) [page number from excerpts reproduced by the North Dakota Legislative Research Committee for use by the Subcommittee on Constitutional Revision May 21, 1963]; Fordham, *supra* note 2, at 137, 139.

7. MASSACHUSETTS LEGISLATIVE RESEARCH COUNCIL, REPORT SUBMITTED BY THE LEGISLATIVE RESEARCH COUNCIL RELATIVE TO MUNICIPAL HOME RULE 48 (Senate No. 580 March 22, 1961).

8. J. FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE COMMENT NO. 3, at 20-21 (1953); N.Y. TEMPORARY COMMISSION ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, FIRST STEPS TOWARD A MODERN CONSTITUTION 19 (Legislative Doc. No. 58, 1959).

government unit in a metropolitan area, especially a central city, to provide services to citizens of the area who are not residents of the unit and who do not pay local taxes. If home rule is to succeed, the irrational pattern of local government both in metropolitan and rural America must be rectified either by cooperative arrangements among local governments or by the supervisory power of the state legislature. A number of advocates of the new formula believe that in light of the slow and limited progress made by local governments in establishing cooperative ventures, and in light of the fact that the state represents all the citizens of the region, the legislature should have broad power to reorganize local government.[9] To the extent that traditional home rule prevents the legislature from altering home rule charters or from interfering with local affairs, the power of the legislature to restructure local government is impeded.

Dean Fordham and other commentators criticize traditional home rule, primarily because of Dillon's Rule and the questionable distinction between matters of state and local concern, and suggest that new formula home rule eliminates these difficulties.[10] The typical new formula home rule provision avoids the use of any language which may be reminiscent of the old state and local concern dichotomy. Virtually all new formula provisions adopt the idea introduced by Dean Fordham in his American Municipal Association Model: local units are given a full grant of governmental power subject only to limitation in the constitution, state statutes, or local charter.[11] This full grant of power is designed to eliminate

9. COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING LOCAL GOVERNMENT 48 (1966); MASSACHUSETTS SPECIAL COMMISSION ON MUNICIPAL HOME RULE, REPORT SUBMITTED BY THE SPECIAL COMMISSION ON MUNICIPAL HOME RULE 20-23 (Senate No. 650 January 29, 1962); UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, GOVERNMENTAL STRUCTURE, ORGANIZATION AND PLANNING IN METROPOLITAN AREAS 19-20 (1961).

10. Dillon's Rule indicates that a municipality possesses only those powers which are granted expressly by its charter, state constitution, or statutes; necessarily or fairly implied from such express powers; or essential to the existence of the municipality. C. RHYNE, MUNICIPAL LAW § 4-7, at 70 (1957). The formulation of the rule by the Supreme Court of North Dakota is typical: "A Municipal Corporation is an agency of the state. It is purely a creature of statute. [N.D.] Constitution, [Article 6]. It takes its powers from the statutes which give it life, and has none which are not either expressly or impliedly conferred thereby or essential to effectuate the purposes of its creation. In defining its powers, the rule of strict construction applies, and any doubt as to their existence or extent must be resolved against the corporation." Lang v. City of Cavalier, 59 N.D. 75, 84, 228 N.W. 819, 822 (1930). *See also,* Murphy v. City of Bismarck, 109 N.W.2d 635, 642-43 (N.D. 1961).

11. The American Municipal Association model provision contains 10 sections. Section 6 is the heart of the provision: "A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a nonhome rule charter municipal corporation and which is not denied to the municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute. This devolution of power does not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent municipal power, nor does it include power to define and provide for the punishment of a felony.

A home rule charter municipal corporation shall, in addition to its home rule pow-

the relevance of Dillon's Rule to litigation concerning the validity of the exercise of local government power. The question before the courts is no longer whether a local government unit is authorized to exercise power, but whether it is forbidden to do so by its own charter or the state constitution or statutes. It is hoped that local governments will be more successful defending their exercise of initiative in court when the constitution places the burden on their opponents to prove that they are not authorized to act, rather than on the localities to prove that they are authorized to act. In addition, proponents of the Fordham idea argue that the full grant of power subject to limitation has advantages for localities in their dealings with the legislature, because it is easier to block a legislature from denying localities power than it is to secure from a legislature authority to perform additional governmental functions.[12]

SCOPE OF THE NEW FORMULA'S DEVOLUTION OF POWER

Both the 1966 and the 1968 amendments to Article 6 of the Constitution of North Dakota adopt the Fordham approach. The principal part of the 1966 amendment is:

> The legislative assembly shall provide by law for the establishment of home rule in cities and villages. It may authorize such cities and villages to exercise all or a portion of any power or function which the legislative assembly has power to devolve upon a nonhome rule city or village, not denied to such city or village by its own home rule charter and which is not denied to all home rule cities and villages by statute. The legislative assembly shall not be restricted in granting of home rule powers to home rule cities and villages by Section 183 of this constitution.

The principal part of the proposed 1968 amendment is:

> The legislative assembly shall provide by law for the establishment of home rule in cities. Home rule cities shall have all powers of self-government except:
>
> 1. Those powers withheld from them by law;
> 2. Those powers not accepted by the city by its home rule charter; and
> 3. Those powers prohibited by this Constitution or the

ers and except as otherwise provided in its charter, have all the powers conferred by general law upon municipal corporations of its population class.

Charter provisions with respect to municipal executive, legislative and administrative structure, organization, personnel and procedure are of superior authority to statute, subject to the requirement that the members of the municipal legislative body be chosen by popular election, and except as to judicial review of administrative proceedings, which shall be subject to the superior authority of statute."

12. Kresky, *Local Government*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION 150, 158 (J. Wheeler, Jr., ed. 1961).

> law of the land; provided that the legislative assembly shall not be restricted in granting of home rule powers to home rule cities by section 183 of this Constitution.

In spite of a good deal of discussion about the fact that absent limitation in a statute or local charter, a court in a new formula home rule jurisdiction must find a lack of power in the state legislature to act in an area in order to find a lack of power in a local government to act in that area, the North Dakota amendments and other proposals inspired by the A.M.A. model do not grant coextensive or parallel power to local units. The goal eloquently stated by Ylvisaker which is quoted above that ". . . the concerns and the decisions which the component area can legitimately undertake ought to embrace the whole range of matters assigned to the governmental process by that society in its time,"[13] subject only to supersession by general law, has not been realized by any new proposal. The most obvious retreat from a parallel grant is a list of areas of governmental power which are reserved to the state. Section 6 of the A.M.A. proposal stipulates:

> This devolution of power does not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent municipal power, nor does it include power to define and provide for the punishment of a felony.

The A.M.A. model and the present North Dakota home rule provision embody another limitation on a full grant of power to localities, known as the devolution ttest. A.M.A. Section 6 states:

> A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a nonhome rule charter municipal corporation. . . .

Article 6 of the North Dakota Constitution embodies similar phrasing:

> . . . [C]ities and villages to exercise . . . any power or function which the legislative assembly has power to devolve upon a nonhome rule city or village . . .

The comments to the A.M.A. article assert that, "The theory of the draft is . . . to leave a charter municipality free to exercise any *appropriate* power or function except as expressly limited by

13. *Supra* note 5.

charter or general statute."[14] The introduction to the A.M.A. article asserts that the above quoted language, "leaves room for constitutional questions as to what powers a legislature may devolve upon any municipality but makes nothing of the general concerns—local affairs dichotomy."[15] There is no justification for such a devolution provision in the constitution. The language quoted from the A.M.A. introduction admits that the draftsman deliberately inserted a vague provision in the constitution, not presently defined and perhaps not capable of satisfactory definition. This vague provision is thrust upon the courts, but the courts have no standards for construing it. The whole point of the new formula approach is that the allocation of power is a political or policy question best resolved by the legislature which is the policy-setting branch of government. Here, however, the draftsman creates "constitutional questions" for the courts concerning the allocation issue. The problem with the devolution test is that it creates an intolerable situation similar to the one created by the local concern-state concern dichotomy. The devolution test is apparently not a territorial limitation which is a relatively clear and discrete restriction, because traditional nonhome rule local government articles often allow municipalities certain extraterritorial powers like, for instance, the power to take land by eminent domain outside corporate limits for an airport or for water supply.[16] Thus the devolution test is apparently a limitation of the substantive, rather than the areal, powers of local government units; there are some types of legislative activity which are beyond local competence. What these are is ultimately a court question.

It can be argued that the statement in the introduction to the A.M.A. article that the devolution test "leaves room for constitutional questions as to what powers a legislature may devolve upon any municipality" indicates simply that the legislature must act in accordance with constitutional provisions which prohibit delegation of power to localities or limit such delegation and that these constitutional strictures directed toward the legislature are by virtue of the devolution test applicable to home rule municipalities. This interpretation is supported by the fact that the A.M.A. article does not in terms require that home rule municipal corporations act in accordance with the constitution. The same is true of the 1966 amendment to Article 6 of the Constitution of North Dakota. By contrast, the proposed 1968 amendment to Article 6 which does not embody the devolution test does provide that cities may not exercise powers prohibited by the constitution. Two recent variants

14. Fordham, *supra* note 8, at 20 (emphasis added).
15. *Id.* at 6.

of the Fordham approach cast doubt on the validity of this interpretation, however. Section 6 of Amended Article 2 of the Constitution of Massachusetts provides in part:

> Any city or town may . . . exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court . . . and which is not denied . . . to the city or town by its charter.

In November 1967 the voters of New York State defeated a referendum proposal for a new constitution. The Local Government Article of this constitution provides in part:

> Every local government shall have all legislative and administrative power which the legislature has authority to confer on it, consistent with the constitution, except as limited by statute. . . .[17]

The Massachusetts and New York provisions embody both the devolution test and a requirement that local units act in a manner consistent with the constitution. The obvious implication is that the devolution test has a function other than assuring that localities act in accordance with constitutional prohibitions. In addition, the fact that the A.M.A. and present North Dakota home rule articles do not require that localities act in accordance with the constitution is not particularly significant because such a requirement can be implied. The new formula home rule article of the Constitution of Alaska, for instance, contains neither the devolution test nor a requirement that local units act in accordance with the constitution.[18]

Although the A.M.A. proposal retreats from a constitutional grant of full local government power by introducing the devolution test and certain express limitations, it does make a full grant of local government financial power. Dean Fordham, commenting on the A.M.A. proposal has written:

> Home rule powers are not very meaningful if there be not the means of financing their exercise. There could hardly be any doubt about this; yet it is not believed that home rule municipalities should be beyond legislative control

16. *See generally,* F. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA (1962).

17. N.Y. CONST. Art. 11, § 2b quoted in N.Y. Times, Sept. 27, 1967, at 25, col. 6 (City ed.).

18. N.Y. CONST. Art. 10, § 11. *See also* the constitutional proposal of the N.Y. TEMPORARY COMMISSION ON THE REVISION AND SIMPLICATION OF THE CONSTITUTION, in FIRST STEPS TOWARD A MODERN CONSTITUTION 16-17 (Legislative Doc. No. 58, 1959).

> with respect to the raising of revenue and the borrowing of money. Thus the draft does not provide for a complete autonomy in this respect. Its effect would be to give a charter municipality broad fiscal powers except only as might be limited by general statute or by the very home rule charter. This is designed to leave the state legislature in a position to erect safeguards and to coordinate state and local fiscal affairs and policies.[19]

The National Municipal League adopted Fordham's new formula home rule approach in the Local Government Article of the 6th Edition of its Model State Constitution.[20] Like the A.M.A. proposal, the model of the National Municipal League makes a full grant of local government financial power. This can be determined by an examination of Article 8, the local government article of the model, and Article 7, the finance article, which contain no strictures on local government power to tax or to become indebted.[21] Although neither the 1966 nor the 1968 amendment to the Municipal Corporations Article of the Constitution of North Dakota restricts home rule power in the taxation and debt area, the constitution does include articles which regulate taxation and public debt and a number of the sections in these articles refer in terms to local government units. Both the 1966 and 1968 amendments specifically exclude the operation of the debt restrictions in Section 183, however.[22]

A crucial issue which is often submerged in the debate on new formula home rule is the territorial scope of the grant of power to local government units. The various proposals are not explicit in this regard.[23] A.M.A. Section 2 states:

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19. Fordham, *supra* note 2, at 142.

20. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 94 (6th ed. 1963).

21. Unlike the National Municipal League model, the A.M.A. proposal is not a complete constitution but includes only a local government article.

22. It is apparent that the draftsman of the 1968 amendment made a mistake when he simply repeated the language of the 1966 amendment with respect to Section 183. Because the 1966 amendment is a permissive home rule provision; that is, it merely authorizes or permits the legislature to devolve upon local units full governmental power, the amendment appropriately indicates that Section 183 should not restrict the legislative assembly in granting home rule power. The 1968 amendment, however, embodies a direct constitutional grant of home rule power. Under the 1968 proposal, the only function of the legislature is to limit local government power, not to grant it. Subsection 3 of this amendment, therefore, should have been phrased in part in the following manner: "provided that nothing in Section 183 of this Constitution shall restrict this grant of home rule powers." If the draftsman of the 1968 amendment did not wish to free home rule cities from the restrictions of Section 183 without legislative authorization, he should have rephrased Subsection 3 of the amendment by deleting the words "home rule" before the word "power". Subsection 3 would then state in part: "provided that the legislative assembly shall not be restricted in granting of powers to home rule cities by Section 183 of this Constitution". As rephrased, Subsection 3 of the 1968 amendment allows the legislature to grant home rule cities additional powers without regard to the strictures of Constitutional Section 183. The legislature may grant to home rule cities powers in addition to their home rule power. *See* A.M.A. proposal § 6, para. 2 quoted in n. 11, *supra*.

23. One commentator believes that both the American Municipal Association and National Municipal League Home Rule Articles grant extraterritorial powers. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L.R. 643, 692 (1964).

> The legislature shall provide by law, general in terms and effect, for the incorporation and government of municipal corporations and the methods by which municipal boundaries may be altered, municipal corporations may be merged or consolidated and municipal corporations may be dissolved.

The comment discusses annexation and disannexation and asserts:

> The subject is one which . . . affects three areas of interest; the state, the general area in which the city is located and the city proper. Thus there is ground for hesitancy over leaving the subject to municipal control by direct constitutional devolution of power. While a liberal policy toward municipal expansion is much needed, it is not proposed here to take responsibility away from the legislature.[24]

The clear implication from the comment is that extraterritorial exercise of the police, eminent domain, or tax power is not intended by the A.M.A. draftsman to be granted to localities "by direct constitutional devolution." The implication is clear, because what the comment asserts about annexation is equally true of the extraterritorial exercise of the three sovereign powers; like annexation, the extraterritorial exercise of any of these powers, "affects the state, the general area in which the city is located and the city proper."[25] But the language of Section 2 standing by itself does not carry a clear negative implication. The section is entitled merely "Incorporation and Corporate Changes." Although the "powers" section of the A.M.A. draft, Section 6, does not mention extraterritorial exercise of power either, its inclusion in the Section 6 grant of "any power . . . which the legislature has power to devolve upon a nonhome rule charter municipal corporation and which is not denied . . . by . . . charter . . . [or] by statute" can be implied, because the legislature in a nonhome rule system may devolve extraterritorial power.[26]

The comment to the Model State Constitution of the National Municipal League states:

> Under section 8.02 it is clear that the home rule locality can act on *any* matter, limited by its territorial jurisdiction, so long as it is not specifically denied the power by general law or by its charter.[27]

There is no support for the comment in the text of Section 8.02.

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24. Fordham, *supra* note 8, at 14.
25. The comment also indicates on the same page: "This section . . . leaves provision for merger or consolidation and for dissolution to the legislature;" that is, merger, consolidation, and dissolution are not within the direct constitutional devolution of power. *Id.*
26. *Supra* note 16.
27. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 97 (6th ed. 1968).

8.02 is a broad grant of power, broader even than Section 6 of the A.M.A. draft. The only support for the comment in the National Municipal League Local Government Article is by implication from Section 8.01 which stipulates:

> The legislature shall provide by general law . . . for methods and procedures of incorporating, merging, consolidating and dissolving such civil divisions and of altering their boundaries. . . .

This language is similar to language in A.M.A. Section 2 discussed above; the weakness of the implication is pointed out in the discussion on the A.M.A. provision. Section 8.01 also stipulates that the legislature shall provide, "For the adoption or amendment of charters by any county or city for its own government . . . ." The phrase, "for its own government" may indicate that a municipality's home rule charter powers are restricted territorially. The comment to Section 8.02 is supported slightly by N.M.L. Article 11, entitled Intergovernmental Relations:

> Nothing in this constitution shall be construed . . . to prohibit . . . the cooperation of the government of any county, city, or other civil division with any one or more other governments in the administration of their functions and powers. . . .

If specific mention need be made of the power of a locality to *cooperate* with other local governments, there is an implication that the locality is not authorized to exercise *coercive* powers extraterritorially. But the comment to Article 11 undercuts this implication somewhat:

> Since it is almost impossible to conceive that any other provision of the *Model State Constitution* may be viewed as prohibiting or limiting intergovernmental cooperation, it may be argued that this article should be eliminated.[28]

The proposed 1968 amendment to Article 6 of the Constitution of North Dakota states that "[h]ome rule cities shall have all powers of self-government except. . . ." those powers specifically listed in the amendment. The phrase "self-government" in the proposed North Dakota amendment may have a meaning similar to the phrase "for its own government" which appears in the Model State Constitution. The implication from the phrase "self-government" that the proposed 1968 amendment is not designed to grant extraterritorial powers is strengthened by the proposed 1968 amendment to Section 185 of the constitution. The proposed amendment to

28. *Id.* at 104.

Section 185 changes the section in part by adding the following language:

> . . . [T]he state and any of its political subdivisions may enter into joint enterprises with each other in carrying out their public projects to the extent authorized by law.

The comment of the North Dakota Legislative Research Committee, which drafted the quoted language, as well as the proposed amendment to Article 6, asserts:

> The additional phrase makes it clear that the various political divisions can engage in joint enterprises if the legislative assembly permits it. Since cities may wish to join with other cities or with the county in some projects such as airports, sewage purification plants, water systems, or recreational areas it would seem that there should be no doubt regarding their ability to do so with the sanction of the legislature.[29]

If the proposed amendment to Article 6 includes a constitutional devolution of extraterritorial power to home rule municipalities there would seem to be no need for legislative authorization of joint enterprises; that is, cooperative interlocal arrangements. The proposed amendment to Section 185 may not have negative implications with respect to the extraterritorial powers of home rule cities, however, because it refers to all political subdivisions including counties which are not covered by the home rule article. It is probable that under traditional rules of construction, in particular Dillon's Rule, counties and nonhome rule cities do not have power to enter joint enterprises with other government units without legislative authorization. Perhaps, the proposed amendment to Section 185 is designed merely to relieve any doubts which may arise with respect to nonhome rule local government units. The present home rule provision of Article 6 contains no negative implications with respect to the devolution of extraterritorial power because it has no counterpart to Section 2 of the A.M.A. proposal or to Section 8.01 of the N.M.L. proposal.

LOCAL GOVERNMENT REORGANIZATION

If the 1966 and 1968 amendments are interpreted as allowing the extraterritorial exercise of power granted to a local unit, a problem of considerable complexity is created, because no standards are set forth in these amendments as to which local units are "superior" to others in the sense that one unit can exercise

29. *Supra* note 1, at 26.

its authority in the territory of another unit without being vetoed by the unit subject to the exercise. In the absence of a controlling statute, what is to be done when inevitable conflicts of policy arise; for instance, the City of Grand Forks wants to take land in Grand Forks County by eminent domain for a power plant but the County wants to take the same land for a park or to retain its present agricultural character in accordance with the County's zoning regulations? May the locality, subject to the exercise of another locality's power, regulate that exercise as it regulates private activity? To take the example about the power plant, may the County refuse Grand Forks a building permit because the proposed power plant is not allowed in the applicable zoning district? Such questions are extremely difficult for courts to determine, since the answer is based on a policy judgment, rather than analysis of precedents.[30]

In light of the possibility that the 1966 and 1968 amendments to Article 6 allow extraterritorial exercise of power and in light of the fact that the number of local government units is excessive, many local units are too small, and many even if not too small do not serve an appropriate area, the legislature needs broad power to reorganize the structure of local government and to mediate and adjust conflicts among local government units. The United States Advisory Commission on Intergovernmental Relations and the Committee for Economic Development, as well as other authorities in the field, recommend that unsound local units be dissolved or consolidated and that local government structures which are characterized by a multiplicity of overlapping jurisdictions be eliminated in favor of regional entities which are large enough to achieve economies of scale, adequate revenue, and active citizen interest in the political process.[31]

The A.M.A. and N.M.L. home rule proposals require that the legislature act by general law in essential aspects of local government reorganization including incorporation, merger, dissolution

30. The courts may be able to decide a few of these questions by applying the Due Process Clause of the United States Constitution. The traditional due process rule is "minimum contacts;" i.e., there must be a constitutionally adequate relation between the governing body and the people governed. Familiar concepts such as no taxation without representation and government only with the consent of the governed are available as guides for judicial determination. But an argument which may well defeat an attack based on the "minimum contacts" theory is that the locality is exercising delegated state authority, and the state has ample contacts with the territory subject to the locality's exercise of power. The rejoinder to this argument is that the state has not delegated authority to localities with adequate standards regulating its exercise; in fact, there are no standards in the constitutional grant.

31. COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING LOCAL GOVERNMENT 42 (1966); U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOVERNMENT 73 (October 1962). *See also, County Government Reorganization Study,* REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMLTTEE 95, 111-12 (1965).

and annexation.[32] Unlike the A.M.A. and N.M.L. proposals, neither the 1966 nor the 1968 amendment to Article 6 of the Constitution of North Dakota contains language specifically indicating the power of the legislature with respect to such matters, so neither amendment requires in terms that the legislature act by general law when reorganizing local government. It appears, however, that Sections 69 and 70 require the legislature to reorganize local government by general law. Section 70 of the Constitution of North Dakota prohibits the enactment of a special law where a general law can be made applicable, and Section 69 enumerates various situations where a local or special law is forbidden. Subsection 33 of Section 69 forbids a local law with respect to the "incorporation of cities, towns or villages, or changing or amending the charter of any town, city or village," and other subsections of Section 69 forbid local or special laws with respect to creating offices, prescribing the powers or duties of officers, or providing for elections. The present wording of Article 6 may be interpreted as requiring that the legislature act by general law, if it wishes to reorganize local government, because the article indicates that the legislature may not deny home rule power unless by general law; that is, by statute which applies to all home rule localities. If the reorganization of local government is deemed to be a denial of home rule power, the general law requirement of present Article 6 is applicable to legislative efforts to reorganize local governments. The recently adopted home rule article of the Constitution of Massachusetts allows the legislature to act by special law:

> . . . to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns, or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger of consolidation of cities and towns, or any of these matters.[33]

The Massachusetts provision is superior to those of the American Municipal Association and North Dakota, because it is designed to allow the legislature to tailor a special plan for a metropolitan or regional entity. If the legislature has to act by general law, it may have to sacrifice a creative or original solution that would other-

32. A.M.A. § 2 and N.M.L. § 8.01. *See also* A.M.A. §§ 1 and 6 and N.M.L. § 8.02. Sec. 8.08.

33. MASS CONST. Amended Art. 2, § 8.

wise be available. For instance, a special law can create a bistate government for the City of Grand Forks. A general law cannot do this because a bistate solution may not be appropriate for Fargo or for other cities on the borders of the state.[34]

A number of new formula home rule proposals limit the grant of power to certain localities, rather than extend it to all local units. The N.M.L. limits home rule to cities and counties. The Alaska Constitution places the limit at cities and boroughs (Article 10, Section 11). The A.M.A. limits home rule to municipal corporations and indicates in the comment that a population minimum may be added, if desired.[35] There are three reasons for limitation on the group of local units to receive home rule power. First, a smaller group helps to minimize conflict among home rule localities and ease the legislature's task of allocating power and functions among them. Second, broad home rule power should be vested in only those local governments capable of exercising broad power.[36] New formula home rule could be retrogressive if granted to structurally unsound local units. Third, reorganization of local government is made more possible if structurally unsound local units are not given constitutional status and recognition. Flexibility is achieved by excluding them from the constitution.[37] Both the 1966 and 1968 amendments to Article 6 of the Constitution of North Dakota devolve home rule power upon some localities which serve an extremely small population.[38] This devolution is subject to criticism for the three

34. Although the Constitution of North Dakota does not authorize the legislature to act by special law in the critical area of local government reorganization, the actual difference from the approach of Massachusetts is not great because of the doctrine of classification. Section 3 of the A.M.A. draft forbids the legislature to classify localities in more than four groups or to include fewer than two localities in a class, but the Constitution of North Dakota is silent as to classification. Cases construing both § 69 and § 70 have held that reasonable classification is valid. Vermont L. and T. Co. v. Whithed, 2 N.D. 82, 49 N.W. 318 (1891); Baird v. Rask, 60 N.D. 432, 234 N.W. 651 (1931). By classifying the legislature can achieve almost the same flexibility which is available when the legislature is authorized to act by special law. In addition, if the act of legislative reorganization is not within one of the enumerated cases of § 69, it is controlled by § 70. Because the courts have held that whether a general law can be made applicable is purely a legislative question and the decision of the law making power in this respect is subject to no judicial review, the legislature may determine that due to the complexities of local government reorganization, the matter must be resolved by special law. Edmonds v. Herbrandson, 2 N.D. 270, 50 N.W. 970 (1891).

It can be argued that the North Dakota Constitution is defective because, unlike the A.M.A. and Massachusetts provisions, it does not restrict classification. Judicial acceptance of rather narrow classification and the doctrine that whether a general law can be made applicable is a legislative question has allowed the legislature to interfere unduely with matters appropriately resolved at the local level by enacting statutes which are special in their terms or effect. The Massachusetts Home Rule Article seeks to avoid legislative abuse by not only restricting classification but also limiting the special law power of the legislature to carefully defined areas. Amended Art. 2, § 8.

35. Fordham, *supra* note 8, at 18.

36. COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING LOCAL GOVERNMENT 48 (1966). U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL AND PERSONNEL POWERS OF LOCAL GOVERNMENT 73 (October 1962).

37. *Supra* note 12, at 152; *supra* note 27, at 95.

38. Although the 1968 amendment applies only to cities, as distinct from the 1966 amendment which applies to both cities and villages, both amendments apply to village-

reasons just listed. The third reason has force because of political realities and the possibility that the courts may hold that the home rule amendment bars the legislature from eliminating a home rule municipality or from even amending its charter.[39] The comment to the draft of the American Municipal Association specifically indicates that this judicial interpretation is not intended to result from the A.M.A. language.[40] Although there is some ambiguity with respect to the proposed 1968 amendment to Article 6, it is clear that the article's present wording cannot be construed as barring the legislature from revoking or altering the charter of a home rule city, because the present article embodies a permissive home rule provision. Since under a permissive home rule system the legislature, not the constitution, grants home rule power, the legislature should be able to terminate or alter the power.[41]

CONFLICT AND PREEMPTION DOCTRINES

The conflict and preemption doctrines should apply to legislative activity relating to new formula home rule localities, because the legislature needs the assistance of the judiciary's reasoned elaboration of statutory law in establishing the details of the new system of state-local relations. The courts exercise an important interstitial or subordinate policy making role in the regulatory process by finding that a statute impliedly supersedes conflicting ordinances or excludes local legislative activity.[42] Creative interpretation by the judiciary compensates for the legislature's failure to be omniscient, for its failure to foresee all the possible actions of subordinate units which are contrary to the interest of the state. The broad power granted to localities by the new formula is designed to free the legislature from the traditional home rule task of acting on requests by local units for authorizing legislation. But if new formula home rule does not allow for the operation of the conflict

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size units, because Chapter 323, § 283 of the Laws of the 40th Legislative Session (1967) provides for the mandatory transition of villages to cities.

39. J. KEITH, in CITY AND COUNTY HOME RULE IN TEXAS 34, 35 (1951), states that the courts have so held in Texas.

40. Fordham, *supra* note 8, at 14-15. *See also, supra* note 2, at 141.

41. Even if the power of the North Dakota legislature to reorganize local government is not limited by the constitutional status of home rule localities, it is restricted by the provisions in the constitution concerning counties, local units which are not granted home rule power. Section 167 provides, in part, that the legislature can effect the consolidation or dissolution of counties only by general law and then only with the consent of 55% of those voting on the question in each county effected. Section 168 provides that the boundaries of organized counties cannot be changed without the affirmative vote of a majority of voters in each county effected. These and other sections in Article 10 severely inhibit legislative power to restructure local government. The effect of these sections is clear: There has been virtually no change in the county system. Voluntary county consolidation or other reorganization has not met with success anywhere in the United States. REPORT OF NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 107 (1965).

42. *See* Henry M. Hart, Jr., *Comment on Courts and Law Making,* in LEGAL INSTITUTIONS TODAY AND TOMORROW 40, 43, 45 (M. Paulsen ed. 1959) for a discussion of the judiciary's role in interpreting legislation.

and preemption doctrines, it puts a much greater burden on the legislature than traditional home rule: without the conflict and preemption doctrines, statutory regulation of an exercise of local government power can be accomplished only by explicit mention of the exercise, a limitation which is a formidable obstacle to effective legislative supervision of local government activity.

The comment to the American Municipal Association model states that the model:

> . . . [E]mphatically reverses the old strict-constructionist presumption against the existence of municipal power and, so long as the legislature does not *expressly* deny a particular power, renders unnecessary petitioning the legislature for enabling legislation.[43]

The comment to the Model State Constitution of the National Municipal League claims that, ". . . the county or city has the power to act unless the power has been *specifically* denied."[44] If these comments are accurate, one must conclude that the courts are unable to perform their interpretative function and that the legislature is either burdened with endless specification of prohibited activity or forced to destroy the constitutional scheme by eliminating government power with blanket prohibitions and reservations. In fact, however, the language of the A.M.A. and N.M.L. proposals can be construed to allow the operation of the conflict and preemption doctrines.[45] A.M.A. Section 6 states in part:

> A municipal corporation . . . may exercise any power or perform any function which . . . is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute.

First of all the phrase "expressly denied" or "specifically denied" does not appear. The mere word "denied" can be construed as including implied denial incident to conflict between state law and a local ordinance or incident to state law which "occupies the field" in order to achieve uniformity or for some other regulatory purpose.[46] A better basis for the conflict and preemption doctrines is

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43. Fordham, *supra* note 8, at 20. (emphasis added). *See also* R. MOTT, HOME RULE FOR AMERICA'S CITIES 10 (1949).

44. *Supra* note 27. (emphasis added).

45. John E. Keith, a member of the executive staff of the National Municipal League and a draftsman of the League's Model State Constitution, has written that a requirement that the legislature expressly overrule municipal action is not workable. *Supra* note 4, at 140.

46. The home rule proposal of the United States Advisory Commission on Intergovernmental Relations explicitly distinguishes between express denials and denials which take the form of legislative pre-emption. STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL AND PERSONNEL POWERS OF LOCAL GOVERNMENT 74 (1962).

the distinction between "denied" and "within such limitations as may be established by statute." It can be argued that this distinction is between express denials mentioned in the comments and the general body of statutory law to which the conflict and preemption doctrines apply. Section 8.02 of the N.M.L. draft is subject to similar construction. Massachusetts Article 2, Section 6, states in part:

> Any city or town may . . . exercise any power or function . . . which is not inconsistent with the constitution or laws enacted by the general court . . . and which is not denied either expressly or by clear implication to the city or town by its charter.

The Massachusetts variation of the new formula for constitutional home rule gives recognition to the conflict and preemption doctrines by the use of the word "inconsistent," especially in contrast to the phrase "denied . . . expressly." The home rule provision of Article 6 of the Constitution of North Dakota differs significantly from Section 6 of the American Municipal Association proposal. Section 6 grants home rule power which "is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute." Article 6 grants home rule power "which is not denied to all home rule cities and villages by statute" but does not include the phrase concerning "limitation by statute." As indicated above, the distinction between denial and limitation in both the A.M.A. and N.M.L. model home rule provisions may enable the courts to interpret the phrase "limitation by statute" as allowing the operation of the conflict and preemption doctrines. If the phrase "limitation by statute" is deleted, as it is in Article 6, perhaps, a contrary interpretation is required. On the other hand, the word "denied" is not modified by the word "expressly" and so can be construed as including implied denial. The proposed 1968 amendment to Article 6 grants power to home rule cities except "those powers withheld from them by law." In view of alternative language available to the draftsman of the 1968 proposal, such as a phrase excepting powers inconsistent with law, the term "withheld" may be interpreted as requiring the legislature to act expressly and specifically if it wishes to restrict home rule power.

EXISTING LAW

The legislature determines the breadth of power devolved upon home rule localities by a new formula home rule provision by limiting the devolution. It is for this reason that proponents of the new formula for home rule stress that a favorable political climate

is essential to the success of the new system of state-local relations.[47] But even if the legislature were to adopt a liberal attitude toward home rule localities and place few limits on their power, home rule localities would not benefit significantly from the new formula unless the great body of existing statutory law relating to municipalities is deemed not to be applicable to them. In this great body of statutory law are a profusion of restrictive provisions which are not in accord with the spirit of the new formula and which would destroy its effectiveness, if found to be applicable to home rule units.[48] Because the laws of North Dakota relating to municipalities were drafted to operate in a nonhome rule system, it can be argued that these laws do not apply to home rule cities.[49] Furthermore, it can be argued that a statute enacted to enable nonhome rule localities to exercise certain powers cannot be construed simply because of its limited grant as denying or withholding devolved home rule power. This is an especially forceful argument with respect to statutes enacted prior to the home rule amendment to the constitution. If the courts hold that existing law relating to cities is applicable to home rule units, the legislature must review this law to determine which statutes should be declared applicable only to nonhome rule cities.

PARTICULAR FEATURES OF THE NORTH DAKOTA AMENDMENTS

Essential to home rule, whether traditional or new formula, is the right of a locality to draft its own charter. Both the 1966 and 1968 amendments to the Constitution of North Dakota state that "the legislative assembly shall provide by law for the establishment of home rule;" that is, the legislature is required to pass a statute which enables home rule cities to design and adopt a charter. The North Dakota amendments are mandatory though not self-executing; they do not set out procedures for the establishment of home rule but require the legislature to do so. Section 8.01 of the N.M.L. proposal is similar in this regard but more explicit:

> The legislature shall provide by general law for . . . the adoption or amendment of charters by any county or city for its own government, by a majority vote of the qualified voters of the city or county voting thereon, for methods and procedures for the selection of charter commissions, and for framing, publishing, disseminating and adopting such

47. Fordham, *supra* note 8, at 10-12.

48. N.Y. TEMPORARY COMMISSION ON THE REVISION AND SIMPLIFICATION OF THE CONSTITUTION, FIRST STEPS TOWARD A MODERN CONSTITUTION 20 (Legislative Doc. No. 58, 1959).

49. *See,* for instance, a Texas case, Forward v. City of Taylor, 214 S.W.2d 282, 285 (Tex. 1948) which states that the cities of Texas are divided into three classes by their mode of incorporation and that a statute expressly applicable to one class does not apply to the others.

charters or charter amendments and for meeting the expenses connected therewith.

The N.M.L. comments indicate that the section is not self-executing, because the draftsman wished to free the constitution from procedural details and felt that if such details were left to legislation they could be modified more easily to reflect changing conditions.[50] The risk of the mandatory but not self-executing approach of the North Dakota amendments and N.M.L. proposal is that the legislature will fail to respond to the constitutional mandate and, therefore, new formula home rule powers will not be made available to localities. Section 4 of the A.M.A. draft attempts to eliminate this risk by providing that if the legislature does not establish adequate procedures for charter making, a local legislative body may do so, and if the local legislature fails to do so, it can be compelled to act by a judicial proceeding.

The 1966 amendment to Article 6 of the Constitution of North Dakota is not self-executing procedurally or substantively; the legislature is directed to provide procedures for municipalities to adopt home rule charters and authorized to devolve substantive powers. This type of provision is called "permissive home rule," because the constitution does not devolve power directly but merely permits the legislature to grant home rule power.[51] As of 1961, the constitutions of 13 states provided for permissive home rule, but the legislatures in three of these states had not devolved home rule power and the legislatures in a number of them had devolved only power of rather limited scope.[52] The Pennsylvania legislature took 27 years to act under that state's permissive home rule amendment.[53] There is a substantial risk that the legislature of North Dakota will not implement the present home rule article or will do so by making only a parsimonious grant of power. The present wording of Article 6 is ambiguous, because the legislature is merely authorized to grant home rule power but is required to provide for charter making. This ambiguity may be resolved by interpreting the requirement that the legislature "provide by law for the establishment of home rule" as including not only procedures for charter making but also substantive powers. Such an interpretation is strained, however, since the article states that the legislative assembly *may* authorize, not *shall* authorize, municipalities to exercise power. The second sentence of the second paragraph of Article 6 is subject to the interpretation that the legislature cannot grant

50. *Supra* note 27, at 96.
51. *Supra* note 7, at 12-13.
52. *Id.* at 159-60.
53. *Id.* at 133.

power which has been denied by a general law, without first specifically repealing the general law. Because this reading places a considerable burden on legislative implementation of the article, it probably was not intended.

The proposed 1968 amendment to Article 6 attempts to eliminate the ambiguities of the present home rule wording and to substitute for permissive home rule a self-executing devolution of power. Although the proposed 1968 amendment is a definite improvement over the 1966 amendment because it is self-executing, it fails to relieve the ambiguity of Article 6. The proposed 1968 amendment creates new uncertainties by describing the grant of authority to home rule cities as "all powers of self-government" instead of as "any power or function," the phrase introduced by the A.M.A. model.[54] The phrase "local self government," or its occasional variant "self government," appears in both traditional and new formula home rule provisions and is notable for the judicial confusion which it has caused. Professor McBain in his classic work on home rule asserts that the phrase is unprecise and indefinite and criticizes its operation in the traditional home rule provisions of Ohio and Colorado.[55] Later commentators also have noted the confusion with respect to this phrase.[56] Because "local self government" or "self government" generally is identified with the concept of home rule, the meaning of the phrase varies with differing ideas of the scope of home rule and the way that it can best be achieved. The judiciary usually interprets "local self government" or "self government" in traditional home rule articles as expressing the distinction between matters off local and state concern: The right of a locality to govern itself is equated with its right to exercise initiative power with respect to local matters. The term "local self government" or "self-government" is often used by advocates of new formula home rule to express one of its key goals,[58] but because of judicial interpreta-

54. The formula is adopted in FORDHAM, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (1953); MASS. CONST., Amended Art. 2 § 6; N.M.L. MODEL STATE CONSTITUTION Art. 8 § 8.02 (6th ed. 1963). The latter constitutional provision adopts the phrase "all legislative powers" rather than simply "all powers".

55. H. MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 668, 670 (1916). *See* OHIO CONST. Art. 18, § 3 and COLO. CONST. Art. 20 § 6. *See also* PA. CONST. Art. 15, § 1.

56. *See supra* note 7, at 128; Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINNESOTA LAW REVIEW 643, 660 (1964). *See also*, in CITY AND COUNTY HOME RULE IN TEXAS 131-133 (1951), John P. Keith's discussion of the confusion of the judiciary with respect to the Texas home rule article and its enabling act. The home rule article of Texas does not include the "local self-government" phrase but the enabling act does. The courts of Texas have variously interpreted the home rule provisions as giving local initiative on matters of local concern, as incorporating the devolution test, and as devolving all legislative power.

57. *See* MCQUILLAN, MUNICIPAL CORPORATIONS, § 1.93, at 342 (3d ed. 1949) for a discussion of the equivalence of the phrase "local self government" with the concept of home rule.

58. Association of the Bar of the City of New York, Report of the Special Committee on the Constitutional Convention: Local Government and Finance 13 (April 1967); KEITH, CITY AND COUNTY HOME RULE IN TEXAS 29 (1951); *supra* note 48, at 15.

tion of "local self government" in the context of traditional home rule, new formula provisions usually avoid the phrase in the section devolving power, although the phrase occasionally appears in an introductory section stating the purpose of the new formula provision.[59] The comment to the proposed 1968 amendment to Article 6 states that, ". . . the *grant* of all power to home rule cities with specific exemptions . . . [is] a more easily comprehensible method of providing for home rule than the method used in [the present article].[60] The specific exemptions referred to are the three num bered exceptions of the proposed amendment. According to the comment, the proposed 1968 amendment grants *all* power except for the specific exemptions, thus "self-governmnt" should not be construed as limiting the grant to matters of local concern. The fact that the proposed amendment drops the word "local" from "local self government" may be further indication that the phrase "self-government" should not be construed as introducing the distinction between state and local concern. Earlier in this article it was suggested that "self-government" may refer to the territorial extent of home rule power.

It has been stated:

> No constitutional or legal draftsman has yet devised an entirely satisfactory word formula to lay down a division of power between a general and local government when each has functions to perform in the same area and with the same population.[61]

This is an appropriate concluding comment, because it reflects the history of state-local relations in the United States. Traditional home rule was a reaction to the shortcomings of a non-home rule system. New formula home rule is a reaction to the shortcomings of traditional home rule. Although the ideal of a seamless web, of shared powers, is appropriate for this country's system of overlapping governments operating under modern social conditions, the new formula home rule models achieve this ideal only partially and both the North Dakota amendments are significantly more defective than the models. The proposed 1968 amendment is superior to the present wording of Article 6, because it is self-executing; its passage would grant North Dakota cities home

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59. MASS. CONST. Amended Art. 2 § 1; § 1 of home rule article proposed in First Steps Toward a Modern Constitution, *supra* note 48, at 16. *See also,* Art. 11, § 1 of constitution proposed in a referendum to the voters of New York State in November 1967 and ALAS. CONST. Art. 10, § 1. The local government article of the Alaska Constitution and of the proposed New York Constitution provide for both home rule and non home rule localities.

60. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE 20 (1967).

61. *Supra* note 48, at 17.

rule power, power which can contribute to the solution of pressing problems, if the judiciary and legislature act creatively in clarifying the ambiguities of the amendment and in determining the details of the new pattern of state-local relations.