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MUNICIPAL HOME-RULE IN COLORADO SELF-DETERMINATION v. STATE SUPREMACY

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I. INTRODUCTION

Probably no problem in Colorado is of greater importance than the home-rule city.[1] At a recent date there were twenty-two home-rule cities in the state.[2] The number continues to increase. Until recently only one[3] of the larger cities was a "general statute" city.[4]

The population growth in metropolitan areas since World War II marks a revolutionary change in our national characteristics. The problems arising from this population shift are wide and varied. Local governments are hard pressed to meet the demands for additional municipal services and to meet the cost of defraying them. The financial woes of municipalities, school districts, and other political subdivisions in heavily populated urban areas are commonplace. Problems encountered in home-rule cities involve a wide range of municipal matters.

II. CONFLICTING THEORIES OF GOVERNMENT

Home-rule is an outgrowth of a desire for independence, and self-determination. As a general rule, a municipality is a creature of

*In the preparation of this paper, the author is indebted to the authors of a number of papers and published articles, as well as to several of the attorneys in the firm in which he is a partner. Particularly, the assistance of his partner, Thomas B. Faxon, should be noted.

1 Colo. Const., art. XX § 6, provides in part that, "The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with . . . power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters."

2 Alamosa, Boulder, Canon City, Colorado Springs, Cortez, Craig, Delta, Denver, Durango, Englewood, Fort Collins, Fort Morgan, Grand Junction, Greeley, Lafayette, Littleton, Monte Vista, Montrose, Pueblo, Sterling, Westminster and Wray.

3 Greeley.

4 The rapid population growth in metropolitan Denver in the last ten years has altered this picture. Arvada, Aurora, and Thornton have grown to become relatively large municipalities and they are not home-rule cities.

the legislature and has no inherent powers. This fundamental rule has been expressed as follows:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation . . . . Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[5]

Further, courts generally adopt a rule of strict construction of municipal powers to determine if there is any reasonable doubt about the existence of a power and if it is actually non-existent. The rationale for these rules of construction is that the legislature intended to grant only those powers which it expressly granted or which are necessarily or incidentally implied.[6] Frequently, this dependence upon a state legislature has been frustrating to large numbers of persons in whom the drive for independence is strong.

Home-rule for municipalities has been practiced for many years, both in this country and in England. One writer describes cities in England having rights of home-rule prior to Magna Charta. The

5 1 Dillon, Municipal Corporations § 237 (5th ed. 1911). To the same effect, see 2 McQuillin, Municipal Corporations §§ 10.03-.12 (3d ed. 1949); 1 Jones, Bond and Bond Securities § 36 (4th ed. 1935); 1 Yokley, Municipal Corporations § 52 (1956); Rhyne, Municipal Law §§ 4-2, 4-7 (1957); 1 Antieau, Municipal Corporation Law § 5.01 (1958).

6 2 McQuillin, Municipal Corporations §§ 10.18-.19 (3d ed. 1949). See also 1 Dillon, Municipal Corporations §§ 237-39 (5th ed. 1911); 1 Antieau, Municipal Corporation Law § 5.03 (1958); 1 Yokely, Municipal Corporations § 60 (1956).

same writer cites the Great Charter of the City of London as granting powers of self-government. The earliest home rule provision in this country, however, dates from a constitutional amendment by Missouri in 1875.[7]

III. Types Of Home-Rule

As is indicated above, there is considerable variation from state to state in theories of home-rule. Some basic classification of the theories is, however, possible.

There are two basic theories or approaches to the problems of municipal home-rule power and legislative control. The "constitutional" or "self-executing" theory is that a municipality has all powers over its local and municipal affairs.[8] This extreme view followed in Arizona, California, Colorado and Oklahoma denies all legislative control of municipal affairs, and invalidates legislative acts on such matters even if there is no municipal legislation in point.[9] The more common, and less extreme, view results in the invalidation of legislative acts affecting municipal affairs only when the conflict is with a municipal charter or ordinance.[10]

In the non-self-executing or "legislative" states, a municipality is still dependent upon the state legislature for its powers. The courts, however, generally adopt a rule of liberal construction in their interpretations of legislation. Enabling acts are frequently required, although many of these acts constitute broad general grants of power. In some jurisdictions special legislative charters are permitted.[11]

Nevertheless, practically all jurisdictions, both "self-executing" and "legislative" in theory, indicate that in matters not pertaining solely to local and municipal matters, but which also are of "state-wide concern," or "of general concern to the people of the state," municipal charters and ordinances are superseded when in conflict with a legislative act.[12] Numerous problems exist as to what matters are of state-wide concern, what constitutes a "conflict," and when has the state "preempted" or "occupied the field." Although there is a considerable body of case law distinguishing municipal affairs from state affairs, no clear objective test emerges.

In distinguishing municipal affairs from state affairs, four broad generalizations have been made.[13] First, if it appears that uniform regulation of the matter in question is necessary or desirable for the state as a whole, the matter is usually found to be one of state-wide concern. Secondly, historical considerations have some effect in determining whether a particular subject is of local or state-wide concern. Thirdly, and most important, is the relative effect of the subject upon those people living outside the city in question. If the effect of the matter is of minor significance to those urban dwellers, the subject is usually deemed to be of local concern. The courts, however, generally hold that a matter is of state concern if it vitally affects many of those living outside the home-rule city. Finally, where uniformity as well as co-operation among many govern-

7 1 Antieau, Municipal Corporation Law § 3.00 (1958).
8 *Id.* § 3.03.
9 *Id.* § 3.14.
10 *Id.* § 3.15.
11 *Id.* § 3.08.
12 *Id.* § 3.16.17.
13 *Id.* § 3.36.

mental units is necessary, and action of state and county officials is required within the city to effectuate adequate protection outside the city, the matter will most likely be considered to be of state-wide concern. It is necessary for the courts to keep an open mind in determining these questions and to avoid ruling in a particular way merely because of precedents established many years before. The courts should not hastily determine these questions, but should thoroughly evaluate the effects upon the entire state, the people living around the city, and those living within the city.

There are at least two "models" to which states can look for guidance as to home-rule theories and which express the divergent theories suggested above. The National Municipal League (N.M.L.) model was published in 1948 in the fourth edition of the Model State Constitution. It sets forth the powers of home-rule municipalities in broad general terms, with specific enumeration of certain powers, without thereby limiting or restricting the general grant of municipal power. The legislature's power, however, to enact laws of state-wide concern uniformly applicable to every city is not restricted. The provision does create a self-executing *imperium in imperio*, a realm of home-rule power in local and municipal affairs, partially enumerated, which is not subject to legislative grace or tolerance.

This provision of the N.M.L. gives the municipalities a measure of protection from a legislature controlled by the rural districts. The provision is subject to the disadvantage that courts have a considerable burden in the case of conflicting state and municipal legislation to decide which matters are municipal affairs and which are state affairs.[14]

The model of the American Municipal Association (A.M.A.) was printed in 1953 under the title *Model Constitutional Provisions for Municipal Home Rule*. A home-rule city thereunder has a plenary grant of powers in municipal affairs, effective without the aid of enabling legislation except to the extent any power is not denied by the city's charter, is not denied to all home-rule municipalities by statute, and is within such limitations as may be established by statute.

Unlike the theory in many "legislative" home-rule jurisdictions, the existence of any power is not dependent upon an enabling act. Nevertheless, a home-rule city is subject to control by the legislature — if the legislature affirmatively limits power without discrim-

14 Bromage, *Home Rule - NML Model*, 44 Nat'l Munic. Rev. 132 (1955).

ination. The advantage of this model of the A.M.A. lies in the fact that it avoids the necessity of repeated court determinations of what constitute municipal affairs and what constitute general affairs, determinations which place a considerable burden on the courts and which have defied "reasonably predictable application because of its (the distinction between municipal and state affairs) lack of a firm rational core." The disadvantage, if it be such, is that, with certain exceptions,[15] no home-rule power is beyond legislative control, even in an area which almost any court would hold to be solely of local and municipal concern.[16]

IV. Inception Of Home-Rule In Colorado

The Colorado Supreme Court recently stated that in construing a constitutional provision, "its particular meaning depends not alone on definitions but also on the history of the amendment as a whole, including the intent of the framers; the context in which it appears, together with the applicable facts."[17]

Local self-determination in Denver, among white settlers in Colorado, had its origin in the mining "districts" and the agricultural and urban "claim-clubs," created as early as 1859 with the initial gold rush in Colorado, and as late as 1880. Few, however, were created after 1861 when the Colorado Territory was effectively launched under federal authority, and few failed to surrender their law-making and enforcement powers to territorial officials. These "districts" and "claim-clubs," however, filled a vacuum existing between 1859 to 1861 and were in a real sense autonomous local governments operating without any legislative grants of power.[18]

Denver was incorporated by a special act of the Legislative Assembly of the Territory of Colorado, entitled "An Act To Incorporate the City of Denver," adopted and approved on November 7, 1861. This act or charter was amended a number of times by subsequent sessions of territorial and state legislatures.

The author of the "Rush Amendment" to the Colorado Constitution, i.e., article XX, sometimes called the "home-rule amendment," wrote a book in which he describes the turbulent history of the birth of home-rule in Colorado.[19] Many pages are devoted to the tribulations leading to the sentiment that home-rule was necessary to rescue control of the cities, particularly Denver, from the rurally-controlled General Assembly. In the 1880's, the situation was such that control of Denver was a political football. Many persons believed the City of Denver had been reduced to political serfdom. So intolerable had conditions become that the people of Denver began to demand home-rule. A citizen's party managed to elect a non-partisan mayor in 1895 and again in 1897; but he was defeated in 1899, allegedly by nefarious means.

Many charges of graft and coruption were hurled at the county officials. Judge Ben B. Lindsey, then on the county bench, unearthed proof of these charges. Another source of irritation was the

15 The A.M.A. model restricts the state's legislative power as to municipal procedures by making "charter" provisions superior to statutes.
16 Fordham, *Home Rule - AMA Model*, 44 Nat'l Munic. Rev. 137 (1955).
17 Board of Education v. Spurlin, 349 P.2d 357,361 (Colo. 1960).
18 Rogers, *The Beginning of Law in Colorado*, 36 Dicta 111 (1959).
19 Rush, *The City-County Consolidated* 328-32 (1940). This book is unfortunately relatively rare and is not readily available.

unequal taxation for the five different school districts which were either wholly of partially within the city limits of Denver. Attempts to consolidate these districts failed.[20]

Dissatisfaction was also expressed for the alleged mis-handling of the city council's powers in awarding franchises to public utility corporations. Corrupt bargaining was openly charged.

Several abortive attempts were made in 1898 and again in 1899 to correct these problems. In 1901, Mr. Rush, the author of the above books, as a state senator introduced a bill for an amendment to the constitution which would add article XX for purposes of creating a City and County of Denver as a new political entity in the state. The people and leading newspapers rallied to the support of the proposed amendment. On the other hand, the public utilities and other newspapers came out in vicious opposition to the proposal. After a bitter struggle, the legislature voted to submit the proposed amendment to a vote of the people in November of 1902. In that election, the amendment carried by more than a two-to-one majority.

Immediately upon the amendment's going into effect in 1902, its beneficial results became apparent. Taxes were materially reduced, the dual set of officers was eliminated, official responsibility was fixed, conflict in authority was obviated and the governmental operations were simplified.[21]

It seems equally clear, however, that the author of article XX did not intend a home-rule city to be completely independent of the state legislature. He stated in his book:

> It seems clear . . . that the City and County of Denver is a 'single body politic and corporate,' with one set of officers to perform both city and county functions . . . All that the legislature may do is to pass general laws prescribing what acts and duties county officers must perform, but in no event has it any power to authorize the governor or any other person to name a single one of such officers. That was the deliberate purpose of the author in drafting article XX *so as to leave the legislature that limited power necessary only to the proper exercise of the sovereign power of the state.*[22]

In Denver, pursuant to the constitutional amendment, the first charter convention was elected and a proposed charter was framed in 1903. The utility companies in Denver, however, voiced strong opposition to the charter. The proposed charter was not passed. A second charter convention was elected, and the charter framed by it was adopted by the electors on March 29, 1904. It was much like the proposed charter of 1903. The provisions concerning the acquisition of privately-owned utilities by Denver were so burdensome and complex that as a practical matter it was not feasible to follow them. In 1917, the acquisition of the Denver Union Water Company properties and water system was authorized by a separate charter amendment.

The voters of Colorado Springs adopted a home-rule charter by authority of article XX on May 11, 1909; Grand Junction, on Sep-

20 *In re* Senate Bill No. 9,26 Colo. 136, 56 Pac. 173 (1899); *In re* Senate Bill No. 23, 23 Colo. 499, 48 Pac. 647 (1897).
21 Rush, *op cit. supra* note 19, at 337, 339-40.
22 *Id.* at 351. (Emphasis Added).

tember 14, 1909; and Pueblo, on July 28, 1911. These three cities and Denver were the pioneers in home-rule in its first decade in Colorado.

V. PROVISION OF ARTICLE XX

In summary, article XX as adopted in 1902, provided that the "municipal corporation known as the city of Denver, and all municipal corporations and that part of . . . the county of Arapahoe . . . included within the exterior boundaries of the said city of Denver. . . are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the 'City and County of Denver'." There follow several powers[23] which are like those typically granted by state legislatures to cities which are creatures of the legislatures, e.g., the powers . . . to sue and defend, have a seal, receive and manage gifts and bequests, acquire utilities and issue bonds. It was provided that the united city and county should grow as a unit under the general annexation statutes; and that the City and County of Denver should alone constitute school district No. 1, the school district to be governed under the general laws of the state, with automatic merger in the district of lands annexed to Denver.[24]

Article XX also provided that Denver's officers should be those provided by charter, which should designate the officers to perform acts and duties required by the constitution or general law, "as far as applicable."[25] The amendment provided for the transfer of government and for interim officers.[26] Article XX stated that the people of Denver "are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter," and the taxpaying electors shall be elected to a charter convention to draft a charter to be submitted to the people.[27] No franchise relating to any street, alley or public place of Denver can be granted without the approval of taxpaying electors. The council has the power to fix the rate of taxation on property each year for city and county purposes.[28] A procedure was provided for the amendment of a charter.[29]

Section 6, article XX, before its amendment in 1912, provided that cities of the first and second class in the state were empowered to adopt charters and to have the same power as provided in article XX.

The last section of article XX proides that "anything in the constitution of this state in conflict or inconsistent with the provision of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for."[30]

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23 This article, in line with the language of the constitution and of most of the charters, speaks of "powers" and "authority." Where, however, the question has been squarely presented, it generally has been held that the home-rule charters, as well as constitutional provisions, constitute limitations on power and are not in fact grants of power. Thus, it has been held that Article XX confers upon the City and County of Denver all necessary powers in local and municipal matters which the legislature could validly grant; and, unless otherwise limited, these powers may be exercised through the legislative department of the city. Laverty v. Straub, 110 Colo. 311, 134 P.2d 208 (1943); People *ex rel.* McQuaid v. Pickens, 91 Colo. 109, 12 P.2d 349 (1932). See also Hawkins v. Hunt, 113 Colo. 468, 160 P.2d 357 (1945).

24 Colo. Const., art. XX, §§ 1, 7.

25 Colo. Const., art. XX, § 2.

26 Colo. Const., art. XX, § 3.

27 Colo. Const., art. XX, § 4.

28 Colo. Const., art. XX, § 4.

29 Colo. Const., art. XX, § 5.

30 Colo. Const., art. XX, § 8.

VI. LEGISLATIVE HISTORY IN THE FIRST DECADE

Within a month after its adoption, article XX was under attack in the courts. The tenor of Mr. Rush's remarks indicates that emotions ran high, that vitriolic remarks were publicly made, and that there was a great deal of political intrigue and activity concerning Denver's home-rule powers.[31]

On December 1, 1902, the newly-proclaimed treasurer of the City and County of Denver demanded of the treasurer of the old City of Denver, who refused to be displaced, that the latter give him all moneys, records and property belonging to the office of city treasurer. This demand was denied, and the new treasurer sought a writ of mandamous commanding the transfer. The answer asserted the unconstitutionality of the mode of amendment and of its substantive content. The final decision, in *People v. Sours*,[32] upheld article XX in its entirety. This decision included a thirty-page opinion by Mr. Justice Steele, a separate concurring opinion, and a dissent by Mr. Justice Campbell which was as long as the majority opinion.

In the court's opinion, Mr. Justice Steele wrote that "the amendment is to be considered as a whole in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern."[33]

Then, in 1905, eight cases[34] arose involving the title to the

31 Rush, *op. cit. supra* note 19 at 341-51.
32 31 Colo. 369, 74 Pac. 167 (1903).
33 *Id.* at 387, 74 Pac. at 172.
34 People v. Johnson, 34 Colo. 143, 86 Pac. 233 (1905). The other seven cases follow in 34 Colo.

offices in Denver of county judge, county assessor, county clerk and recorder, treasurer, constable, sheriff, county commissioners and justices of the peace. Fifteen hundred pages of briefs and arguments were filed in the Colorado Supreme Court by a great bank of attorneys on each side.

The court held invalid the Denver charter provisions relative to election and term of office of these persons who would perform the "county" jobs in the home-rule city and county. These matters, the court held, were governed by general statute.

This decision was in the face of section 2 of article XX of the Colorado Constitution, which provided then, as it does today, that "the officers of the City and County of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office and qualifications of all such officers shall be such as in the Charter may be provided; but the charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the Constitution or by the general law, as far as applicable."

Mr. Justice Steele and one other dissented, stating that it was held in positive language in *Sours,* not only that the people could, but that they had freed Denver from several provisions of the constitution by making article XX a part of the constitution.[35]

These eight cases relating to county officers were all overruled six years later in the *Cassiday*[36] case . . . Mr. Justice Steele's dissent in the earlier "officer cases" was adopted *in toto* by the majority in *Cassiday.* The court said in substance:

> Article XX is as much a part of the constitution as any other. There is provision (under section 2) clearly providing for the appointment and election of such officers of the City and County of Denver as may be provided by the Charter. There is no room for construction. There is in Denver a county government and a city government, just as in other portions of the state. There is no pretense in the Charter of setting aside governmental duties as to state and county affairs; the Charter, pursuant to the Constitution, simply provides by *whom* the duties shall be performed.[37]

While *Cassiday* was held to be a great victory for Denver, it was followed by two cases in quick succession which again showed an extremely restrictive attitude toward home-rule. In the first of these,[38] the court held that there was no authority vested in the City and County of Denver to control and fix in any way the levy of taxes for *county* purposes within its boundaries. This was apparently directly contrary to article XX which expressly says "The council shall have power to fix the rate of taxation on property each year

35 *Id.* at 188, 86 Pac. at 247. For an interesting sidelight involving contempt proceedings brought against the publisher of a newspaper which bitterly criticized the *Johnson* case, see People v. News-Times Publishing Co., 35 Colo. 253, 84 Pac. 912 (1906), *aff'd, sub nom* Patterson v. Colorado, 205 U.S. 454 (1907).

36 People v. Cassiday, 50 Colo. 503, 117 Pac. 357 (1911). Cases intervening between the 1905 "officer cases" and *Cassiday* were: Glendenning v. The City and County of Denver, 50 Colo. 240, 114 Pac. 652 (1911); Keefe v. The People, 37 Colo. 317, 87 Pac. 791 (1906); City of Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066 (1905).

37 Mr. Rush's remarks concerning the alleged "most astounding theft of the legislative, executive and judicial branches of an entire state without parallel in history" during the period between the dates the *Sours* and *Cassiday* decisions were rendered, as well as his rather vitriolic comments concerning a number of the judicial decisions rendered in that period and their authors, indicate considerable political turmoil. Rush, *op. cit. supra* note 19, at 344 *et seq.*

38 Hilts v. Markey, 52 Colo. 382, 122 Pac. 394 (1912).

for city and county purposes." The court said however, that the provision applied only to purposes of the *consolidated* unit. What is meant by a "consolidated unit" is not clear. The case is unquestionably one difficult to understand. Then came the last straw. In the *Mauff*[39] case, the selection of judges for *municipal* elections was held to be a matter of state-wide concern on which there could be no legislation by the people of Denver. Mr. Justice Teller said several years later that "It is common knowledge that the decision [in *Mauff*] was the moving cause of the framing and initiating of the Amendment of 1912."[40]

It was in November of 1912 that article XX was amended to add the forceful section 6. Reference is made to "Dillon's rule," stated above,[41] that a municipal corporation has only those powers granted in express words, those necessarily or fairly implied in the powers expressly granted, and those essential to the accomplishment of the declared objects of the corporation which are not merely convenient, but indispensable. So far, the Colorado Supreme Court, at least some of the time, has made it clear that article XX completely freed the home-rule City of Denver from this mandate in local and municipal matters.

The "reluctant" cases, however, culminated in the substantial amendment of section 6, article XX, to read in part as follows:

> (T)he charter of such city or town . . . shall be its organic law and extend to all its local and municipal matters.
>
> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith . . . .[42]

Powers granted by this amendment included the powers of the home-rule city "to legislate upon, provide, regulate, conduct and control:"

a. Municipal officers and agencies.
b. Police courts and magistrates.
c. Municipal courts and magistrates.
d. Municipal elections.

39 Mauff v. People, 52 Colo. 562, 123 Pac. 101 (1912).
40 City and County of Denver v. Mountain States Tel. & Tel. Co., 67 Colo. 225, 238, 184 Pac. 604, 610 (1919).
41 See text at note 5.
42 Colo. Const., art. XX, § 6.

e. Municipal bonds and elections.
f. Municipal park and water districts.
g. Assessment and collection of municipal taxes.
h. Enforcement and collection of fines for violations of municipal regulations.

After the enumeration of the above powers, the following broad provisions were added as if to remove any doubt of the over-all scope of home-rule powers:

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right to self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.
>
> All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction . . . not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date . . . .[43]

Section 6 also made provision for municipalities other than Denver to become home-rule cities. Such cities are granted "the powers set out in Sections 1, 4 and 5 of this Article," as well as those otherwise stated in Section 6.

The major battle was won, at least for a time. The eight specific items presumably governed all the areas which the proponents of Section 6 thought had proven or were likely to prove troublesome. The Colorado Supreme Court readily upheld the adoption of the amendment, and in so doing, noted that if any of the matters specifically enumerated in Section 6 were not of local concern before, they are now.[44]

The first of those eight specified powers is that to legislate upon, provide, regulate, conduct and control the creation and terms of municipal officers. In this area, it is now fairly clear that *Cassiday* is the rule, that is, the home-rule city can provide for the selection and term of the officer to do the job, whether the functions are properly specified by the state legislature or by the council. Thus, a charter provision for the manager of safety to issue liquor licenses prevails over the statute providing that the issuance shall be by the council of a city and county.[45]

But this right of selection has not been left unqualified. It cannot stand in the way of the performance of a function of a statewide nature. Thus, where Denver had not appointed her own registrar of vital statistics and the legislature had provided for a dis-

43 *Ibid.*
44 People v. Prevost, 55 Colo. 199, 134 Pac. 129 (1913).
45 Reed v. Blakely, 115 Colo. 559, 176 P.2d 68 (1946).

trict covering Denver, Denver could be compelled under the statute to pay the state appointee's salary.[46]

Another of the specific powers provided in Section 6, article XX, is "the assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements." This clearly met the troublesome "county purpose" tax case[47] which had been decided immediately before the amendment.

It does not mean, however, that the state cannot require the Denver treasurer, along with all other county treasurers, to make certificates as to special assessments due, at least in the absence of conflicting charter or ordinance provisions.[48] The court has also held that a general statute exempting cemeteries from assessments is declarative of the public policy of the state and may not be superseded by ordinance.[49] In this case, the 1912 amendment was ignored and the repudiated *Mauff* case was cited as authority.

The *Tihen* case is difficult to follow. Measured by the tests suggested by *Antieau*,[50] the subject matter seems to be solely of local and municipal concern. Any peculiar desirability of uniform regulation is absent. Historical considerations suggest no general concern. The effect on people outside the city would be negligible. There is no necessity for cooperation among governmental units. The history of article XX, including but not limited to the amendment of Section 6 thereof, indicates that the people desired a liberal attitude by the courts in finding matters to be of local and municipal concern; and, conversely, a conservative attitude in finding a matter to be of state-wide concern. Further, Section 6, article XX, specifically provides that a home-rule city has the "power to legislate upon, provide, regulate, conduct and control . . . the levy and collection of . . . special assessments for local improvements." If it be conceded that that matter is of state-wide concern, a decision that the conflicting ordinance was superseded by the statute exempting the cemetery property from the levy of a special assessment would be sound. But the statement that the city has no power in a matter of state-wide concern, at least in the absence of a legislative delegation of power,

46 Hershey v. McNichols, 91 Colo. 141, 13 P.2d 266 (1932).
47 Hilts v. Markey, 52 Colo. 382, 122 Pac. 394 (1912).
48 City and County of Denver v. Highlander Boy Foundation, 102 Colo. 365, 79 P.2d 361 (1938).
49 City and County of Denver v. Tihen, 77 Colo. 212, 235 Pac. 777 (1925). In the area of special assessments, see also County Comm'nrs v. City of Colorado Springs, 66 Colo. 111, 180 Pac. 301 (1919); Londoner v. City and County of Denver, 52 Colo. 15, 119 Pac. 1956 (1912).
50 1 Antieau, Municipal Corporation Law § 3.36 (1958). See text at note 13.

totally ignores the historical reasons for and the inferences created by the 1912 amendment of Section 6, article XX. The court places emphasis upon the *Mauff* case as precedent for its decision, but the dissatisfaction with the *Mauff* decision precipitated the 1912 amendment of Section 6.

Statutory,[51] and even constitutional[52] provisions which, by their terms, regulate or limit the issuance of bonds have been held not to be applicable to the issuance of bonds by home-rule cities.

The last of the eight express powers, herein mentioned, is that for the imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter or ordinances. The section additionally provides that any act in violation of the provisions of a city's charter or any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The narrow holding of the *Merris* case[53] is that since there is a statute which makes driving under the influence of intoxicating liquor a crime, its counterpart in the municipal laws of Canon City must be tried and punished as a crime.[54] The proper procedure where there is no state statute is not yet entirely clear.[55]

Section 6 of article XX makes it clear that the enumeration therein is by no means exclusive. Nor has there been any suggestion in the cases since 1913 that beyond the named powers, there are only those necessarily implied. It is true that since 1913, particularly in areas other than those enumerated in article XX, the court has tended to hold state legislation applicable to home-rule cities on the theory of state-wide concern,[56] even though there may be a conflicting local provision.[57] One exception to this is the well-

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51 Newton v. City of Fort Collins, 78 Colo. 380, 241 Pac. 114 (1925).

52 Montgomery v. City and County of Denver, 102 Colo. 427, 80 P.2d 434 (1938); Clough v. City of Colorado Springs, 70 Colo. 87, 197 Pac. 896 (1921). Consistent with *Clough* is City and County of Denver v. Mountain States Tel. & Tel. Co., 67 Colo. 225, 184 Pac. 604 (1919). This holding has since been nullified because the regulation of a telephone company with properties in numerous municipalities and unincorporated areas was found to be of state concern in People ex rel. Public Utilities Comm'n v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952). Cases which lend support to the proposition that constitutional provisions existing prior to, as well as after, the enactment of article XX, constitute limitations on the exercise of local legislative power of home-rule cities are: Berger v. City and County of Denver, 350 P.2d 192, 194 (Colo. 1960) (equal protection of laws in overtime parking traffic violation); City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958) (Denver income tax case involving constitutional amendment subsequent to art. XX, (Sec.) 6); City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958) (the "Bill of Rights" prevails); Deti v. City of Durango, 136 Colo. 272, 316 P.2d 579 (1957) (lease constituted an unconstitutional debt); Kingsley v. City and County of Denver, 126 Colo. 194, 247 P.2d 805 (1952) (voting-machine acquisition case); McNichols v. City and County of Denver, 101 Colo. 316, 74 P.2d 99 (1937), involved the purchase of lands with bond proceeds for Air Corps School and bombing field, in which case, at page 330, 74 P.2d at 106, the court notes that the bonds were issued under the limitations of Colo. Const., art. XI, § 8; Lord v. City and County of Denver, 58 Colo. 1, 143 Pac. 284 (1914) (constitutionality of the lending-of-credit provisions); City and County of Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066 (1905) (decided before § 6 of art. XX was added).

53 City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958).

54 See earlier cases which viewed similar questions from the standpoint of local and municipal matter v. state-wide concern: McCormick v. City of Montrose, 105 Colo. 493, 99 P.2d 969 (1940); Walker v. People, 55 Colo. 402, 135 Pac. 794 (1913); Keefe v. People, 37 Colo. 317, 87 Pac. 791 (1906).

55 In McCormick v. City of Montrose, 105 Colo. 493, 501, 99 P.2d 969, 973 (1940), an ordinance making peddling a nuisance, in the absence of any statute on the subject, was held to be of local concern only "at least until the state has seen fit to exercise its police powers with reference to it."

56 Spears Clinic and Hospital v. State Board of Health, 122 Colo. 147, 22 P.2d 872 (1950); People v. Newton, 106 Colo. 61, 101 P.2d 21 (1940); Denver v. Highlander Boy Foundation, 102 Colo. 365, 79 P.2d 361 (1938); Horst v. City and County of Denver, 101 Colo. 284, 73 P.2d 388 (1937); People v. City and County of Denver, 90 Colo. 598, 10 P.2d 106 (1932); Armstrong v. Johnson Storage and Moving Co., 84 Colo. 142, 268 Pac. 978 (1928); City and County of Denver v. Bossie, 83 Colo. 329, 266 Pac. 214 (1928).

57 People v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952); Ray v. City and County of Denver, 109 Colo. 74, 121 P.2d 886 (1942); People v. Graham, 107 Colo. 202, 110 P.2d 256 (1941). The first-cited case reversed a long line of decisions relating to utility regulation within home-rule cities, the first of which was City and County of Denver v. Mountain States Tel. & Tel. Co., 67 Colo. 225, 184 Pac. 604 (1919). See also Colo. Const., art. XXV, which was added Nov. 2, 1954.

known right-of-way case, *City and County of Denver v. Henry*,[58] followed in *Retallack*. The court in *Merris* added questions of speed, parking and designation of one-way streets. All of these, the opinion said, are matters of purely local concern.

However, since the amendment of Section 6 in 1912, the court has frequently and consistently invoked the so-called *Hallett* rule that article XX was intended to confer not only the powers expressly mentioned, but to bestow upon the people of home-rule cities every power possessed by the legislature in the making of a legislative charter therefor. As we have seen, it has on occasion gone further and suggested that at least some pre-existing constitutional provisions have no application.[59]

VII. BASIC THEORIES OF HOME-RULE IN COLORADO

A charter is a municipality's organic law and is equivalent to a state's constitution.[60] The charter, like a state constitution and as distinguished from the federal constitution, is not a grant of power but is a limitation thereon.[61]

A home-rule city in Colorado has plenary power in a matter which is solely of a local and a municipal nature, subject to the limitations imposed by the state's admission act, the federal constitution and the state constitution. Nothing in the recent cases of the Colorado Supreme Court indicates any deviation from this principle.[62]

If, however, the matter is a state affair, the state has jurisdiction to act,[63] and in case of a conflict with municipal charter or ordin-

58 City and County of Denver v. Henry, 95 Colo. 582, 38 P.2d 895 (1934). This category might be said to include the extraterritorial condemnation cases, *i.e.*, Toll v. City and County of Denver, 340 P.2d 862 (Colo. 1959); City of Glendale v. City and County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958); City and County of Denver v. Board of Comm'nrs, 113 Colo. 150, 155 P.2d 998 (1945); Fishel v. City and County of Denver, 106 Colo. 576, 108 P.2d 236 (1940).

59 See cases cited in note 52, *supra*. Conceptually, it is not illogical for a court to hold that art. XX supersedes earlier constitutional provisions by permitting a charter, or even an ordinance, to supersede any constitutional provision adopted prior to the adoption of art. XX in any manner solely of local and municipal concern. Similarly, any constitutional provision subsequently adopted can limit the power of the people of a city so to supersede a constitutional provision in a local and municipal matter.

60 Colo. Const. art. XX, § 6. Flanders v. City of Pueblo, 114 Colo. 1, 160 P.2d 980 (1945); City and County of Denver v. Board of Comm'nrs, 113 Colo. 150, 155 P.2d 998 (1945); McNichols v. City and County of Denver, 101 Colo. 316, 74 P.2d 99 (1937).

61 City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); Hawkins v. Hunt, 113 Colo. 468, 160 P.2d 357 (1945); Laverty v. Straub, 110 Colo. 311, 134 P.2d 208 (1943); People v. Pickens, 91 Colo. 109, 12 P.2d 349 (1932).

62 Retallack v. Police Court of City of Colorado Springs, 351 P.2d 884 (Colo. 1960) (reckless driving is a local affair regulated by ordinance); Burks v. City of Lafayette, 349 P.2d 692 (Colo. 1960) (charter can validly fail to restrict referendum in emergency in contravention of statute).

63 Spears Clinic and Hospital v. State Board of Health, 122 Colo. 147, 22 P.2d 872 (1950); Armstrong v. Johnson Storage and Moving Co., 84 Colo. 142, 268 Pac. 978 (1928); Walker v. People, 55 Colo. 402, 135 Pac. 794 (1913).

ance, the statute controls.[64] Authorities are agreed that, for example, when a person is required by statute to do something in one manner and is required by ordinance to do the same thing in another manner, there is a real conflict; and if a matter of state-wide concern, the state's statute should and does control. Such a conflict, however, is not to be confused with the situation where an ordinance supplements or also regulates a particular subject without actually creating any real conflict.

Furthermore, the powers of a home-rule city can be limited by the adoption of a constitutional amendment subsequent to the adoption of article XX.[65]

VIII. CONCURRENT POWERS

The Colorado Supreme Court has recently enunciated and developed the theme that if a matter is a state affair, *i.e.*, is predominately of general interest, a municipality derives no authority from article XX, and the city can exercise no power in the absence of a consent of the state.[66] The court does not indicate whether the consent can be given by other than the state legislature or a quasi-legislative body such as the State Highway Commission, as distinguished from executive officials and department heads. This principle laid down by the court is all the more surprising in view of the fact that the majority of jurisdictions concede that a municipality may have concurrent powers or jurisdiction with the state on a matter which is of state-wide concern and in view of the court's statement in *Sweet* that "we know of no state with any broader home-rule provisions than ours."[67]

In the *Merris* case, the Colorado Supreme Court stated that "application of state law or municipal ordinance, whichever pertains, is mutually exclusive."[68] It is submitted that this statement of principle constitutes a revolutionary doctrine and a judicial amendment of article XX.

The court cites in support of this principle the *Tihen* case[69] and the *Keefe* case.[70] The *Tihen* case based its statement of this "mutually exclusive" principle upon the *Mauff* case.[71]

The *Merris* case is ill-founded in its designated precedents. The *Keefe* and *Mauff* cases were two of the several cases in the first decade of home-rule which resulted in the amendment of Section 6, article XX in 1912. The author of the *Tihen* case evidently did not appreciate the fact that dissatisfaction with the "mutually exclusive" rule as enunciated by the Colorado Supreme Court in the ten years following the adoption of article XX in 1902 *i. e.*, a dissatisfaction with decisions that Denver could not legislate in any particular field in which the matter in question was not solely of a local and

64 People *ex rel.* Public Utilities Comm'n v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952); City and County of Denver v. Birdwell, 122 Colo. 520, 224 P.2d 217 (1950); Board of Trustees v. People, 119 Colo. 301, 203 P.2d 490 (1949); Ray v. City and County of Denver, 109 Colo. 74, 121 P.2d 886 (1942). See also City of Colorado Springs v. Graham, 352 P.2d 273 (Colo. 1960); Welch v. City and County of Denver, 349 P.2d 352 (Colo. 1960).

65 Geer v. Rabinoff, 138 Colo. 8, 328 P.2d 375 (1958).

66 City and County of Denver v. Pike, 342 P.2d 688 (Colo. 1959); Davis v. City and County of Denver, 342 P.2d 674 (Colo. 1959); City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 620 (1958).

67 City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). See text at note 73, *infra*.

68 City of Canon City v. Merris, 137 Colo. 169, 180, 323 P.2d 614, 620 (1958).

69 City and County of Denver v. Tihen, 77 Colo. 212, 235 Pac. 777 (1925). See text note at 49, *supra*.

70 Keefe v. People, 37 Colo. 317, 87 Pac. 791 (1906).

71 Mauff v. People, 52 Colo. 562, 123 Pac. 101 (1912).

municipal nature but was also of state-wide concern, resulted in the 1912 amendment for the purpose of modifying that principle.[72]

Furthermore, the court is going to find itself on the horns of a dilemma if it adheres to the "mutually exclusive" principle. Section 6, article XX delineates a number of areas in which a home-rule city has power to act. For example, Section 6 specifically provides that a home-rule city has the "power to legislate upon, provide, regulate, conduct and control . . . the levy and collection of taxes and special assessments . . . to be made by municipal officers or by the city or state officers as may be provided by charter." Particularly in view of the court's restrictive views as to what constitutes a matter which is solely of local and municipal concern, any holding by it that the charter provisions requiring the collection of special assessments at a given time in a designated manner by a county treasurer is not a state matter would be strained. The court's alternatives are to ignore or "to construe away" this language in the constitution, to make substantially illogical distinctions among its decisions as to what constitutes a matter solely of local and municipal concern and what constitutes a matter also of state-wide concern, or to abandon the principle in question and to hold that that state and a home-rule city can have concurrent jurisdiction concerning the same subject matter. Other specific provisions in Section 6 will result in similar dilemmas for the court if it continues to adhere to the "mutually exclusive" principle.

There actually is no sound objection to a doctrine of concurrent jurisdiction in the absence of an actual conflict. The "better and majority" view permits it.[73]

No persuasive reason is suggested as to why, in the criminal field, for example, a miscreant should be protected from municipal regulation for a wrong committed within a home-rule city because the state has concurrent jurisdiction and has made the act in

72 In Davis v. City and County of Denver, 342 P.2d 674, 686 (Colo. 1959), the specially concurring opinion states that the majority opinion "indicates a retrogression to principles enunciated prior to our decision in the case of City of Canon City v. Merris." The implication is surprising from the statement that the court should ignore a constitutional amendment and return to a principle existing prior to its modification by the 1912 amendment merely because the court feels the former principle is preferable. As an example of a case indicating that a home-rule city has concurrent powers with the state in the absence of a conflict in a matter of state-wide concern see Ray v. City and County of Denver, 109 Colo. 74, 121 P.2d 886 (1942). The decision of the majority is difficult to reconcile with *In re* Senate Bill No. 72, 339 P.2d 501 (Colo. 1959), in which the legislature attempted to "consent", i.e., to authorize a home-rule city to legislate in an area of state concern. The court surprisingly held that the statute was an unconstitutional delegation of legislative power.

73 1 Antieau, Municipal Corporation Law §§ 5.20-.21 (1958). See also Scott, *Municipal Penal Ordinances in Colorado*, 30 Rocky Mt. L. Rev. 267, 283 (1958); Comment, *Conflicts between State Statutes and Municipal Ordinances*, 72 Harv. L. Rev. 737 (1959).

question a crime. In a highly urban area, regulation solely by state officers or pursuant to state statutes may not afford the protection to which the inhabitants of the city are entitled. The fact that both the state and the city delineate a series of "do nots" does not impose any real conflict. Any person can easily comply with the less restrictive limitations by complying with the more restrictive limitations, be they imposed by statute or ordinance. Any suggestion of "double jeopardy" is a corruption of the intent and purpose of that constitutional prohibition.

In the financial field, the "mutually exclusive" doctrine, if it be extended to its logical extreme, would render a municipality more or less powerless to raise the revenues which are essential to its continued existence and effective operation in the public interest. Such holdings would render largely nugatory any doctrine of home- rule powers. Manifestly, if all tax measures are of state-wide concern, the legislature, "by pulling the purse strings," can effectively control home-rule municipalities and make them largely dependent upon the state.

IX. PREEMPTION

In the *Sweet* case,[74] the Colorado Supreme Court held that Denver had no power to levy an income tax, because after the adoption of article XX, *i.e.*, in 1936, the constitution was amended by the addition of Section 17, article X, which reads: "The general assembly may levy income taxes, either graduated or proportional, or both graduated and proportional, for the support of the state, or any political subdivision thereof, or for public schools, and may, in the administration of an income tax law, provide for special classified or limited taxation or the exemption of tangible and intangible personal property."[75]

The court alluded to the "mutually exclusive" principle discussed above, and then held that "Section 17 preempted the field of income taxation for the general assembly" by the section's adoption.

The court states no reason why it feels the adoption of Section 17 preempted the income tax field unless the "reason" be the statement that Section 17 "says that the general assembly may levy this tax, thus making it solely a matter of state-wide concern." This, it is submitted, is merely a conclusion, not a reason.

As the court noted Section 7, article X, Colorado Constitution, provides in part that the "general assembly shall not impose taxes for the purpose of any county, city, town or other municipal corporation." Section 6, article X, provides that "All laws exempting from taxation, property other than that hereinbefore mentioned shall be void." Section 17 was adopted to avoid or limit the application of the constitutional limitations in Section 6 and 7, and perhaps others, to the field of income taxation.[76] Nothing in the language of the constitution itself, nor in the history concerning the adoption of Section 17, article X, suggests that an "exclusive jurisdiction" nor a "preemption" was intended by the state in relation to the powers of a home-rule city. The state was merely adopting a constitutional provision which would enable it to adopt a graduated income tax law to

74 City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958).
75 Colo. Const., art. X, § 17.
76 City and County of Denver v. Tax Research Bureau, 101 Colo. 140, 71 P.2d 809 (1937).

solve its financial woes. It is quite another matter to find that the state thereby intended to preempt the income tax field and prevent a municipality from levying a similar tax.

Double taxation is commonplace. The federal government, any state, and its subdivisions, must raise revenues by taxation in order to defray the costs of necessary funds. Overlapping taxes are almost inevitable, and historically have been quite common, at least in the field of general (*ad valorem*) taxes.

Those decisions which have held that a state legislature has preempted an income tax field by the adoption of a state tax law of a certain type have been extensively criticized. "The preemption doctrine is not realistic; it is not sensitive to the fact that all taxes are imposed on people and that government simply varies the incident by its choices of tax subjects and measures."[77]

Another author, skilled in the field of municipal law, states:

> The occupation of the field doctrine should be discarded. If the matter is a general one in a home-rule state, or any kind elsewhere, the legislature can prevent further municipal regulations by simply indicating its wish. In the absence of such specific indication of the legislative intent the judiciary would be well advised to avoid invalidating municipal ordinances upon inquiries into the legislative psyche. The doctrine may provide a too handy prop for invalidating municipal rules with which jurists are unsympathetic. One cannot help but notice how avidly courts in-

77 Fordham and Mallison, *Local Income Taxation*, 11 Ohio St. L.J. 217, 223 (1950).

> validate municipal regulations in one 'field' on the theory that it has been occupied, while condoning considerable complementary regulation in another. Since it is practically impossible for either municipal attorney or private counsellor to determine in advance what is the 'field' and to forecast whether one has been 'occupied' the doctrine is unserviceable to the bar.[78]

Nevertheless, a legislature can relatively easily correct any misconstruction of a tax act by the courts by adopting an amendatory act specifically stating that preemption is not intended.

In the case of a court finding a "constitutional preemption," a greater dis-service is done, because it is relatively difficult to correct any court's misconstruction of preemption by the adoption of a constitutional amendment.[79] There is little reason why a state and a home-rule city should not have concurrent jurisdiction to levy and collect the same type of tax. Each political subdivision, as well as the state, should be responsible for raising the revenue which it needs for its operation and should have the power so to do on an equitable basis in the absence of an actual conflict between statute and ordinance.

Thus, a court should be extremely reluctant to find that a state statute, let alone a constitutional provision, has preempted a tax field for the state in the absence of specific language clearly indicating an intent to preempt.

X. SUMMARY

The Colorado Supreme Court should re-examine its recent and revolutionary cases in the field of home-rule powers and the "mutually exclusive" and "preemption" doctrines recently enunciated. Any extension of those doctrines, coupled with a restrictive approach as to matters which constitute an affair solely of local and municipal concern, will gradually erode the substantive powers of a home-rule municipality until it is largely dependent upon the state legislature and until the theory of home-rule power effected by the adoption of article XX has been substantially modified by judicial construction.

The disruption resulting from the recent cases is already a matter of common knowledge. State police officials and courts are overburdened in enforcing state statutes in the criminal field where previously regulation was effected primarily in the municipal courts by municipal police officials, particularly in the case of relatively minor offenses. The need for additional revenues of municipal corporations in heavily populated urban areas experiencing rapid growth is a matter of common knowledge. It is not in the public interest to whittle away a municipality's power of taxation by judicial decision under such circumstances. Indeed, it is difficult to imagine any field of taxation in which the court might not hold that the field has been preempted leaving the municipality without the power to levy that type of tax. In the case of constitutional preemption, there can be no redress to the legislature.

78 1 Antieau, Municipal Corporation Law § 5.22 (1958).
79 Hartman, *Municipal Income Taxation*, 31 Rocky Mt. L. Rev. 123, 146 (1959).