Washington Law Review

Volume 64
Number 1 *Dedication to Professor Charles E. Corker; Symposium on State Constitutional Law*

1-1-1989

One Century of Constitutional Home Rule: A Progress Report

Michael Monroe Kellogg Sebree

ONE CENTURY OF CONSTITUTIONAL HOME RULE: A PROGRESS REPORT?

Abstract: Despite constitutional and statutory provisions providing for home rule, Washington municipalities continue to lack meaningful local autonomy. The author examines the need for home rule and its genesis in the United States and Washington. In addition, the author analyzes Washington case law in this area and concludes with constitutional and judicial proposals designed to increase municipal self-governance.

The strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got a spirit of liberty.[1]

One hundred years ago, the framers of Washington's constitution developed constitutional provisions laying out a framework to provide local governments with the freedom to govern themselves in partnership with the state. The Washington State legislature, in turn, created a variety of statutory mechanisms designed to realize this objective. The fundamental goal of these efforts was to give municipalities the ability to control their own affairs. This, it was thought, would allow municipalities to be more responsive to problems taking place in their communities, and to solve these problems using local information and insight with a minimum of delay. All this was to occur within a more accountable political system.[2] Despite these well-intentioned attempts, however, in the last century home rule in Washington has been marked by confusion and uncertainty. The troubled judicial record must shoulder much of the blame.

This Comment discusses the need for and origin and history of home rule in the United States and in Washington.[3] It examines the Washington constitutional provisions for home rule, and develops an analysis of the decisions by the Washington courts over the last hundred years interpreting these provisions. Finally, this Comment provides recommendations for a number of structural changes which will,

1. A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 63 (F. Bowen trans. 1945).

2. Andersen, *The Current Meaning of Home Rule in Washington*, 8 WASH. PUB. POL'Y NOTES No. 2 (1980).

3. Although home rule has escaped precise definition, the legal doctrine may be broadly stated as "a particular method for distributing power between state and local government, i.e. a grant of power to the electorate of a local government unit to frame and adopt a charter of government." Sandalow, *The Limits of Municipal Power Under Home Rule, A Role for the Courts*, 48 MINN. L. REV. 643, 644–45 (1964).

if adopted, create an environment more conducive to municipal home rule in the state of Washington.

I. THE ORIGIN AND HISTORY OF HOME RULE IN THE UNITED STATES

Home rule in the United States began with Missouri's adoption of the first constitutional home rule provision in 1875.[4] This provision was a synthesis of the two leading theories of municipal sovereignty advocated in the mid-nineteenth century; one by Thomas M. Cooley, and the other by John F. Dillon.

Throughout the history of the United States, the township has been a fundamental unit of government. It should come as no suprise, therefore, that until the last half of the nineteenth century, there was a substantial amount of local autonomy in the United States.[5] In the nineteenth century, municipalities were the most important governmental entities in most citizens' lives.[6] Local governments spent more money than the state and federal governments combined and wielded a comparatively significant amount of power.[7]

As towns and cities increased in size and stature, however, state legislatures began to increase their control over the municipal governing process. By the middle of the nineteenth century, "legislation descended into regulation of the minutest details of municipal government."[8] At about this time, the explosion in railroad building began.

In their search for capital, the railroads first turned to state bonds.[9] After a number of states passed constitutional provisions prohibiting states from issuing railroad bonds, in response to a severe panic in 1837,[10] the railroads turned to municipal bonds for revenue.[11] These bonds were precariously perched on dreams of a rapid influx of new

4. Vanlandingham, *Municipal Home Rule in the United States,* 10 WM. & MARY L. REV. 269, 270 (1968).

5. *See generally* A. DETOCQUEVILLE, *supra* note 1 (discussing autonomy of local governments).

6. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law,* 1986 WIS. L. REV. 83, 100.

7. *Id.*

8. Sandalow, *supra* note 3, at 647 ("Cities were compelled by the legislature to buy lands for parks and places because the owners wished to sell them; compelled to grade, pave, and sewer streets without inhabitants, and for no other purpose than to award corrupt contracts for the work." (quoting H. MCBAIN, THE LAW AND PRACTICE OF HOME RULE 9 (1916))).

9. Williams, *supra* note 6, at 142.

10. As a result of a severe financial panic in 1837, $40 million of railroad bonds were left outstanding. *Id.*

11. The railroad interests successfully lobbied state legislatures to permit the issuance of municipal bonds. The railroads quickly obtained their needed financing from cities and towns

residents to purchase all the available farmland adjacent to the railroad line. When, in 1862, the Supreme Court of Iowa ruled that the state constitution forbade the issuance of municipal bonds, the formerly precarious situation developed into a near panic.[12]

A. Cooley's Theory of Municipal Home Rule

Thomas M. Cooley, a Michigan Supreme Court justice, developed his theory of municipal power during a period in history when the need for capital, brought on by the explosion of railroad building, exacerbated the existing tension in the competition for power between municipalities and state legislatures.[13] Although these railroad bond panics were by no means the sole source of inspiration for Cooley's theories on home rule (or Dillon's), they did serve to underscore his fear of special interests, and thus played a significant role in his theories' development.[14] Cooley's belief in municipal autonomy owed much to this fear of special interests and the power they could obtain.[15] Thus, he felt that the railroad lobbyists' success in persuading the state legislatures to allow the issuance of municipal bonds, demonstrated that unlimited power vested in the state legislatures resulted in the exploitation of the majority of citizens by a powerful elite.[16] He theorized that, rather than limit the municipality, the proper response was to limit the state government.[17] By inherent right to self-government Cooley did not mean to suggest, however, that the ideal state would consist of a number of localities wholly autonomous from the state, but rather that the state and local governments should share power.[18] Although Cooley's theories were incorporated into a

whose gullible leaders, blinded by overly optimistic hopes of becoming the next boomtown, issued large offerings of local bonds. *Id.*

12. Although the United States Supreme Court in Gelpcke v. Dubuque, 1 Wall. 175 (1864), later overruled the Iowa court, the Iowa ruling caused a number of cities to repudiate their bond issues which in turn created economic uncertainty and instability throughout the business community. *Id.* at 94.

13. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1927). This was one of the most respected treatises of its time. One commentator has referred to it as "America's second Constitution." Williams, *supra* note 6, at 88 (quoting Paludan, *Law and the Failure of Reconstruction: The Case of Thomas Cooley,* 33 J. HIST. IDEAS 597, 598 (1972)).

14. Williams, *supra* note 6, at 147.

15. Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration,* 53 J. AM. HIST. 751, 756 (1967).

16. Williams, *supra* note 6, at 142.

17. *Id.* at 147.

18. Cooley wrote:

> The state may mould local institutions according to its views of policy and expediency; but local government is a matter of absolute right; and the state cannot take it away. It would

number of state constitutional provisions providing for limited municipal self-governance, today most states, including Washington, reject a theory of inherent local sovereignty.[19]

B. Dillon's Theory of Municipal Home Rule

John F. Dillon's theory of municipal power, formulated shortly after the municipal bond crisis during his tenure as an Iowa Supreme Court justice, was more readily accepted.[20] He believed, contrary to Justice Cooley's views, that municipalities were the governmental entity most subject to abuse. He developed Dillon's Rule accordingly.[21]

Dillon's Rule, a long-standing principle of judicial interpretation,[22] states that local governments have those powers expressly conferred by state constitutional provisions, state statutes, and, where applicable, the home rule charter; those powers necessarily or fairly implied in, or incident to, the powers expressly granted; and those powers essential to the declared objects and purposes of the municipality or quasi-corporation.[23] Under Dillon's Rule, a municipality will have no power unless it is granted under one of these three categories.[24]

State judiciaries routinely use Dillon's Rule as a tool to limit municipal self-government and maintain legislative supremacy. Many state judiciaries still use the Rule today to define the scope of municipal

---

> be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at its discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

People *ex rel.* Leroy v. Hurlbut, 24 Mich. 44, 108 (1871), *quoted in* Williams, *supra* note 6, at 148.

19. At one time as many as four states—Michigan, Indiana, Iowa, and Kentucky—accepted this doctrine. O. REYNOLDS, LOCAL GOVERNMENT LAW 66 (1982). The Washington Supreme Court has firmly rejected this theory of inherent local government. *In re* Cloherty, 2 Wash. 137, 139–40, 27 P. 1064, 1065 (1891).

20. J. DILLON, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872). The bond panic affected Dillon's theorizing as evidenced in the preface of his work: "[I]t has, unfortunately, become quite too common with us to confer upon our [municipal] corporations extraordinary powers, such as the authority to aid in the construction of railways, or other undertakings, which are better left to private capital . . . ." *Id.* at 102, *quoted in* Williams, *supra* note 6, at 94; *see infra* note 21.

21. Dillon's Rule continues to be universally recognized by American jurisdictions. 1 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS 8 (3d ed. 1971).

22. Andersen, *supra* note 2.

23. *See, e.g.*, O. REYNOLDS, *supra* note 19, at 139.

24. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448–50 (5th ed. 1911) ("Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."). *Id.* at 449–50.

powers.[25] The Washington Supreme Court has recently reaffirmed its commitment to the use of Dillon's Rule in construing home rule grants.[26]

II. HOME RULE IN WASHINGTON

Washington was the third state to adopt constitutional provisions providing for home rule.[27] Both sections 10 and 11 of article XI were drafted and accepted during the Constitutional Convention of 1889. The provisions passed through the convention with little substantive debate.[28] As in Missouri and California, the Washington constitutional drafters attempted to design provisions which provided municipalities with the local sovereignity advocated by Cooley, while at the same time, in recognition of Dillon's advocation for legislative supremacy, limiting the scope of this sovereignity.

The final version of article XI, section 10 provides any city with a population of 20,000 or more with a self-executing grant of power to frame a charter for its own government, subject to the constitution and laws of the state.[29] The Washington Supreme Court has interpreted the provision to "give to cities . . . the largest measure of local self-government . . ."[30] and to "[r]ecognize that large, growing cities should be empowered to determine for themselves, and in their own way, the many important and complex questions of local policy which arise."[31]

All power granted to cities under section 10, however, must be "consistent with and subject to the constitution and laws of this state."[32] Section 10 relies upon section 11 and its judicial interpretation to define the boundaries of the scope of power. Section 11 provides that: "[A]ny county, city, town or township may make and

25. *See generally* O. REYNOLDS, *supra* note 19, chs. 6, 8 (discussing use of Dillon's Rule in American jurisdictions).

26. Tacoma v. Taxpayers of the City of Tacoma, 108 Wash. 2d 679, 743 P.2d 793 (1987).

27. Missouri developed the first constitutional provision in 1875, followed by California in 1879. Vanlandingham, *supra* note 4, at 270, 284–86.

28. Q. SMITH, AN ANALYTICAL INDEX OF THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 723–24 (1964).

29. WASH. CONST. art. XI, § 10 (1889, amended 1964). The remainder of the provision expressly provides the manner by which a municipality may amend a charter, including public notice requirements. In 1964, the legislature adopted amendment 40, which reduced the population requirement to 10,000 and slightly altered the notice requirements. *Id.*

30. Malette v. City of Spokane, 77 Wash. 205, 224, 137 P. 496, 503 (1913).

31. Hilzinger v. Gillman, 56 Wash. 228, 234, 105 P. 471, 474 (1909).

32. WASH. CONST. art. XI, § 10.

enforce within its limits all such local police, sanitary and other regulations [ordinances] as are not in conflict with general laws."[33]

An examination of section 11 reveals that it grants to specified municipalities the power to enact local ordinances as long as they do not conflict with general laws. The Washington Supreme Court has attempted to define the scope of this grant as well as the import of this limitation.

A. Scope of Grant of Power

Section 11 was taken nearly verbatim from the California Constitution and caused no published debate when passed at the constitutional convention.[34] The express language of the provision seems to provide a broad grant of power to municipalities. However, the courts' interpretation of this language has created a different result.

The supreme court rejected Cooley's doctrine of inherent self-government shortly after the adoption of the home rule provisions.[35] Despite occasional judicial statements intimating an adoption of the theory, the majority of cases hold that a municipality in Washington has no inherent powers.[36] Thus, in this state, there are no implied constitutional limitations on the legislature. Accordingly, all municipal powers must come from the constitutional provisions or legislative delegations.[37]

Rejecting the inherent right to local sovereignty, the supreme court has long applied Dillon's Rule and construed constitutional grants of power strictly. The court has consistently held that a municipality's authority to act must be found in an express grant by the legislature or a power vested in it by the constitution.[38] In *Massie* v. *Brown*,[39] the supreme court addressed the question whether the City of Seattle had the authority to apply its civil service provisions, including the requirement for examinations, to warrant server applicants. The court held that because there was no express delegation of this power by the legislature and the legislature had an interest in civil service employ-

33. WASH. CONST. art. XI, § 11.

34. Q. SMITH, *supra* note 28, at 728–29.

35. *In re* Cloherty, 2 Wash. 137, 139–40, 27 P. 1064, 1065 (1891).

36. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 WASH. L. REV. 743, 746–48 (1964). The term "municipality" is used throughout this Comment to refer to any home rule city, town or county.

37. *Id.* at 768.

38. *See, e.g.*, City of Spokane v. J.R. Dist., 90 Wash. 2d 722, 726, 585 P.2d 784, 786 (1978). This construction applies to municipal laws as well as charter provisions. *See, e.g.*, State *ex rel.* Lynch v. Fairley, 76 Wash. 332, 136 P. 374 (1913).

39. 84 Wash. 2d 490, 527 P.2d 476 (1974).

ment procedures, Seattle did not have this authority.[40] The court reasoned that "[w]hen the interest of the State is paramount to or joint with that of the municipal corporation, the municipal corporation has no power to act absent a delegation from the legislature."[41]

If strictly interpreted, this holding could be applied to make local governments wholly dependent on the legislature for their powers, regardless of the local government's home rule status. Since the state would likely have at least a joint interest in almost any municipal action taken, a municipality would have to wait for a legislative delegation before it could exercise any power. At a minimum, the uncertainty as to whether an action is purely local or one of joint interest would severely limit home rule powers.

Frequently, however, courts will temper this strict holding in *Massie* when interpreting a municipality's home rule powers. Courts take into consideration a number of factors in determining whether to liberally construe the scope of these powers. These factors are implied powers, the type of power exercised, the type of municipality, the local nature of the subject matter, and the reasonableness of the charter or ordinance.

1. Implied Powers

In addition to powers granted a municipality through express delegation by the legislature or the constitution, the Washington Supreme Court has frequently recognized, in conjunction with Dillon's Rule, that home rule municipalities may possess implied or necessary powers.[42] Although courts have often upheld municipal power grants on the basis of implied powers, they have issued few judicial statements explaining under what circumstances a power may or may not be implied. The supreme court has held that a power may be necessarily implied when the power arises from those expressly granted, when the power may be reasonably inferred from the powers expressly granted, and when those powers are essential to give effect to powers expressly granted.[43] The critical test appears to be the last one.

Thus, in *Municipality of Metropolitan Seattle v. City of Seattle,*[44] where a statute granted the city power to provide for a sewer system as well as the power to control, regulate, and manage it, the court held

40. *Id.* at 495–96, 527 P.2d at 477–79.

41. *Id.* at 492, 527 P.2d at 477.

42. *See* Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes,* 59 WASH. L. REV. 653, 654–57 (1984).

43. State v. Superior Court, 93 Wash. 267, 269, 160 P. 755, 756 (1916).

44. 57 Wash. 2d 446, 357 P.2d 863 (1960).

that despite the absence of an express provision granting the power to pledge city revenues to pay for sewage disposal services, an implied grant of power would suffice.[45]

Washington courts have similarly held that an ordinance governing hobby kennel licenses necessarily implied that the county animal control division had the power to deny applications for those licenses;[46] that the City of Seattle, being empowered to conduct ferry operations and collect tolls, had implied authority to maintain landings and approaches;[47] that the power to contract was necessarily implied from a grant empowering the city to distribute a municipal water supply;[48] and that the power to purchase liability insurance was implied from the power to conduct necessarily insurable activities.[49]

The Washington Supreme Court has recently ignored its previous holdings broadly construing implied powers, however. In *Chemical Bank v. WPPSS,*[50] the court defined the proper test for implied powers as "legal necessity rather than practical necessity."[51] Although this interpretation seems to seriously limit implied powers in Washington, it has not been relied upon since this opinion. It is difficult to predict what future effect this decision may have on home rule powers.

2. *Type of Power Exercised in Ordinance or Charter*

The Washington courts may also take into consideration the type of power exercised when determining the scope of municipal powers.[52] Although section 10 provides for municipal authority to enact ordinances on local police, sanitary, and other affairs, the supreme court has placed a stronger emphasis on police power, while deemphasizing the other subject matters. In *Kimmel v. City of Spokane,*[53] for exam-

45. The court reasoned, "It must follow that with the power to provide a sewer system there is implied the power to pay for it." *Id.* at 460, 357 P.2d at 872.

46. Stegriy v. King County Bd. of Appeals, 39 Wash. App. 346, 353, 693 P.2d 183, 191 (1984).

47. Hart v. King County, 104 Wash. 485, 492, 177 P. 344, 346 (1918).

48. Scott Paper Co. v. City of Anacortes, 90 Wash. 2d 19, 29, 578 P.2d 1292, 1297 (1978).

49. Hunter v. North Mason School Dist., 85 Wash. 2d 810, 817, 539 P.2d 845, 849–50 (1975); *see also* Ayers v. City of Tacoma, 6 Wash. 2d 545, 554, 108 P.2d 348, 352 (1940) (city has implied power to offer pension program); Armstrong v. City of Seattle, 180 Wash. 39, 42, 38 P.2d 377, 378 (1934) (power to operate stone or asphalt plant implies the power to condemn).

50. 99 Wash. 2d 772, 666 P.2d 329 (1983).

51. *Id.* at 792, 666 P.2d at 340. ("[I]f the legislature has not authorized the action in question, it is invalid no matter how necessary it might be." (quoting Hillis Homes, Inc. v. Snohomish County, 97 Wash. 2d 804, 808, 650 P.2d 193, 195 (1982))).

52. *See* Note, *supra* note 42, at 656.

53. 7 Wash. 2d 372, 109 P.2d 1069 (1941); *see also* Detamore v. Hindley, 83 Wash. 322, 326, 145 P. 462, 463 (1915) (a city has police powers "as ample within its limits as that possessed by the Legislature").

ple, the supreme court, after citing section 11, stated that: "[T]he court accords to municipalities plenary police power within their limits."[54] The cases imply that section 11 is the basis for municipal police power and nothing else.

This police power construction is significantly broader than that generally allowed under the holding in *Massie*. The cases hold that municipalities may enact police power regulations regardless of the state's paramount or joint interests and the lack of the state's prior express authorization, as long as the regulations are local and are not in conflict with general laws or the constitution.[55] Thus, cities have enacted valid police power ordinances prohibiting the opening of theaters on Sunday,[56] regulating massage parlors,[57] and establishing plumbing standards.[58]

On the other hand, courts generally have strictly interpreted municipal power regarding eminent domain and taxation. In *In re Seattle,*[59] for example, the supreme court invalidated a Seattle ordinance condemning land for a retail shopping facility (Westlake Project) when there was no statute providing authority for such a condemnation. The court held that a municipality's power to condemn must be conferred in express terms or be necessarily implied.[60] The court also held that all statutes delegating eminent domain power must be strictly construed, subject, however, to the intent of the legislature.[61]

The supreme court has strictly construed taxation statutes as well. In *Hillis Homes, Inc. v. Snohomish County,*[62] for example, the court held that although section 11 delegates extensive police power to municipalities, it does not provide authority to tax, absent a grant from the legislature.[63] The court has consistently required express authority when a municipality attempts to levy taxes.[64]

54. 7 Wash. 2d at 374, 109 P.2d at 1070.

55. *Id.*

56. *In re* Ferguson, 80 Wash. 102, 141 P. 322 (1914).

57. City of Spokane v. Bostrom, 12 Wash. App. 116, 528 P.2d 500 (1974).

58. State *ex rel.* Rhodes v. Cook, 72 Wash. 2d 436, 433 P.2d 677 (1967).

59. 96 Wash. 2d 616, 638 P.2d 549 (1981).

60. *Id.* at 629, 638 P.2d at 557.

61. *Id.*

62. 97 Wash. 2d 804, 650 P.2d 193 (1982).

63. *Id.* at 809, 650 P.2d at 195. "If the Legislature has not authorized the tax, it is invalid no matter how necessary it might be." *Id.* at 808, 650 P.2d at 195.

64. *See, e.g.,* Pacific First Fed. Sav. and Loan Ass'n v. Pierce County, 27 Wash. 2d 347, 353, 178 P.2d 351, 354 (1947).

3. Type of Municipality Enacting the Ordinance or Charter

Section 10 directs the legislature to provide, by general laws, for the incorporation of cities and towns by population size. In accordance with this provision, the legislature has adopted two mutually exclusive titles of the Revised Code of Washington ("Code") under which municipalities may choose to operate. The powers granted to a local government are determined in part by the applicable statutory provisions.

The Code classifies municipalities on the basis of population. Cities over 20,000 are classified as first-class cities and those with fewer than 20,000 are further classified by size as second-, third-, or fourth-class cities.[65] Generally, cities, other than first-class cities, are bound solely by Dillon's Rule.[66] First-class cities are provided far greater powers.[67]

In 1967, the legislature adopted the Optional Municipal Code.[68] This code divides cities into two classes, those with a charter and those without. To become a charter "code" city, the city must enact its own charter and have a population over 10,000.[69] Optional code cities are provided with powers similar to those of first-class cities.

The courts have taken into consideration the type of municipality when defining the scope of municipal powers and have, in a number of cases, liberally construed these powers when dealing with first-class or code cities. For example, in *United States v. Town of North Bonneville,*[70] North Bonneville, a code city, was to be relocated because a portion of a hydroelectric powerhouse project required the destruction of a significant area of the town. The town entered into a contract with the United States Army Corps of Engineers to purchase land in contemplation of the town's relocation. The Corps later challenged

65. WASH. REV. CODE, §§ 35.01.010–.040 (1987).

66. Trautman, *supra* note 36, at 773.

67. WASH. REV. CODE § 35.22.570 (1987) provides:

> Any [first-class] city adopting a charter under the provisions of this chapter shall have all the powers which are conferred upon incorporated cities and towns by this title or other laws of the state, and all such powers as are usually exercised by municipal corporations of like character and degree."

In addition, WASH. REV. CODE § 35.22.900 (1987) provides: "The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter, but the same shall be liberally construed for the purpose of carrying out the objects for which this chapter is intended."

68. 1967 Wash. Laws 554 (codified as amended at WASH. REV. CODE § 35A.11.020 (1987)).

69. WASH. REV. CODE § 35A.11.050 (1987) provides: "The general grant of municipal power conferred by this chapter [on all code cities] . . . is intended to confer the greatest power of local self-government consistent with the Constitution of this state and shall be liberally construed in favor of such cities."

70. 94 Wash. 2d 827, 621 P.2d 127 (1980).

the validity of this contract, arguing that the acquisition of land was beyond the town's authority and thus unconstitutional.[71] The supreme court, ignoring the holding in *Massie,* did not address the question of whether there was a paramount or joint state and local interest. The court instead focused on the broad powers of self-government afforded by the Optional Municipal Code and held that, absent a general prohibition against land transactions, North Bonneville was indeed authorized to contract to purchase the land.[72]

The supreme court has treated first-class cities with similiar deference. In *Daggs v. City of Seattle,*[73] three plaintiffs challenged the city's right to enact an ordinance requiring plaintiffs to file a claim with the city before commencing a tort action against the city.[74] The court's analysis consisted entirely of an examination of the constitution, state statutes, and the city charter to see if the ordinance contravened any of them. Finding no general laws conflicting with the ordinance, the court held that the ordinance was a valid exercise of municipal power.[75]

These decisions, along with those construing general police powers, imply that a first-class or code city no longer must consider whether the state has a paramount or joint interest. As long as the powers they exercise do not contravene any constitutional provisions, state general laws, or the city's charter, they are free to enact ordinances without express legislative delegation. In addition, the courts have held that Dillon's Rule, which resolves doubts over power grants against municipalities, does not apply to first-class cities.[76] These holdings would presumably apply to code cities as well. Although these cases appear to make the strict construction of *Massie* no longer meaningful for first-class and code cities, *Massie* may not be dead yet.

In *Chemical Bank v. WPPSS,*[77] the court adopted the reasoning of *Massie* to hold that first-class and code cities lacked the power to enter

71. *Id.* at 830–31, 621 P.2d at 128–29.

72. *Id.* at 835, 621 P.2d at 131; *see also* Shaw Disposal v. City of Auburn, 15 Wash. App. 65, 66, 546 P.2d 1236, 1238 (1976) (non-charter code cities may contract for any manner of garbage disposal service as long as the contract does not conflict with the constitution or a general law).

73. 110 Wash. 2d 49, 750 P.2d 626 (1988).

74. If the plaintiffs had waited the requisite 60 days under the ordinance, their cases would have been subject to the Tort Reform Act. *Id.* at 57, 750 P.2d at 627.

75. *Id.; see also* State v. City of Seattle, 94 Wash. 2d 162, 615 P.2d 461 (1980); Winkenwerder v. City of Yakima, 52 Wash. 2d 617, 622, 328 P.2d 873, 878 (1958) (powers of first-class cities are as broad as the legislature's powers subject to legislative restrictions); *infra* text accompanying note 106.

76. Winkenwerder v. City of Yakima, 52 Wash. 2d 617, 622, 328 P.2d 873, 878 (1958).

77. 99 Wash. 2d 772, 666 P.2d 329 (1984).

into a financing agreement.[78] The court held that because of at least a joint state interest, the municipalities must have express or implied "legally necessary" authority for their actions.[79] A recent decision, *Tacoma v. Taxpayers of the City of Tacoma,*[80] although not mentioning *Massie,* also emphasized legislative supremacy. The court stated that the city of Tacoma, a first-class city, was wholly subject to Dillon's Rule, including the clause providing that doubts are to be decided against the municipality.[81] Although the court eventually ruled in favor of the city, this ruling, if consistently followed, would seriously undermine the status of first-class cities.

It is too early to tell if these cases signify a trend away from broad construction or are merely a temporary resurrection of Dillon's Rule. One of the more recent cases on point, *Daggs v. City of Seattle,* liberally construed the scope of municipal powers of these cities[82] and ignored the holdings of the cases just discussed. This may be a sign of things to come.

4. Subject Matter of Ordinance or Charter: Local Affairs

In Washington, a municipality does not have complete autonomy over decisions of a purely local nature. Unlike other states, where a municipality is free to enact ordinances dealing with municipal affairs without legislative intervention, in Washington the legislature may enact superseding general laws on any subject matter, local or state.[83] However, the court has recognized a niche where, although not completely autonomous from the state, a municipality may act upon exclusively local matters without a delegation from the legislature.[84] The supreme court, in *Massie,* left some room in which municipalities may maneuver. *Massie* required express legislative authorization only in areas of paramount or joint state concern.[85] Because the state legislature could be considered to have at least a joint concern in nearly any area of the law, this local affairs niche is rather small. A modern case suggests that this area may be broadening, however.

In *City of Issaquah* v. *Teleprompter Corp.,*[86] the supreme court held that a municipal action having some statewide effect would not render

78. *Id.* at 793–94, 666 P.2d at 340.
79. *Id.* at 793, 666 P.2d at 340.
80. 108 Wash. 2d 679, 743 P.2d 793 (1987).
81. *Id.* at 692, 743 P.2d at 799–800.
82. 110 Wash. 2d 49, 54, 750 P.2d 626, 629 (1988).
83. Trautman, *supra* note 36, at 768.
84. *Id.* at 772.
85. *See supra* notes 39–41 and accompanying text.
86. 93 Wash. 2d 567, 611 P.2d 741 (1980).

it non-local, thus requiring an express delegation of authority. The court reasoned that although municipal ownership of a cable television system would have some statewide significance, it was not of such a magnitude as to require an express legislative authorization.[87] This decision carves out a significant subject matter area where a municipality may be free to act without express delegation. In contrast to the rule in *Massie,* a municipality, under this holding, may act without express delegation in matters of joint state and local concern and in matters that are purely local. The legislature would still, of course, have the power to enact superseding laws in all areas, including those affecting purely local affairs.

5. Reasonableness of Regulation or Charter

The supreme court has long held that for a municipal power to be valid, it must be reasonable.[88] This factor is given particular emphasis in cases involving an exercise of municipal police power.[89] The court has formulated a two-part test to determine when an ordinance is reasonable, and thus constitutional.

Initially, a court inquires whether the ordinance is reasonably necessary to protect the public safety, health, morals, or general welfare. A court then inquires whether the ordinance is substantially related to the ends established by the first inquiry.[90] If both inquiries are satisfied, the court will uphold the ordinance.

Courts generally are highly deferential to the municipality's judgments and will ordinarily uphold an ordinance as reasonable. The supreme court has held that "[i]f the court can reasonably conceive of a state of facts which would warrant the legislation, those facts will be presumed to exist."[91] However, the courts have not hesitated to hold otherwise.[92]

B. Limitation on Grant of Power to Municipalities

The courts' holdings regarding the scope of the limitation on the grant of power are also somewhat ambiguous. The grant of power to home rule cities under sections 10 and 11 is limited by the clause "as

87. *Id.* at 572–73, 611 P.2d at 744–45.

88. *See, e.g.,* Hass v. City of Kirkland, 78 Wash. 2d 929, 932, 481 P.2d 9, 11 (1971).

89. *Id.*

90. Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 26–27, 586 P.2d 860, 866 (1978).

91. *Id.* at 27, 586 P.2d at 866.

92. *See, e.g.,* Patton v. City of Bellingham, 179 Wash. 566, 574, 38 P.2d 364, 367 (1934) (ordinance prescribing hours for opening and closing barber shops unreasonable).

are not in conflict with general laws."[93] In some states, a constitutional home rule provision limits the legislature's action in municipal affairs. In Washington, however, the only constitutional limitation is placed upon the municipality. The supreme court has held that in the event of a conflict, the state's general law will always supersede a municipal ordinance.[94] Thus, determining when a conflict exists becomes critical.

1. Definition of General Laws

Article XI, sections 10 and 11, provide that a municipal ordinance may not conflict with general laws. Section 10 also provides that even if conflicting, a "special law" cannot supersede a municipal law.[95] It is therefore of vital importance in a determination of conflict, to distinguish between special and general legislation. The supreme court has defined general and special laws as the following:

> A special law is one which relates to particular persons or things, while a general law is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions.[96]

The judicial recognition of this distinction is important to effective home rule. Disregarding this distinction allows the legislature to enact laws directed at a single municipality, robbing the home rule grant of nearly any substance. For that reason, nearly all states where home rule is effectively practiced have eliminated special legislation.[97]

Although the legislature may regulate the powers of cities only by general legislation, all cities do not have to be treated as one class. For example, the legislature may validly distinguish between cities on the basis of population.[98] A general law classification must simply bear a

93. WASH. CONST. art. XI, §§ 10, 11.

94. State *ex rel.* Seattle v. Carson, 6 Wash. 250, 33 P. 428 (1893).

95. Martin v. Tollefson, 24 Wash. 2d 211, 216–17, 163 P.2d 594, 596–97 (1945).

96. Y.M.C.A. of Seattle v. Parish, 89 Wash. 495, 497–98, 154 P. 785 (1916); Trautman, *supra* note 36, at 758.

97. Vanlandingham, *Symposium: Problems in Constitutional Law; Constitutional Municipal Home Rule since the AMA (NLC) Model,* 17 WM. & MARY L. REV. 1, 6 n.13 (1975).

98. City of Seattle v. State, 103 Wash. 2d 663, 674, 694 P.2d 641, 653 (1985). However, these classifications may serve to thwart home rule. Home rule may be diminished through the use of special legislation disguised as general legislation in the form of "population acts." Vanlandingham, *supra* note 97, at 6 n.13.

rational relationship to the purpose and subject matter of the legislation for the classification to be upheld.[99]

2. Inconsistency Between a Municipal Law and a General Law

a. Direct Conflict

The basic test applied in determining conflict is whether or not a municipal ordinance permits that which a general law prohibits or vice versa.[100] When a local and state law directly conflict, the state law will always supersede the local law. For example, in *State v. City of Seattle,*[101] the University of Washington challenged the city's right to declare state property a landmark, alleging that it directly conflicted with state law. This state law provided that the university would, upon expiration of the lease or acquisition by the university, have the power to "raze, reconstruct, alter, remodel or add to existing buildings . . . ."[102]

The court held that the laws governing the buildings were general laws and not special laws, since they applied to all things in the class of university properties.[103] The court also held that the ordinance effectively forbade the alterations allowed by the legislature. Thus, the two laws directly conflicted and the court declared the ordinance invalid.[104]

b. Concurrent Jurisdiction

Even when a municipal law deals with the same subject matter as a state law, the court will not reject it as conflicting if the court finds that the state and municipality may exercise their powers concurrently. State statutes are not interpreted as denying a power to a municipality unless the intent to preempt is express.[105] The courts will attempt to harmonize conflicting laws.[106] In *State v. Everett District Court,*[107] the supreme court reversed a court of appeals ruling that a state law, which provided regulations for the safety and operation of boats, conflicted with a municipal ordinance prohibiting the use of

99. State *ex rel.* Lindsey v. Derbyshire, 79 Wash. 227, 234, 140 P. 540, 544 (1914).

100. City of Bellingham v. Schampera, 57 Wash. 2d 106, 111, 356 P.2d 292, 296 (1960).

101. 94 Wash. 2d 162, 615 P.2d 461 (1980).

102. *Id.* at 166, 615 P.2d at 463.

103. *Id.*

104. *Id.*; *see also* State v. Inglis, 32 Wash. App. 700, 701–02, 649 P.2d 163, 164–65 (1982) (state statute overrules ordinance when both define the same crime of prostitution).

105. State v. Everett Dist. Court, 92 Wash. 2d 106, 108, 594 P.2d 448, 450 (1979); Nelson v. City of Seattle, 64 Wash. 2d 862, 866, 395 P.2d 82, 84–85 (1964) .

106. 94 Wash. 2d 162, 166, 615 P.2d 461, 463 (1980).

107. 92 Wash. 2d 106, 108, 594 P.2d 448, 450 (1979).

boats on a specific lake. The court found that because there was no express statement or clear intent in the state law permitting motor boats on all state waters, no conflict existed, and both laws could continue to be effective concurrently.[108]

The court has been more hesitant to harmonize state and municipal laws when the statutes involved concern criminal matters. Foremost among the reasons against concurrent jurisdiction is the prohibition against double jeopardy. The court has stated that convictions under two laws, prohibiting the same offense, violates double jeopardy prohibitions.[109] Nevertheless, the court has allowed concurrent criminal jurisdiction in some instances.[110]

c. Ordinance or Charter Less Rigorous than General Law

The courts generally invalidate municipal laws that are less rigorous than state laws. Although not expressly conflicting, a less rigorous municipal law may potentially allow behavior restricted under the more rigorous state law. For instance, in *Town of Republic v. Brown,*[111] a municipal ordinance defined a person as presumably intoxicated when the person's blood alcohol content reached a level of 0.10 percent or greater. The ordinance did not provide for a mandatory prison sentence. The state law, in contrast, stated that a person was conclusively intoxicated when a person's blood alcohol reached a level of 0.10 percent or greater. The state law also provided for a mandatory jail sentence. The supreme court held that these differences necessarily invalidated the municipal law.[112]

d. Ordinance or Charter More Rigorous than General Law

The courts are much less inclined to invalidate a municipal law which is more rigorous than a state law. The rationale is that a municipal law does not conflict with a state law regulating the same subject matter where the municipal law merely adds to the state requirements.[113]

108. *Id.* at 107–08, 594 P.2d at 448.

109. State v. Ensminger, 77 Wash. 2d 535, 536, 463 P.2d 612, 614 (1970).

110. *See, e.g.,* State v. Roybal, 82 Wash. 2d 577, 512 P.2d 718, 720–21 (1973) (that a municipal ordinance and a state statute both regulating concealment of a weapon each included a separate element was enough to allow for concurrent jurisdiction).

111. 97 Wash. 2d 915, 652 P.2d 955 (1982).

112. *Id.* at 920, 652 P.2d at 958.

113. City of Bellingham v. Cissna, 44 Wash. 397, 403, 87 P. 481, 482 (1906).

For example, in *Lenci v. City of Seattle,*[114] the state had enacted a law regulating motor vehicle wrecking yards, requiring a fence or wall of at least six feet. The City of Seattle, deeply concerned with local crime prevention, enacted a law regulating the same yards, but required an enclosure at least eight feet high. The supreme court held that this was a valid exercise of municipal police power, and thus there was no conflict.[115]

e. Preemption by the Legislature

A general law may also conflict with a municipal law or charter through express or implied legislative preemption. Express preemption occurs when the legislature expressly declares its intent to have exclusive jurisdiction over a particular subject matter.[116] For example, in 1969 the state legislature enacted the Washington State Explosives Act.[117] This Act provided extensive regulations on handguns and ammunition. In addition to the regulations, the state included a proviso expressly stating its intent to exercise exclusive jurisdiction.[118]

Even if the legislature has not expressly spoken on the issue of preemption, a court may infer an intent to preempt.[119] A variety of factors, including the quantity and specificity of state law on the subject, determine whether the legislature has preempted municipal power by implication. The court's weighing of state and local interests is well illustrated by the leading case in this field, *City of Spokane v. Portch.*[120] In *Portch,* the City of Spokane had enacted an ordinance defining obscenity and making it a misdemeanor to sell or distribute obscene materials, punishable by a maximum fine of $500 or six months in prison, or both.[121]

The state had previously enacted a statute almost identical to the municipal law, except for the obscenity definition.[122] Portch, convicted under the Spokane ordinance, argued that the city was without authority to enact a local ordinance because the state had preempted this subject area. The court was unable to find any state provision

114. 63 Wash. 2d 664, 670–71, 388 P.2d 926, 928–30 (1964).

115. *Id.* at 677, 388 P.2d at 934.

116. *Id.* at 670, 388 P.2d at 930.

117. WASH. REV. CODE § 70.74.201 (1987).

118. "*Provided,* That the state shall be deemed to have preempted the field of regulation of small arms ammunition and handloader components." *Id.*

119. City of Seattle v. Shin, 50 Wash. App. 218, 221 748 P.2d 643, 646 (1988).

120. 92 Wash. 2d 342, 596 P.2d 1044 (1979).

121. *Id.* at 343–44, 596 P.2d at 1044.

122. *Id.* at 345, 596 P.2d at 1045.

expressly limiting local legislation. Nevertheless, the court did find that the legislature had intended to preempt the field of obscenity.[123]

The court first considered whether the legislature had intended to create a uniform standard. The mere fact that the legislature enacted a statute in a subject area previously had not been considered by the Washington Supreme Court to show the need for a uniform standard.[124] The court in *Portch,* however, considered the potential first amendment ramifications and held that the enactment of the statute in this case did show a legislative intent for a uniform standard.[125] The court also found that the quantity and specificity of the state law served to further indicate an intent of preemption.[126] In reliance on these two factors, the supreme court held that the field of obscenity had been preempted by implication.

This holding may have a chilling effect on home rule. A municipality's freedom to enact regulations will be severely restricted if Washington courts frequently apply the implied preemption doctrine. Without a judicial ruling, a municipality would not be certain whether it could regulate a subject area. The supreme court has seemingly recognized this potential for undesirable judicial intervention, however, and has relied on this doctrine infrequently.[127]

Although the taxonomy developed above is of assistance in determining when a court will find conflict between general laws and municipal ordinances or charters, it is by no means a wholly accurate means of prediction. As with the interpretation of a municipal grant of power, the courts have not yet developed a consistent policy for dealing with cases involving conflict. In some cases, a court will refuse to find laws inconsistent unless they are in direct conflict.[128] In other cases, a court will find conflict if the state has acted in a subject area at all.[129] Judicial discretion in determining the proper relationship of state and local government powers makes it difficult to predict when a conflict will be found.

123. *Id.* at 347–48, 596 P.2d at 1045–47.

124. City of Bellingham v. Schampera, 57 Wash. 2d 106, 109, 356 P.2d 292, 296 (1960).

125. "We do not believe that the legislature intended to permit individualized systems of obscenity prohibition which may serve to chill protected First Amendment expression within the state. Rather, it seems clear that the legislature intended to create a uniform system of obscenity prohibition when it enacted R.C.W. 9.68." 92 Wash. 2d at 348, 596 P.2d at 1046.

126. *Id.*

127. The author has been unable to locate any cases relying on this doctrine of implied preemption since *Portch.*

128. Andersen, *supra* note 2.

129. *Id.*

III. PROPOSALS FOR MEANINGFUL HOME RULE

One century ago, the framers of Washington's constitution were forward thinking enough to recognize the need for home rule, and to provide in the original constitution what they believed to be the necessary means to achieve it. Due to the rapid population growth of our municipalities and the concomitant expansion of local services and responsibilities, local autonomy is even more imperative today. However, primarily due to narrow judicial interpretation of home rule grants and legislative inaction, municipal governments lack the ability to self-govern. Washington needs to develop a constitutional and statutory structure in which home rule may flourish.

A. Broaden the Grant of Municipal Power

The key to increasing municipal home rule is to reduce the uncertainty that pervades Washington home rule. Because of the unpredictability of judicial decisions in this area, local government officials are unable to determine accurately if an ordinance they enact will be upheld under a home rule grant of power. As a result, they hesitate to enact any ordinances at all.[130] One solution to this uncertainty-engendered inaction would be to broaden the grant of municipal power.

Currently, the most reliable method of determining the validity of a local law is for the municipal government to ask for an express delegation from the legislature. For example, in the past decade, the City of Seattle has sought special authority from the legislature to enact ordinances for protection of the city's watershed, consumer protection, regulation of libraries, and a variety of other city functions.[131] With a state legislature that only meets part-time, this is an extraordinarily inefficient state of affairs.[132] This inefficiency could be virtually eliminated by the passage of a constitutional amendment granting to municipalities the power to do anything that the legislature has the constitutional power to grant, and has not specifically prohibited.[133]

130. *Id.*

131. *Id.*

132. The Washington Legislature is limited to a 105-day regular session in odd-numbered years and a 60-day regular session in even-numbered years. WASH. CONST. art. II, § 12.

133. The amendment could be worded similarly to the National League of Cities, Model Constitutional Provisions for Municipal Home Rule which provides:

> 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 non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute, and is within such limitations as may be established by statute. This devolution of power does not include the power to enact private or civil law governing civil relationships except

Absent constitutional or statutory prohibitions, this amendment would allow a municipality the independence to develop its own ordinances, free from the need to apply to the legislature for specific grants. This amendment would also effectively shift the primary responsibility for determining the scope of municipal home rule powers from the judiciary to the state legislature. The legislature is a better forum in which to determine the scope of home rule powers. As an elected body, the state legislature can assure at least some municipal representation through each municipality's state representatives. In addition, the legislature, as a policy-making body, has the expertise in distributing power lacking in the judiciary. Although the judiciary's role would be lessened under this amendment, the courts would continue to resolve state and local law conflicts.

A complementary structural change should take place in the judiciary. Judicial construction necessarily plays a key role in the effectiveness of any amendment, for the court has the last word in constitutional interpretation. The court could play an active role in ending the ambiguity and confusion which its troubled record has sown. First, the supreme court could consistently adhere to its own precedent. Presently, a municipality can never be certain whether the court will follow a strict interpretative approach, as in *Massie,* or a more liberal construction.[134] Rather than citing a line of cases narrowly or broadly construing the scope of municipal power in order to reach a desired result, the court could establish a clear standard on which practitioners and government officials could rely in establishing policy and regulations. Consistency from the court would be a significant step toward the reduction of the current uncertainty.

Second, the court could deemphasize its reliance on Dillon's Rule. Dillon's Rule was developed in an era of distrust of municipal governments and therefore is not as meaningful today.[135] Most modern municipal officials are at least as competent as state legislators. The size and sophistication of first-class and charter code municipalities require these officials to act quickly and responsively. The delay

---

as incident to an exercise of an independent municipal power, nor does it include power to define and provide for punishment of a felony.

AMERICAN MUNICIPAL LEAGUE (NATIONAL LEAGUE OF CITIES), MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 19 (1953), *quoted in* Vanlandingham, *supra* note 97, at 6.

134. Andersen, *supra* note 2.

135. Dillon stated in reference to municipal officials that those "best fitted by their intelligence, business experience, capacity, and moral character" do not hold municipal positions. 1 J. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 9, at 85–86 (2d ed. 1873), *quoted in* Note, *supra* note 42, at 656 n.24 (emphasis omitted).

inherent in Dillon's Rule of express delegation makes it difficult for these administrators to perform their jobs adequately.

Finally, the supreme court could give greater weight to the intent of the legislature. The legislature has, on a number of occasions, clearly expressed its intent that home rule powers were to be liberally construed.[136] Yet the court in many cases continues to follow a strict construction of statutes regarding municipal power regardless of the legislature's intent.[137] Full recognition of legislative intent is a prerequisite to the effectiveness of any broad grant of municipal power.

Although these recommendations may ameliorate difficulties inherent in a narrow grant of home rule power, they do nothing to prevent the legislature and courts from denying power to municipalities through the strict application of the conflict clause.[138] These problems would have to be rectified through constitutional amendments providing for a sphere of immunity.

B. Provide a Sphere of Immunity for Municipalities

Under article XI, sections 10 and 11, the legislature has the ability to supersede a municipality on any subject matter, state or local. This allows the state legislature to enact general laws on purely local affairs such as matters regarding the recall of city council members[139] and the establishment of crematories within the city limits.[140] A preferable approach is to enact a constitutional amendment providing a sphere of immunity that would give local governments freedom to act without legislative intervention.[141] Municipal laws regulating purely local affairs would supersede state laws on the same subject. This amendment would be beneficial for a number of reasons.

A sphere of municipal immunity over local affairs would prohibit the state legislature from involving itself in affairs that can be best handled by local government.[142] As a result, the state legislature

136. *See supra* notes 67–69 (statutory language expressly providing for liberal interpretation of statutes regarding municipal power).

137. *See supra* notes 39–41 and accompanying text (strict interpretation of statutes regarding home rule powers under *Massie* decision).

138. *See supra* text accompanying note 33.

139. State *ex rel.* Lynch v. Fairley, 76 Wash. 332, 136 P. 374 (1913).

140. Oakwood Co. v. Tacoma Mausoleum Ass'n, 22 Wash. 2d 692, 157 P.2d 595 (1945).

141. California has adopted such a provision. CAL. CONST. art. XI, § 6 (1879, amended 1970).

142. The following is a response by the Association of Washington Cities to a questionnaire sent by Professor Vanlandingham in October 1965:

> Legislative bodies are subject to extreme political pressures from special interest groups with private axes to grind. The will of these groups is often given much greater consideration because of campaign contributions, etc., than the recommendations of the duly constituted

would be spared the burden of having to spend its limited time on issues that could be more effectively handled at a local level. In addition, a sphere of municipal immunity would encourage citizen participation in local government. Currently, citizens and local government leaders may shy away from participation because there is a significant likelihood that their work will be overturned by the courts. Under a sphere of immunity amendment, however, citizens would have the incentive to work at innovative solutions to local problems without the fear of their work being negated by the courts.

The difficulty in defining "municipal affairs" presents a drawback to permitting a sphere of immunity in municipal affairs. Because it is virtually impossible for a legislature to draft a totally comprehensive definition, the courts will ultimately be the branch of government forced to make this decision. This judicial case-by-case definition process will likely result in significant uncertainty. Municipalities will not be certain whether the subject matter of the ordinance they contemplate enacting is a "municipal affair" until the courts have ruled on the question.

To avoid the problems of judicial definition of "municipal affairs," Washington could adopt a complementary constitutional amendment, such as that recently passed in Kansas.[143] This amendment provides for a broad grant of municipal power, subject only to "uniform" state legislative acts. Except in cases of taxation, extraterritorial affairs, and municipal incorporation, where state involvement is arguably more essential, home rule municipalities may exempt themselves from state laws which are not uniformly applied to all cities. This structure allows an environment conducive to the development of home rule.

Washington could adopt such an amendment in conjunction with a sphere of immunity amendment to preserve local autonomy in "municipal affairs." With a sphere of immunity amendment standing alone, immunity is granted to municipalities only on issues that are purely local. There are few areas of regulation in which no state interest could be found. Thus, the courts and the state legislature could

---

local authorities. Unless cities are given some specific powers which the legislature cannot constantly override, the whole concept of home rule is in shambles. The legislature, in other words, will constantly go over the heads of local officials to appease an interest group, hamstringing an administration, or place undue burdens on cities without providing the funds to pay the bill.

Vanlandingham, *supra* note 4, at 296 n.142.

143. *See generally* Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule,* 20 KAN L. REV. 631 (1972) (discussing Kansas amendment).

pierce the sphere at will by classifying an area as one of joint state and local interest.

Under the uniformity amendment, however, in conjunction with the sphere of immunity amendment, only legitimate areas of joint interest would supersede municipal regulations. If the state has a legitimate joint interest—for example, uniform statewide traffic markings—then it could enact a general law, uniformly applied to all municipalities, that would supersede municipal regulations. If, however, the legislature enacts laws aimed at fewer than all municipalities, each local government would have the right to exempt itself from the legislation. This constitutional amendment would ensure meaningful local autonomy over "municipal affairs."

Under such an amendment, the courts would continue to adjudicate questions of constitutionality and the limits of legislative delegation. The role of the courts would be limited, however, to making determinations of what is uniformly applicable. Presumably, a state law would fall short of being uniform if it was not applied to all home rule municipalities.[144]

These three amendments, the broad grant of power amendment, the sphere of immunity amendment, and the uniformity amendment, would solve a number of the difficulties of Washington home rule today. The broad grant of power amendment would eliminate the need for local governments to wait for an express delegation before they can act. The sphere of municipal immunity amendment would create an area in which the municipality's ordinance would reign supreme, thus dispensing with the problem of excessive legislative involvement in local affairs. Finally, the uniformity amendment would eliminate much of the ambiguity inherent in the judicial determination of conflict and prevent the circumvention of the municipal affairs immunity by the legislature through special legislation disguised as general laws. Critical to the effectiveness of each of these amendments is a judiciary committed to meaningful local self-governance.

IV. CONCLUSION

The home rule currently practiced in Washington is, in many ways, illusory. The intent our founders had in developing the home rule provisions has not been realized. Constitutional changes, as well as changes in judicial interpretation, are needed to develop the environment necessary for local autonomy. Only through a concerted effort

144. *Id.* at 657 n.106.

by the courts, the legislature, and the citizens of this state can home rule in Washington become a reality.

Michael Monroe Kellogg Sebree