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# THE POWERS OF HOME RULE CITIES IN COLORADO\*

HOWARD C. KLEMME\*\*

Article XX of the Colorado constitution, which provides for municipal home rule, was adopted in 1902 for the purpose of creating the consolidated City and County of Denver and establishing that city's independence from state legislative control of its internal affairs.<sup>1</sup> By section 6 of the original amendment, certain home rule powers specifically conferred upon Denver were also made available to other cities in the state. The very brevity of section 6 suggests, however, that this objective was not then of pressing concern.<sup>2</sup> The more definitive grant of home rule powers now available to cities<sup>3</sup> was adopted in 1912, when section 6 was amended to amplify the

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\*Other works on this subject include MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 498-557 (1916); MCGOLDRICK, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE* 1916-1930, at 121-32 (1933); Johnson, *Municipal Home-Rule in Colorado Self-Determination v. State Supremacy*, 37 *DICTA* 240 (1960); McBride, *Municipal Home Rule in Colorado* (pts. 1-4), 31 *COLO. MUNICIPALITIES* 195, 216, 236 (1955), 32 *COLO. MUNICIPALITIES* 6 (1956); Reinhart, *Municipal Home Rule in Colorado*, 28 *MICH. L. REV.* 382 (1929).

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1. *People ex rel. Elder v. Sours*, 31 *Colo.* 369, 387, 74 *Pac.* 167, 172 (1903).

2. Section 6 originally read: Cities of the first and second class in this state are hereby empowered to propose for submission to a vote of the qualified electors, proposals for charter conventions and to hold the same, and to amend any such charter, with the same force and in the same manner and have the same power, as near as may be, as set out in sections four (4) and five(5) hereof, with full power as to real and personal property and public utilities, works or ways, as set out in section one (1) of this amendment. *COLO. CONST.* art. XX, § 6 (1902).

With the exception of section 6 and section 8 (which simply provides that the home rule amendment should prevail over other conflicting or inconsistent constitutional provisions), the remaining six sections of the amendment relate specifically to Denver.

Section 6 was included to assure the passage of the bill which proposed the amendment. KING, *THE HISTORY OF THE GOVERNMENT OF DENVER WITH SPECIAL REFERENCE TO ITS RELATIONS WITH PUBLIC SERVICE CORPORATIONS* 222 (1911).

3. While *COLO. CONST.* art. XX, § 6 as amended makes home rule available to both towns and cities, it does so only if they have a population of 2,000. Since under the present legislative classification, the dividing line between towns and cities is also 2,000, the provisions are presently available only to cities. *COLO. REV. STAT. ANN.* § 139-2-2 (Perm. Supp. 1960). The one exception to this is the remote possibility that an incorporated municipality had exactly 2,000 inhabitants. In that case it would still be classed as a town under the statute but would be able to avail itself of *COLO. CONST.* art. XX.

At the end of 1963, 30 Colorado municipalities had become home rule cities. *COLORADO MUNICIPAL LEAGUE, 1963 DIRECTORY, MUNICIPAL AND COUNTY OFFICIALS IN COLORADO* 30 (1963). As listed by the League, those cities are Alamosa, Arvada, Aurora, Boulder, Canon City, Colorado Springs, Cortez, Craig, Delta, Denver, Durango, Edgewater, Englewood, Fort Collins, Fort Morgan, Grand Junction, Greeley, Gunnison, Lafayette, Lamar, Littleton, Longmont, Monte Vista, Montrose, Pueblo, Rifle, Sterling, Westminster, and Wray. Since the 1963 Directory was issued, League officials report, Manitou Springs has also adopted home rule status.

powers conferred upon cities whose inhabitants might choose to avail themselves of the constitutional provisions.

Viewed as a *negative* doctrine limiting state legislative interference with local affairs of a particular municipality, or with particular local matters of concern to all cities, home rule has been, in some measure, accorded all municipalities by the Colorado constitution since its original adoption. For example, several provisions require the legislature, when dealing with certain local matters, to use general, rather than local or special, laws.<sup>4</sup> This prevents the legislature from acting as an *ad hoc* super-city council for individual cities. Other provisions expressly prohibit legislative control of specified *local* matters,<sup>5</sup> guaranteeing local self-government in these areas. None of the provisions, however, afford the inhabitants of Colorado's municipalities any real measure of *affirmative* home rule; that is, the power to decide locally how they should organize their municipal governments and what powers they should confer upon themselves as a local governmental unit. That the primary purpose of article XX was to achieve these objectives is nowhere better indicated than in the 1912 amendment to article XX, section 6:

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of 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 thrust of this declaration of purpose cannot be fully appreciated without some understanding of the traditional legal rules governing the organization and powers of municipalities. Of these rules the most fundamental is that the legislature, when creating municipalities and prescribing their organization and powers, is supreme. Its powers are plenary, limited only by the constitution

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4. *E.g.*, COLO. CONST. art. XIV, § 13, requiring the use of general laws for the organization, classification (which is limited to four classes) and designation of powers of municipalities; art. V, § 25, prohibiting the use of local or special laws, for "laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys and public grounds; . . . creating, increasing or decreasing fees, percentage or allowances of public officers. . . ."

5. *E.g.*, COLO. CONST. art. XV, § 11, prohibiting the construction of street railways within any municipality without the consent of local authorities; art. XV, § 12, prohibiting any law which imposes on the people of any municipality a new liability in respect to past transactions; art. V, § 35, prohibiting any legislative delegation "to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects . . . or to levy taxes or perform any municipal function whatever." Had the Colorado Supreme Court not emasculated this last provision in *In re Senate Bill Providing for a Board of Public Works in the City of Denver*, 12 Colo. 188, 21 Pac. 481 (1888), constitutional home rule might not have been adopted in Colorado.

itself.<sup>6</sup> There are only a few cases in which courts have deviated from this proposition by suggesting that cities may have some inherent right of local self-government.<sup>7</sup> The legislature's supremacy encompasses all activities, governmental and proprietary;<sup>8</sup> no action of a municipality is valid unless some relatively specific grant of authority can be found in a statutory or constitutional provision.

Historically, as with private corporations, the legislature could create a municipal corporation by enacting a special law granting a corporate charter. By the terms of the grant, the legislature could control the form of organization and scope of powers of any particular city. The legislature could maintain continuing control by enacting additional special laws amending the original corporate charter. Since the legislature could use special laws to provide for the creation, organization and powers of municipalities, it could, if it chose, easily assert its dominance over any city at any time.<sup>9</sup>

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6. Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.

Thus did Judge Dillon state the rule as a judge. *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868). For his comments as a text-writer concerning the legislature's supremacy over organization, see DILLON, *MUNICIPAL CORPORATIONS* § 92 (5th ed. 1911).

Concerning municipal powers, Judge Dillon's statement in the first edition of his treatise is undoubtedly the most widely accepted rule in the law of municipal corporations.

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

DILLON, *Id.* at 101-02. For a more recent discussion of Dillon's rule see Tooke, *Construction and Operation of Municipal Powers*, 7 TEMP. L.Q. 267 (1933).

The Colorado Supreme Court has accepted Judge Dillon's view. *Phillips v. City of Denver*, 19 Colo. 179, 34 Pac. 902 (1893); *City of Durango v. Reinsberg*, 16 Colo. 327, 26 Pac. 820 (1891). See also *People ex rel. Johnson v. Earl*, 42 Colo. 238, 94 Pac. 294 (1908).

The basic rule continues to be applicable to non-home rule municipalities in Colorado. *Dalby v. City of Longmont*, 81 Colo. 271, 256 Pac. 310 (1927). See also *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951 (1960).

7. DILLON, *op. cit. supra* note 6, § 98; FORDHAM, *LOCAL GOVERNMENT LAW, TEXT, CASES AND OTHER MATERIALS* 43-45 (1949); McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 199 (1916); Winter, *Municipal Home Rule, a Progress Report?*, 36 NEB. L. REV. 447, 449-50 (1957).

8. *Dalby v. City of Longmont*, 81 Colo. 271, 275, 256 Pac. 310, 312 (1927). As the authority cited in note 7 *supra* indicates, the power of a municipality to act either in a governmental or proprietary capacity is dependent upon legislative grant. However, once the power has been granted and exercised, for example, by the acquisition of property or the execution of a contract, subsequent legislative control may be less pervasive in the case of proprietary activities than in the case of government activities. DILLON, *op. cit. supra* note 6, §§ 109-10. This seems to be particularly true of municipal property held in a proprietary capacity. 2 McQUILLIAN, *MUNICIPAL CORPORATIONS* § 4.81 at 132 (3d ed. 1949). But see *Monaghan v. Armatage*, 218 Minn. 108, 15 N.W.2d 241, *appeal dismissed*, 323 U.S. 681 (1945).

9. See generally McBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 1-12 (1916).

The Colorado constitution, as originally adopted, restricted the General Assembly to the use of *general* laws when providing for the organization, classification and powers of towns and cities.<sup>10</sup> Had this constitutional limitation been more complete, the home rule movement might never have been of much importance in Colorado. However, the constitution also provided for the preservation of the charters of those municipalities which, prior to the constitution, had been incorporated by local or special laws, if such municipalities should choose to continue to operate under their special charters.<sup>11</sup> In an early case,<sup>12</sup> the supreme court held the General Assembly could continue to use special laws to amend the charters of such cities. Those specially chartered cities, therefore, which elected to continue under their charters rendered themselves subject to the possibility of direct legislative control.

Denver was such a city. For a time after the adoption of the constitution the city's status actually seemed to work to its advantage, especially in terms of the powers granted by the legislature.<sup>13</sup> Gradually, however, the tables were turned. First in 1889 and then in 1891 the General Assembly, by special legislation amending the city's charter, created two boards,<sup>14</sup> investing them with broad powers over important municipal affairs. To assure state control, the governor was given power to appoint the members of each board.<sup>15</sup> A "thoroughly inefficient" scheme of municipal government was created by subsequent amendments to the city's charter enacted in 1893.<sup>16</sup> In addition, the political turmoil of the times made impossible the passage of special legislation designed to broaden the city's powers.<sup>17</sup> The efforts of some of Denver's citizens to alleviate the city's problems led eventually to the home rule movement, culminating in the adoption in 1902 of article XX.<sup>18</sup> Thus, as seems generally true in other states,<sup>19</sup> home rule was adopted in Colorado for the purpose of re-

10. Art. XIV, § 13, discussed in *People ex rel. Johnson v. Earl*, 42 Colo. 238, 258, 94 Pac. 294, 300 (1908).

11. Art. XIV, § 14. The procedures by which a specially chartered municipality may be reorganized into one functioning under the general laws are provided for in COLO. REV. STAT. ANN. §§ 139-8-1 to -10 (1953).

12. *In re Senate Bill Providing for a Board of Public Works in the City of Denver*, 12 Colo. 188, 21 Pac. 481 (1888), citing *Darrow v. People*, 8 Colo. 417, 8 Pac. 661 (1885).

13. KING, *op. cit. supra* note 2, at 108, 110.

14. The Board of Public Works and the Fire and Police Board. The constitutional validity of the former was decided by the court in *In re Senate Bill Providing for a Board of Public Works in the City of Denver*, 12 Colo. 188, 21 Pac. 481 (1888).

15. KING, *op. cit. supra* note 2, at 124-30.

16. *Id.* at 192.

17. *Id.* at 218.

18. *Id.* at 211-22. Another interesting history of the home rule amendment is provided by the Author of the amendment himself in RUSH, *THE CITY-COUNTY CONSOLIDATED* 327-54 (1941).

19. MCBAIN, *op. cit. supra* note 9, at 5-9, 110-12; Tollemaar, *A Home Rule Puzzle*, 50 NAT'L CIVIC REV. 411 (1961).

lieving municipalities from their dependence on legislative action for their form of organization and powers and from the resultant interference in municipal affairs such dependence made possible.<sup>20</sup>

#### SUBSTANTIVE POWERS IN GENERAL

The most famous case defining the scope of the substantive powers conferred upon municipalities by the home rule amendment is *City & County of Denver v. Hallett*.<sup>21</sup> "[Article XX] was intended to confer not only the powers specially mentioned, but to bestow upon the people of Denver [as a home rule city] every power possessed by the Legislature in the making of a charter for Denver."<sup>22</sup> Under this broad standard, the test for determining the validity of action taken by a city is simply whether or not the legislature could have authorized the action taken.<sup>23</sup> This standard has been reaffirmed by the court on many occasions.<sup>24</sup>

Competing with this standard is a second: "The purpose of article XX was to give to the people of the city and county of Denver [as a home rule city] exclusive control in matters of local concern only."<sup>25</sup> Needless to say, this standard, too, has often been reaffirmed by the court.

These represent the two extremes the court has reached in attempting to establish guide lines for municipal activity under the home rule amendment. Which standard the court uses tends to depend upon two factors: (1) what power the city is attempting to exercise, e.g., the police power or the taxing power; and (2) whether or not the city's exercise of its legislative power is in apparent conflict with the state's exercise of its legislative power.

Neither standard is very useful in trying to decide whether a home rule city has authority to engage in a given activity. One reason is that the two standards are not coextensive. Some matters are sufficiently local to justify the conclusion that the legislature

20. Even if the constitution had not preserved the charters of those cities which had been specially incorporated prior to the adoption of the constitution, the legislature might still have been able to exert extensive control over the City of Denver, thereby providing the impetus for the home rule amendment. COLO. CONST. art. XIV, § 13 requires the legislature to use general laws in providing for the incorporation and powers of municipalities. The section also permits the legislature to classify municipalities into as many as four classes. To the extent Denver had a larger population than other cities, the legislature could have so classified cities that only Denver would fall within a given class. Thereafter, though the laws regulating that particular class would have been general in form, they would in fact have been special in the sense that they would have been applicable only to Denver.

21. 34 Colo. 393, 83 Pac. 1066 (1905).

22. *Id.* at 399, 83 Pac. at 1068.

23. *City & County of Denver v. Board of County Comm'rs*, 113 Colo. 150, 156 P.2d 101 (1945).

24. See, e.g., *Fishel v. City & County of Denver*, 106 Colo. 576, 108 P.2d 236 (1940); *City & County of Denver v. Henry*, 95 Colo. 582, 38 P.2d 895 (1934); *Newton v. City of Fort Collins*, 78 Colo. 380, 241 Pac. 1114 (1925).

25. *Maufl v. People*, 52 Colo. 562, 568, 123 Pac. 101, 103 (1912). See also *Williams v. People*, 38 Colo. 497, 88 Pac. 463 (1906).

could authorize a city to regulate or control them, and hence under the *Hallett* rule a home rule city would have power to do so. On the other hand, these same matters may not be "local only" and consequently under the second standard they would be beyond the purview of a home rule city. On occasion the court has attempted to bring the two standards together. In one case the court asserted that any power the legislature could have delegated before the amendment rendered the matter one of local or municipal concern.<sup>26</sup> While In another it indicated that the propriety of any delegation by the general assembly of powers to a municipality depended on the subject matter being of purely local concern.<sup>27</sup>

The home rule amendment does not exempt cities operating under it from the basic rule applicable to legislative cities<sup>28</sup> that action taken by a city without authority is invalid.<sup>29</sup> There are two important differences, however, which must be kept in mind when applying this rule to a home rule city. First, in claiming authority to justify its action, a legislative city is limited to the state statutes<sup>30</sup> and a few constitutional provisions.<sup>31</sup> A home rule city, on the other hand, may appeal for its authority to the home rule amendment, to its charter and in many, if not most, instances, to the general statutes applicable to the class of cities in which the city falls.

The second difference relates to how specific the grant of authority must be before the city may validly exercise any particular power. Under the traditional rules<sup>32</sup> a legislative city, in order to sustain the exercise of a substantive power, must be able to demonstrate a more or less specific statutory grant of authority from the legislature. A home rule city is not limited to its charter in the same way. A power may be exercised by the city council of a home rule city even though the charter does not expressly, or by necessary implication, grant it.<sup>33</sup> The power must not, of course, be limited either by the

26. *City of Pueblo v. Kurtz*, 66 Colo. 447, 182 Pac. 884 (1919).

27. *Sanborn v. City of Boulder*, 74 Colo. 358, 221 Pac. 1077 (1923).

28. A city incorporated under general laws is here called a "statutory" or "legislative" city.

29. "If a municipality acts beyond the authority granted it by the legislative enabling act or constitutional home rule provision or charter adopted thereunder, the action is ultra vires and therefore invalid whether or not it conflicts with a state statute." Comment, 72 HARV. L. REV. 737, 739 (1959).

30. See note 7 *supra*.

31. See, e.g., COLO. CONST. art. V, § 1, which provides that "municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation."

32. See discussion note 7 *supra*.

33. "[A]s a general rule the powers vested in home-rule cities, not specifically limited, by constitution or charter, may be exercised through their legislative authority." *People ex rel. McQuaid v. Pickens*, 91 Colo. 109, 112, 12 P.2d 349, 351 (1932), citing *Newton v. City of Fort Collins*, 78 Colo. 380, 241 Pac. 1114 (1925). The holding of the *McQuaid* case *supra* was subsequently approved and applied in *Fishel v. City & County of Denver*, 106 Colo. 576, 585, 108 P.2d 236, 241 (1940). It may not be without significance that at the time the *Fishel* case was decided a provision in the charter generally conferred on the city council all legislative



charter or by the constitution, and it must be one which is at least generally conferred by the home rule amendment, that is, one relating to a local or municipal matter. Within the scope of these broad powers, however, the charter is an instrument of limitation, not one of grant.<sup>34</sup> For example, in order that the city council of a legislative city may enact a valid ordinance providing for the construction of a municipal auditorium, there must be a statute authorizing the activity. However, for the city council of a home rule city to enact such an ordinance, a charter provision specifically conferring such authority is not required. Reference to the charter is necessary only to determine the existence of any limitations. Failure to comply with any limitations will render the action invalid.<sup>35</sup>

In addition to the charter-making powers of section 4 and the charter-amending powers of section 5 conferred on all home rule cities by section 6 of article XX, section 6 itself enumerates several specific powers.<sup>36</sup> It also adopts by reference the enumerated powers

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possessed by the city except as otherwise provided for. See also *Lavery v. Straub*, 110 Colo. 311, 134 P.2d 208 (1943); *Clough v. City of Colorado Springs*, 70 Colo. 87, 197 Pac. 896 (1921).

34. The recent case of *Fellows v. LaTronica*, 377 P.2d 547 (Colo. 1962), tends to limit the usefulness of the general rule of the *McQuaid* case, *supra* note 33, by suggesting that an implied limitation in a city's home rule charter may not be too difficult to find. See also *City & County of Denver v. Denver Buick*, 141 Colo. 121, 347 P.2d 919 (1960).

35. See, e.g., *City & County of Denver v. Miller*, 149 Colo. 96, 368 P.2d 982 (1962); *McNichols v. City & County of Denver*, 123 Colo. 132, 230 P.2d 591 (1950).

36. From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

of section 1.<sup>37</sup> The enumerated powers in section 6 are supplemented by a general grant of "all other powers necessary, requisite or proper for the government and administration of [the city's] local and municipal matters."

As set out in section 6, the basic law of municipal home rule can be easily stated. If a matter is of local or municipal concern, a home rule city may regulate or otherwise control or act with reference to it. In the absence of municipal action the matter is to be governed by applicable state law. If the matter is solely of local or municipal concern and the city has acted with reference to it, the municipality's action will supersede any conflicting state statute regulating the same matter. If a matter is solely of statewide, as opposed to local or municipal concern, no action taken by the municipality with reference to it is valid. A municipality can claim no authority to regulate such matters under the home rule amendment.<sup>38</sup>

Although the basic law may be simply stated, the problems it presents have not been so simple to resolve. What, for example, constitutes a *local* or *municipal* matter as opposed to a *statewide* matter? Are the categories of "local" and "statewide" mutually ex-

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g. 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; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter. . . . COLO. CONST. art. XX, § 6.

37. By virtue of this adoption, home rule cities are given perpetual succession and:

may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city . . . and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city . . . may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city . . . which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided. COLO. CONST. art. XX, § 1.

38. *City & County of Denver v. Palmer*, 140 Colo. 27, 342 P.2d 687 (1959); *Glendinning v. City & County of Denver*, 50 Colo. 240, 114 Pac. 652 (1911).

clusive, or are there some matters which fairly can be said to partake of both? If there are such "mixed" matters, may a home rule city regulate them? If so, under what conditions? Finally, in the absence of municipal action with reference to a local matter, under what conditions, if any, may the state, through its general laws, regulate the matters?

#### CHARACTERIZATION OF SUBJECTS AS LOCAL OR STATEWIDE

Since the categorization of subjects under the home rule amendment as statewide or local determines the allocation of basic legislative powers as between the General Assembly and home rule cities, it should not be surprising that the court has had difficulty making these characterizations. In the first place, the task of allocating legislative powers often involves fundamental policy questions, which, being essentially political, are not the type courts are particularly well suited to resolve.<sup>39</sup> Secondly, the categories are not susceptible to any precise definition, primarily because few, if any, subjects can be said to be entirely local or entirely statewide.<sup>40</sup> Finally, as the court itself has recognized, once a matter has been classified, its classification is subject to change in the light of altered conditions and circumstances.<sup>41</sup>

Nothing illustrates better the impossibility of giving any precise definition to "local" or "statewide" than the fact that the court has never tried to do so. The court has yet to develop any useful test for distinguishing the two, although it has indicated from time to time some factors which may influence it in making any particular decision. For example, in one case the fact that the subject matter which the municipal regulation was attempting to control was peculiar to heavily populated areas caused the court to view the matter as local.<sup>42</sup> On the other hand, the subject matter in another case was classed as one of statewide concern because the municipal regulation would have a substantial impact on persons living outside the city.<sup>43</sup> If uniformity of regulation seems desirable, the matter is likely to be classed as statewide.<sup>44</sup> Whether uniformity is desirable

39. McBAIN, *op. cit. supra* note 9, at 669-73, 684; Mendelson, *Paths to Constitutional Home Rule for Municipalities*, 6 VAND. L. REV. 66, 76-77 (1952).

40. "It has been a fundamental difficulty with the home rule concept from the beginning that public affairs are not inherently either local or general in nature." Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 25 (1948); See also Mendelson, *supra* note 39, at 69-70.

41. *People v. Graham*, 107 Colo. 202, 205, 110 P.2d 256, 257 (1941); *People ex rel. Stokes v. Newton*, 106 Colo. 61, 66, 101 P.2d 21, 23 (1940). See also Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571, 582 (1955).

42. *Dominguez v. City & County of Denver*, 147 Colo. 233, 363 P.2d 661 (1961) (vagrancy).

43. *People ex rel. Pub. Util. Comm'n v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952), *overruling City & County of Denver v. Mountain States Tel. & Tel. Co.*, 67 Colo. 225, 184 Pac. 604 (1919) (regulation of telephone rates).

44. *People v. Graham*, 107 Colo. 202, 110 P.2d 256 (1941) (duties to stop after a traffic accident, give name and address and render aid).

may depend on whether local physical conditions vary sufficiently to justify variations in local regulations.<sup>45</sup>

In a very brief opinion the court recently held larceny to be a matter of statewide concern and invalidated a municipal ordinance which sought to regulate the subject.<sup>46</sup> Only Justice Doyle in a concurring opinion<sup>47</sup> offered an explanation for the conclusion. In deciding how a specific subject should be classified, he suggested the respective interests of the state and the municipality should be weighed, and if those of the municipality greatly outweigh those of the state, the municipality's regulation should prevail by classifying the subject as local. If, on the other hand, the interests of the state greatly outweigh those of the municipality, the matter should be classed as statewide, with the state retaining sole legislative jurisdiction. Aside from the fact that the city was attempting to regulate conduct which historically had been controlled by the state, Justice Doyle also noted<sup>48</sup> that the specific problem dealt with by the ordinance was a "general one faced by all citizens and communities" in the state. The specific problem was not peculiar to cities of "metropolis size." It was his conclusion, because of the seriousness of the conduct, that the state's interest in obtaining clarity and uniformity of definition, "a high level of enforcement, a parity in sentencing procedures and effective reformatory practices"<sup>49</sup> had to prevail by classifying the subject as exclusively statewide.

In some cases where the legislature has enacted a statute regulating a matter and a municipality has attempted to do the same by ordinance, the court has tended to raise a presumption in favor of the state that the matter is of statewide concern. This has occurred even though the policy sought to be effectuated by the ordinance was consistent with the policy the statute was intended to further.<sup>50</sup> The court has wisely rejected the proposition that regulation by the legislature automatically renders the matter of statewide concern. To hold otherwise would "strip all of the home rule cities . . . of every last vestige of local rule and local control with the possible exception of a few regulatory and licensing ordinances."<sup>51</sup> The fact remains that a party seeking to rely on the city's right to control will usually have a more difficult task persuading the court than a party who is asserting the state's right to control.

45. *Retallack v. Police Court*, 142 Colo. 214, 351 P.2d 884 (1960) (reckless driving held local); *City & County of Denver v. Henry*, 95 Colo. 582, 38 P.2d 895 (1934) (duty to yield right-of-way at street intersections held local).

46. *Gazotti v. City & County of Denver*, 143 Colo. 311, 352 P.2d 963 (1960).

47. *Id.* at 315, 352 P.2d at 965.

48. *Id.* at 317-18, 352 P.2d at 966-67.

49. *Id.* at 318, 352 P.2d at 967.

50. See, e.g., *City of Canon City v. Merris*, 137 Colo. 169, 323 P.2d 614 (1958); *Mauff v. People*, 52 Colo. 562, 123 Pac. 101 (1912). The specific holding of the *Mauff* case was subsequently nullified by an express provision in the 1912 amendment to Section 6. See subsection d, note 36 *supra*.

51. *Retallack v. Police Court*, 142 Colo. 214, 216, 351 P.2d 884, 885 (1960).

This situation of concurrent, and hence potentially conflicting, legislative regulation occurs most frequently when both the city and the state are exercising the police power for the protection of public health or safety. The two cases which best illustrate the presumption in favor of state control, however, involved other municipal powers; specifically the power to spend municipal funds and the power to levy special assessments. In *Keeffe v. People*,<sup>52</sup> the court upheld the criminal conviction of a contractor who had not complied with a state statute imposing maximum hours of work for laborers employed on projects undertaken in behalf of any municipality. The court acknowledged that under the then existing state of constitutional law the statute could not be upheld under the state's police power. It could, however, be sustained under the state's right to control the terms and conditions under which work for itself and its political subdivisions could be done. The fact that the work was being done for a home rule city was not considered relevant, although one would have expected that under the home rule amendment the city and not the state had the right to control the terms and conditions under which work was done for the city.

The court seemed to adopt the view that state legislation on the subject automatically rendered it one of statewide concern and thereby deprived the home rule city of any control over it.

[Denver as a home rule city] is just as much an agency of the state for the purpose of government as if it was organized under a general law passed by the general assembly. . . . It is as much amenable to state control in all matters of a public, as distinguished from matters of a local, character, as are other municipalities. The state still has the supreme power to enact general laws declaring what shall be its public policy, and it can make them applicable to the city of Denver. . . . What the public policy of the state is, rests with its legislative department.<sup>53</sup>

While the city had not attempted to regulate the subject matter involved in the *Keeffe* case by ordinance, the court's holding indicates that had it attempted to do so, the ordinance would have been invalid.

While the *Keeffe* case was decided prior to the 1912 amendment expanding section 6, the court followed the same approach after the

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52. 37 Colo. 317, 87 Pac. 791 (1906).

53. *Id.* at 324-25, 87 Pac. at 793. The court continued:

The work of building a sanitary sewer by a city, in a sense, is local, in that it affects, primarily, its own citizens; but it is directly connected with the public health, and is a matter of concern and great importance to the people of the entire state.

The subject matter which was either of local or statewide concern was, of course, not the sewer, but the maximum hours an employee could be permitted to work for a contractor doing work for the city. The state, as the court notes, could not as the law then stood impose such a restriction under the police power. This being the case, the effect such a requirement would have on the cost to the city of having the work done would seem to render the subject wholly a matter of local concern.

1912 amendment in *City & County of Denver v. Tihen*.<sup>54</sup> In that case the court held a home rule city was bound by a state statute exempting the property of non-profit cemetery corporations from local assessments. As one of its premises, the court again accepted the argument that:

The Legislature of a state has sole power to say what the public policy of the state shall be [and that] public policy must be applicable to all portions of the state. . . . The people of the state, in adopting article XX and the amendments thereto, did not intend to confer upon municipalities organized thereunder the absolute and unrestricted power to tax, or to make assessments for local improvements regardless of public policy.<sup>55</sup>

No argument could misconceive the purposes of the home rule amendment more completely. No one would expect a public power to be exercised without regard to public policy. The question is: public policy as determined by whom? The home rule amendment makes clear that a public policy concerning a local matter can be determined by the state, but only so long as it does not conflict with a contrary determination made by a home rule city. In terms of the power to formulate a public policy about a local matter, the home rule amendment must be construed as divesting the legislature of its "sole" power to declare the public policy, for if it does not, the amendment and most of its language makes no sense at all.

The fundamental legislative question in the case was: who should pay the cost of improvements benefiting abutting land owned by a non-profit cemetery corporation—the taxpayers of the city or those who would receive the benefit of the improvements through their purchases of land from the corporation? If the answer to such a question is not a purely local matter, it is difficult to conceive of any policy determination which could properly be considered local.

The fact that cemeteries were exempted from local assessments before article XX was adopted hardly justifies the conclusion that home rule cities were not given a power to adopt a contrary policy. If this were not true, home rule cities would be bound by every statute regulating towns and cities enacted prior to article XX. As far as local matters are concerned, however, the fundamental objective of article XX was to permit cities, if they should so choose, to free themselves from the operation of just such statutes.

Neither does the "general sentiment of all civilized people"<sup>56</sup> that burial grounds are sacred justify the conclusion that the liability of non-profit cemetery corporations for special assessments is a mat-

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54. 77 Colo. 212, 235 Pac. 777 (1925).

55. *Id.* at 219, 235 Pac. at 780.

56. *Id.* at 223, 235 Pac. at 782.

ter of statewide concern. To say that a subject about which there is a general public sentiment is a matter of statewide concern is inconsistent with the home rule amendment, since almost every statute can be taken as expressing a public sentiment and the existence of any statute on any subject would thereby render the subject one of statewide concern. This view the court has specifically rejected.<sup>57</sup> It hardly need be said that the existence or non-existence of a general public sentiment about a subject was not the criterion upon which the drafters of article XX expected the court to determine the legislative jurisdiction of home rule cities. In the absence of a specific constitutional provision, the public policy of exempting or not exempting non-profit cemetery corporations from special assessments would clearly seem to be a matter for local determination, especially in view of the express provisions of article XX.<sup>58</sup>

While it may have been unfortunate that the court in *Keefe* and *Tihen* took such a limited view of the home rule amendment, it may not be so unfortunate that the court generally tends to favor the state over home rule cities in instances of conflict. As one author has noted:

For those upon whom such responsibility falls must be constantly aware that there is far greater danger in depriving a larger, rather than a smaller, unit of government of any power. Thus at the very least in cases of doubt . . . the judicial tendency must be—and quite properly is—against home rule.<sup>59</sup>

#### THE POWER OF A HOME RULE CITY TO REGULATE MATTERS INVOLVING STATEWIDE INTERESTS

A careful reading of section 6 reveals that in no place does the provision speak of a category other than local and municipal. The category "statewide" has been created by the courts on the basis of obvious implication. The question is: Is this the only other category which can be fairly implied from section 6?

Several earlier cases recognized that there are subject matters which involve both local and state interests and these subjects cannot, therefore, be classified exclusively as either local or statewide. The licensing of hospitals for the protection of the public health,<sup>60</sup> the regulation of pawnbrokers<sup>61</sup> and peddlers,<sup>62</sup> and the establishment of pension funds for firemen and policemen<sup>63</sup> have thus been treated as matters of "mixed" concern.

57. *Retallick v. Police Court*, 142 Colo. 214, 216, 351 P.2d 884, 885 (1960).

58. See COLO. CONST. art. XX, § 6(g) note 36 *supra*.

59. *Mendelson*, *supra* note 39 at 70.

60. *Spears Hosp. v. State Bd. of Health*, 122 Colo. 147, 220 P.2d 872 (1950).

61. *Provident Loan Soc'y v. City & County of Denver*, 64 Colo. 400, 172 Pac. 10 (1918).

62. *McCormick v. City of Montrose*, 105 Colo. 493, 99 P.2d 969 (1940).

63. *Board of Trustees v. People ex rel. Behrman*, 119 Colo. 301, 203 P.2d 490 (1949), *overruled on other grounds*, *Police Pension v. McPhail*, 139 Colo. 330, 338 P.2d 694 (1959).

In these areas of mixed concern a home rule city could, according to these earlier cases, properly regulate the subject matter on the basis of the home rule amendment.<sup>64</sup> The fact that the legislature too had chosen to regulate did not deprive the home rule city of its power to regulate the same subject matter unless the municipal regulation conflicted with that of the state,<sup>65</sup> or unless the state by its legislative exercise of power intended to occupy the field.<sup>66</sup>

In these earlier cases the court did not treat the dual exercise by a home rule city and by the General Assembly of their respective legislative jurisdictions over the same subject matter as necessarily creating a conflict. More typically the court viewed the municipal regulation as properly supplementing the state statute when, although more stringent, the municipal regulation was in accord with the basic policy of the statute.<sup>67</sup> The added problems which might arise because of the greater density of population in cities was taken by the court as sufficient justification for the imposition of more rigid restrictions by the municipality.<sup>68</sup> The test for determining whether a statute and an ordinance conflicted was whether the ordinance permitted that which the statute prohibited or vice versa.<sup>69</sup> In cases involving conflicts of this sort, the statute prevailed and the ordinance was held invalid.<sup>70</sup> And even though there was no such conflict, an ordinance regulating a mixed matter did not supersede the statute. The statute continued to be applicable to persons in home rule cities.<sup>71</sup>

To some extent the use of this category of mixed matters permitted the court to lighten its burden of allocating legislative powers

64. "Whether there shall or shall not be soliciting in or upon private residences within the city, at least until the state has seen fit to exercise its police powers with reference to it, is a matter of local concern only." *McCormick v. City of Montrose*, 105 Colo. 493, 501, 99 P.2d 969, 972-73 (1940).

65. *Provident Loan Soc'y v. City & County of Denver*, 64 Colo. 400, 172 Pac. 10 (1918); *Ray v. City & County of Denver*, 109 Colo. 74, 121 P.2d 886 (1942) (by implication).

66. *Board of Trustees v. People ex rel. Behrman*, 119 Colo. 301, 203 P.2d 490 (1949), *overruled on other grounds*, *Police Pension v. McPhail*, 139 Colo. 330, 338 P.2d 694 (1959).

67. It is well settled that the mere fact that the state, in the exercise of the police power, has made certain regulations does not, however, prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two . . . both will stand. . . . The city has the power to legislate upon local and municipal matters. If, as contended by plaintiff in error, the [matter] is . . . of state-wide interest, this fact does not prevent [the matter] from being also a matter of municipal interest. The preservation of the health, safety, welfare and comfort of the dwellers in urban centers of population requires the enforcement of very different and usually much more stringent police regulations in such districts than are necessary in a state taken as a whole.

*Provident Loan Soc'y v. City & County of Denver*, 64 Colo. 400, 404-05, 172 Pac. 10, 12 (1918).

68. *Id.* See also *Spears Hosp. v. State Bd. of Health*, 122 Colo. 147, 149-50, 220 P.2d 872, 874 (1950) (dictum).

69. *Ray v. City & County of Denver*, 109 Colo. 74, 121 P.2d 886 (1942).

70. *Ibid.*

71. *Spears Hosp. v. State Bd. of Health*, 122 Colo. 147, 220 P.2d 872 (1950).



under the home rule amendment between the General Assembly and home rule cities. Nonetheless, for a brief period, the court abandoned the device in favor of the doctrine of mutual exclusion. This doctrine was first enunciated as dictum in the *Merris* case.<sup>72</sup>

In the company of words, appearing in Article XX, Section 6, the term "supersede" means that the law of the state is displaced on a local and municipal matter where there is an ordinance put in its place. Where, however, the matter is of statewide concern, supersession does not take place. Application of state law or municipal ordinance, whichever pertains, is mutually exclusive.<sup>73</sup>

Under this doctrine, the respective legislative jurisdictions of the state and the home rule city are encompassed within two distinct, separate spheres. If a matter involves a statewide interest, the legislature's jurisdiction is exclusive and a home rule city has no power whatever to regulate the matter. If the matter is "purely" or "strictly" a local matter, then the home rule city has exclusive legislative jurisdiction and the state may not regulate it.<sup>74</sup>

Although it was originally presented as dictum in *Merris*, the doctrine of mutual exclusion was soon transformed into a holding.

In *In re Senate Bill No. 72*,<sup>75</sup> the court was asked by the Governor for an advisory opinion on the constitutionality of a statute which in effect sought to re-establish the law as it existed prior to the creation of the doctrine of mutual exclusion. The statute provided generally that municipal corporations should have the power to make and publish ordinances which were not inconsistent with state law, for the purpose of carrying into effect and discharging the various powers and duties conferred by the state statutes or which were deemed necessary to provide for the safety, health and welfare of the corporation and its inhabitants. Although the statute did not mention home rule cities specifically, the language of the statute, at least in part, seemed clearly intended to apply to them.

It shall be the public policy of the state that where the subject matter of a municipal ordinance may be of both local and municipal concern and also of state wide concern, the existence of state legislation upon such subject matter, or the

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

73. *Id.* at 180, 323 P.2d at 620. The court cited no authority in support of the doctrine. Had it desired to do so, however, it could have relied on language from earlier cases asserting that the powers conferred upon home rule cities by the amendment are limited to matters "purely" of local concern. See, e.g., *Williams v. People*, 38 Colo. 497, 506, 88 Pac. 463, 466 (1906). "[The charter of a home rule city] is confined to . . . local concerns, and cannot invade the field of county or state legislation at all, and, as to such matters, the general assembly is both supreme and exclusive except as limited by the constitution."

74. *City of Canon City v. Merris*, 137 Colo. 169, 323 P.2d 614 (1958), as interpreted in *Woolverton v. City & County of Denver*, 146 Colo. 247, 251-52, 361 P.2d 982, 984 (1961).

75. 139 Colo. 371, 339 P.2d 501 (1959).

subsequent adoption of state legislation thereon, shall not deprive any municipal corporation of the right or power to make . . . ordinances thereon not inconsistent with the laws of the state, nor be construed to mean that such subject matter is solely of statewide concern, unless it is expressly declared by statute that only the state shall have power to adopt legislation thereon. . . .<sup>76</sup>

It is evident from this and other provisions in the statute that the statute was the legislature's answer to some of the problems created or suggested by the *Merris* decision.<sup>77</sup>

Without discussion, the court advised the Governor that the statute was unconstitutional for at least two reasons. First, the statute unconstitutionally delegated legislative power over matters of statewide concern to municipal corporations, and secondly, the statute unconstitutionally authorized the adoption of special and local laws in violation of article V, section 25. In view of the effect this decision had on the prior cases involving mixed matters, where the court had permitted simultaneous regulation by the state and home rule cities, an explanation of the court's holding would, to say the least, have been useful.

Almost immediately after the decision in *In re Senate Bill No. 72* was rendered, however, the court began to depart from the holding by rejecting the premise on which it was based—the doctrine of mutual exclusion as espoused in the *Merris* case. Insofar as the court's holding in the case could be said to be applicable to its own prior decisions involving the power of home rule cities to regulate mixed matters, the case, as we shall see, has been overruled sub silentio.

In *Davis v. City & County of Denver*,<sup>78</sup> the defendant had been convicted of violating a municipal ordinance prohibiting a person from driving while his license was suspended. The court held the ordinance invalid on the grounds that the state statute which regulated the same conduct was intended by the legislature to pre-empt the field. The court also noted in dictum, however, that nothing in the Constitution required that as to all matters of general interest the state alone be deemed to have exclusive legislative jurisdiction. Although the matter may be of predominantly statewide concern, a municipality may have a sufficient interest to justify a delegation of power to it to regulate the matter.

76. As quoted by the court. *Id.* at 373, 339 P.2d at 502.

77. The statute, for example, provided that where a municipal ordinance and a state criminal statute punished the same conduct, prosecution for violation of the ordinance would bar prosecution for violation of the statute and vice versa. The statute also preserved that part of the *Merris* case which required that prosecutions for violations of municipal ordinances be tried in accord with criminal rather than civil procedures.

78. 140 Colo. 30, 342 P.2d 674 (1959).

The power to so delegate is, of course, subject to the limitation that the State cannot surrender its sovereignty with respect to subjects exclusively statewide and general. However, the authority of the State to delegate police powers to the municipality in those areas where the subject matter, although predominately general is also to some extent municipal, seems to be approved practice.<sup>79</sup>

The court rejected the mutual exclusion doctrine of *Merris*:

To hold that matters which are general are the exclusive preserve of the state, just as matters local and municipal can be regulated only by the city (once the city has acted) would create a highly inflexible system and would require the state or city to obtain a continuous stream of rulings from this Court as to whether a subject is local or state-wide. This kind of 'strait jacket' rule is inappropriate to the changing society in which we live and *Canon City v. Merris* . . . should not be construed as so holding.<sup>80</sup>

The power of a home rule city to regulate these mixed matters, said the court, can only be exercised if the state consents to its exercise. Since there was no statute delegating the power to, or consenting to its exercise by, the city in this particular case, the ordinance was held invalid.

Justice Frantz, who had written the opinions for the majority in both the *Merris* and *In re Senate Bill No. 72* cases, concurred<sup>81</sup> on the grounds that the matter was of statewide concern and, therefore, was subject to the exclusive legislative jurisdiction of the state. Consistent with his opinion in the latter case, Justice Frantz viewed as unconstitutional any legislative delegation of powers to cities to regulate matters involving any degree of statewide concern.

In another case<sup>82</sup> decided the same day as *Davis*, with Justice Doyle writing the opinion for the majority, the court considered again the limits of a home rule city's powers to regulate matters of joint concern to the state and a municipality. The case involved the question of Denver's authority to regulate speeds on that section of the Valley Highway located within the city. By an agreement between the city and the State Highway Engineer, the city agreed not to establish a speed limit of less than 50 m.p.h. without the written consent of the State Engineer. Parking regulations were not to be put into effect by the city without prior approval by the State Engineer. The duties of maintaining, policing and lighting the highway were placed on the city. A statute authorized the State Engineer to enter into such agreements; an ordinance authorized the mayor of Denver to enter into this particular agreement. The trial court

79. *Id.* at 38, 342 P.2d at 677.

80. *Id.* at 40, 342 P.2d at 679.

81. *Id.* at 42, 342 P.2d at 680.

82. *City & County of Denver v. Pike*, 140 Colo. 17, 342 P.2d 688 (1959).

had held the city lacked jurisdiction to put these speed limits into effect, despite the agreement, because they had not been submitted to the State Department of Highways for approval as required by another statute. The city claimed that the regulation of speeds on a state highway within a home rule city was a matter of local concern and subject to the exclusive legislative jurisdiction of a home rule city if it choose to exercise such jurisdiction. The city, therefore, asserted its ordinance would have been valid even had there been no agreement between itself and the State Engineer.

The supreme court, on appeal, rejected the city's contention that the agreement and the statute authorizing the agreement were irrelevant considerations. Regulation of speed on a state highway is a matter of mixed concern. Because the highway is a connecting link across the city between other state highways, the state has an interest in preventing local regulations which might interfere with statewide or national travel. On the other hand, as the highway serves as a city street carrying heavy intra-city traffic, the city has an obvious interest in controlling traffic flow. The city's regulation was, therefore, valid, the state having consented to it through its State Engineer. Formal consent from the Highway Department as required by the second statute was unnecessary.

Again, Justice Frantz, relying on the doctrine of mutual exclusion concurred<sup>83</sup> in the result on the grounds that the matter was one of local concern, subject to the exclusive jurisdiction of the city if it chose to exercise it.

The doctrine of mutual exclusion as originally set forth in the *Merris* case was finally, by specific holding, rejected by the court in *Woolverton v. City & County of Denver*.<sup>84</sup> With some care, Justice Doyle, again writing for the majority, reviewed the earlier cases,<sup>85</sup> coming to the conclusion that the doctrine was contrary to the basic law the court had been developing under the home rule amendment for several decades. The home rule amendment must be read, Justice Doyle continued, as contemplating at least three broad categories into which subjects may be classified—those which are wholly local; those which are strictly statewide; and those which, though predominantly statewide, are of sufficient concern to municipalities to permit supplemental regulation.<sup>86</sup> The doctrine of mutual exclusion, if there is any room for it in the law of home rule, "has validity [only] as

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83. *Id.* at 26, 342 P.2d at 693.

84. 146 Colo. 247, 361 P.2d 982 (1961).

85. *E.g.*, *Spears Hosp. v. State Bd. of Health*, 122 Colo. 147, 220 P.2d 872 (1950); *McCormick v. City of Montrose*, 105 Colo. 493, 99 P.2d 969 (1939); *Provident Loan Soc'y v. City & County of Denver*, 64 Colo. 400, 172 Pac. 10 (1918).

86. A fourth category for matters which are predominately local but which involve some statewide interests is also possible.

between the home rule city and the state where the subject is unquestionably and wholly local or is strictly statewide."<sup>87</sup>

This statement, it will be noted, is not completely accurate, for even in these areas, the exclusion is not mutual. A home rule city does not have exclusive legislative jurisdiction over local matters unless it chooses to exercise such jurisdiction. Until then, a state statute governing a local matter is, by the express language of section 6, the applicable law.<sup>88</sup> Supersession does not occur until the home rule city acts by adopting a *conflicting* provision. As to matters which are strictly statewide, only the state has jurisdiction and the legislature may not delegate to a home rule city the power to regulate such subject matters. The state's jurisdiction over strictly statewide matters therefore is exclusive, but a home rule city's jurisdiction over strictly local matters is not, unless the city should decide to make it so by enacting a conflicting ordinance or adopting a conflicting charter provision.

As to matters which are predominantly statewide, but which are also of local interest, both the home rule city and the legislature may regulate the matter. As a home rule city can assume exclusive jurisdiction over a strictly local matter by enacting a conflicting ordinance, the state legislature can assume exclusive jurisdiction over "mixed" matters by pre-empting the field, or, as the court has sometimes put it, by refusing to consent to the regulation by the home rule city.

The *Woolverton* case does not clearly establish the source from which a home rule city may claim its power to regulate mixed matters. May the city effectively assert jurisdiction over these matters on the basis of the powers conferred by the home rule amendment or must it rely, as a legislative city must, on a statute specifically delegating regulatory powers to cities of the class in which the city falls? The earlier cases indicated the home rule amendment was the source of authority.<sup>89</sup> However, in the *Woolverton* case, which involved the power of the city and county of Denver to regulate gambling, the court viewed as significant a statute delegating such power to cities generally. If the home rule amendment is the source of authority, then it would seem a statute regulating the same subject would be relevant only in determining whether a conflict existed or whether the legislature by its enactment intended to pre-empt the

87. *Woolverton v. City & County of Denver*, 146 Colo. 247, 252, 361 P.2d 982, 984 (1961).

88. *Id.* at 253, 361 P.2d at 895.

89. See particularly, *McCormick v. City of Montrose*, 105 Colo. 493, 501, 99 P.2d 969, 972 (1939).

The Twentieth Amendment to the Constitution gives to home rule cities the right to exercise police power as to local matters, possibly subject to the limitation that they may not exercise police power in such manner as to interfere with the state's exercise of its police power where it has elected to deal with the same subject matter.

field. And obviously, as was the situation in *Woolverton*, if the statute generally delegated the power to cities to regulate the matter, the lack of any intention by the legislature to pre-empt the field would be clear. If the source of authority is the home rule amendment, it would also seem to be true that in the absence of any statute dealing with the subject, the ordinance would be valid. On the other hand, if the power of a home rule city to regulate these mixed matters is dependent upon the legislature's consent, as is the case with legislative cities, then a home rule city's power would seem to depend on a more or less specific delegation of power from the legislature. Absent such a statute, any ordinance of a home rule city regulating the matter would be invalid.<sup>90</sup>

In the *Davis* case, the court talked in terms of legislative consent and concluded that the legislature intended to pre-empt the field because of the absence of any statute delegating or consenting to the city's exercise of power. In the *Woolverton* case the court at times speaks in terms of consent,<sup>91</sup> suggesting the necessity of a legislative delegation. But much of the language in the majority opinion, as well as the court's reliance on the earlier cases, suggest that the home rule amendment was Denver's source of authority. Certainly Justices Frantz and Hall in their dissent<sup>92</sup> assumed that the majority opinion was premised on the assumption that Denver's authority was derived from the Constitution, not the delegating statute.

The *Davis* case might easily have been decided on the ground that the matter there involved (driving while one's license was suspended) was a matter strictly of statewide concern.<sup>93</sup> Certainly it is arguable that the offense was just as reprehensible whether it occurred on a city street or a country lane, whereas gambling, as the court noted in *Woolverton*, is a more acute problem in heavily populated areas. This difference in the cases may explain why in the *Davis* case the court spoke as if the home rule city's authority had to be derived from a statute whereas in *Woolverton* the implication is that the city's authority was derived from the home rule amendment. Even more significant perhaps is that in the *Davis* case the penalty imposed by the ordinance was less severe than that imposed by the statute. The opposite was true with respect to gambling in the *Woolverton* case. What this may suggest is simply that if the matter is a mixed matter and there is no statute or the statute re-

90. Authorities cited note 7, 9 *supra*.

91. *Woolverton v. City & County of Denver*, 146 Colo. 247, 257, 361 P.2d 982, 987 (1961). "If an ordinance and a statute which do not conflict can coexist, it would follow that a city, acting with the consent of the state, can legislate on a subject within the legitimate sphere of both its interest and that of the state."

92. *Id.* at 267, 361 P.2d at 992.

93. In a case decided the same day, the court held it was a matter of statewide concern where the license had been revoked, rather than suspended. *City & County of Denver v. Palmer*, 140 Colo. 27, 342 P.2d 687 (1959).

gulating the subject imposes a lesser penalty than a comparable ordinance of a home rule city, the court may very well sustain the ordinance, indicating that the city's authority to regulate is derived from the home rule amendment. If the statute, on the other hand, imposes the greater penalty, the court may talk in terms of consent, and refuse to sustain the ordinance in absence of a clear-cut delegation. Obviously the source of authority ought to be the same in either case. But regardless of the source of a home rule city's authority to regulate these mixed matters, the mere existence of a more stringent state statute is likely to cause the court to consider the statute as pre-empting the field.

The most cogent argument Justice Frantz makes in his dissent in the *Woolverton* case goes to the question of how it can be said, considering the express language of the home rule amendment, particularly section 6, that the amendment was intended to delegate to home rule cities concurrent jurisdiction over matters which are of both local and statewide concern. The amendment speaks only of local and municipal matters when referring to the authority delegated. The supersession clauses in Section 6 certainly do suggest that the powers delegated by the amendment are only with reference to matters which are strictly local in their character. A reasonable answer may lie in the supersession clauses themselves.

Such charter and the ordinances made pursuant thereto in such [local and municipal] matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith. \*\*\*The statutes of the state . . . 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.<sup>94</sup>

Under these provisions supersession does not occur even as to purely local matters until (1) the city has enacted an ordinance or adopted a charter provision which (2) conflicts with a state statute. The exercise of legislative power by the city does not itself necessarily create a conflict and thereby cause supersession. The ordinance may prohibit or authorize exactly what the statute does. In this case both continue to be applicable to and in the home rule city.<sup>95</sup>

The category of mixed matters (*e.g.*, gambling, or the regulation of peddlers) are by definition of local and and municipal concern. By the home rule amendment a city would therefore seem to have authority to regulate them. But what of the supersession clauses?

94. COLO. CONST. art. XX, § 6.

95. This analysis is based on the express language of the supersession clauses. The court has never specifically so held. Under the mutual exclusion doctrine as stated in the *Merris* case, a conflict would arise simply by the home rule city's enactment of a regulation. It would not matter that the ordinance and the statute imposed the same penalties for exactly the same conduct.

These matters are also by definition of statewide concern and it would doubtless be unwise to apply the supersession clauses to them and thereby deprive the legislature of ultimate regulatory power over them in home rule cities. Supersession, however, does not become a problem unless the ordinance and statute conflict, as would occur, for example, were Denver to authorize gambling generally.

When a city does enact such an ordinance which conflicts with the state's legislative policy, it could be argued that the city, by the enactment of the ordinance itself, causes the *matter of regulation* within that city to become entirely a matter of statewide concern. It would seem, for example, to be a matter of statewide concern, that is, be of significant interest to people living outside the home rule city, if the city were to authorize conduct which by statute has been prohibited. An ordinance *regulating a matter involving a statewide interest* in a manner contrary to the declared public policy of the state would clearly seem to become a matter of statewide concern. However, if the ordinance is consistent with the declared public policy of the state, the fact that a home rule city may impose more stringent penalties because local conditions in the particular city tend to cause the prohibited conduct to occur more frequently or have more severe consequences, then it is difficult to see how the city's more strict control could be said to be a matter of statewide concern in the absence of a legislative determination to that effect. It may be said where the ordinance is less severe than the statute, the failure of the city to treat the matter (which involves a statewide interest) as seriously as the state does also renders the whole matter of regulation a matter of statewide concern. This would explain why the court, when it has permitted municipal regulation of these mixed matters, has done so either when the ordinance was more severe than the state statute or when there was no statute at all.

Viewing the matter in this light, the question becomes one of the interpretation and application of the supersession clauses. Nothing in the home rule amendment itself necessarily precludes the separation of the question of authority to regulate from the question of whose authority should prevail in the event of conflict. As to "strictly local" matters, concurrent regulation is permissible until the city decides and does create a conflict. Do the supersession clauses prevent the same approach from being adopted with reference to matters of mutual concern to cities and state, but reserving, in this instance, the final authority in the legislature? The majority of the court have apparently concluded that the supersession clauses do not prohibit this result.<sup>96</sup>

96. It will be noted that this approach to home rule is similar to that adopted by the U.S. Supreme Court for adjusting the respective regulatory powers of the states and Congress over interstate commerce.



The recognition of a category of mixed matters over which a home rule city may exercise (until preempted) concurrent legislative jurisdiction with the General Assembly lends a useful flexibility to the home rule amendment.<sup>97</sup> Admittedly where a statute and an ordinance conflict, and the subject could be reasonably classed as strictly local or mixed, the court is likely to view the matter as mixed, rather than strictly local, and hold the ordinance invalid under the preemption doctrine. The tendency will therefore probably be to classify fewer and fewer subjects as strictly local. Even so, when there is no statute, the city is free to regulate according to its needs, within the limits of the constitution, without the necessity of an express legislative authorization. Matters which need prompt attention can be more expeditiously attended to. The practical political choice of reserving or not reserving exclusive regulatory powers over the subject matter is placed in the hands of the legislature. The court, of course, is not likely to have fewer cases to decide, but in fewer cases will the court have to assume the awesome responsibility of saying to the legislature or a home rule city that it lacks power to regulate at all.

The recognition of a category of mixed matters under the home rule amendment is not unattended by other difficulties, both theoretical and practical. Justice Frantz argued in his dissent in *Woolverton* that to imply a concurrent power in home rule cities to regulate mixed matters under the home rule amendment is to permit a delegation of the legislature's powers, which is specifically prohibited by the constitution unless the constitution itself otherwise *expressly* directs or permits. One difficulty with this argument is that article III on which Justice Frantz relies was designed to assure a separation of powers between the executive, legislative and judicial branches of government and consequently only specifically prohibits the delegation of legislative powers to another coordinate branch of the state government.<sup>98</sup> The court has, of course, construed the provision as prohibiting the delegation of legislative powers generally, but it has done so on the basis of implication.<sup>99</sup> Section 8 of the home rule

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97. McGoldrick suggested nearly thirty years ago that one of the basic difficulties with home rule was the lack of any "mechanism for the handling of problems in which there is both state and local interest." MCGOLDRICK, *LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-1930*, 317 (1933). He suggested that the lack of any such mechanism with the consequent necessity of having to classify all matters as either strictly local or strictly statewide would "all but destroy municipal home rule."

98. COLO. CONST. art. III provides:

The powers of the government of this state are divided into three distinct departments, — the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

99. *E.g.*, *Prouty v. Heron*, 127 Colo. 168, 255 P.2d 755 (1953).

amendment could be construed as rendering article III inapplicable to the problem since it provides that other inconsistent or conflicting constitutional provisions shall be inapplicable to matters "covered and provided for" by the home rule amendment. The basic problem would, therefore, still seem to be whether the home rule amendment "covered and provided for" the regulation of local matters by home rule cities when such matters also involve a statewide interest. It seems as reasonable to imply such a grant of power as it does to imply a prohibition from article III against the delegation generally of any legislative powers.

Another problem which seems to have bothered those members of the court<sup>100</sup> who have favored the doctrine of mutual exclusion is that of double jeopardy.<sup>101</sup> Under the doctrine of mutual exclusion, this problem is avoided since if the matter is local, only the municipality can validly regulate it, whereas, if it is statewide, only the state can regulate it. It is not possible to have both a valid statute and a valid ordinance punishing the same conduct when it occurs in a home rule city. However, under the doctrine that both the state and a home rule city may exercise concurrent jurisdiction over mixed matters the statute and the ordinance may both be valid and consequently punishment could be imposed under either. As the supersession clauses are worded, this situation can also exist when the matter is considered "strictly local." As has been noted,<sup>102</sup> when the matter is strictly local, a statute dealing with the subject is not superseded by an ordinance which also deals with the subject unless the ordinance and statute conflict. A "conflict" would not seem to exist, as the court has defined it,<sup>103</sup> when the ordinance and the statute punish the same conduct with the same degree of severity.

The solution to the double jeopardy problem would appear to be relatively simple, especially since the court has now taken the position that any conduct for which a municipal ordinance imposes a penalty, either in the form of a fine or term of imprisonment, constitutes a crime.<sup>104</sup> Obviously, the fact that a home rule city may derive its power from the state constitution should not change the basic law that the city is an agency of the state. Such being the case, a prosecution by the city is a prosecution by the state and should serve to bar the state, acting through another agency, from conducting a second prosecution for the same misconduct. Similarly a prosecution by the state through its regular criminal processes should

100. See, e.g., *City of Canon City v. Merris*, 137 Colo. 169, 181, 323 P.2d 614, 620 (1958), with Justice Frantz writing for the majority.

101. Prohibited by COLO. CONST. art. II, § 18.

102. Note 95 *supra*.

103. A conflict exists if the ordinance prohibits what the statute permits or vice versa. *Ray v. City & County of Denver*, 109 Colo. 74, 121 P.2d 886 (1942).

104. *City of Pueblo v. Clemmer*, 375 P.2d 99 (Colo. 1962).

bar a second prosecution by the city.<sup>105</sup> Justice Doyle in the *Woolverton* case made it clear the decision in that case was not intended to permit double prosecutions or to revive the prior notion that proceedings for violations of municipal ordinances were civil in nature. "The mere fact that the city has the power to legislate does not mean that there could ever be recognition of dual sovereignty or double prosecutions."<sup>106</sup>

Even if double prosecutions could not be had, there remains the problem of which agency—the state or the city—should assume the task of prosecution. To some extent the court could regulate this matter by the way it defines "conflict." If the matter being regulated is a mixed matter and the ordinance imposes a lesser penalty than the statute, then if the city is permitted to prosecute first, the state's interest will not receive the protection the legislature deemed necessary. To date in this situation the court has found the ordinance invalid on the theory that the state had not consented to the municipality's regulation.<sup>107</sup> A better theory would be that of preemption, that is, that the legislature intended to preempt the field at least to the extent of requiring a minimum penalty. Under either view, the state's right to protect the state's interest by a state prosecution is preserved. Where the ordinance is more severe than the statute, a prosecution under the ordinance necessarily protects the state's interest to the fullest extent intended,<sup>108</sup> and there seems to be no reason for not permitting a city from protecting its interests under a municipal prosecution. This is, of course, the arrangement the court has worked out by readily sustaining municipal prosecutions under ordinances which pursue the same policies as the state statutes but which do so more stringently.

When the matter is "strictly local" it is probably advisable to find a conflict and hence supersession barring a state prosecution whenever the ordinance and the statute are not identical, both as to the conduct regulated and the penalty imposed. Whenever the matter is strictly local, the city has a right to treat the matter either more or less seriously than the state legislature. In either case if the state is permitted to prosecute first and thereby bar a municipal prosecution, the state will be interfering with the enforcement of a policy determination which by the home rule amendment the city should be entitled to control. Only if the state regulates the matter in exactly the same

105. Comment, 72 HARV. L. REV. 737, 747-748 (1959). For an excellent discussion of this point as well as other procedural problems suggested by the *Merris* case, see also, Scott, *Municipal Penal Ordinances in Colorado*, 30 ROCKY MT. L. REV. 267 (1958).

106. *Woolverton v. City & County of Denver*, 146 Colo. 247, 283, 361 P.2d 982, 990 (1961).

107. *Davis v. City & County of Denver*, 140 Colo. 30, 342 P.2d 674 (1959).

108. This assumes that the competency of the courts and the prosecutors, be they state or municipal, are about the same.

way and imposes the same punishment can such interference through a state prosecution be avoided.

THE POWER OF THE STATE TO REGULATE MATTERS OF  
STRICTLY LOCAL CONCERN

The competing doctrines of mutual exclusion and concurrent jurisdiction have been developed by the court primarily in cases involving the question of a home rule city's power to regulate matters under the home rule amendment. These doctrines are not without significance, however, when consideration is given to the power of the state to regulate matters strictly of local interest. Often this question is phrased in terms of the municipality's power, that is: to what extent may a home rule city disregard its power to regulate a local matter under its constitutional powers and rely instead on a statute conferring on cities generally powers to regulate a local matter in a particular way? Though the question may be phrased in terms of municipal power, the crux of the matter is the state's power to regulate local and municipal affairs.

An important statute which illustrates this problem is the Improvement Districts Act of 1949.<sup>109</sup> Suppose certain residents of a home rule city decided to avail themselves of the provisions of this statute for the purpose of establishing a parking district within their city. The act is specifically made applicable to home rule cities.<sup>110</sup> Under the provisions of the statute, the organization of the district is begun by filing a petition praying for its creation signed by a majority of the taxpaying electors of the city who own property in the district "having an assessed value of not less than one half of the assessed value of all . . . property"<sup>111</sup> in the proposed district. The petition is filed with the governing body of the city which is given authority to create such districts under the statute.<sup>112</sup> After a hearing, the city council may reject the petition if it finds it insufficient in the number of required signatures, or if it decides that the proposed improvement will not benefit the district or that the cost is excessive when compared to the value of the property within the district. If the council's findings are favorable to the creation of the district, the council by ordinance *must* declare the district created.<sup>113</sup>

By the statute such a district is given a separate, though limited, corporate status.<sup>114</sup> The members of the city council become the district's board of directors, and the corporate officers of the city become the corporate officers of the district.<sup>115</sup> The district is given power

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109. COLO. REV. STAT. ANN. §§ 89-4-1 to -30 (1953).

110. COLO. REV. STAT. ANN. § 89-4-2 (Perm. Supp. 1960).

111. COLO. REV. STAT. ANN. § 89-4-4 (1953).

112. COLO. REV. STAT. ANN. §§ 89-4-3, -7 (1953).

113. COLO. REV. STAT. ANN. § 89-4-7 (1953).

114. COLO. REV. STAT. ANN. § 89-4-7 (1953).

115. COLO. REV. STAT. ANN. § 89-4-9 (1953).

to construct improvements, borrow money, issue bonds, condemn private property, impose and collect service charges, levy *ad valorem* taxes on property within the district, and so forth.<sup>116</sup>

One of the reasons for using these separately incorporated districts within a city or a town is to avoid the constitutional limitations on municipal debts.<sup>117</sup> In *Anderson v. Town of Westminster*,<sup>118</sup> the court specifically held such a district created within a legislative city was not subject to these constitutional limitations. Since the immediate tax burden rests only on those who own property within the district and who, presumably, are the principal recipients of the benefits, the use of such districts also permits a more equitable allocation of the tax burdens without (probably) violating the uniformity requirement of article X, section 3.

Are the citizens of home rule cities to be deprived of these and possibly other benefits, because they have chosen to adopt the status of a home rule city rather than remaining a legislative city? Or may they, if they deem it advisable, continue to exercise the powers conferred upon legislative cities of their class? Under the doctrine of mutual exclusion these benefits would be lost, for the activities of such a district would affect strictly local matters and consequently be beyond the legislative domain of the state legislature to control.

With the exception of the court's recent decision in the *MCID*<sup>119</sup> case, the court has uniformly rejected this result. As the court noted in the *Woolverton* case: "To hold that a statutory city has more power than a home rule city would be anomalous indeed."<sup>120</sup>

Not only would such a conclusion be anomalous, it would also be contrary to the express language of the home rule amendment. Section 6 specifically provides that the statutes of the state shall continue to be applicable to home rule cities except as superseded by the charter or ordinances, and such supersession does not occur unless a conflict exists. Properly then, a home rule city may exercise such powers as the legislature has conferred upon cities of the same class over strictly local matters. Only if the citizens of the city or their council choose not to have such powers, and they express their desire by the enactment of a conflicting ordinance or by the adoption of a conflicting charter provision, is the city deprived of such powers. The supersession clauses do not divest the legislature of its power to regulate strictly local matters of a home rule city; only conflicting ordinances or charter provisions can do this. The home rule city

116. COLO. REV. STAT. ANN. §§ 89-4-11, -12, -20 (1953).

117. COLO. CONST. art. XI, § 8.

118. 125 Colo. 408, 244 P.2d 371 (1952).

119. *Four-County Metropolitan Capital Improvement Dist. v. Board of Country Comm'rs* 149 Colo. 284, 369 P.2d 67 (1962).

120. *Woolverton v. City & County of Denver*, 146 Colo. 247, 263, 361 P.2d 982, 990 (1961).

may therefore, if it likes, accept the legislative regulation for whatever advantages it may appear to offer.

As early as 1919, the court adopted this view, upholding the power of a home rule city to levy a special assessment against property owned by a county. The city's right to collect the special assessment, said the court, could be upheld either under the general laws or the home rule amendment.<sup>121</sup> In *People ex rel. Stokes v. Newton*,<sup>122</sup> the argument was made that the Denver Housing Authority, created by the city under a general statute,<sup>123</sup> was without corporate existence because the statute, insofar as home rule cities were concerned, was an unconstitutional exercise of legislative powers over matters strictly of local concern. The relator contended that to permit the establishment of such an authority, a city charter amendment was required. The court rejected the relator's contentions and in so doing rejected as to strictly local matters any theory of mutual exclusion.

Realtor's theory is that the state has lost all jurisdiction over a home-rule city in matters of local and municipal concern. The theory is untenable [in view of the supersession clause of § 6, article XX].

. . . Denver has not amended its charter so as to take advantage of provisions of the National Housing Act. There is no contention that the present charter forbids such action. Assuming, but not deciding, that the authority granted to Denver by [the state statute] . . . is a matter of local concern . . . Denver not having exercised the authority to legislate by amending its charter, the state law controls.<sup>124</sup>

A similar constitutional attack based on article XX was recently made on the Urban Renewal Law of 1958.<sup>125</sup> In an original prohibition proceeding in the supreme court,<sup>126</sup> the petitioner contended that the statute and ordinances creating the Urban Renewal Authority of Denver were unconstitutional in that they conferred on the Authority the power of eminent domain which by article XX and the Denver City Charter had been conferred upon the city. Consequently the enabling statute and the ordinances establishing the Authority, it was argued, unconstitutionally delegated powers reserved to the city. Quoting with approval its decision in the *Stokes* case, the court dismissed the argument:

The case of *People ex rel. Stokes v. Newton* . . . is authority for the principle that the state may, in the absence of local legislation, adopt a uniform statewide legislative pro-

121. *Board of Comm'rs v. City of Colorado Springs*, 66 Colo. 111, 180 Pac. 301 (1919).

122. 106 Colo. 61, 101 P.2d 21 (1940).

123. *Now COLO. REV. STAT. ANN.* §§ 69-3-1 to -32 (1953).

124. *People ex rel. Stokes v. Newton*, 106 Colo. 61, 66, 101 P.2d 21, 24 (1940).

125. *Now COLO. REV. STAT. ANN.* §§ 139-62-1 to -14 (Perm. Supp. 1960).

126. *Rabinoff v. District Court*, 145 Colo. 225, 360 P.2d 114 (1961).

gram even though the subject has a local or municipal character where the municipality has not acted.<sup>127</sup>

These cases left little doubt that under the home rule amendment the legislature could exercise concurrent jurisdiction over matters strictly of local concern to home rule cities unless the city itself decided to assert its jurisdiction in a way which conflicted with that exercised by the state. The *MCID* case,<sup>128</sup> however, seems to have rejected this doctrine of concurrent jurisdiction in preference to that of mutual exclusion.

In 1961 the General Assembly<sup>129</sup> authorized the creation of metropolitan capital improvement districts for any metropolitan area, which by the law was defined as being any "contiguous area consisting of one or more counties in their entirety, each of which has an average population density of at least fifteen persons per square mile."<sup>130</sup> Following the traditional pattern for the creation of districts by petition and election, the statute authorized any governing board of any county within the proposed district (or any governing body of any city or town with more than 30 per cent of a county's population) to petition the district court for creation of the district.<sup>131</sup> After a judicial determination of the sufficiency of the petition, the court was required to call an election. If a majority of those voting approved the creation of the district, the court was required to declare the district established.<sup>132</sup> The Board of Directors of the district, in the case of a multi-county district, were to be selected, directly or indirectly, by officials of the counties and municipalities located within the district.<sup>133</sup> The statute conferred upon the district a corporate status. The statute also conferred upon the district authority to levy a sales tax.<sup>134</sup> A fund for each local unit within the district was to be established to which was to be credited "that part of the total proceeds of the revenue from any district sales and use tax which is available for construction of capital improvements or acquisition of capital equipment requested by such local unit." The net tax revenues collected within each county were made available to local units within each county; and the allocation among local units within each county was to be made on the basis of population.<sup>135</sup>

127. *Id.* at 240, 360 P.2d at 122.

128. *Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 360 P.2d 67 (1962).

129. COLO. REV. STAT. ANN. §§ 89-17-1 to -23 (Supp. 1961), *repealed*, Colo. Sess. Laws 1963, ch. 203, § 1.

130. COLO. REV. STAT. ANN. § 89-17-2 (2) (Supp. 1961). The statute was so drafted (§ 89-17-3) that in the Denver metropolitan area, Denver, as well as the adjoining three counties, had to be included in any district created in that particular area.

131. COLO. REV. STAT. ANN. §§ 89-17-4 to -6 (Supp. 1961).

132. COLO. REV. STAT. ANN. §§ 89-17-7 to -11 (Supp. 1961).

133. COLO. REV. STAT. ANN. § 89-17-12 (Supp. 1961).

134. COLO. REV. STAT. ANN. §§ 89-17-13, -14 (Supp. 1961).

135. COLO. REV. STAT. ANN. § 89-17-15 (Supp. 1961).

Only funds allocated to a local unit could be spent by the district for improvements or capital equipment within that unit. And such improvements could not be made by the district unless requested by the local unit. Under the act, any request for a capital improvement or item of capital equipment had to be approved by the Board of Directors unless three-fourths of the members determined that the project did ". . . not conform to one or more of the standards of metropolitan coordination developed by it. . . ." <sup>136</sup> Upon completion of a project or acquisition of an item of capital equipment, title to the property was to be conveyed by the district to the requesting local unit or units.<sup>137</sup>

The four county district held invalid in the *MCID* case was created under this statute. In holding the act unconstitutional as a violation of article XX, the court reverted back to a theory of mutual exclusion.

Considering the history of the home rule movement in Colorado,<sup>138</sup> no one can honestly dispute the court's basic holding that: "[t]here can be no doubt that the activities contemplated by the district board of directors involve 'local and municipal matters'."<sup>139</sup> What can be disputed is the court's final conclusion that because this is so, the act is unconstitutional. The court's prior decisions render this conclusion unsound. The relevant decisions are not those which upheld such super-districts as the Moffat Tunnel Improvement District<sup>140</sup> and the Pueblo Conservancy District<sup>141</sup> which included home rule cities. The objectives contemplated by those districts were obviously beyond the scope of the local and municipal affairs of the included cities. The relevant cases are those noted above which firmly established the General Assembly's concurrent legislative jurisdiction over the local and municipal affairs of home rule cities in the absence of conflicting municipal regulation.

It is true that sections 1 and 6 render nothing more certainly a matter of local concern than local improvements. But it is not true that

[a]fter the adoption of Article XX all the home rule cities within the 'Four-County District' . . . had *all the power* that could be acquired by anyone to govern with relation to their local and municipal affairs . . . [and that by] the Home Rule Amendment the General Assembly had been deprived of *all*

136. COLO. REV. STAT. ANN. §§ 89-17-13 (6), -16, -17 (Supp. 1961).

137. COLO. REV. STAT. ANN. § 89-17-19 (Supp. 1961).

138. Notes 10-20 *supra*.

139. Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 296, 369 P.2d 67, 73 (1962).

140. Milheim v. Moffat Tunnel Improvement Dist., 72 Colo. 268, 211 Pac. 649 (1922), *aff'd*, 262 U.S. 710 (1923).

141. *People ex rel. Setters v. Lee*, 72 Colo. 598, 213 Pac. 583 (1923). See also *People ex rel. Rogers v. Letford*, 102 Colo. 284, 79 P.2d 274 (1938).



the power it might otherwise have had to legislate concerning matters of local and municipal concern.<sup>142</sup>

The express language of section 6 of article XX belie these conclusions.

'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.' (Italics added.)

The court itself seemed to recognize it was overstating its case when it noted:

Particularly is this true [the proposition that Article XX divested the General Assembly of power over local matters in a home rule city] where a home rule city has adopted a charter or ordinances governing such matters.<sup>143</sup>

The question the court should have addressed itself to was whether or not a conflict existed between the statute and various home rule city charters. Had the court done this, it would, of course, have reached the same result in the *MCID* case, for as the court itself notes, the Denver city charter conflicts with the statute by providing that the duties of managing, designing, and constructing all general public improvements are vested exclusively in the Department of Public Works.<sup>144</sup> This approach would not have rendered the statute unconstitutional as a violation of article XX. Rather it simply would have rendered Denver's participation in the district impossible. And since the validity of the district under the statute and under the election was dependent upon the lawful inclusion of Denver, the district would have been defective in its organization.

In terms of its potential long range effect on the law of municipal home rule, the decision in the *MCID* case is disturbing not because of the specific result but because of the reasoning adopted by the court in reaching its conclusion. Consider the implications of these dicta:

When the people by constitutional provision have lodged exclusive power in a political subdivision of government such as a home rule city, that power may be exercised only by the entity to which it was granted, and the home rule city cannot delegate the power elsewhere. Neither can the General Assembly re-invest itself with any portion of the authority it lost to home rule cities upon the adoption of Article XX by the people.<sup>145</sup>

142. Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962).

143. *Id.* at 294, 369 P.2d at 72.

144. *Id.* at 295-96, 369 P.2d at 73.

145. *Id.* at 295, 369 P.2d at 72.

The very essence of a 'Home Rule City' is embodied in the constitutional mandate that in its local and municipal affairs the city has full, complete, and exclusive authority. The legislature is powerless to change this essential concept of home rule.<sup>146</sup>

The essential concept of home rule is that a home rule city may, as to local matters, free itself from legislative control or direction but only if it chooses to do so. Its "exclusive authority" is only a latent one. Section 6 clearly preserves the power of the General Assembly, in the absence of conflicting municipal legislation, to control or provide direction for the regulation of local affairs. How can the exercise of a power clearly reserved to the legislature by the constitution be considered a "reinvestment" of power?

As to the power of a home rule city to delegate control over local and municipal affairs, the case suggests this rather remarkable rule: because of the home rule amendment, the legislature may not authorize a home rule city to exercise any of its powers over local affairs by creating a separate corporate governmental body and delegating to that body any of its home rule powers. If this is to be the rule, districts created under the Improvement Districts Act of 1949, Urban Renewal Authorities, Housing Authorities, and other cooperative efforts between home rule cities and other governmental units<sup>147</sup> are unconstitutional. The court might distinguish some of these "delegations" on the degree of control retained by the home rule cities over the activities of the subordinate governmental unit. For example, under the 1949 act the district board of directors as well as its officers are the city's own legislative and executive officers',<sup>148</sup> and under the Urban Renewal Act, the city's legislative body retains substantial control over the Authority's activities.<sup>149</sup> The dictum of the *MCID* case, however, would seem to render all these "delegations" invalid regardless of their limited scope.

If they are invalid in the case of home rule cities, then they must also be invalid in the case of legislative cities, for the utilization of such statutes by a home rule city makes such cities, in effect, legislative cities. The home rule city's claim of authority to act in the premises is based on a statutory grant of authority, not a constitutional one. To say that a legislative city could utilize such statutes, but a home rule city could not, would run counter to the basic purpose of the home rule amendment, that is, to broaden the powers of home rule cities to deal with local and municipal problems. The amend-

146. *Id.* at 304, 369 P.2d at 77 (on rehearing).

147. *E.g.*, municipal-county cooperation in the maintenance of public libraries, now permitted under COLO. REV. STAT. ANN. § 84-1-10 (1953).

148. Note 115 *supra*.

149. COLO. REV. STAT. ANN. § 139-62-7 (Perm. Supp. 1960) requires that urban renewal plans developed by an authority be approved by the municipality's governing body before they are undertaken.

ment was not intended to divest them of whatever powers they might have had had they remained a legislative city. What other reason can explain the careful drafting of the supersession clauses in section 6 if it was not to preserve to home rule cities such of the legislative grants of power the home rule city might find useful in solving its local and municipal problems?

It is arguable that the reasoning of the *MCID* case does not seriously impair the powers of a home rule city since if the matters are exclusively local in character, the home rule amendment confers legislative authority upon the municipality to deal with them. As has been noted, in the absence of charter limitations, the legislative body of the city is vested with authority to act with reference to such matters.<sup>150</sup> The difficulty with this argument is that while many of the activities of such separate corporate bodies are matters of local and municipal concern, the creation of such districts and authorities is probably not. Who but the most ardent advocate of municipal home rule would suggest that the home rule amendment conferred authority on home rule cities to create separate corporate entities? The activities of these entities may be local, but in carrying out their activities, important powers must be exercised which traditionally are dependent upon a grant from the sovereign, for example, the power of eminent domain and the taxing power. If Justice Moore's dictum concerning delegation has merit, it would seem to be in this context. It is quite doubtful that the home rule amendment contemplated that a home rule city, as such, could create a separate corporate entity and confer or delegate to such a body the important governmental powers the city had received from the constitution. The creation of such corporate bodies is not a matter strictly of local concern, although many, if not most, of their activities may be. The capacity to sue or to enter into contracts, affecting as it does the rights of persons who may deal with such bodies, amply illustrates this. And if the liability of a home rule city itself to a third person on a contract or a tort claim is a matter of general state law, as it surely is,<sup>151</sup> it must also be true of these subordinate corporate bodies. It would seem to follow that the legal existence of such corporate bodies must be a matter involving, at least to some degree, a statewide interest.

If the power to call these bodies into legal existence is a matter involving statewide interest, the state does have a power to regulate. Further, if this power to create separate corporate bodies is viewed as a matter exclusively of statewide concern, then only the legislature

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150. Notes 33-35 *supra*.

151. See, e.g., *City & County of Denver v. Madison*, 142 Colo. 1, 351 P.2d 826 (1960).

can prescribe the manner of creation and the scope of their powers.<sup>152</sup> If the manner of creation is a matter of exclusively statewide concern, then any home rule city which desired to carry on some of its activities through subordinate corporate, governmental bodies could only claim authority to create such bodies by way of the statute itself. To deny them this power on a theory of nondelegability of home rule legislative powers would be as absurd as denying private individuals the power to create a private corporation under the general corporation laws.

If the power to create these separate corporate bodies is considered a mixed matter, then a home rule city could claim authority under the home rule amendment to create them.<sup>153</sup> But such authority on the part of the city would be subject to legislative preemption. Consequently, to assure greater stability of the legal status of such bodies and of contract rights of persons who might deal with them, any home rule city would be prudent to rely on a statute rather than the home rule amendment for authority to create these subordinate corporate entities.

In effect, the reasoning of the *MCID* case divests the legislature of its power to authorize the creation of subordinate corporate bodies to aid home rule cities in the performance of their local functions. All of this is quite remarkable if the creation of such bodies is indeed a matter involving statewide interests, for the home rule amendment has never before been construed to reach this result.

Surely, as the court noted in the *Sweet* case,<sup>154</sup> the home rule amendment was not intended to create independent city states. But just as surely, the home rule amendment was not intended to make home rule cities orphan cities by depriving them of the right to look to the legislature for such additional powers they, as cities, might need or could effectively use, but which they could not claim under the constitution as a home rule city.

The reasoning of the *MCID* case does not represent a victory for the advocates of municipal home rule, although the particular result does. The reasoning and much of the dicta cast long shadows on the efficiency of municipal home rule in Colorado.

This is not to say that the alternative reasoning suggested does not present any problems. Suppose, for example, the charter of Denver did not contain a provision which conflicted with the statute and thereby rendered Denver's participation in the district impossible and the election on which the district depended invalid. How could Denver or another home rule city exclude itself from the district if

152. *Supra* note 120; *In re* Senate Bill No. 72, 139 Colo. 371, 339 P.2d 501 (1959).

153. *Supra* note 120.

154. *City & County of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958).

it chose to do so? It could, of course, enact a provision similar to Denver's and thereby divest the district of power to construct public improvements of a strictly local nature in the city. But what of the sales tax levy? Could the city council simply enact a prohibition against the levy and collection of the tax? This clearly would create a conflict and under the supersession clauses the municipal legislation would prevail. If this approach could be used,<sup>155</sup> any home rule city which chose to, would not, it seems, have been defenseless against the district had the court in the *MCID* case adopted a theory of concurrent jurisdiction as opposed to that of exclusive jurisdiction.

But it may not always be so easy for a home rule city to make its jurisdiction exclusive if it should decide to do so. Suppose, for example, a home rule city does take advantage of a state statute authorizing the creation of a subordinate corporate body and it is later decided that the assistance is no longer desirable or necessary. Can it now destroy or somehow disable what has since become an intermeddler in local and municipal affairs? If it cannot, Justice Moore's dictum against delegation makes a great deal of sense. Otherwise one city council could effectively divest a later city council, and indeed the citizens themselves, of the ultimate control over local and municipal affairs which the home rule amendment was intended to confer.<sup>156</sup>

Touching this point the court has decided only one case, *People ex rel. Stokes v. Newton*.<sup>157</sup> In that case, the court indicated the subordinate body, the housing authority, was a state agency, not a municipal agency, and, after its creation, was beyond the control of the municipality, except to the extent the statute provided otherwise. "The Denver Housing Authority is an independent entity, not subject to the charter of Denver, though the city forms a part of the district."<sup>158</sup>

The territorial limits of the district exceeded those of the city and, as a result, this statement is not surprising. But the implication that once having created the authority, the city is bound to tolerate what may become serious intermeddling in local affairs is hardly consistent with the fundamental purposes of home rule.

To the extent that the municipality can control the important

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155. Since the district tax would not be a state tax, the prohibition in § 5 of article XX preventing a home rule from interfering "in any wise with the collection of state taxes" would not seem to be applicable.

156. Under the 1949 Act, the General Assembly has wisely sought to avoid this problem by providing: "No . . . improvement or facility [of the district] shall duplicate or interfere with any municipal improvement already constructed or planned to be constructed within the limits of such district." COLO. REV. STAT. ANN. § 89-4-2 (Perm. Supp. 1960).

157. 106 Colo. 61, 101 P.2d 21 (1940).

158. *Id.* at 68, 101 P.2d at 24.

activities of these separate corporate bodies, as is the case with Urban Renewal Authorities and districts created under the 1949 Act, no serious problem is created. Even so, if home rule cities are permitted to utilize separate corporate bodies to perform local functions, they must not be held to have surrendered their ultimate control over the activities of such bodies which are strictly local. They must be permitted to retain, in one form or another, a veto power, for otherwise, home rule will be permitted to destroy itself.

The opinion of the court in the *MCID* case should not be taken as establishing a complete roadblock to the solution of common problems in metropolitan areas. There is authority for the proposition that what may have been a local and municipal affair can cease to be such and become a matter of more general concern, the regulation of which is subject to state control.<sup>159</sup> In a metropolitan area such matters as sanitation (including air pollution), public transportation and police and fire protection are likely to undergo this metamorphosis. Contrary to the suggestion made by the court in the *MCID* case, nothing, at least in the home rule amendment, requires that these metropolitan problems be solved by the creation of a traditional district in which is vested an *ad valorem* taxing power or in which ownership of property must be maintained. It is apparent that much imagination will have to be exercised to develop new governmental structures to solve many of these problems effectively. The home rule amendment may create some legal problems, but as long as the subject matter is not strictly local and municipal, the specific holding in the *MCID* case does not add to the complexities of those problems.

The problems created by the *MCID* decision relate only to matters which are strictly local and municipal. Even in these areas, of course, it may be sensible to deal with a particular matter on a metropolitan basis, for example, public libraries. The *MCID* decision would seem to prohibit cooperative efforts between home rule cities, non-home rule cities and counties, even though the legislature made it possible, either by simply authorizing such cooperation between such units on a more or less informal basis or by authorizing the creation of separate corporate entities through which such cooperation could be achieved. If we are ever to achieve more effective forms of local government units, experimentation is desirable. Seemingly the most useful experimentation will be that based on cooperation—cooperation between the General Assembly and all other interested subordination governmental units. The regrettable effect of the *MCID* decision is that it may close the door to important opportunities for fruitful experimentation. The decision is all the

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159. *Supra* note 41. See also *People ex rel. Public Utilities Comm'n. v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952), where the court recognized this possibility, but did not rely on it in reaching its decision.

more lamentable because it was rendered on a wholly unnecessary interpretation of the home rule amendment, the very provision which by giving a freedom of experimentation has done much to improve the governmental structures of our municipalities.

DIVESTMENT OF HOME RULE POWERS BY  
SUBSEQUENT CONSTITUTIONAL AMENDMENT

The powers conferred by article XX on home rule cities, having been granted by the constitution, can be divested by subsequent constitutional amendment.<sup>160</sup> In 1944, for example, section 14, article XII was added, requiring cities when making civil service appointments to give a preference to veterans. The provision is specifically made applicable to "cities . . . chartered under the XXth amendment." In 1954, article XXV was added to the constitution for the explicit purpose of divesting home rule cities of certain regulatory powers over privately owned public utilities operating within their territorial limits.

Article XXII placed the power to regulate the manufacture, sale and distribution of intoxicating liquors exclusively within the control of the legislature. Such regulation is to:

. . . be performed exclusively by or through such agencies  
and under such regulations as may hereafter be provided  
by statutory laws of the state. . . .<sup>161</sup>

This provision does not mean that a home rule city may not regulate matters relating to intoxicating liquors. It does mean that they may do so only as legislative cities, that is, under an express grant of authority from the legislature. They can claim no regulatory power by virtue of the home rule amendment.<sup>162</sup>

In addition to the divestment of home rule powers which may occur because of express provisions in subsequent constitutional amendments, the court has also held such divestment may be implied from subsequent amendments, as, for example, in the case of the income tax amendment.<sup>163</sup> In *City & County of Denver v. Sweet*,<sup>164</sup> the court held this subsequently enacted provision, by conferring authority in the General Assembly to levy an income tax, preempted

160. *City & County of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958).

161. COLO. CONST. art XXII.

162. *Geer v. Rabinoff*, 138 Colo. 8, 328 P.2d 375 (1958); *City & County of Denver v. The People*, 103 Colo. 565, 88 P.2d 89, *appeal dismissed*, 307 U.S. 615 (1939); *City of Colorado Springs v. People ex rel. Campbell*, 99 Colo. 525, 63 P.2d 1244 (1936).

163. COLO. CONST. art. X, § 17 (added 1936):

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.

164. *City & County of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958).

whatever authority a home rule city might otherwise have had under article XX. The court assumed that by adopting the income tax amendment the people intended to make this form of taxation exclusively a matter of statewide concern. The ultimate conclusion may be sound,<sup>165</sup> but the reasoning is not convincing.<sup>166</sup> The salutary reluctance of courts to find repeals or amendments by implications ought to be at its highest when dealing with constitutional provisions. Yet this principle was not followed in deciding the *Sweet* case. Clearly if the grant of power contained in article X, section 17 was necessary before any part of the state government could constitutionally levy an income tax, then it is probably fair to view the section as conferring such authority only upon the governmental agency specifically named. On the other hand, if the provision was intended to be only declaratory of an already existing power in the General Assembly, there would seem to be no warrant for concluding that by its adoption the people of Colorado intended to preempt whatever power home rule cities might otherwise have constitutionally claimed under article XX. When it has been the desire of the people to divest home rule cities of control over certain local matters, they have had no difficulty making their intention clear, either by making the provision specifically applicable to such cities<sup>167</sup> or by stating clearly that a certain power was vested exclusively in the General Assembly.<sup>168</sup>

With any form of legislation, it is not possible to foresee all of the possible or apparent conflicts a new proposal may create with existing provisions. When, as in the *Sweet* case, it is apparent that the lawmakers did not foresee the apparent conflict, it is a fiction to resolve the problem on the basis of some presumed intent. The better practice would seem to be for the court first to determine if an actual conflict exists, that is, whether it is or is not possible to give meaningful effect to the purposes of both the old and the new provisions. Only if an actual conflict does exist would it seem necessary to imply any intent on the part of the lawmakers to abandon the old in favor of the new. Considering the importance of the home rule amendment to the people of Colorado, it is difficult to believe that those who voted in favor of the income tax amendment intended to divest home rule cities of whatever power they might have had under article XX to levy a similar tax. If this is true, the *Sweet* case should

165. For a more exhaustive discussion of the *Sweet* case, see Comment, 35 ROCKY MT. L. REV. 370, 382-390 (1963).

166. E.g., "Clearly our federal system does not envisage as a part thereof city-states. It therefore follows that home rule cities can be only an arm or branch of the state with delegated power." *City & County of Denver v. Sweet*, 138 Colo. 41, 48, 329 P.2d 441, 444 (1958). This may all be true, but it does not answer the question of whether or not the home rule amendment in conferring powers over local affairs included the power to levy an income tax for local purposes on the local inhabitants.

167. E.g., COLO. CONST. art. XXV (1954) (regulation of privately owned public utilities operating in home rule cities).

168. E.g., COLO. CONST. art. XXII (1932) (regulation of intoxicating liquors).



have been decided on the basis of whether or not under article XX such power ever existed in home rule cities. Conceivably, the court might have concluded that it did not.

Premised as it is on a theory of presumed intent, the doctrine of implied divestment advanced by the court in the *Sweet* case requires the court to speculate as to the state of mind of the electorate. Since any error in this process will result in a judicially created amendment to the constitution, the doctrine places a heavy responsibility on the court.

In so far as home rule cities are concerned, the doctrine necessarily creates doubts about other powers conferred by article XX.<sup>169</sup> To some extent, therefore, the vitality of that amendment will probably depend on whether the court limits the doctrine of the *Sweet* case to instances of irresolvable conflict or continues to apply it on the basis of some presumed intent of the electorate.

#### AN OVERALL EVALUATION

It has been claimed that: "Of the 50 states, Colorado's Constitution provides one of the broadest and strongest grants of home rule powers to cities."<sup>170</sup>

This statement, as a description of the express language of article XX, is undoubtedly true. But what of the judicial gloss the court has added over the years? Looking at some of the decisions,<sup>171</sup> one could argue that the court has greatly reduced the breadth and strength of the home rule amendment. On balance, however, when all of the court's decisions are considered this argument has little, if any, validity. In the vast majority of its decisions, the court has

169. Article XXIV of the Colorado constitution (the old age pension amendment), for example, could conceivably be construed to require that 85% of all revenues derived from municipal retail sales and excise taxes levied on the "storage, use or consumption of any commodity or product" *id.* § 2, be allocated to the pension fund. Such a construction would not, as in the *Sweet* case, deprive the home rule city of the power to levy such taxes, but it would deprive the city of the major portion of the tax revenues. Such a construction of article XXIV seems very doubtful in view of the court's earlier decisions. *Colorado v. City & County of Denver*, 106 Colo. 519, 107 P.2d 317 (1940) (amendment not applicable to cigarette tax levied by city as an "occupational tax"); *Post v. City of Grand Junction*, 118 Colo. 434, 195 P.2d 958 (1948) (amendment not applicable to occupational tax levied on liquor dealers).

The recent amendment to section 3 of article X authorizing the legislature to exempt "household furnishings and personal effects" from the general *ad valorem* property tax may preclude a home rule city from taxing such property under section 6 of article XX in the face of legislative exemption. COLO. CONST. art. X, § 3 (1956).

Similarly, because of the 1956 amendment of article X, section 6, home rule cities, with certain exceptions, may also be precluded from imposing taxes, particularly *ad valorem* property taxes, on motor vehicles. The 1934 amendment adding section 18 to article X may divest home rule cities of any authority to impose revenue licensing fees on motor vehicles or excise taxes on motor fuels; or, if it does not deprive them of such authority, it may obligate them to remit such revenues to the state for the "construction, maintenance and supervision of the public highways of [the] state." COLO. CONST. art. X, § 18 (1934).

170. YEAR BOOK OF THE STATE OF COLORADO 201 (1961).

171. *E.g.*, *City & County of Denver v. Tihen*, 77 Colo. 212, 235 Pac. 777 (1925).

demonstrated an awareness of, and sympathy for, the original objectives and purposes of the amendment. The cases indicating lack of sympathy or understanding have been few.<sup>172</sup> To be sure, particularly since 1950, the reasoning employed by the court in some cases<sup>173</sup> cannot easily be reconciled with the amendment nor with many of the court's prior decisions. But the specific results in these cases are not necessarily contrary to what one might have expected had the court maintained a greater consistency with its earlier philosophy.<sup>174</sup>

The cases which have caused the court its greatest difficulties have been those involving an exercise of the police power by home rule cities. But even here, home rule cities have been accorded a substantial degree of control. Indeed, more subjects have been classed by the court as local<sup>175</sup> or mixed<sup>176</sup> than statewide.<sup>177</sup>

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172. Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 369 P.2d 67 (1962); *In re* Senate Bill No. 72, 139 Colo. 371, 339 P.2d 501 (1959); City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); City of Canon City v. Merriis, 137 Colo. 169, 323 P.2d 614 (1958); People v. City & County of Denver, 90 Colo. 598, 10 P.2d 1106 (1932); City & County of Denver v. Tihen, 77 Colo. 212, 235 Pac. 777 (1925); Mauff v. People, 52 Colo. 562, 123 Pac. 101 (1912); Keefe v. People, 37 Colo. 317, 87 Pac. 791 (1906).

173. Specifically, Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 369 P.2d 67 (1962); City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); City of Canon City v. Merriis, 137 Colo. 169, 323 P.2d 614 (1958).

174. Particularly the results in Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, *supra* note 173, and City of Canon City v. Merriis, *supra* note 173.

175. Dominguez v. City & County of Denver, 147 Colo. 233, 363 P.2d 661 (1961) (vagrancy); Lehman v. City & County of Denver, 144 Colo. 109, 355 P.2d 309 (1960) (unauthorized parking on private property); Wiggins v. McAuliffe, 144 Colo. 363, 356 P.2d 487 (1960) (regulation of speeds on city streets); Pickett v. City of Boulder, 144 Colo. 387, 389, 356 P.2d 489, 490 (1960) (dictum) (failing to stop for flashing red school light); Retallack v. Police Court, 142 Colo. 214, 351 P.2d 884 (1960) (reckless driving); Thiele v. City & County of Denver, 135 Colo. 442, 312 P.2d 786 (1957) ("dog leash" ordinance); Heron v. City & County of Denver, 131 Colo. 501, 283 P.2d 647 (1955) (ordinance requiring plans for buildings of a public nature be prepared and submitted by a state licensed architect); Rosenbaum v. City & County of Denver, 102 Colo. 530, 81 P.2d 760 (1938) (Sunday closing ordinance); City & County of Denver v. Henry, 95 Colo. 582, 38 P.2d 895 (1934) (rights-of-way at street intersections); Colby v. Board of Adjustment, 81 Colo. 344, 255 Pac. 443 (1927) (zoning) (by implication); Averch v. City & County of Denver, 78 Colo. 246, 242 Pac. 47 (1925) (zoning); City of Pueblo v. Kurtz, 66 Colo. 447, 182 Pac. 884 (1919) (impounding stray animals).

Numerous cases had held that rates charged by a privately owned public utility within a home rule city were a matter of local concern. See *e.g.*, City & County of Denver v. Mountain States Tel. & Tel. Co., 67 Colo. 225, 184 Pac. 604 (1919), *appeal dismissed*, 251 U.S. 545 (1920); Spears v. Public Util. Comm'n, 100 Colo. 369, 67 P.2d 1029 (1937). For all practical purposes these cases were overruled in 1952, at least as to privately owned utilities which also provided services to persons living outside home rule cities. People *ex rel.* Pub. Util. Comm'n v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952). Subsequently, with the adoption of article XXV of the constitution, in 1954, home rule cities were divested of such control over all privately owned utilities.

176. Woolverton v. City & County of Denver, 146 Colo. 247, 361 P.2d 982 (1961) (gambling); City & County of Denver v. Pike, 140 Colo. 17, 342 P.2d 688 (1959) (speeds on a federal highway traversing the city); Spears Hosp. v. State Bd. of Health, 122 Colo. 147, 220 P.2d 872 (1950) (licensing of hospitals); Board of Trustees v. People *ex rel.* Behrman, 119 Colo. 301, 203 P.2d 490 (1949) (firemen and policemen pension funds), *overruled on other grounds*, Police Pension and

Moreover, the history of the home rule amendment suggests that in terms of securing greater freedom in making policy judgments about municipal affairs, other powers were considered as, or more, important than the police power.<sup>178</sup> Certainly today with municipalities providing an ever increasing number of services, other governmental powers, at least in total, should be of greater concern. The power to tax (including the power to levy local assessments and impose service charges), to condemn private and public property, to borrow money, and to spend money and otherwise acquire and dispose service charges), to condemn private and public property, to of a city to provide services to its inhabitants. It is clear from looking at the cases involving these powers that the court has given real meaning to the home rule amendment by allowing a wide range of freedom.<sup>179</sup> When these powers are considered, it cannot

Relief Bd. v. McPhail, 139 Colo. 330, 338 P.2d 694 (1959); Ray v. City & County of Denver, 109 Colo. 74, 121 P.2d 886 (1942) (by implication) (rates charged by small loan companies); McCormick v. City of Montrose, 105 Colo. 493, 99 P.2d 969 (1940) (regulation of peddlers); Provident Loan Soc'y v. City & County of Denver, 64 Colo. 400, 172 Pac. 10 (1918) (licensing of pawnbrokers); Glendinning v. City & County of Denver, 50 Colo. 240, 114 Pac. 652 (1911) (by implication) (licensing of oleomargarine manufacturers).

177. *Gazotti v. City & County of Denver*, 143 Colo. 311, 352 P.2d 963 (1960) (larceny); *Davis v. City & County of Denver*, 140 Colo. 30, 342 P.2d 674 (1959) (driving while one's license has been suspended); *City & County of Denver v. Palmer*, 140 Colo. 27, 342 P.2d 687 (1959) (driving after one's license has been revoked); *City of Canon City v. Merris*, 137 Colo. 169, 323 P.2d 614 (1958) (driving under the influence of intoxicants); *People ex rel. Pub. Util. Comm'n v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952) (see discussion note 175 *supra*); *City & County of Denver v. Bridwell*, 122 Colo. 520, 224 P.2d 217 (1950) (appeals from municipal courts of home rule cities to state courts); *People v. Graham*, 107 Colo. 202, 110 P.2d 256 (1941) (duties of drivers of motor vehicles to stop after an accident, give certain information and render aid); *Armstrong v. Johnson Storage & Moving Co.*, 84 Colo. 142, 268 Pac. 978 (1928) (licensing of motor vehicles. Case suggests subject might be considered mixed.).

178. See generally KING, *THE HISTORY OF THE GOVERNMENT OF DENVER WITH SPECIAL REFERENCE TO ITS RELATIONS WITH PUBLIC SERVICE CORPORATIONS* ch. V (1911); RUSH, *THE CITY-COUNTY CONSOLIDATED* ch. XVIII (1941).

179. *Taxing power*. The court has upheld the power of home rule cities to levy other taxes than the *ad valorem* taxes specifically authorized by COLO. CONST. art. XX, § 6 (g). *City of Englewood v. Wright*, 147 Colo. 537, 364 P.2d 569 (1961) (general occupation tax); *Post v. City of Grand Junction*, 118 Colo. 434, 195 P.2d 958 (1948) (occupation tax on liquor dealers); *Hollenbeck v. City & County of Denver*, 97 Colo. 370, 49 P.2d 435 (1935) (occupation tax on service stations); *Interstate Business Exch. v. City & County of Denver*, 68 Colo. 318, 190 Pac. 508 (1920) (occupation tax on employment agencies).

*Special assessments for local improvements*. "[A]ssessments for local improvements would seem to be typically and pre-eminently 'of local concern.' The city's powers with reference to local assessments are therefore plenary." *Board of County Comm'rs v. City of Colorado Springs*, 66 Colo. 111, 117, 180 Pac. 301, 304 (1919). A home rule city may establish its own procedures for creating improvement districts and levying special assessments. *Sanborn v. City of Boulder*, 74 Colo. 358, 221 Pac. 1077 (1924). But it must comply with its own established procedures. *Watson v. City of Fort Collins*, 86 Colo. 305, 281 Pac. 355 (1929). The special assessment theory may be used for the acquisition of park lands. *Londoner v. City & County of Denver*, 52 Colo. 15, 119 Pac. 156 (1911). And assessments may be levied against property owned and used by a county. *Board of County Comm'rs v. City of Colorado Springs*, *supra*.

*Service charges for municipal services*. A home rule city may impose service charges for municipal utility services. *Western Heights Land Corp. v. City of Fort Collins*, 146 Colo. 464, 362 P.2d 155 (1961) (sewer system). The General Assembly

fairly be said that the home rule amendment has failed in its objectives because of judicial antipathy. On the contrary, considering the

may not delegate to the Public Utilities Commission the authority to regulate such charges, whether the service is being rendered to customers located within or without the city. *City of Englewood v. City & County of Denver*, 123 Colo. 290, 229 P.2d 667 (1951). In the latter case the court relied on COLO. CONST. art. V, § 35, as well as art. XX.

**Eminent Domain.** An exercise of this power is not limited to the purposes enumerated in COLO. CONST. art. XX, § 1. It may be exercised for other local and municipal purposes. *Fishel v. City & County of Denver*, 106 Colo. 576, 108 P.2d 236 (1940) (condemnation of extraterritorial lands to be donated to federal government). The power may be used to condemn extraterritorial lands, whether privately or publicly owned. *Toll v. City & County of Denver*, 139 Colo. 462, 340 P.2d 862 (1959) (condemnation of flowage easements and channel improvements rights in stream flowing across privately owned lands); *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 322 P.2d 1053 (1958) (home rule city has power to condemn storm and sanitary easements through public streets of another municipality, subject to the latter's right to impose reasonable regulations for the protection of its inhabitants' health and safety); *City & County of Denver v. Board of County Comm'rs*, 113 Colo. 150, 156 P.2d 101 (1945) (city may condemn county roads for more important public use. Statute limiting the distance within which cities may condemn extraterritorial lands for airport purposes not applicable to home rule cities, at least where such statute is not enacted as a state police power measure, but simply as a limitation on the authority of municipalities.).

**Borrowing Power.** Any indebtedness must be incurred for a public and municipal purpose. However, "... a legislative declaration to such effect is given great weight . . . especially when it comes from a [home rule] municipality. . . ." *Broadhead v. City & County of Denver*, 126 Colo. 119, 125, 247 P.2d 140, 143 (1952) (off-street parking facilities); *McNichols v. City & County of Denver*, 101 Colo. 316, 74 P.2d 99 (1937) (purchase of lands to be donated to federal government). Home rule cities are bound by the constitutional debt limitations of COLO. CONST. art. XI, § 8, if these provisions are incorporated into their charters. *Deti v. City of Durango*, 136 Colo. 272, 316 P.2d 579 (1957). They may or may not be bound otherwise. *City & County of Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066 (1905) (city held bound by article XI, § 8, at least when not issuing bonds under the authority conferred by article XX, § 1. Case decided before amendment in 1912 to § 6 of article XX which seems to confer broad borrowing powers.); *Montgomery v. City & County of Denver*, 102 Colo. 427, 80 P.2d 434 (1938) (suggests city not bound); *McNichols v. City & County of Denver*, *supra* (suggests city is bound); *McNichols v. City & County of Denver*, 123 Colo. 132, 230 P.2d 591 (1951) (holds city is bound by maximum total indebtedness permitted by article XI, § 8. Holding is weakened by fact that this particular question was not presented to the court in argument. See *Petition for Rehearing on behalf of Defendants-in-Error*, p. 3).

A home rule city under COLO. CONST. art. XX, § 6, may by charter authorize the submission of bond issues at *special elections*. *Clough v. City of Colorado Springs*, 70 Colo. 87, 197 Pac. 896 (1921). A city may also, by adopting the provisions of article XI, § 8, which exempts indebtedness incurred for the purpose of supplying water from the requirement that the question be put to a vote of the electorate, avoid the same requirement imposed on such indebtedness by article XX, § 1.

**Utilization of municipal property.** A home rule city has broad powers to determine how municipal money and property shall be used. *Brodhead v. City & County of Denver*, 126 Colo. 119, 247 P.2d 140 (1952) (off-street parking facilities); *Garden Home Sanitation Dist. v. City & County of Denver*, 116 Colo. 1, 177 P.2d 546 (1947) (sanitary sewer); *McNichols v. City & County of Denver*, 101 Colo. 316, 74 P.2d 99 (1937) (donation of lands to federal government); *Cook v. City of Delta*, 100 Colo. 7, 64 P.2d 1257 (1937) (electric light plant); *Newton v. City of Fort Collins*, 78 Colo. 380, 241 Pac. 1114 (1925) (waterworks); *City & County of Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066 (1905) (municipal auditorium). The city must, however, comply with any charter or constitutional limitations. *Kingsley v. City & County of Denver*, 126 Colo. 194, 247 P.2d 805 (1952) (charter limitations); *Lord v. City & County of Denver*, 58 Colo. 1, 143 Pac. 284 (1914) (city bound by COLO. CONST. art. XI, §§ 1, 2, prohibiting grants-in-aid to, or joint ownership of property with private persons or other corporations).

heavy responsibility the court must bear when apportioning the respective legislative jurisdictions of the state and home rule cities, its performance over the years cannot be described as less than commendable.

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