

Michigan Law Review

Volume 35 | Issue 5

1937

MUNICIPAL CORPORATIONS - CONSTITUTIONAL HOME RULE

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Recommended Citation

Charles M. Kneier, *MUNICIPAL CORPORATIONS - CONSTITUTIONAL HOME RULE*, 35 MICH. L. REV. 841 (1937).

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MUNICIPAL CORPORATIONS — CONSTITUTIONAL HOME RULE — The home rule provision of the New York constitution provides that as to the “property, affairs or government of cities,” the legislature may pass special or local laws only on message from the governor declaring that emergency exists, and the concurrent action of two-thirds of the members of each house of the legislature is necessary in such cases.¹ In 1936 the legislature passed an act providing for the establishment of the three platoon system for fire departments in all cities of over 1,000,000 population.² The act provided for a referendum vote on the question in such cities. A mandamus action was brought to compel the board of elections in the city of New York to omit the question from the ballot used at the general election of November 3, 1936. *Held*, that the act was unconstitutional, being a matter relating to the “property, affairs or government” of a city, and not having been passed on emergency message from the governor. *Osborn v. Cohen*, 272 N. Y. 55, 4 N. E. (2d) 289 (1936).

¹ Constitution of New York, art. 12, § 2. The New York legislature may also enact legislation as to the “property, affairs or government” of cities by general law.

² Though the act applied to all cities of over 1,000,000 population the court held that it could not be considered general in terms and effect. After the adoption of the home rule amendment, the courts in New York applied a new test to determine whether legislation was special or local. The courts of that state now consider both the terms of an act and its *effect*. *Matter of Mayor of New York re Elm Street*, 246 N. Y. 72, 158 N. E. 24 (1927).

In states having constitutional home rule,³ the grant of powers to cities is in general terms, such as control over "all power of local self-government,"⁴ "municipal affairs"⁵ or "local affairs and government."⁶ Under such a constitutional provision, the question arises as to whether a certain function is one of local concern, or is one of general state interest. It has been necessary in home rule states to answer this question by a slow process of judicial inclusion and exclusion. It has been established by prior decisions in New York that the time and manner of electing local officers is a matter pertaining to the property, affairs or government of the city.⁷ But the following have been held not be of this nature: the establishment of a municipally owned and operated bus system;⁸ the establishment of a municipal boundary;⁹ the control of the courts;¹⁰ the control of county government;¹¹ and the regulation of multiple dwellings.¹² There is no objective test by which a court can determine whether a matter relates to the "property, government or affairs" of a city.¹³ "Municipal affairs" is not a fixed quantity but depends upon changing conditions.¹⁴ The

³ Arizona, California, Colorado, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Oklahoma, Oregon, Texas, Utah, Washington and Wisconsin. In addition to these states Maryland has county home rule which extends to Baltimore, that city being treated as a county. Pennsylvania, by constitutional amendment of 1922, empowered the legislature to grant home rule to cities, but thus far no action has been taken by the legislature.

⁴ Constitution of Ohio, art. 18, § 3.

⁵ Constitution of California, art. 11, § 6.

⁶ Constitution of Wisconsin, art. 11, § 3.

⁷ *Bareham v. City of Rochester*, 246 N. Y. 140, 158 N. E. 51 (1927). Also see *Stanford v. Summers*, 157 Misc. 698, 284 N. Y. S. 840 (1936); *Mooney v. Cohen*, 272 N. Y. 33, 4 N. E. (2d) 73 (1936).

⁸ *Browne v. City of New York*, 241 N. Y. 96, 149 N. E. 211 (1925), affg. 213 App. Div. 206, 211 N. Y. S. 306 (1925).

⁹ *City of New York v. Village of Lawrence*, 250 N. Y. 429, 165 N. E. 836 (1929).

¹⁰ *Matter of Siracusa*, 125 Misc. 882, 212 N. Y. S. 400 (1925); *Schieffelin v. Leary*, 219 App. Div. 660, 220 N. Y. S. 587 (1927).

¹¹ *Schieffelin v. Berry*, 217 App. Div. 451, 216 N. Y. S. 367 (1926), affd. 243 N. Y. 603, 154 N. E. 623 (1926).

¹² *Adler v. Deegan*, 251 N. Y. 467, 167 N. E. 705 (1929). Also see *Robertson v. Zimmerman*, 268 N. Y. 52, 196 N. E. 740 (1935) on health administration; *New York Steam Corp. v. City of New York*, 268 N. Y. 137, 197 N. E. 172 (1935) on poor relief administration.

¹³ "There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation. . . ." *Carlberg v. Metcalfe*, 120 Neb. 481 at 487, 234 N. W. 87 (1930).

¹⁴ This changing scope of state and municipal affairs has been expressed by the District Court of California as follows: "Until the advent of the automobile, inter-urban traffic was so small as to be negligible, and, as a result, traffic regulations were a matter of concern only to the inhabitants of the city. But when autos and motor-trucks invaded our highways and streets in tens and hundreds of thousands, a matter that yesterday was local has become of state and nation-wide importance today. . . . The term 'municipal affairs' is not a fixed quantity, but fluctuates with every change

decision of the court in the present case seems the proper one. Shortening the hours of firemen, with the resulting increase in their numbers and the cost of fire administration, would seem to relate to the "property, government or affairs" of a city.¹⁵ A contrary result might be reached on the basis of the non-liability of the city in tort for the acts of firemen. If the city is not liable in tort for the acts of firemen because it is acting in a governmental capacity as an agent of the state, a court in a home rule state might hold that fire administration is a matter of state concern and thus subject to state control.¹⁶

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in the conditions upon which it is to operate." *Helmer v. Superior Court*, 48 Cal. App. 140, 191 P. 1001 (1920).

¹⁵ In Missouri, control over police has been held to be a matter of state concern. *State ex rel. Goodnow v. Police Commrs. of Kansas City*, 184 Mo. 109, 71 S. W. 215 (1902); *State ex rel. Reynolds v. Jost*, 265 Mo. 51, 175 S. W. 591 (1915); *Strother v. Kansas City*, 283 Mo. 283, 223 S. W. 419 (1920). A contrary result has been reached in California and Minnesota. *Popper v. Broderick*, 123 Cal. 456, 56 P. 53 (1899); *State ex rel. Zimmerman v. City of St. Paul*, 81 Minn. 391, 84 N. W. 127 (1900).

¹⁶ For the way in which various functions have been classified by the courts, see: *McBain, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916); *McGoldrick, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930* (1933); *Jacobson, "Charter Amending Powers of Cities Under Michigan Home-Rule Legislation," 14 MICH. L. REV. 281* (1916); *Anderson, "Municipal Home Rule in Minnesota," 7 MINN. L. REV. 306* (1923); *Jones, "Municipal Affairs in the California Constitution," 1 CAL. L. REV. 132* (1913); *Reinhart, "Municipal Home Rule in Colorado," 28 MICH. L. REV. 382* (1930).