

# Direct City Legislation on Foreign Policy Matters

Edwin Conrad

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Edwin Conrad, *Direct City Legislation on Foreign Policy Matters*, 51 Marq. L. Rev. 426 (1968).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol51/iss4/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# DIRECT CITY LEGISLATION ON FOREIGN POLICY MATTERS

EDWIN CONRAD\*

"In every man's writings, the  
character of the writer must  
be recorded." Thomas Carlyle

## I. THE ANCIENT CITY STATES AND FOREIGN POLICY

The city state is as old as antiquity. The powerful ancient city states of Thebes, Babylon, Athens, Sparta and Rome are classic examples of the tremendous power possessed by these city states.<sup>1</sup> At one time the Roman Senate, representing the City of Rome, determined foreign policy matters for the entire ancient world, including the Roman Republic and its allies (*socii*) and later the vast Roman Principate Empire.<sup>2</sup> As one of the terms of the peace treaty following the Second Punic Wars (218-201 B.C.), Carthage was forbidden to declare war on any country without the consent of the Roman Senate.<sup>3</sup> Historically, therefore, it is quite appropriate to note that the determination of foreign policy matters by city states has very ancient roots.

With the adoption of the United States Constitution in 1787, foreign policy matters of the United States fell within the domain of the President and the Congress. Under the Constitution of the United States, only Congress can declare war.<sup>4</sup> However, the President, with the advice and consent of the Senate, is empowered to enter into treaties involving foreign policy.<sup>5</sup> But this very delicate balance between the executive and the legislative branches is complicated to a great extent by the tremendous powers which the President of the United States has as Commander-in-Chief of the United States Armed Forces.<sup>6</sup> By virtue of this awesome power, as Commander-in-Chief of the Armed Forces, the President of the United States can virtually commit this country to a state of war without the consent of Congress.<sup>7</sup>

\* City Attorney, Madison, Wisconsin, B.A., 1932, J.D., 1934, M.A., 1938 University of Wisconsin. New York University Summer School, Vanderbilt School of Law, 1959, Lecturer in Law, University of Wisconsin, School of Law, 1954-1960. Professor of Law, College of Law, Syracuse University, 1958-1960. Member New York and Wisconsin Bars. Author, "Modern Trial Evidence", "Wisconsin Evidence", and numerous articles in the field of law and scientific evidence. Member, American Law Institute; Fellow, American Academy of Forensic Sciences.

<sup>1</sup> See HALLIDAY, W. R., *THE GROWTH OF THE CITY STATES*, (Argonaut, Chicago, 1967).

<sup>2</sup> See MOMMSEN, C. M., *THE HISTORY OF ROME*, (Scribner's Sons, N.Y. 1887).

<sup>3</sup> See BOAK, E. R., SINNIGEN, W. G., *A HISTORY OF ROME TO 565 A.D.*, (Macmillan, N.Y., 1965) 122.

<sup>4</sup> U.S. CONST. art. I, § 8.

<sup>5</sup> U.S. CONST. art. II, § 2.

<sup>6</sup> U.S. CONST. art. II, § 2.

<sup>7</sup> This is the burning issue of the day. See National Commitments, S. Doc. 797, 90th Cong., 1st Sess. (1967).

Within the framework of the United States Constitution, the States as such have no voice in foreign policy determinations except through their duly elected representatives, although such decisions may seriously affect them. Since the cities are creatures of the state, these same observations must apply to municipalities in general.

It is quite conceivable that this situation may change by virtue of historical and sociological pressures. If the prognostications of the sociologists are correct, the United States of 2000 A.D. may consist of six major strip cities running north and south from Canada to the southernmost portions of the United States. Two of such major strip cities are already evident on the Atlantic and Pacific coast lines and another major one, on a line through Chicago, is now in a state of metamorphosis. This realignment of the major cities of the United States may once again resurrect the power of the cities.

Recent historical events have raised the provocative question of what power the cities may exercise with respect to foreign policy matters. Shall they be denied any voice in this area? These same occurrences have also raised questions as to whether the *electors* of a city may have a *direct* voice in the foreign policy area by utilizing the procedure of direct legislation or initiative and referendum.

## II. DIRECT LEGISLATION BY CITIES

It is correct to say that generally common councils of cities determine legislative matters within their respective jurisdictions and that only the common council representatives chosen by the people, and not the people themselves, enact legislation for the cities. Thus the cities are governed by a representative or republican form of government. Cities, therefore, are not run as pure democracies.

A number of states have reserved certain powers which may be exercised by the people through proceedings designated as either direct legislation or initiative and referendum. Thus, under Section 9.20 of the Wisconsin Statutes<sup>8</sup> a number of electors equal to at least 15 percent of the votes cast for governor at the last general election in their city, may sign and file with the city clerk a petition requesting "*that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or be referred to a vote of the electors.*" [emphasis added] Since this paper deals with the subject matter of the ordinance or resolution, no attempt will be made to outline the procedural details involved. However, one should direct attention to the provisions that such ordinance or resolution is not subject to the veto power of the mayor and cannot be repealed or amended within two years of its adoption except by a vote of the electors.

<sup>8</sup> Section 9.20 was formerly § 10.43 and was created by ch. 666, laws of 1965, effective July 1, 1967. While a few changes are to be noted, essentially § 9.20 is a restatement of § 10.43, which was generated by ch. 513, Laws of 1911.

The justification for direct legislation or initiative and referendum statutes is succinctly stated in *Spencer v. City of Alhambra*<sup>9</sup> from which the following is taken:

It is a basic principle inherent in the American system of representative government . . . that 'all political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it.' From the foregoing, it follows that the legislative power of the municipality resides in the people thereof. By writing into the charter, initiative and referendum laws, the people of the city have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent political power.<sup>10</sup>

### III. IMPLIED EXCEPTIONS TO WISCONSIN DIRECT LEGISLATION STATUTES

The Wisconsin Supreme Court has not been too liberal in its interpretation of Section 9.20. The court's holding that the statute applies only to cities and not to counties is quite in conformity with the language of the present law.<sup>11</sup> But despite Justice Fowler's admonition in *Feavel v. Appleton*<sup>12</sup> that the Law makes no exceptions of *subjects* to which it applies, the Wisconsin Supreme Court has construed Section 9.20 quite strictly and has tacked onto the statute many implied exceptions. Under various interpretations, it has held that:

(1) Direct legislation changing the salaries of aldermen after the first regular meeting in February, the last date that a common council could act to increase its salaries for a new term, was in contravention of Section 62.09(6) and was therefore invalid.<sup>13</sup>

(2) If a statute prescribes a certain procedure, such as in the acquisition of, or additions to a utility under Section 66.066, the electors and so forth of a city may not demand the submission of a question which will modify the statutory authority.<sup>14</sup>

(3) In initiative and referendum proceedings, city electors may

<sup>9</sup> *Spencer et al. v. City of Alhambra et al.*, 44 Cal. App. 2d 75, 111 P.2d 910 (1941).

<sup>10</sup> *Id.* at 77, 111 P.2d at 912.

<sup>11</sup> *Marshall v. Dane County Board of Supervisers*, 236 Wis. 57, 294 N.W. 496 (1940). At one time counties were included: *Meade v. Dane County*, 155 Wis. 632, 145 N.W. 239 (1914). However, in 1939 the Attorney General asserted that the equivalent of § 10.43 could not constitutionally be applied to counties, 28 Op. Att'y. Gen. 719 (1939). The position of the Attorney General was sustained in *Marshall v. Dane County*, 236 Wis. 57, 294 N.W. 496 (1940); and § 59.02(2) was repealed by ch. 177, Laws of 1943.

<sup>12</sup> *Feavel v. City of Appleton*, 234 Wis. 483, 494, 291 N.W. 830, 835 (1940). *Id.* at 494, 291 N.W. at 835 for dissent on this point by Justice Fowler.

<sup>13</sup> *Feavel v. City of Appleton*, 234 Wis. 483, 291 N.W. 830 (1940).

<sup>14</sup> *Heider v. Common Council of City of Wauwatosa*, 37 Wis. 2d 466, 155 N.W.2d 17 (1967); *Denning v. Green Bay*, 271 Wis. 230, 72 N.W.2d 30 (1955); *Flottum v. Cumberland*, 234 Wis. 654, 291 N.W. 777 (1940); *Henderson v. Hoesley*, 225 Wis. 596, 275 N.W. 443 (1937).

exercise only such powers as are conferred upon the common council of the city.<sup>15</sup>

(4) Existing legislation cannot be substantially amended or repealed by direct legislation, so as to, in effect, nullify the previous enactment.<sup>16</sup>

(5) The power of initiative or referendum is usually restricted to *legislative* ordinances, resolutions, or measures and is not extended to *executive* or *administrative* action.<sup>17</sup>

The Wisconsin Supreme Court has tolled the bells for City Home Rule.<sup>18</sup> The many implied exceptions which it has attached to Section 9.20 are highly debatable and have weakened the initiative and referendum procedures in cities which may use them. Nevertheless, the court has never been confronted with the question whether direct legislation may include foreign policy matters, so we will have to look elsewhere for positive and definitive answers to this question.

#### IV. THE RISING IMPORTANCE TO CITIES OF FOREIGN POLICY DETERMINATIONS

Cities have not until recently been concerned with foreign policy matters. The heavy cost of a large scale war has brought upon the people of the cities the sudden realization that the siphoning of money to the war areas, the blight of the cities, and the drain of federal funds away from the urban areas have caused real municipal problems. Therefore, certain groups have been using direct legislation to admonish the government of the United States to end its war in Southeast Asia. For example, in Madison, Wisconsin the required number of petitioners presented to the Common Council, pursuant to the provisions of Section 9.20, the following *resolution*:

Now Therefore, Be it Resolved that the Common Council of the City of Madison hereby refers the following question to the City electorate at the Spring Election on April 2, 1968:

It is the policy of the people of the City of Madison that there be an immediate cease fire and the withdrawal of United States troops from Vietnam, so that Vietnamese people can determine their own destiny.

As a matter of historical interest, the adoption of the resolution was placed upon the April 2, 1968 ballot and was defeated.

<sup>15</sup> *Feavel v. City of Appleton*, 234 Wis. 483, 291 N.W. 830 (1940).

<sup>16</sup> *Heider v. Common Council of City of Wauwatosa*, 37 Wis. 2d 466, 155 N.W.2d 17 (1967); *Landt v. Wisconsin Dells*, 30 Wis. 2d 470, 141 N.W.2d 245 (1966). *Town of Wilson v. Sheboygan*, 230 Wis. 483, 283 N.W. 312 (1939). Whether an existing ordinance may be amended by initiative procedure has not been directly decided. *Heider v. Common Council of the City of Wauwatosa*, 37 Wis. 2d 466, 155 N.W.2d 17 (1967).

<sup>17</sup> *Heider v. Common Council of City of Wauwatosa*, 37 Wis. 2d 466, 155 N.W.2d 17 (1967).

The distinction between legislative and administrative matters in municipal affairs is of extreme complexity. We will not pursue this issue in view of the nature of the subject matter of this article.

<sup>18</sup> WIS. STATS. § 66.01 (1965).

Two questions were raised by the presentation of this resolution:

- (1) Did the common council of the City of Madison have the power on its own initiative to adopt such a resolution?
- (2) Was the resolution within the purview of Section 9.20?

In approaching the answers to these problems, one must bear in mind that the Wisconsin cases are silent on the subject matter, that direct legislation statutes elsewhere vary greatly as to content, and that there is very little authority to be found involving specific discussion of the problems raised. It would be quite simple to evade the issues, but a lawyer would not fulfill his moral obligation as a professional person if he did not attempt to do his best to answer the questions raised.

#### V. THE CALIFORNIA RULE

Fortunately, the leading case on this subject is *Farley v. Healey*<sup>19</sup> in which the court discussed the City and County of San Francisco charter, Section 179, which provided for direct legislation by the people and which contained the following clause: "Any declaration of policy may be submitted to the electors in the manner provided for the submission of ordinances." When such policy was approved by the people, it was the duty of the board of supervisors to carry such policies or principles into effect. The board likewise must have had the power to enact any such ordinance or act and to adopt any other measure covered by the charter of the City and County of San Francisco. Petitioners' right to have an initiative measure urging an immediate cease fire and withdrawal from Vietnam<sup>20</sup> placed on the City-County ballot was upheld by the Supreme Court of California on the following grounds:

- (1) The power of initiative must be liberally construed to promote the democratic process.
- (2) The subject matter of the proposal was within the purview of the charter.
- (3) One of the purposes of local government is to represent its citizens before the Congress, the legislature, and administrative agencies in matters over which the local government has no power in order to produce a desired effect.
- (4) Traditionally it is common for local legislative bodies to make their positions known on matters of foreign policy and other matters affecting them even though such declarations of policy have no binding effect elsewhere.
- (5) The language of the charter of the City and County of San Francisco was broad enough to include a foreign policy determination on the Vietnam war issue.

<sup>19</sup> *Farley v. Healey*, 62 Cal. Rptr. 26, 431 P.2d 650 (1967). Chief Justice Traynor and Associate Justices Peters, Tobriner, Mosk and Sullivan filed the majority opinion. Justices Burke and McComb entered vigorous dissents.

<sup>20</sup> *Id.* It is to be noted that the question in the *Farley* case is identical to that submitted to the City of Madison electorate.

- (6) The board of supervisors itself could enact such measure as an avenue of advocacy available to express its will.
- (7) The board could hire a Washington lobbyist to make the people's position known to Congress on all matters affecting the City and County of San Francisco including foreign policy of the United States.
- (8) The measure on Vietnam concerned itself with *municipal affairs* on which the board could enact binding legislation, as far as the board itself was concerned.
- (9) A local position on foreign policy matters is within the powers of the board and within the powers of the people through the process of initiative and referendum.

#### VI. THE OHIO AND NEW YORK RULES

An identical Vietnam question was kept off the ballot of the Village of Willoughby Hills, Ohio by the Supreme Court of Ohio on the ground that the subject matter of the resolution did not fall within the powers of local government under the Ohio Constitution.<sup>21</sup> It should be noted that the opinion is per curiam, a device used frequently by the judicial bodies to avoid individual exposure of the justices on highly controversial matters. While the court is to be complimented for its extreme brevity at a time when the American system of law may fall by the weight of its own law books, the Ohio Supreme Court's decision will never become a landmark in American legal history.

The New York rule as stated in *Silberman v. Katz*<sup>22</sup> considered the question of Vietnam and initiative and referendum in a rather unique way. Instead of placing the anti-Vietnam question directly on the ballot, petitioners in that case sought to place before the electorate the question of creating a new municipal office to be known as the "Anti-Vietnam War Coordinator," whose duties in effect were directed at ending the war in Vietnam. The Supreme Court of New York, Special Term, New York County, while admitting that United States policy in Southeast Asia and this Country's participation in the Vietnam war was of utmost concern to citizens of the City of New York, nevertheless refused to place such a question on the ballot for the following major reasons:

- (1) Initiative and referendum proceedings may not be utilized on matters strictly national or international in character.
- (2) The New York City Charter provisions pertaining to initiative and referendum can only be used to effectuate changes, alterations or modifications of the local government's functions.
- (3) Such charter does not provide for a referendum to declare

<sup>21</sup> State *ex rel* Rhodes v. Board of Elections of Lake County, 12 Ohio St. 2d 4, 230 N.E.2d 347 (1967), construing OHIO CONST. art. II, § 1f.

<sup>22</sup> *In Re* Silberman v. Katz, 54 Misc. 2d 956, 283 N.Y.S.2d 895 (Sup. Ct., Spec. T. 1967), *aff'd.* without opinion 28 App. Div. 2d 992, 284 N.Y.S.2d 836 (1967).

- policy—language for which was specifically included in the charter of the City and County of San Francisco.
- (4) New York City electors did not contemplate the establishment of the office of a federal lobbyist on every aspect of federal action not affecting New York City when they adopted the charter law.
  - (5) The creation of the office in question was a device to circumvent the New York City charter law.
  - (6) Foreign policy is clearly beyond the powers of municipal government and should be handled through Congress or the President or both.
  - (7) Public polls on foreign policy matters at taxpayers' expense are not within the purview of the New York City charter law.
  - (8) The distinctiveness and exclusive jurisdictions of the City, State and Federal Governments cannot be merged by tortured reasoning or by an abandonment of basic principles.

In all fairness it should be pointed out that the Supreme Court Special Term, New York County is a trial court whose decision was affirmed *without opinion* by the Supreme Court, Appellate Division, First Department, an intermediate court of appeals. The highest court, the Court of Appeals of New York, has not yet spoken on the subject. It is also in order to observe that in the New York City charter the provisions on initiative are not similar to those found in the statute books of other states. These considerations, therefore, must weaken the effect of the holding in the principal New York case here involved.

#### VII. AN EVALUATION OF POSITIONS

What the Wisconsin Supreme Court would do if the question were presented to it at this time cannot, of course, be predicted. From an overall analysis of the cases, it would seem that the California position is the soundest in legal theory. Section 9.20, while omitting any language relating to policy questions, nevertheless includes the phrase "any resolution or ordinance," and in this sense more closely approximates the charter of the City and County of San Francisco than does the initiative and referendum laws of Ohio or New York. It would be wise to heed the warning of Justice Fowler of the Wisconsin Supreme Court that the present Section 9.20, formerly Section 10.43, "contains no exceptions of subjects to which it applies."<sup>23</sup>

It is axiomatic that all initiative and referendum statutes should be liberally construed so as to promote the democratic process. In 1628, Sir Edward Coke was successful in having Charles I recognize the

<sup>23</sup> See dissenting opinion of Justice Fowler in *Feavel v. Appleton*, 234 Wis. 483, 493, 291 N.W. 830, 835 (1940). Initiative and referendum proceedings are applied to all ordinances and resolutions. *Meade v. Dane County*, 155 Wis. 632, 145 N.W. 239 (1914).

Great Petition of Right<sup>24</sup> whereby any aggrieved person was entitled as a matter of right to petition his government for the redress of his grievance. This Great Petition of Right was incorporated both into the United States<sup>25</sup> and Wisconsin<sup>26</sup> Constitutions.

It is unrealistic to argue today that the foreign policy of the United States is of no direct immediate concern to the cities. In this chromium civilization, what happens in Washington is of vital concern to every city and what happens to the rest of the world has a direct bearing upon our own civic affairs.

This is best exemplified by the Poet John Donne, in his Meditation XVII, the theme for Ernest Hemingway's, *For Whom the Bell Tolls*:

No man is an island, entire by itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontary were, . . . any man's death diminishes me because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

Foreign and municipal affairs are now so intertwined that no longer can one area be separated from the other. It will not be possible to still the voice of the cities (*vox municipiorum*) in foreign affairs and for these various reasons, the California decision now symbolizes a new hallmark of law, justice, and equity.

---

<sup>24</sup> Lord Coke himself stated that the words of the petition "were worthy to be written in letters of gold." See COKE, *FOURTH PART OF THE INSTITUTE* (W. Lee and D. Pakeman, ed., London, 1648) 21; BOWEN, *THE LION AND THE THRONE*, (Boston, Little, Brown, 1957) 483-502, 521.

<sup>25</sup> U.S. CONST. amend. I.

<sup>26</sup> WIS. CONST. art. I, § 4.