The Home Rule Amendment

Max Schoetz Jr.
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The people of Wisconsin by a majority of over 107,000 votes amended our constitution so as to give to the five hundred cities and villages of this state home rule in their local and municipal affairs. It was intended to be a new declaration of independence for municipalities. The amendment approved by the people states:

Cities and villages organized pursuant to state law are empowered to determine their local affairs and government subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature.

The legislature of 1925 submitted to the Attorney General a request for an opinion upon the construction of this constitutional home rule amendment and Herman L. Ekern, Attorney General, under date of February 8, 1925, among other things stated:

The amendment read as a whole clearly indicates an intention to depart from the rule long established that cities may be classified and that cities can exercise no powers beyond those specifically authorized by the legislature. The amendment provides not only that enactments of the legislature must be of state-wide concern and operate with uniformity but that those must affect every city or every village. Subject to this general power in the legislature, cities and villages are inherently authorized to determine their local affairs and government.

Acting upon this opinion, the legislature of 1925 enacted the so-called Home Rule Enabling Act for cities and villages by Chapter 198 of the Laws of 1925. This act enables cities and villages to amend their charters by two-thirds vote of the members elect of the legislative bodies of such cities or villages and also provides for a charter convention if the city deems it proper, which charter so adopted by the charter convention must, however, be submitted to a vote of the people of the respective cities and villages.

Before any of the cities and villages of this state adopt any changes in their charters the laws in existence at the time the constitutional amendment was adopted remain in force until amended by the cities or villages under the Enabling Act of 1925.

We are now confronted with the practical application of the home rule amendment. It is no longer the subject of theoretical discussion but of practical application. Villages and cities are stunned, so to speak,

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with the great powers which are entrusted to them by the sovereign people. Justice Timlin in his concurring opinion in the case of *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N. W. 20, decided May 14, 1912, anticipated the great difficulties which would confront us by the home rule amendment. He said:

No doubt the words, “municipal affairs,” “municipal concerns,” or “municipal purposes” *in a constitution* could be handled by a slow process of inclusion and exclusion until some workable theory of local government could be developed, but this promises a long period of uncertainty and a multiplication of legal questions and local quarrels and does not seem to possess much advantage over the older system.

There is no doubt then that this home rule amendment will be productive of a large amount of litigation. It is not surprising that the first case to come before our court is a quarrel between themselves of governmental agencies of the cities, the recipients of this great power. It has always been so and always will be so, that as soon as more powers are given, the more quarrels there will be. We have now pending the case of *State ex rel. Harbach v. Mayor and members of the Common Council of the City of Milwaukee*,¹ wherein the school board is quarreling with the common council about their respective rights under home rule. This case is now before the Supreme Court for a decision and I have the benefit of the very able briefs of Wehe and Landry, Benjamin Poss, John M. Niven and Clifton Williams, Frank R. Bentley, Walter H. Bender and Charles E. Hammersley.

¹Ed.—This case has been decided since the article was written — (Wis.) 206 N.W. 206. The case was the outgrowth of a petition for mandamus by the state, on the relation of Frank M. Harbach, against the mayor and members of the common council of the city of Milwaukee, to compel them to levy a state tax for the repair of school buildings in said city. The chief litigation centered around Ch. 285, Laws 1925, which amended Ch. 247, Laws 1921, by changing the limit of taxation for the repairing of school buildings in cities of the first class from eight-tenths of one mill to one mill upon the dollar of the total assessed valuation of the taxable property in said cities. It was contended that the repair of school buildings constituted a local affair of the city, and that by the constitutional provision (quoted in the article) the legislature was prohibited from legislating upon that subject except by general law, which “shall with uniformity affect every city or every village”; that as Ch. 285, Laws 1925, affected only cities of the first class, it was not a law which “uniformly affected every city or every village.” The court, in allowing a peremptory writ of mandamus to issue held that . . . . “although the boundaries of a school district may be coterminous with the boundaries of a city, there is no merger of the school district affairs with the city affairs. They remain separate and distinct units of government for the purpose of exercising separate and distinct powers and for the accomplishment of separate and distinct purposes. It follows that the so-called Home Rule Amendment imposes no limitation upon the power of the legislature to deal with the subject of education, and this applies to every agency created or provided, and to every policy adopted by the legislature, having for its object the promotion of the cause of education throughout the state.”
It was because of the paternalistic spirit of our state that the home rule amendment was passed. The loss of inherent powers and liberties of municipal corporations by force of legislative acts and a narrow construction by the courts which gradually whittled away, fettered, curtailed, and even took away the liberty and freedom of action of cities and local units, and now the insistence of the people to have such liberties, thus taken away from their cities restored by constitutional amendment, should be a lesson to the people to put them on their guard so that their own inherent rights to life, liberty, and the pursuit of happiness shall not be whittled, fettered, and eventually lost because of the modern ideas of centralization of all powers and the curtailment of individual freedom. Already the people have been pressed with unreasonable laws depriving them of their liberties, curtailing their rights in the enjoyment of their life, their liberty, and their property, and each legislative session turns out a grist of new laws, still more encroaching upon the rights of the individual. Moreover power and authority have been given to administrative boards and officers constantly, during the interim while the legislature is not in session, to exercise dominion and power over the individual, dictating like a general in an army and carrying on government according to the rules of the army and not of liberty—constantly destroying individuality.

From the storm floods of legislative enactments and police regulations that threaten to make wreck of the liberties of the people, there will emerge, defaced, but not broken, the still living and breathing spirit of liberty, of our revolutionary forefathers carried down from generation to generation not by any command of the constitution or laws but by the inherent powers of the individual. The liberty of the individual and of local units will arise again to supremacy among the ruins of centralized dominion and will again be supreme in our country.

Municipal charters have had a thorny experience in Wisconsin. First we granted special charters to cities. Then by force of a constitutional amendment these special charters could not be amended except by general law. Finally a general charter law was enacted for all cities except Milwaukee. Now we have thrown overboard our work of fifty years and are permitting each city to govern its own affairs and we will have the three millions of Wisconsin people living in more than five hundred cities and villages with as many as five hundred different charters.

Home rule is not new in other states. As early as 1875 Missouri adopted a home rule law for cities, exceeding one hundred thousand in population and since then seventeen states have adopted home rule for cities. In every one of these states more litigation and uncertainty has resulted. California has had hundreds of these cases. These foreign decisions are not very helpful to us since the language adopted by the several states is not identical.