

Municipal Government and Modern Federalism

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Abstract

Since the beginning of the U.S. Constitution, state governments have possessed great control over the power of local governments. In 1868, State Representative Robert Dillon of Iowa voiced a theory of strong control of state lawmakers over the state's municipalities. Dillon's Theory was thought to be the norm across the states until the Progressive Era with the passage of Home Rule Charter and Optional Plan Laws. While the great reforms of local government were to have changed, the power relationship, the real fact is that little but structure has altered. With states unwilling to truly alter this power structure, general assemblies have left municipalities in financial distress with an inability to address their local needs effectively.

Municipal Government and the Effects of Federalism

The history of the State Government to their extensions, local government throughout the state has been and an arbitrary and often one-sided relationship both in local structure and in finances. State General Assemblies, over the years have created extensions that have become too often confused in the powers they exert regardless of the structures provided by the state and to even a greater extent incapable of financing their general obligations to municipal residents. This paper will tie these two problems together to better depict their relationship and the dilemma faced by municipalities across the U.S. today.

The history of the "Home Rule" and often named "Option Plan Forms of Government" is an old concept in the history of the U.S. According the A Primer on Home Rule, published by the Institute of Public Policy and Economic Development at Marywood University in 2009, Home Rule dates to "March 4, 1681 King Charles authorized William Penn's Charter - giving the Penn Family the power to oversee and govern more than 16 million acres of land that would ultimately be known as Pennsylvania" [1]. The history of cities and towns have since the development of a state and local level government been in flux over what powers each would be authorized to carry out. With the establishment of the U.S. Constitution in 1789, the United States developed a form of federalism to define the powers between the national and state governments. As Grover Starling defined in his public administration text managing the Public Sector, "Federalism divides power between central government and regional governments (dates, provinces, cantons, and lands). With each government, central or regional legally supreme in its own area of jurisdiction. With the original concept of federalism was the 'layer cake' model assuming functions appropriate to each level and be with reasonable precision and should be kept independent [2]." Local government, the third level of the federalism model was viewed as extensions of state government and duly authorized to be governed by them. Over the past nearly 200 years, state and local governments have attempted to iron out their relationship and the powers vested in each governmental entity. In attempting to understand better the state and local Federalism, Alexander Hamilton recognized that:

It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State are apt to feel a stronger bias towards their local governments than towards the government of the Union [3].

Unlike Hamilton, many other individuals believed municipalities to be creations or extensions of the state government. Many state officials believe that the only powers municipal governments possessed were those officially granted to them by state constitutions. Numerous examples of such opinions can be found in court cases and journal articles such as professor Hugh D. Spitzer's article in the Washington Law Review entitled, Municipal Police Power in

Washington State [4,5]. Professor Spitzer depicts the court cases and arguments many new incoming western states to the country dealt with over invisible powers. A lengthy presentation of constitutional arguments, statutes and State Supreme Court cases attempt to adjust the role and powers local government was to possess as progressive individuals and ideas in Western states struggled between more freedom for municipalities and what became known as Dillon's Theory.

In 1868, Iowa legislature representative Robert Dillon espoused in his general assembly a theory of state and local government that has been utilized by the other state legislatures across the country as well as the courts. The concept known as Dillon's Theory suggests that: "the state legislature was supreme over the state's municipalities and that they were only able to do what the state legislature and the general rule state constitution allowed" [2]. More clearly Dillon's Theory states that:

"Dillon's Theory became the accepted legal opinion across the United States regarding the relationship of state legislatures and municipal governments in 1907.

The Development Home Rule and Non-Chartered Municipalities

"Home rule, was first constitutionally authorized by the Missouri State Legislature in 1875. It has been said to be the logical outgrowth of constitutional prohibitions on special legislation for cities, for the most prevalent form of state legislative treatment of many of them until late in the nineteenth century" [4]. The concept of "Home Rule" was to provide local government who desired to take on this form more power to deal with local problems because as the advantages of Federalism on the local level. Municipalities were better equipped to handle such problems, understood the issues more clearly and usually had the expertise to solve the issue. In the era of the Progressive Movement in the late 1800's and early 1900's, many states utilized the progressive concepts to improve women's rights, labor rights and "Home Rule and optional plan laws for over 27 states to provide for "more effective government [7]. Many of the progressive western states such as Washington, Oregon, Wisconsin, etc. sought to provide more local policing powers to local government than had been established previously.

Pennsylvania Home Rule and Option Plan History

While many states had already taken progressive steps to Home Rule Charter Governments, it was not until 1949 when Pennsylvania acted for the first time in providing such reform authority. In that year, the county and the city of Philadelphia, one in the same, was granted a Home Rule Charter. Dissatisfaction with the manner of treatment the city and county of Philadelphia were receiving from the Pennsylvania State General Assembly under facets of Dillon's Theory led leaders to push for this reform. The State Supreme Court of Pennsylvania by law was provided with authority to litigate and legislate which local powers Philadelphia was to exercise [8]. Philadelphia has been through history both a county and the state's only first-class city. This effort in 1949 was viewed as a minimalistic action taken by the state gen assembly.

Since 1949, there have been a variety of actions taken by the city of Philadelphia in what has been considered its own best interests, i.e., gun-control legislation which violates the state law of Pennsylvania's ruling on such [9]. It should be noted as well that the city/county continuous to remain heavily reliant on the state of Pennsylvania for many of its financial resources. While not the crux of this paper, little can be understood of the plight of other municipalities within the state of Pennsylvania under the old commission form of government, on home rule, or option plan without understanding Philadelphia's command of education finances, property taxes, and sales taxes.

Pennsylvania Enters the World of Home Rule and Optional Plan Law

With the issuing of a Home Rule charter to the city of Philadelphia, the state legislature proceeded slowly on granting home rule to all other 66 counties in the state of Pennsylvania. Opponents to County home rule government were often afraid of a home rule charter arguing home rule leads to higher taxes and an expansion of government [10]. However, later in 1968,

the state legislature granted Home Rule to the additional 66 counties altering components of the government structure and procedures within their authority [3,10].

The real changes to Pennsylvania law came with the constitutional revisions adopted by the state of Pennsylvania including but not limited to Pennsylvania Act 62; 1972, Pennsylvania Home Rule and Option Plan Law. This law opened opportunities to counties, cities, boroughs and townships of wide classification variances to alter the structure and operating procedures of their respective government. From its inception in 1972 until the present time, there are four major types of local government available to Pennsylvania municipalities [11]. Counties number 59 which remain under the traditional three commissioner default form of government, while 7 counties (Allegheny, Delaware, Erie, Lackawanna, Luzerne and Northampton) have chosen home rule charters [10,12]. There are sixteen third class cities in the state which have opted to formulate their own Home Rule Charters. Two municipalities have opted to select Optional Plan Laws, Dubois, PA selecting a council-manager form of government and Hazleton, PA a mayor-council Option Plan B (a mandated Department of Administration) [11].

The 16 Pennsylvania municipalities that have written their own home rule charters certainly have provided their communities with a bit more flexibility than can be found in any “Optional Plan” or default “Commission” form of government. Many explanations including the list provided in a Primer for Home Rule on Pennsylvania, have been offered as reasons to make the change:

- Residual powers – write own administrative code
- Increased citizen access – initiative and referendum
- Improved accountability and responsiveness
- Improved fiscal procedures and controls
- Flexibility
- Professional administration
- Wider representation
- Focused political leadership
- Separate legislative and executive functions
- Merit hiring and advancement [1].

Certainly, these reasons provide strong arguments on behalf of supporting home rule charter adoption. However, with the best intentions of the state legislators many of these arguments have been left ambiguous or severely restricted by the lawmakers themselves. The writing of any administrative code is severely restricted by numerous limitations passed by the state Gen assembly [1].

Numerous reasons offered in suggesting a home rule charter adoption refer to the accountability, responsibility, financial improvement, and the use of professional focused and directed personnel to administer the city's needs. As has often been the case in Pennsylvania as with many other states, the structure and operations of city government have and will always be based on the type of personnel selected by the municipal voters. As suggested many times, the diligence of American voters in monitoring their elected officials is as important if not more important than the vote they cast to select officials. The cities of Reading and Allentown witnessed their mayors indicted for “pay-to-play” scandals [13,14]. Additional incidents of criminal accusations and indictments have been leveled against the Mayor of Harrisburg [15].

Certainly, the great numbers of elected officials in local government are honest hard-working individual's intent on serving the public in the most honest way possible. However, across Pennsylvania and especially in northeastern Pennsylvania the numbers of those prosecuted

for wrongdoing are substantial. Reviewing the Middle District of the State of Pennsylvania Federal Attorneys Office, since 2009, thirty-one public officials were prosecuted successfully by the office [16].

Three of the most famous cases among the thirty-one cases prosecuted concerned the now infamous “kids for cash” case. Three Luzerne County Court of Common Pleas judges were found guilty of accepting bribes from individuals who had constructed detention centers to which the judges sent many undeserving juveniles they judged delinquent [17].

Among the 28 other cases listed, one will find numerous instances of embezzlement, abusive influence and bribery to name a few of the crimes committed. The great majority of remaining cases referred to home rule charter as well as traditional local government structures from county government on down through boroughs and townships. If one goes back just a few years beyond 2009, the number of crimes committed by local officials in Luzerne County alone increases dramatically. For a more complete list of 22 indictments and convictions in Luzerne County please refer to archives two newspapers, the Wilkes-Barre Times Leader and Wilkes-Barre Citizen’s Voice.

The fault lies not just in the corruption of all those who misuse or abuse the people’s trust while in local government. There are often ambiguities and law which leave elected and appointed officials without appropriate guidance. Court cases ensue, and elected officials find themselves using errors and omissions insurance or cities’ general funds to pay various sums of money in legal bills and fines. The city of Hazleton for example has litigated over the appointment powers of municipal authority board members municipal power to deal with undocumented residents living and working in the city and more [18,19].

Additional misuse of power due to lack of clarity has occurred in many other municipalities across the state concerning Home Rule and Option Plan Laws. In Reading, PA the mayor and city council woman were tried and convicted for bribery and pay to play activities in Spencer vs. City of Reading [20]. Still further, court cases have been filed in Scranton, Pennsylvania over the use of “commuter taxes” and wage taxes [21,22]. Further cases across the state at times deal with enforcement or “policing powers” as in the case of Hill vs the Borough of Kutztown [23].

While many court cases about appointments to appropriate commissions, appropriate use of taxation, policing powers as well as advise and consent to name a few are contested, there is often no clarity in the Home Rule and Options Plan Law. When investigating the Act 62, 1972 [24] and especially its provisions for Home Rule and the various Option Plans, little is given during special actions available to act upon. Instead, the law as well as guide books such as the Primer for Home Rule provide much more limitations to municipalities than to specific powers. Pennsylvania Act 62, 1972 and many of its primers list approximately 26 specific powers denied the local government while providing 7 general limitations. Examples of such limitations are:

To these are listed below:

General Limitations

- United States Constitution
- Pennsylvania Constitution
- State laws - Act 62
- Laws that is uniform and applicable
- Throughout the Commonwealth
- Laws directed expressly at home rule governments
- The charter itself Specific [1]

Specific Limitations

- Arbitration/labor relation
- Independence of municipalities
- Ethics Law
- Taxation subjects
- Sunshine Law
- Tort claims
- Local government autonomy.

The amount of time spent in law itself indicates the concern that the legislators placed on municipalities that were interested in selecting Optional Plan Laws. Plan A (Strong Mayor Council Form) is reviewed in approximately 4 pages of the law, which explain a great deal about structure but little about its power. Plan B (Strong Mayor-Council Form) is provided two paragraphs and only suggests that the differences rest in providing a mandatory Department of Administration. Plan C which one municipality has adopted creates a Council-Manager Form of Government [24].

The law itself is quite vague then on the type of governments that municipal governments may adopt and the powers that coincide with that form of government. There are many issues that remain as ambiguous in the Option Plans as with Home Rule. What is the ultimate power of the Mayor? Can an executive borrow money from city funds on his/her own? When is a transfer of money necessary to be passed by council or can the administration conducting such actions on its own? When is the mayor required to use the power of “advise and consent” with the council on actions taken or appointment of department heads?

These and many more issues are left unanswered in local government because most of these types of questions stem from an argument between the executive branch and the legislative. Arguments such as these when unable to come to an agreement between branches, have one of two courses to follow: (1) the error in government and the inappropriate action continues as unfair and possible illegal government. (2) Legal action is taken by the two branches which may settle the matter, but at what cost to the taxpayers of the municipality who must shoulder the cost of the lawyers involved.

In 2010, the Mayor of Harrisburg won a PA State Supreme Court ruling giving him the power to appoint members of municipal authorities. In a footnote within this case, the court referred to the Hazleton 1992 case. The Pennsylvania Supreme Court, while agreeing with the mayor of Harrisburg in appointment power of authority board members, did not overturn the Hazleton opinion for legal differences. Non-the-less, the case sent up red flags for the Hazleton Mayor new yet unclear rights to appoint authority members to Hazleton’s boards. Upon more analysis by a variety of lawyers, it was determined that the Justices would not try to overturn an earlier court case just by the use of a footnote in the opinion of another years later [18,25].

Local governments have used their power to deal with immigration in manners they felt were consistent with the U.S. Constitution through the passage of the Illegal Immigration Relief Ordinance (IIRO). Believing that the city was using Federal Legislation, it passed ordinances making it illegal to hire undocumented job seekers as well as making it illegal to knowingly rent housing to an undocumented individual. Upon a legal contest through the Federal Middle District Court of Pennsylvania, the Third Circuit Court of the U.S. and a denial hearing by the U.S. Supreme Court, the city of Hazleton found itself in debt with approximately \$1.4 million dollars in legal defense [26,27]. The powers of protection of citizens and policing powers were the arguments put forth as municipal powers, but the city found itself deeper in debt than it had been previously and as too often the case, with no good means to pay.

There are many challenges that are available for investigation throughout the history of Act 62, 1972. The state has re-written the third-class city code a few times since the passage of

Act 62, the most recent being [28]. This code is the primary source to investigate whether any Pennsylvania municipal government has the power to act in a manner it wishes. While quite extensive, it still leaves areas of government as mentioned above in the Home Rule and Option Plan Law unclear and therefore open to argument.

Home Rule, Option Plans and Growing Municipal Debt External Issues

Because of Home Rule and Option Plan differing interpretations by municipal leaders, debt due to court cases continue to grow, see Hazleton court case of 1992 which cost the city over \$20,000 at that time [18]. Cases today cost a great deal more with multiple lawyers and costs involved. The recent Hazleton IIRO court case cost the city nearly \$6 million and was finally settled for \$1.4 million, the original bill submitted by forty-four lawyers from a variety of organizations including: the ACLU, Puerto Rican Education and Defense Fund and Federal Civil Rights attorneys were asking for a great deal more [29].

However, court cases are only a small portion of the problems faced by local municipalities today. Financial distress is a real problem and a monetary abyss into which more and more cities are sliding. Simply meeting wages, benefits, pensions and basic city services are now stretching city budgets to the limit. PA municipalities may upon proper consideration enter a status referred to as Act 47. This allows “The Department of Community and Economic Development (DCED) to administer the Municipalities Financial Recovery Act, Act of 1987, P.L. 246, No. 47. Under Act 47, DCED has a responsibility to assist Pennsylvania municipalities that are experiencing severe financial difficulties to ensure the health, safety and welfare of their citizens” [30]. At present time there are 18 cities and boroughs under Act 47 coverage however, there are many more municipalities that are headed in that direction and will soon be increasing the numbers of Pennsylvania financial distressed municipalities.

The causes of a community declaring financial distresses are quite numerous and often not a city's fault. There are several external as well as internal issues causing cities to fail. Many of these issues are well related to the General Assembly's oversight of the state's municipalities. One issue worth discussion is the Pennsylvania's inability to deal effectively with the decline of manufacturing jobs within the state.

For one thing, states do not manage the global economy. The drop in manufacturing jobs in Pennsylvania, especially in the steel and textile industries, hurt cities large and small. But it was caused by external events, including increased foreign competition, advances in worker productivity and a series of crippling recessions. Between 1990 and 2009, manufacturing jobs declined 40 percent in Pennsylvania [31].

Pennsylvania being considered part of the Rust-belt, suffered greatly with the closure or movement of many industries from the state. With these loses, went Earned Income Tax money and Property Taxes as well as additional financial resources. Yet another state obstacle to improving municipal finances is the Pennsylvania Corporate Tax Rate which at 9.990% flat tax is the second highest rate in the U.S. [32]. There is little if anything that cities and smaller municipalities can do to improve manufacturing conditions in the state on their own.

Local and regional natural disasters present a tremendous burden to many municipalities. Whether floods, massive snow storms, fires, or court cases and other legal issues, the State General Assembly has forced local municipalities to pay on their own. The communities of Northeast Pennsylvania suffered through a thirty plus inch snow storm in March of 2017. Because of the small regional effect of the paralyzing storm, the Federal Government sent no disaster financial relief to communities who far outspent their snow plowing and removal budgets on one storm. The State of Pennsylvania assisted with some equipment to municipalities hard hit and aided of the Pennsylvania National Guard, but little money to help [33].

In addition to disasters, manufacturing slumps and corporate tax issues, many residents in Pennsylvania as in other states are witnessing extremes in migration to their communities. The differences far exceed language. Cultural differences including housing differences (often

very similar to those of New York or their homelands) that lead to police, fire, code, and other issues that stretch municipal budgets beyond their limits. With declining industrial jobs and older living structures many of the communities observe increasing blight and a declining tax base on a yearly basis. While collecting fewer dollars in taxes, the services demanded by residents increase yearly. Municipalities such as Scranton, PA, have sought remedies to addition costs in services often with little success:

A 2011 state Supreme Court ruling created barriers to Scranton's efforts to exit Act 47 after 20 years. As part of its financial recovery plan in 2002, the city tried to check rising labor costs by freezing wages and cutting benefits for unionized police and firefighters. Arbitrators awarded workers bonuses and raises, but a lower court reversed them, saying the pay increases would make it difficult for Scranton to carry out its financial recovery plan [31].

State law has in addition proved to be a strangle hold on local municipalities whether they possess Home Rule Charters, Optional Plan Laws or traditional Commission forms of government in Pennsylvania. From County government to the smallest townships, municipalities are limited to property taxes and earned income taxes. Apart from specifically designated grants and smaller loans from state and federal government, strict limitations by the General Assembly limit the sources of income any municipality can use for funding services: housing, recreation, gambling grants which have been used as economic development within the community along with private investors [34]. Elected office holders across Northeast, Pennsylvania asked for help in financing their municipal governments expenses at a March 2016, round-table discussion of local officials and state elected officials at the Luzerne County Court House. State senators and representatives alike suggest little to no help coming while the State Legislature could not get its own financial house in order facing a state debt surpassing \$2 Billion [35].

One final external cause of rising financial problems faced by Pennsylvania and other state municipalities is the rising immigration rate that has affected many municipal areas but not all. According to a 2017 Pew Report entitled 20 metro areas are home to six-in-ten unauthorized immigrants in U.S., the New York and Philadelphia are two metropolitan areas receiving these immigrants [36]. This paper will not look to answer immigrant issues, however, among this group there is great fear of police officers, firefighters, code officers, utilities service people and even teacher. All these individuals wear some type of uniform or possess some authority in the community. Many of newcomers have a great fear of such personnel because of the mistreatment by official in uniform and power. Today's culture in the U.S. has created a fear that giving one's name and address may lead to President Donald's deportation policies [37].

Related to the above new migration within the state, laws demand translation of literature dispersed by municipal government departments concerning services and protection of residents that can become very costly. Garbage schedules for hauling trash, announcements and posting of plowing and snow parking bans, fire department materials on safety in homes and apartments along with all other city hall materials need to be translated professionally and printed in the primary languages of the city residents. In Northeastern Pennsylvania which has most recently witnessed significant changes in population the reprinting of materials in Spanish particularly are additional costs not seen in previous times [38].

With the purchase of properties of absentee landlords, older homes and a change in culture toward improving home quality in many older and central city locations, the problem of blighted properties have become an ever-more concerning issue to municipalities. This "economic crime" costs cities such as Harrisburg, York, Lancaster and Reading as well as other Pennsylvania municipalities and their taxpayers millions of dollars a year in lost property tax revenue, and statewide, it's in the hundreds of millions of dollars [39].

When their property became dilapidated, the owner could simply walk away and abandon it; with thousands of dollars of unpaid taxes and sewer and water bills, which had to be made up

through higher taxes and sewer and water fees on taxpayers and property owners who do maintain their properties.

Legislation and legal action have been taking place since 2007 with the passage of the Neighborhood Blight Reclamation and Revitalization Act, Senate Bill 900, sponsored by the late Sen. James J. Rhoades and then by Sen. David G. Argall [40]. Positive action has been taking place therefore to remedy blighted property, but at a cost. Additional legislation has been passed to assist local communities and county housing courts through the creation of local and county Blighted Property Committees, giving these communities legal resources to name properties blighted and in some cases through Pennsylvania Act 90 force the property owner to raise the property for the good of the community.

With all the legislation and regulations, the state has provided local government from counties to small townships to improve their communities, there has been little money provided to carry out these activities. Blighted Property Committees need solicitors to carry out their functions and files need to be maintained on properties being investigated. Legal action requires housing courts. General meetings as well as public sessions to decide on declaration of blighted status need to be advertised and be conducted with court stenographers. All these functions cost money. Creation of housing courts, training of judges, the work of any lawyers involved in the proceedings cost money which local governments do not have and at this time cannot receive from the state.

A second avenue to handling blighted property would be the modern technique of creating a "Land Bank" which would buy the property, refurbish it and sell it to private developers who would once again place the property on the tax role. Communities who have little money to spare are not able to deal with such issues. In most states, Land Banks of smaller than county size is not entitled to Federal assistance in coping with blight problems and therefore are at a financial disadvantage. The general intent of the legislation was that land banks would be set up by counties who might financially handle the costs in a more efficient manner. Getting a few or several municipalities to enter such a board could by the literature become quite difficult [42].

The above issue leads to an ever-more need for appropriate code enforcement within the cities of Pennsylvania. With dwindling budgets, less personnel can be hired to handle the increasing load of code violations found in older cities. While absentee landlords account for many of the serious infractions, local property owners are at fault as well. With dwindling budgets however, code infractions, blighted property and additional city services receive less support because of a declining tax base.

One final issue that many, but not all cities face which limit their tax base is the inability of growth because of their borders. Many cities have reached their limits and therefore have little if any space to expand even if industries were willing to enter the city. Many of the townships surrounding cities because of their population density and allure of Economic Development Zones can accommodate these new businesses [43,44]. In many cases the taxes are much less, and except for police service, much the same as could be found developing a plant in a city even if land was available [45,46].

Conclusion

The plight of the cities in Pennsylvania and other states is growing more severe as time passes. As extensions of the state, their reliance on legislation and or legislation to assist them in dealing with the problems they face is essential. The prospect of local governments attempting to develop Home Rule Charters or Option Plan Form of Government is not an answer if the ability to finance its own needs is not attached. All too often citizens create what they consider a solution to their problem by forming a new government structure and they walk away from any additional attention. As in all other facets of life, attempting to work out a solution is only one phase of an answer. Constant monitoring and further action is always needed. One would not lose fifty pounds of weight through diet and exercise only to return to one's old habits of eating and lounging around and expect to stay thin. In like manner, no

government can be expected to be responsive to the people's needs if left unchecked by the citizens who voted for that government and the people who serve in it.

As extensions of State Government, General Assemblies must take more of an active interest in the financial obligations of its municipalities. If State government is unwilling or unable to assist municipalities in solving their structural, legal and financial problems, then they should at least give them the legal means to come up with financial remedies that can best solve local problems. There is no one answer that fits all circumstances. There are wealthy suburban communities outside Philadelphia and Pittsburgh that will not face the dilemmas discussed in this paper for years to come. For too many municipalities however, the problems are real today. Fire, water supplies, police, street maintenance and snow removal among other actions are needed all too often. Without state intervention by General Assemblies, local municipalities will be condemned to inefficient governments, elected officials who may act in near dictatorial manners, and taxing situations that decrease the property values of a community rather than improve them. Flight to lower tax townships and boroughs cannot be the only answer. While many may believe that state laws across the country and local government reforms have dealt Dillon's Theory ineffective, it is quite alive today and negatively impacting on municipalities everywhere.

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