1997

Home Rule School Districts: An Opportunity For Meaningful Reform Or Simple Window Dressing?

Charles W. Goldner Jr.
University of Arkansas at Little Rock William H. Bowen School of Law

HOME RULE SCHOOL DISTRICTS: AN OPPORTUNITY FOR MEANINGFUL REFORM OR SIMPLE WINDOW DRESSING?

Charles W. Goldner, Jr.*

INTRODUCTION

Reform of public education is the politicians' current battle cry. In the recently concluded presidential campaigns, one heard President Clinton calling for school uniforms[1] and former Senator Robert Dole praising the idea of school vouchers.[2] States and local school districts are creating charter schools as part of this reform effort.[3] Schools granted charter status adopt programs and rules which apply only within that school rather than district or state-wide.[4] Charter schools may also be exempted from some state statutes and regulations, such as laws governing maximum class size.[5] Freeing the occasional school from state dictates does not go far enough according to some reformers. Some believe the entire school district should be freed from the state-imposed strait jacket of regulation. Granting home rule authority is currently touted as a sure method of improving education by freeing local school districts from state red tape and mandates. Texas, at the urging of its governor,[6] recently enacted

---

* Associate Dean and Associate Professor of Law, University of Arkansas at Little Rock School of Law, B.A. Depauw University, 1971; J.D. University of Oklahoma, 1973; LL.M. Georgetown University, 1987.

1. George J. Church, *The Learning Curve*, TIME, Sept. 2, 1996, at 32.
2. Richard Lacayo, *Jabs, No Knockout*, TIME, Oct. 14, 1996, at 40.
3. *See* TEX. EDUC. CODE ANN. § 12.052 (West 1996) (authorizing the board of trustees of an independent school district to grant a charter to a campus or program upon request of parents and teachers); TEX. EDUC. CODE ANN. §§ 12.101, 12.103 (authorizing the State Board of Education to grant a charter to a school); N.J. STAT. ANN. § 18A:36A–3 (West 1996).
4. *See* TEX. EDUC. CODE ANN. § 12.058 (charter is to describe the governing structure for that campus or program); TEX. EDUC. CODE ANN. § 12.111 (state-created charter schools must include governing structure and description of educational program in the charter); CAL. EDUC. CODE § 47605 (West Supp. 1996).
5. *See* TEX. EDUC. CODE ANN. § 12.054 (exempting charter campus or program from the school district's instructional and academic rules); TEX. EDUC. CODE ANN. § 12.103 (exempting state-created charter schools from the provisions of the Texas Education Code unless otherwise provided); CAL. EDUC. CODE § 47610.
6. Mary Ann Roser, *Bush Likes Education Bill But Regrets Some Omissions*, FT. WORTH STAR-TELEGRAM, May 18, 1995, at 19.

legislation granting school districts in the state statutory authority to become home rule school districts.[7] The Kansas legislature considered granting school districts home rule authority but did not.[8] The California legislature approved legislation authorizing home rule for California school districts, although Governor Wilson vetoed one of the two bills required for the authorization to become law.[9] A member of the governing board of a Florida school district has proposed that the Florida legislature authorize home rule authority for its school districts.[10]

School districts, together with counties, municipal corporations, and multiple types of special districts, are political subdivisions of the state.[11] States allow local residents to create school districts as separate political subdivisions of the state.[12] These districts are referred to as "independent" school districts, often in the statutes regulating the districts[13] and in the name of the school district itself. If these districts are truly independent, why did Texas feel it necessary or even desirable to authorize home rule school districts[14] and why are other states either considering authorizing home rule status for school districts or at least discussing the possibility?[15] Is home rule authority in fact part of the solution to improving public education? These questions and what it means for a school district to be independent will be addressed in Part I. The reasons for development of home rule authority for municipal corporations, including the perceived advantages, will be explored in Part II. The relationship between a state and its independent school districts will be explored in Part III. In Part IV, there will be a brief discussion which traces the extension of home rule to counties and to Texas independent school districts. Part IV concludes by using the Texas home rule statute as part of the analysis of the legal, practical and theoretical limitations on the use of home rule authority to cure whatever one decides is the problem in our public education system. Finally, the appropriate balance between state and local control in public education and

---

7. TEX. EDUC. CODE ANN. § 12.011 (West 1996).
8. *See* H.R. 2283, 76th Leg., 1st Reg. Sess. (Kan. 1995).
9. *See* A.B. 66, 1995 Leg., 1995–96 Reg. Sess. (Cal. 1995).
10. Anne Lindberg, *"Charter District" Urged for Pinellas Schools*, ST. PETERSBURG TIMES, March 14, 1996, at 1B.
11. *See* Atkin v. Kansas, 191 U.S. 207, 221 (1903); Robinson v. Cahill, 303 A.2d 273, 285 (N.J. 1973); 1 C. DALLAS SANDS & MICHAEL E. LIBONATI, LOCAL GOVERNMENT LAW § 2.07 (1996).
12. *See* 3A CHESTER J. ANTIEAU, LOCAL GOVERNMENT LAW § 30Q:1.02 (1996); 16B EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 46.02.30 (3rd ed. 1992).
13. *See* ALA. CODE § 41–4–1 (1991); GA. CODE ANN. § 20–2–476 (1996); KY. REV. STAT. ANN. § 65.940 (Michie 1994); TEX. EDUC. CODE ANN. § 11.011 (West 1996).
14. *See* TEX. EDUC. CODE ANN. § 12.011.
15. *See infra* notes 81–88 and accompanying text.

what that balance suggests about the wisdom of granting home rule authority to independent school districts will be addressed in Part V.

I. INDEPENDENT SCHOOL DISTRICTS

To understand the significance of granting a school district home rule status, one must first understand how school districts are created, and the source of and limitation on authority exercised by school districts. The independent school district is a particularly popular form for school district organization. An independent school district is a separate political subdivision of the state. It derives its power directly from constitutional and legislative grant.[16] Election of its governing body,[17] control of its revenues,[18] and authority to raise revenues[19] are powers held independently of other political subdivisions of the state. Even though the independent school district's boundaries may be coterminous with the boundaries of a county or municipal corporation, the independent school district is not subject to the control of that county or municipal corporation.

Note that all discussion of what it means for the school district to be independent relates to the school district *vis a vis* other political subdivisions of the state. Nothing suggests that the district is independent of its state; in fact, quite the contrary is true. The independent school district looks to the state constitution, statutes and regulations for both its organization and powers. State control of education is based in both the federal constitution[20] and state constitutions.[21] As discussed in Part II, as a political subdivision of the state, the independent school district has no inherent right to exist.[22] The power of a state to consolidate or abolish an independent school district[23] provides graphic

---

16. *See* 16B MCQUILLIN, *supra* note 12, § 46.02.
17. *See* COLO. REV. STAT. § 22–31–105 (1988); FLA. STAT. ANN. § 230.05 (West 1989); 105 ILCS 5/10 (West Supp. 1996); TEX. EDUC. CODE ANN. §§ 11.051–.058 (West 1996).
18. *See* COLO. REV. STAT. § 22–44–103; TEX. EDUC. CODE ANN. § 11.151.
19. *See* N.H. REV. STAT. ANN § 194:3 (1989); PA. STAT. ANN. tit. 24, § 6–602 (West 1992); WASH. REV. CODE § 28A.530.010 (West Supp. 1996).
20. "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
21. *See* 16B MCQUILLIN, *supra* note 12, § 46.02; 3A ANTIEAU, *supra* note 12, § 30Q:1.02.
22. *See infra* notes 29–34 and accompanying text.
23. Abolition in modern times normally means consolidation with another school district against the will of one of the districts. This may be done when a district fails to meet state educational goals. ARK. CODE ANN. § 6–15–204 (Michie 1993). Rather than consolidate the district with another, the state might choose to intervene directly in the daily operation of the school district. *See* RONALD T. HYMAN, STATE-OPERATED LOCAL SCHOOL DISTRICTS IN NEW JERSEY, 96 ED. LAW REP. 915 (1995).

proof of a district's reliance on the state for its very existence. Nor does the school district have authority to exercise powers other than those granted to it by the state.[24] In addition to the limitations on fiscal powers normally imposed on all its political subdivisions by a state,[25] states impose specific requirements on independent school districts related to the goals of the district and the method of achieving those goals.[26] One need only review the statutes, education codes, and agency regulations of the various states to quickly see the extent of state direction to independent school districts on how a district should achieve the educational mission. State regulation of both goals and means is the norm in public education–and it is escape from that control which is sought as a means of freeing local public education, allowing local officials the freedom to determine how to improve the quality of their schools.

Although states have delegated much of the responsibility for public education to school districts,[27] the fact remains that the districts have limited discretion. Given this context, persons interested in freeing education from legislative directives have turned to an escape hatch used for municipal corporations and, more recently, for counties: the grant of home rule authority.

Home rule represents the apex in local control for municipal corporations.[28] To determine whether a grant of home rule is likely to impact significantly what local school districts can do and actually do, the history and nature of municipal home rule must be explored.

II. MUNICIPAL HOME RULE

State control of its political subdivisions has been and remains the norm. Although early in this century some commentators advanced a theory positing an inherent right of local self government,[29] the courts never embraced the

---

24. *See* Bettendorf Educ. Ass'n v. Bettendorf Community Sch. Dist., 262 N.W.2d 550, 552 (Iowa 1978); Perry v. Independent Sch. Dist., 210 N.W.2d 283, 286 (Minn. 1973); Fair Lawn Educ. Ass'n v. Fair Lawn Bd. Of Educ., 401 A.2d 681, 683 (N.J. 1979).

25. Limitations on both the ability to raise revenues, whether through the issuance of debt, by taxation or other methods, and the purposes for expending revenues raised are routinely imposed by states on their political subdivisions. *See* Charles W. Goldner, Jr., *State and Local Government Fiscal Responsibility: an Integrated Approach*, 26 WAKE FOREST L. REV. 925, 927–31 (1991).

26. *See* TEX. EDUC. CODE ANN. §§ 21.001–.452, 25.001–.901, 28.001–.058, 29.001–.902, 31.001–.201, 39.021–.185 (West 1996).

27. *See* Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 781 (1992).

28. 1 ANTIEAU, *supra* note 12, § 3.04.

29. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1113 (1980); 1 MCQUILLIN, *supra* note 12, § 1.42 (3d ed. rev. 1987).

theory.[30] Rather, the courts viewed municipal corporations as simple extensions of the state, extensions created for the state's convenience. For instance, the Arkansas Supreme Court held that "[m]unicipal corporations are created to aid the state government in the regulation and administration of affairs."[31] "We [the court] regard as axiomatic that cities and towns are creatures of the Legislature, subject to its control, and that they can function only within the limits fixed by law."[32]

The Federal Constitution provides a political subdivision little protection from its creator state:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The State . . . at its pleasure may modify or withdraw all such powers, . . . repeal the charter and destroy the corporation. . . . In all these respects the State is supreme, and its legislative body, *conforming its action to the state constitution*, may do as it will, unrestrained by any provision of the Constitution of the United States.[33]

State supremacy over its political subdivisions, and the result of that supremacy in resolving questions of local authority to act, is best summarized by Judge Dillon in his treatise on 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–not simply convenient, but indispensable. . . . These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.[34]

The municipal corporation has no power beyond that delegated to it by the state. Grants of home rule authority are meant to lift municipal corporations out of their perceived powerlessness.[35]

Use of the term "home rule" can be misleading, for the term encompasses more than one possible relationship between a state and its home rule municipal corporation. First, home rule can be granted two ways: through a state

---

30. Frug, *supra* note 29, at 1114.
31. Cumnock v. City of Little Rock, 243 S.W. 57 (Ark. 1922), *quoted in*, Ottowa v. Carey, 108 U.S. 110 (1883).
32. Kitchens v. City of Paragould, 88 S.W.2d 843, 846 (Ark. 1935).
33. Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907) (emphasis added).
34. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 55, at 101–02 (1st ed. 1872) (emphasis in original).
35. *See* Frug, *supra* note 29, at 1115–16; 1 ANTIEAU, *supra* note 12, § 3.13.

constitutional provision or through legislative enactment. Constitutional home rule appears to give greater authority and autonomy to a municipal corporation. Because a state constitution serves to limit sovereign power,[36] a direct grant of home rule in the state constitution prevents the legislature from denying home rule authority to its political subdivisions. By comparison, statutory grants of home rule authority may be removed by the legislature.[37]

After determining the source of the power, one must consider the nature of the power granted. Not only are there two sources of home rule authority, there are also two types of home rule authority. If the municipal corporation can act with respect to local matters without regard to legislative enactments, it is said to enjoy the status of a state within a state–"*imperium in imperio.*"[38] The state constitution serves as the sole state law limitation on the powers of the home rule entity. To determine if the local home rule government has authority to act, one asks whether the municipal corporation is acting in a matter which is a local matter or affair.[39] If answered affirmatively, the legislature cannot deny the power.[40] If held not to constitute a local matter or affair, the legislature can direct its municipal corporation's action or even deny it the authority to act.[41]

Compare legislative home rule. A municipal corporation enjoying a grant of legislative home rule has the authority to act as long as authority is not denied by the state constitution or statutes.[42] Because legislative home rule allows the state to effectively deny its municipal corporations the authority to act in a specific area, one would reasonably assume that *imperio* authority affords greater power and authority to a municipal corporation. This is not the case, however. Cities in Texas, which have legislative home rule, are said to enjoy one of the broadest grants of authority to any home rule entity.[43]

The home rule municipal corporation enjoys delegated power not available to non-home rule municipal corporations. Whether *imperio* or legislative, the city through its home rule charter may tailor both the form and scope of local government to fit more precisely the perceived local needs. That flexibility provides greater opportunity for innovation. With more cities acting as innovators, new approaches to solving problems should evolve. Those approaches can then be modified and adapted by other home rule municipalities.

---

36. State v. Ashley, 1 Ark. 513 (1839).
37. *See supra* note 33 and accompanying text.
38. 1 SANDS & LIBONATI, *supra* note 11, § 4.01.
39. Frug, *supra* note 29, at 1117; 1 ANTIEAU, *supra* note 12, §§ 3.16–.17.
40. 1 ANTIEAU, *supra* note 12, § 3.16.
41. *Id.*
42. 1 SANDS & LIBONATI, *supra* note 11, § 4.06.
43. *See* Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 295–96 (1968).

What is the connection between Dillon's Rule, municipal home rule, and independent school districts? The absence of home rule authority for independent school districts leaves those political subdivisions subject to Dillon's Rule: if the power is not expressly given or fairly implied, the political subdivision does not enjoy it.[44] In fact, it has been suggested that so many municipal corporations enjoy home rule authority, "[t]he domain of Dillon's Rule is thus now limited to these smaller localities (*and also to limited-purpose special districts that are beyond the scope of home rule grants*)."[45] The independent school district is one of these limited purpose special districts. Even so, the school district may not be as powerless as the municipal corporation. Public education is mandated by state constitutions.[46] Does this mandate serve as a type of constitutional protection for independent school districts?

III. INDEPENDENT SCHOOL DISTRICTS AND THE STATE

Does the state or the independent school district exercise authority and control over education? Note the exclusion of the federal government in that question. Between the federal government and the states, education *qua* education is not a protected right under the federal constitution, either explicitly or implicitly.[47] Quite the contrary: the federal courts have recognized the right of local control over education. But in some instances, when a court says "local" control, it actually means state control. In other instances, when the court says "local" control, it actually means control by the political subdivision, not by the state. A unanimous Court in *Brown v. Board of Education* wrote that "education is perhaps the most important function of state and local governments,"[48] acknowledging that a state and its local school districts share the responsibility for public education. When faced with equal protection challenges to the Texas scheme for financing the public schools, the Court noted that "[i]n an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived."[49] "Texas legislators and educators' . . . efforts were devoted to establishing a means of guaranteeing a minimum state-wide

---

44. *See supra* note 34 and accompanying text; 3A ANTIEAU, *supra* note 12, § 30Q:4.02.
45. Gary T. Schwartz, *Reviewing and Revising Dillon's Rule*, 67 CHI.-KENT L. REV. 1025, 1026 (1991) (emphasis added).
46. CAL. CONST. art. IX, § 1; FLA. CONST. art. IX, § 1; N.Y. CONST. art. XI, § 1 (amended 1963); TEX. CONST. art. VII, § 1; 3A ANTIEAU, *supra* note 12, § 30Q:1.02.
47. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
48. 347 U.S. 483, 493 (1954).
49. *Rodriguez*, 411 U.S. at 49.

educational program without sacrificing the vital element of local participation."[50]

States thus decide what the relationship will be between the state government and its school districts. Does "independent" for an independent school district simply mean not subordinate to other political subdivisions of the state? Or does it mean that the district may exercise control over its educational goals, policies and procedures limited by state constitutional provisions, but not state legislative or administrative directives? If the latter, one must look to the state constitution to determine the limitations imposed on the ability of the legislature to allocate authority between the state and its political subdivisions for implementing a system of public education. Courts have answered the question of what limitations a state constitution imposes on state control in their review of one aspect of public education: how it is paid for. Analysis of state constitutional provisions creating state agencies with authority over public education will also demonstrate the relative balance of power between a state and its independent school districts.

For the past twenty-five years, reformers of public education have focused on school finances. Efforts to equalize the fiscal resources available to all school districts within any particular state have led to court challenges, both successful and not,[51] and to legislative restructuring of school finances. [52] Richard Briffault, in *The Role of Local Control in School Finance Reform*, finds that "[l]ocal control is a puzzle, or rather, a series of related puzzles. . . . The first puzzle is really a paradox: courts and commentators generally assume that local control of education exists . . . . [Y]et . . . . [t]he ground rule of state-local relations is state control and local powerlessness, not local control."[53] The state constitution determines whether the starting point is powerlessness for school districts; occasionally one finds protection for the school district against state interference in a state constitution.

The Wisconsin Supreme Court found a requirement of local control of school district tax revenues in Wisconsin's state constitution, a requirement sufficient to invalidate a statute seeking to equalize revenues among the state's

---

50. *Id.* at 48.

51. *See* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Board of Educ. of the City Sch. Dist. of the City of New York v. City of New York, 362 N.E.2d 948 (N.Y. 1977); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976).

52. *See* ARK. CONST. art. XIV, § 3 (amended 1996); TEX. EDUC. CODE ANN. §§ 51.001–.003, 52.001 (West 1996).

53. Briffault, *supra* note 27, at 782. Briffault also stated that "the Wisconsin Supreme Court relied on the principle of local control to strike down state legislation that would have redistributed some locally raised revenues from wealthier school districts to poorer ones. *Id.* (citing Buse v. Smith, 247 N.W.2d 141 (Wis. 1976)).

school districts. In *Buse v. Smith*[54] the court considered the legislature's effort to require wealthier districts to transfer tax revenues to poorer school districts in the state. While acknowledging the state's interest in public education, the court noted that "[w]hile the state's power over education is extensive, there remains some local control."[55] Relying on a constitutional provision that required local taxes to be raised for support of the schools, the court held that "the state cannot compel one school district to levy and collect a tax for the direct benefit of other school districts, or for the sole benefit of the state."[56] Raising revenues for public education is only one narrow part of implementing a scheme of education in a state, however. And notwithstanding cases like *Buse*, where local control is determined to be a constitutional shield against a state reallocation of resources from local school districts, courts in other states find in their state constitutions a requirement that spending be more uniform throughout the state's school districts. But even these cases do not preclude local control. They in fact recognize a need to maintain local control in combination with state direction.

Equalization of financial resources among a state's school districts as a requirement of the state's constitution is illustrated by *Edgewood Independent School District v. Kirby*.[57] Rejecting the argument that the school finance reform enacted by the state legislature would undermine local control, the court noted that

> [a]n efficient system [of public education] does not preclude the ability of communities to exercise local control over the education of their children. It requires only that the funds available for education be distributed equitably and evenly. An efficient system will actually allow for more local control, not less. It will provide property-poor districts with economic alternatives that are not now available to them. Only if alternatives are indeed available can a community exercise the control of making choices.[58]

The courts in *Buse* and *Kirby* did not find constitutional mandates for exclusive state control of education; nor did they determine that local control is exclusive. While the two courts disagreed on the constitutionality of the state scheme for equalizing the financial resources of the school districts, they agreed that both the state and the local school district share control over public education in their respective states.

---

54. 247 N.W.2d 141 (Wis. 1976).
55. *Id.* at 151.
56. *Id.* at 155.
57. 777 S.W.2d 391 (Tex. 1989).
58. *Id.* at 398.

One final state constitutional impediment to local control must be considered. A determination that provisions of the state constitution direct the state to oversee public education could make attempts to grant home rule authority to independent school districts by statute unconstitutional, thus requiring a constitutional amendment. Many states have constitutional provisions creating one or more state agencies with oversight over or actual responsibility for education in the state.[59] These constitutional provisions sometimes incorporate the concept of shared power.[60] Ironically, this very constitutional allocation of power to the state can form the basis for a claimed need for home rule authority, but make it impossible for the state to grant home rule authority without a constitutional amendment. Before concluding it is time to amend the state constitution to authorize home rule for independent school districts, one must consider what a grant of home rule authority adds and what disadvantages flow from the grant. Only then will it be known whether the end result is worth the effort.

IV. HOME RULE FOR SCHOOL DISTRICTS

A. The Theory

Home rule was initially granted to only the largest cities.[61] Over time, the home rule option has been extended in some states to make it available to virtually any municipal corporation.[62] The possibility of granting home rule authority to political subdivisions other than municipal corporations, while of

---

59. *See* ALA. CONST. amend. 284; ARIZ. CONST. art. XI, § 2; COLO. CONST. art. IX, § 1 (amended 1992); ILL. CONST. art. X, § 2; NEB. CONST. art. VII, § 2 (amended 1972); OHIO CONST. art. VI, § 4 (amended 1912); TEX. CONST. art. VII, § 8 (amended 1928).

60. As those who first challenged school funding formulas relying on state constitutional provisions know, a state constitution provides ample fodder for those who would challenge a state law. But not all constitutional provisions are created equal. Provisions for state oversight which rely on the state legislature to define the role of the constitutional office or agency would not hinder a statutory grant of home rule authority. *See* COLO. CONST. art. IX, § 1 ("The general supervision of the public schools of the state shall be vested in a board of education whose powers and duties shall be as now or hereafter prescribed by law.") On the other hand, some state constitutions create constitutional offices or agencies with self-executing provisions. For a discussion of the Kansas constitutional provisions of this type, *see* Charles Benjamin, *Should There Be Home Rule for Kansas School Districts?*, 5 KAN. J.L. & PUB. POL'Y 175, 177–78 (1996). Shared responsibility, even among state agencies and officers, is not uncommon. *See* ARIZ. CONST. art. XI, § 2 ("The general conduct and supervision of the public school system shall be vested in a State Board of Education, a State Superintendent of Public Instruction, county school superintendents, and such governing boards for the State institutions as may be provided by law.").

61. *See* Vanlandingham, *supra* note 43, at 278.

62. *See* ILL. CONST. art. VII, § 6.

recent origin, is neither new nor untried. Counties, which are often said to be political subdivisions which exist purely for the administrative convenience of the state,[63] have enjoyed grants of home rule status in recent years.[64] From this extension of home rule, one could conclude that neither the function of the particular political subdivision nor the population of the entity are important factors in determining the appropriateness of extending home rule authority. This in turn superficially supports extending home rule to independent school districts. But a look at why home rule has been extended to counties demonstrates that the expected functions to be achieved by the political subdivision may be relevant.

The trend of authorizing home rule for counties has not been the result of discovering that a county needs home rule authority to carry out its traditional functions. A review of grants of home rule authority to counties suggests that counties are now expected to carry out functions traditionally given municipal corporations.[65] The home rule grant is simply an acknowledgment that the traditional relationship between the state and a county does not match the current demands on counties for services. In short, if the county is expected to act like a municipal corporation in many respects, then in performing those functions the county should enjoy the same powers and relationship with the state as enjoyed by the state's municipal corporations.

The grant of home rule status to counties does not explain the current interest in granting home rule authority to school districts; their situation is not the same. Municipal corporations, and more recently, counties, generally provide a wide and varied range of services and impose multiple controls and regulations. Through exercise of the delegated police power, a county or municipal corporation acts for the general health, safety and welfare of its residents.[66] Police and fire protection, sanitation services, roads and transportation, land use controls, business regulation, public utilities including water, sewer, gas, electricity, and even cable television, libraries, and parks and recreation facilities are all services provided and areas regulated by municipal corporations and home rule counties.

Given the scope of municipal authority and responsibility, and the resulting mix of services provided and range of costs of receiving those services, the

---

63. "Historically the county was solely a subdivision of the State constituted to administer state power and authority." Bergen v. Port of New York Authority, 160 A.2d 811, 816 (N.J. 1960); *See* 1 SANDS & LIBONATI, *supra* note 11, § 2.13.

64. *See* ARK. CONST. amend. 55, § 1; ILL. CONST. art. VII, § 6.

65. *See* ARK. CODE ANN. § 14–14–802(b) (Michie 1987); 55 ILCS 5/2–5016 (West 1993); MICH. COMP. LAWS ANN. § 45.515 (West 1991).

66. Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877); *see* 6A MCQUILLIN, *supra* note 12, § 24.04 (1988).

appeal of maximizing local power to the extent possible without seriously impacting neighboring communities is obvious. In fact, Charles Tiebout argued that in the allocation of power from the state to its municipal corporations, more is better.[67] Tiebout viewed the citizen as a consumer of services; as a consumer, she will either attempt to influence the choices made in her community or move to the municipal corporation which does best at matching services and costs to her ideal mix.[68] The consumer-citizen has two ways to achieve this maximization. She can attempt to influence choices made within a municipal corporation by voting; if that fails, she can move to a city which she feels more closely meets her needs for both the type and level of services and the cost incurred to support those services.[69] While Tiebout's economic efficiency model is flawed,[70] it does help one appreciate the many demands made on the modern municipal corporation. Home rule gives the municipality the flexibility required to achieve a balance satisfactory to its consumer-citizens.

The consumer of public education is in a much better position to react to both the service provided and the cost of that service. Rather than balancing competing demands for municipal services, she can focus on a single service: education.[71] The burden of paying state taxes to fund state revenues provided to the local school district will be based on a uniform rate throughout the state,[72] and thus may be ignored by the consumer. Because the local property tax levied to provide education is a separate tax for the independent school district, the consumer can easily determine the cost of education as compared to the cost in competing school districts. The quality of the education provided is more difficult to determine, but again the consumer is focusing on a single issue: education. The reduction in the number of variables which must be considered enables the consumer to more easily determine whether the value mix meets her needs. What is the quality of the schools, and what is the cost of achieving that quality?

---

67. Charles Tiebout, *Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).
68. *Id.* at 418.
69. *Id.*
70. While helpful as a model, practical considerations temper the ability of the unhappy consumer of services to exit if she is unable to influence the mix and cost of services in her municipal corporation. *See* Charles W. Goldner, Jr., *A Call for Reform of Arkansas Municipal Law*, 15 U. ARK. LITTLE ROCK L.J. 175, 204–05 (1993).
71. This should not be read to suggest that the provision of education is simple or revolves around a single issue. But the same is true for many of the services provided by municipal corporations. Land use, for example, involves multiple concerns and solutions. But for purposes of a service provided, the citizen views it as one service. Education can be viewed as a single service as well.
72. *See* ARK. CONST. art. XVI, § 5 (amended 1980); COLO. CONST. art. X, § 3 (amended 1982, 1988); ILL. CONST. art. IX, § 4.

Tiebout's economic efficiency argument demonstrating the need for increased municipal power *vis a vis* the state can be used to justify greater autonomy and power for school districts; it can also be used to demonstrate that there is no critical need for school district local autonomy. Because the consumer can more easily isolate the cost of the service, and is concerned with only the one service, the independent school district has a greater need for local power so that it can be responsive. Fewer compromises are required of the consumer, because under Tiebout's model the only factors she must balance are the quality and cost of one particular service. Delivery of that one service alone must be satisfactory. The consumer's ability to focus on that single service suggests the school district needs the autonomy to respond to her demands. On the other hand, because it is a single-issue demand for service rather than a demand for a particular mix of services, the question of cost is arguably all that is left for analysis by the consumer. One certainly must value the quality of the service as part of deciding whether the cost is satisfactory. But unlike the consumer of municipal corporation services, the consumer of public education does not have the necessity of finding a public school district that will actually offer the desired service: education. If all school districts in the state have the same delegated authority, each has the same tools available to enhance the quality of education offered. The lack of authority on the local level is not so crucial.

To date no one has suggested that school districts undertake service functions other than the traditionally assigned role of providing public schooling. Extension of home rule to counties can be justified on the same basis as home rule for municipal corporations, but that is not true for independent school districts. Nor does Tiebout's analysis relying on citizens as consumers of services demonstrate a need for the extension of home rule. The justification, if found, must exist in aiding the local school district in carrying out its purposes.

One purpose which must be acknowledged is enhancing, or at least maintaining, local control. Citizens expect it, and courts recognize and respect that expectation.[73] Before determining if home rule authority would in fact strengthen local control, one must determine why citizens value it. Briffault identifies several values courts have assigned to local control: "parents' rights, community choice, efficiency and interlocal competition, educational excellence, accountability, and participatory democracy."[74] At the same time, the larger society has an interest in the education offered by the school district.

---

73. *See supra* notes 47–50 and accompanying text.

74. Briffault, *supra* note 27, at 773.

One need only consider that every state provides free, but compulsory, public education.[75] Why? Because the citizens of the various states recognize the value of education to the individual, the local community, the state, and the country as a whole. The ability to function as an integrated society depends on local school districts preparing their students "for life in a diverse and multi-cultural society."[76] Home rule authority should be granted if it makes it more likely that the independent school district can efficiently carry out it educational mission, but only if the grant protects society's interest in education.

Home rule transfers power by delegation from the state to the political subdivision, in this case to an independent school district. Concern about concentration of power in smaller political units has long been a theme in this country. James Madison considered the likelihood of majority oppression in *The Federalist No. 10*:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority . . . the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.[77]

Devolution of authority for educational content and approach from the state to the local school district would, under Madison's theory of factions, enhance the probability that the larger interest of society would be ignored.

Madison's fear of factions is seen in the work of today's commentators exploring public choice theory. One strand in public choice theory holds that economic self-interest drives political choices, and that those with similar self-interests will band together in an attempt to get what they want from the political process.[78] The group will seek enactment of "legislation [which] will transfer wealth from the majority population to the members of the special interest group, even though the majority does not want the wealth transfer and

---

75. *See* 3A ANTIEAU, *supra* note 12, § 30Q:1.02.

76. Briffault, *supra* note 27, at 808.

77. THE FEDERALIST NO. 10, at 63–64 (James Madison) (Jacob E. Cooke ed., 1961).

78. Public choice theory is at present a large tent covering somewhat divergent views of what is meant by public choice in the legislative process. DANIEL A. FARBER AND PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 7 (1991).

individually opposes the legislation."[79] For local action by a school district, public choice theory suggests society should be concerned about an interest group influencing educational choices to serve the group's own interests which may actually be contrary to society's interests in public education. Agreement that public choice theory accurately explains political processes or predicts legislative outcomes is not required to benefit from applying the analysis. "Even if views [of some public choice theorists] do not fully capture the realities of government, they may still represent some important tendencies . . . . In designing governmental institutions, we need to take these possibilities into account."[80] In considering grants of home rule authority to school districts, legitimate concerns about protecting society's interest in public education must be addressed.

B. In Practice

Home rule for school districts has been considered by the legislature in some states, requested by school boards in some states, rejected in some states, and actually approved in one. In 1995, the Kansas legislature considered H.B. 2283, an act to grant home rule authority to local school districts. The proposed amendment to the Kansas statute would have added a new section, (e), allowing local school boards

> to transact all school district business and perform all powers of local legislation the board deems appropriate, subject only to the following limitations:
>
> > (A) School districts shall be subject to all acts of the legislature and all regulations of the state board of education which apply uniformly to all unified school districts.
> >
> > . . .
>
> (4) The powers conferred upon school districts by this subsection shall be liberally construed. . . .[81]

The proposed legislation would have given Kansas school districts a statutory grant of legislative home rule. Determination of whether a particular power was delegated would not depend on characterization of the proposed exercise

---

79. Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L.Q. 179, 179 (1996).

80. FARBER AND FRICKEY, *supra* note 78, at 4.

81. H.R. 2283, 76th Leg., 1st Reg. Sess. (Kan. 1995) (proposed amendment to Kan. Stat. Ann. § 72–8205).

as one affecting a matter of local concern as opposed to one of state-wide concern. Rather, the district could act as its board deemed appropriate, subject to an important limitation. The delegated power is limited by all state laws and regulations applicable to school districts. The proposed statute also made Dillon's Rule inapplicable by its provision for liberal construction. The Kansas legislature failed to approve the proposed legislation.[82]

California made it further in its efforts. The legislature passed companion bills authorizing school districts to adopt home rule powers.[83] But the legislation as written required both bills to be approved by the governor.[84] Although he signed the Senate bill,[85] Governor Wilson vetoed Assembly Bill 66,[86] and thus kept the section granting home rule authority to California school districts from becoming law.[87]

Texas did enact amendments to its Education Code to provide that an independent school district may adopt a charter for the exercise of home rule authority. The newly adopted Chapter 12, Texas Education Code, provides among other things that "a school district may adopt a home-rule school district charter under which the district will operate."[88] A school district adopting home rule status will enjoy legislative home rule authority. Sections of the Education Code made specifically applicable to a home rule district must be followed;[89] rules adopted by the State Board of Education or the commissioner also govern home rule school districts if the enabling legislation applies to home rule districts.[90]

Three broad areas of the Education Code are made applicable to home rule districts by section 12.013(b): provisions establishing a criminal offense;[91] provisions relating to limitations on liability;[92] and 19 other subject matters set forth in section 12.013(b)(3). Among these 19 subject matters which a home rule district is not freed from is the state's public school accountability provisions. Section 12.013(b)(3)(P) provides that the district is subject to "a . . . restriction . . . or requirement . . . relating to . . . public school accountability

---

82. House Actions Rep., Kansas Legislative Information System, May 23, 1996, at 26.
83. A.B. 66, 1995 Leg., 1995–96 Reg. Sess. (Cal. 1995); A.B. 3384, 1995 Leg., 1995–96 Reg. Sess. (Cal. 1995).
84. A.B. 3384, 1995 Leg., 1995–96 Reg. Sess., § 7 (Cal. 1995).
85. Cal. A.B. 3384 approved by Governor, Sept. 21, 1996, Cal. Bill Tracking (West, WESTLAW).
86. Cal. A.B. 66 vetoed by Governor, Sept. 21, 1996, Cal. Bill Tracking (West, WESTLAW).
87. Ed Mendel, *Governor Wields an Ax as Well as a Pen*, SAN DIEGO UNION-TRIBUNE, Oct. 1, 1996, at A3.
88. TEX. EDUC. CODE ANN. § 12.011(a) (West 1996).
89. TEX. EDUC. CODE ANN. § 12.012(a)(1).
90. TEX. EDUC. CODE ANN. § 12.012(a)(2).
91. TEX. EDUC. CODE ANN. § 12.013(b)(1).
92. TEX. EDUC. CODE ANN. § 12.013(b)(2).

under Subchapters B, C, D, and G, Chapter 39."[93] The home rule district must comply with State Board of Education rules which "establish the essential skills and knowledge that all students should learn to achieve the goals provided under Section 4.002."[94] The Board's rules relating to assessment of outputs apply to the home rule school district, including selection of the instruments to be used in assessing student achievement.[95] Failure to meet those goals can result in a home rule district's being placed on probation or actually having its home rule charter revoked.[96] While home rule districts are freed from many provisions of the Education Code, the state maintains the ability to dictate the ends to be achieved, as well as the methods to be used in assessing whether the goals have been met. At most, the home rule school district has more say in how it plans to meet the goals set by the state.

V. BALANCING STATE CONTROL AND LOCAL AUTONOMY

Independent school districts are in fact not independent. The school district depends on the state for its very existence.[97] Recognizing that provides no guidance in how to answer the questions: should school districts enjoy some degree of autonomy from state control? If so, how absolute should the autonomy be? Looking to the model for municipal government proposed by Gordon Clark, four types of autonomy may be considered:

1. initiative and immunity;
2. initiative and no immunity;
3. no initiative and immunity; and
4. no initiative and no immunity.[98]

If the school district has initiative, it has the power to act. If the school district is protected from state interference with its action, it enjoys immunity. The Texas legislation grants initiative but no immunity to the state's independent school districts which adopt a home rule charter. Because the legislature can always make a provision of the Education Code or of the State Board of Education regulations applicable to a home rule district,[99] the district

93. TEX. EDUC. CODE ANN. § 12.013(b)(3)(P).
94. TEX. EDUC. CODE ANN. § 39.021.
95. TEX. EDUC. CODE ANN. §§ 39.022–.023.
96. TEX. EDUC. CODE ANN. § 12.027(a)(3).
97. *See supra* notes 16, 33 and accompanying text.
98. GORDON L. CLARK, JUDGES AND THE CITIES 70 (1985).
99. TEX. EDUC. CODE ANN. § 12.012(a).

has no immunity. On a more basic level, because the state can repeal in its entirety the statutory authorization for home rule school districts, the district is always subject to the state's interference with the district's exercise of its powers.[100]

If home rule is to be granted, does the Texas model strike the appropriate balance? Interest in the quality of the education, which includes not only how well subjects are taught but what subjects are taught, goes beyond the geographic boundaries of any one school district.[101] To achieve educational excellence, the interlocal competition which might result from loosening the state grip on education recommends the initiative/no immunity model. Initiative under Clark's model unleashes local creativity by granting home rule. The no immunity part of Clark's model allows state intervention to protect the larger societal interest.

Both Madison's fear of factions and public choice theory support adoption of the initiative/no immunity relationship between the state and its independent school districts. Each demonstrates a legitimate concern that truly local education–education freed from state review and direction–has the potential of becoming parochial. One does not have to accept the more extreme statements of public choice theory to conclude that state involvement in education is important and necessary. Given the increasing homogeneity of political subdivisions,[102] what appears to be inclusive education when viewed through local eyes may actually be found to represent a narrow, self-interested approach when viewed through the more diverse eyes of all citizens in the state. The state has a role to play. Legislative home rule, which adopts the initiative/no immunity model, allows the state to intervene to protect society's interests. By adopting legislative home rule for its independent school districts, the Texas statute achieves the appropriate balance.

CONCLUSION

One question posed above has not been answered. Do independent school districts need home rule authority? Apparently, the residents of Texas do not believe so. No school district has adopted a home rule charter.[103] While one

100. *See supra* note 33 and accompanying text.
101. *See supra* notes 75–76 and accompanying text.
102. *See* Briffault, *supra* note 27, at 803–06.
103. Terrence Stutz, *No Schools Seek Control Under Home-Rule Law*, DALLAS MORNING NEWS, July 23, 1996, at 1A.

district has seriously considered initiating the process, it has not done so.[104] One local school official suggested that the method is too cumbersome.[105] A review of the process suggests if residents were actually interested, the procedure should not dissuade or discourage an attempt to adopt home rule status. The process begins if either a petition signed by five percent of the district's registered voters is presented to the board or the board, by a two-thirds vote of its total membership, adopts a resolution starting the process.[106] A charter commission is appointed[107] and an election is held on the proposed charter drafted by the commission.[108] While at least twenty-five percent of the district's registered voters must vote in the election that includes the charter proposition,[109] a simple majority of those voting on the proposition constitutes approval of the proposed home rule charter.[110] Any inability to meet these requirements for adoption of home rule authority indicates a lack of interest rather than residents deterred by an overly-complicated process.

The fact that to date no district in Texas has adopted a home rule charter does not answer the question of whether a district should adopt home rule. Freeing local school district officials to focus on improving education is certainly a worthy objective. Grants of home rule are not necessary to do that, however. The simple expedient of modifying state law requirements, both statutory and regulatory, can increase the room local officials have to be inventive.[111] Repeal of statutes and regulations controlling the methods of achieving educational goals, while leaving in place statutes and regulations defining educational goals, can achieve the same benefits as a grant of home rule authority.

Focusing on home rule can be nothing more than a side show distraction which keeps both residents and politicians from focusing on the true issues of education reform. But state legislatures and agencies may not make the necessary reforms. If the reform cannot be achieved at the state level, creating home rule school districts is a viable alternative. Grant of authority through

---

104. Jessamy Brown, *School Officials to Study Home-Rule Concept, Election Hurdle*, FT. WORTH STAR-TELEGRAM, Dec. 1, 1995, at 33.

105. *Id.*

106. TEX. EDUC. CODE ANN. § 12.014 (West 1996).

107. TEX. EDUC. CODE ANN. § 12.015.

108. TEX. EDUC. CODE ANN. § 12.019.

109. TEX. EDUC. CODE ANN. § 12.022.

110. TEX. EDUC. CODE ANN. § 12.021.

111. School-based decision making is another method states are using to enhance local control and accountability. A council with both parents and educators as members is established at a school; the council helps in setting policies that direct daily operation of the school. *See* Charles. J. Russo, *School-Based Decision Making in Kentucky: Dawn of a New Era or Nothing New Under the Sun?*, 83 KY. L.J. 123 (1995).

constitutional or statutory means is not a crucial issue. Unless a constitutional amendment is required in order to give home rule authority to the state's schools, a statute should be employed. The type of home rule granted is significant, however.

Legislative home rule should be authorized. Courts have had enough difficulty distinguishing local concerns from state-wide concerns for municipal corporations.[112] The state-wide interest in education makes it unlikely that the task will prove any easier when it is a school district's action which is challenged. Any important power is likely to impact the state's interest in the quality of education, making an *imperio* grant of limited use.

Legislative home rule allows the flexibility desired at the local level, while allowing the state to protect its interest in education. As the Court noted in *Brown v. Board of Education*, "[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."[113] Other innovations under consideration, such as charter schools and school vouchers, will prove more significant in current efforts to improve public education; whether they will have the desired positive impact is unknown. Legislative home rule for independent school districts will prove to be of less importance. Even so, it is one more tool available in efforts to improve public education and merits careful consideration.

---

112. *See* 1 ANTIEAU, *supra* note 12, § 3.20.
113. 347 U.S. 483, 493 (1954).