Chapter 15: State and Local Government

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CHAPTER 15

State and Local Government

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§15.1. Municipal home rule: Local law “inconsistent with” state law. Certainly the most significant event in state and local government law during the 1973 Survey year was the opinion of the Supreme Judicial Court in Bloom v. Worcester.1 Indeed, it would be quite accurate to say that the publication of this opinion was the most important event in the field of local government law in the Commonwealth since the adoption of the Home Rule Amendment2 in 1966 and one of the most important of this century. The Court, on a question of first impression arising under the Amendment and parallel provisions of the Home Rule Procedures Act (G.L. c. 43B), construed the words “not inconsistent with” as they are used in the Amendment’s grant of residual power to cities and towns. The Amendment reads:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, [of the Home Rule Amendment] and which is not denied, either expressly or by clear implication, to the city or town by its charter. . . .3

Ever since the Home Rule Amendment was enacted these words have been an obstacle to achieving its intent of expanding the self-governmental powers of cities and towns. The words were a variation of the phrase “not denied by,” which was used in the same context in the National Municipal League’s model home rule document, the source of

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2 Mass. Const. Amend. Art. 2, as inserted by Mass. Const. Amend. Art. 89. Article 89 was adopted by the legislatures of the political years 1963 and 1965 and approved and ratified by the voters on November 8, 1966. It struck out and annulled the former Article 2 and substituted therefor the “Home Rule Amendment.”
much of the language of the Home Rule Amendment. It is not hard to see the mischief thus wrought. A power “denied by” constitutional limitations or relevant legislation is an easy one to identify; a power “inconsistent with” them is not. Faced with this uncertainty, cities and towns (and their legal officers) have often chosen to follow a conservative course, declining to initiate exercises of powers that were possibly “inconsistent with” the constitutional or statutory law of the Commonwealth, even where such powers were not denied in terms. In an instance reported to the Massachusetts Legislative Research Bureau, for example, Professor Frank I. Michelman of the Harvard Law School illustrated the tendency to caution produced by the words “not inconsistent with”:

... I dealt with a proposal to amend a town’s “charter” by providing that the Selectmen’s appointments of members of the board of appeals would be subject to approval by a committee of town meeting members. In drafting this proposal for inclusion in a town meeting warrant, it was decided to frame it as a petition for special legislation rather than as a “charter amendment” under section 4 of the Home Rule Amendment. This decision was based on a reading of ch. 40A, sec. 14 of the general laws, which explicitly provides for city council approval of board of appeals appointments by mayors in cities, but provides for no analogous check on Selectmen’s appointments in the towns. We felt it was clear that providing for such a check would not involve any incompatibility with legislative policy, but that the risks were great that such a provision would nevertheless be found “inconsistent with” the text of ch. 40A, sec. 14.5

This approach by a respected authority in the field illustrates what might be described as a fear of negative inferences. The statute authorizes X; by negative inference Not X is therefore not authorized. The holding in Bloom v. Worcester is that the negative inference is ordinarily unwarranted. As guidance alone this is helpful. More importantly, this is liberalizing guidance that points the way to expansion of local self-government powers.

Bloom involved the creation by ordinance in the City of Worcester of a human rights commission and an advisory human rights committee. The commission was, inter alia, authorized to summon witnesses in support of its broad investigatory powers. Following the adoption of the

5 Id. at 74.
ordinance, the commission requested the city council to appropriate funds "for serving subpoenas for the Human Rights Commission and witness fees." The city solicitor gave an opinion that the grant of subpoena power was invalid and that any appropriation in furtherance thereof would be illegal. Sixteen registered voters of Worcester brought suit against the city of Worcester and its city council, seeking a declaration that the ordinance validly conferred subpoena power upon the commission. The matter was reported without decision on a case stated by a judge of the Superior Court.

The (limited) power of subpoena is granted to local authorities by G.L. c. 233, §8, which provides that witnesses may be summoned to attend and testify and to produce books and papers at a hearing conducted by or before certain state and local agencies. A local human rights commission is not among them. The city of Worcester argued the negative inference: if G.L. c. 233, §8 grants the subpoena power to named agencies, then only those agencies were intended by the Legislature to have it. The grant of the subpoena power to any other agency would therefore be "inconsistent with" the general laws.

The Supreme Judicial Court took a broad view of this controversy, and its extended treatment is a model of thoughtful and helpful judicial discussion. The Court agreed that the Legislature had not expressly

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7 The city and the city council were thus in the anomalous position of asserting the invalidity of their own ordinance. The city solicitor and his assistant have written that the subpoena power was granted subject to a restriction contained in a footnote to the ordinance which provided that the subpoena power should not be used until such time as a declaratory judgment was secured confirming the validity of its grant. "Because the citizens who sought the declaratory judgment argued that the ordinance provisions were valid, the City Solicitor's Office, the original drafter of the law, was put in the ironic position of arguing that the action by the City Council, creating the Commission, was beyond its powers." City Human Rights Commission Power Upheld, 14 Municipal Attorney 153 (August 1975). The Supreme Judicial Court took note of the footnote which, it said, "purports to be a part of the ordinance..." 1975 Mass. Adv. Sh. 291, 294 n.5, 295 N.E.2d 268, 272, n.3. But the Court was plainly troubled by the position taken by the city and suggested that on remand costs, including counsel fees, might be awarded to the plaintiffs under G.L. c. 43B, §14(2).

The question is whether the plaintiffs or the taxpayers of the city should sustain the plaintiffs' costs in this proceeding. The plaintiffs have acted to uphold a city ordinance which the city itself now argues is invalid, which seemingly the city has been unwilling fully to implement and which has no apparent peculiar benefit, financial or otherwise, to the plaintiffs. These particular facts suggest that the taxpayers of the city, rather than individual citizens, should sustain the plaintiffs' costs, but we may not have all the relevant facts before us. Thus we leave the matter of costs, including reasonable counsel fees, to the discretion of the trial judge.


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granted the subpoena power to local agencies such as the human rights commission. "On the other hand," said the Court,

and equally significant for the purpose of determining the authority of the city to grant the subpoena power to the commission, the Legislature has not expressly denied municipalities the right to authorize local agencies by ordinance or by-law to summon witnesses. (Emphasis added). 9

Thus the Court declined to invoke the negative inference in concluding that general law which does not specifically authorize a certain action should not be taken as impliedly forbidding it. The Court next had to devise an alternative means of analysis since merely finding the grant of subpoena power not forbidden by general law did not necessarily mean that it was "not inconsistent with" general law. In the most creative and most helpful part of the opinion, the Court considered the validity of the ordinance by adopting by analogy a standard of "inconsistency" taken from preemption cases arising under the Supremacy Clause of the United States Constitution.

It is clear from the Court's analysis that the Legislature may simply forbid certain activities by municipalities. The Legislature could, therefore, constitutionally pass a statute in terms conferring the subpoena power upon certain local boards and officers and forbidding the conferring of such power upon any others. This is consistent with the conventional jurisprudence under the Supremacy Clause; the United States Congress may explicitly forbid the states to legislate in a certain field. Furthermore, said the Court, a legislative intention to forbid local action might in proper circumstances be inferred. Such an intention should not be inferred merely from the absence of an affirmative legislative grant of authority, but it might be inferred either where the Legislature has dealt with a subject so comprehensively as to leave little room for local action, or where the Legislature has explicitly limited the manner in which cities and towns may act. If, however, the state legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, "the local ordinance or by-law is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances and by-laws on that subject." 10 This too is consistent with the developed line of decisions under the Supremacy Clause, chiefly summarized in modern times by the United States Supreme Court's decision in Florida Lime & Avocado Growers, Inc. v. Paul. 11 As an aside, one might note that a virtue of the Supreme

10 Id. at 309, 298 N.E.2d at 281.
Judicial Court's adoption of the Supremacy Clause analogy is that it makes relevant a great deal of federal case law interpreting that clause. The Home Rule Amendment itself, by contrast, being of recent vintage, has been the subject of only a handful of authoritative interpretations.

In brief, a local by-law or ordinance will not be found "inconsistent with" state law unless (1) the Legislature has preempted the field of regulation, either (a) explicitly, or (b) by fair inference from the statutory scheme, or unless (2) the state legislative purpose cannot be achieved in the face of the local enactment. Using this analysis, the Court found the grant of subpoena power, and the ordinance as a whole, to be valid. "[T]he standard we have adopted requires a showing that some purpose of legislation concerning local use of the subpoena power will be frustrated before we must strike down the grant of the subpoena power set forth in the ordinance. We see the exercise of the subpoena power by the commission as interfering with no statutory purpose relating to the use of subpoenas by local boards, committees and commissions." According to the Court, entry of a decree in the plaintiffs' favor.

Bloom v. Worcester confirms a trend first noted in Belin v. Secretary of the Commonwealth. Read together, the cases warrant a prediction that the Supreme Judicial Court will henceforth treat the Home Rule Amendment less cautiously than it did in the early years after its adoption. Many had thought, in the light of Chief of Police of Dracut v. Dracut and Marshal House, Inc. v. Rent Review and Grievance Board of Brookline (the first Marshal House case), that the Court was bent on restricting municipal initiatives under Section 6 of the Amendment. Bloom not only yields a different result, but arrives at that result after a different legal analysis. Where in earlier cases the Court dealt with home rule by applying familiar rules of statutory construction to the Amendment itself (as in Marshal House) and by attempting to harmonize results under the Amendment with prior doctrine (as in Dracut), in Bloom the Court has treated the Amendment as requiring new approaches and

13 1972 Mass. Adv. Sh. 1665, 288 N.E.2d 287, holding unconstitutional a 1972 statute (St. 1972, c. 596) which purported to eliminate proportional representation, a system of voting existing in fact only in the city of Cambridge, on the ground that the legislation was in fact a "one city" bill not enacted in accordance with section 8 of the Home Rule Amendment. See Brown, Home Rule in Massachusetts: Municipal Freedom and Legislative Control, 58 Mass. L.Q. 29 (March 1973) for a sprightly analysis of this decision.
14 357 Mass. 492, 258 N.E.2d 531 (1970), holding that a municipality may not by virtue of the Home Rule Amendment revoke its previous acceptance of a law subject to local acceptance. The Home Rule Amendment was held not to have changed former law.
15 357 Mass. 709, 260 N.E.2d 200 (1970), holding that a municipality may not, in the absence of state enabling legislation, enact a rent control by-law.
analyses in order to carry into force its stated purpose of reversing much settled law of the commonwealth involving state and local relations.

§15.2. Judicial administration. In addition to being the court of last resort for the Commonwealth, the Supreme Judicial Court has a second role as general superintendent of all courts of inferior jurisdiction. In 1971, in connection with proceedings leading to the disbarment and suspension of a judge, the Court had occasion to examine the extent of this authority and its sources. The sources were found to be, among others:

(a) the inherent common law and constitutional powers of this court, as the highest constitutional court of the Commonwealth, to protect and preserve the integrity of the judicial system and to supervise the administration of justice; (b) the supervisory powers confirmed to this court by G. L. c. 211, § 3, as amended; (c) the power of this court to maintain and impose discipline with respect to the conduct of all members of the bar, either as lawyers engaged in practice or as judicial officers; and (d) the power of this court to establish and enforce rules of court for the orderly conduct (1) of officers and judges of the courts and (2) of judicial business and administration.

Under Chief Justice Tauro the Court has been notably active in asserting and in exercising its supervisory powers. The disciplining of judges is a notable but laudably rare exercise of this power. Day to day details of court administration, however, also call for supervision, and two cases decided in the 1973 Survey year reveal the Court’s concern for efficient functioning of the entire judicial engine.

In Guarente v. Sheriff of Suffolk County the plaintiff had been removed from office as a bail commissioner in Suffolk County. He sought reinstatement by way of a bill for declaratory relief. Bail commissioners are appointed in Suffolk County under G.L. c. 276, §57, which provides that “the sheriff of Suffolk County may, with the approval of the superior court, appoint standing or special commissioners to take bail to a number not exceeding twenty and may, with like approval, remove them.” It appears that the plaintiff had been removed upon an order of the committee on bail of the Superior Court which, in the words of the opinion, “notified the sheriff and the plaintiff that the appointment was to be terminated forthwith. . . .” The sheriff merely informed the bail

4 Id. at 1696, 289 N.E.2d at 889.
commissioner that the former had been ordered by the judges of the Superior Court "to notify you officially that said commission is revoked forthwith, in fact has been revoked since November." It is at least arguable that the sheriff misapprehended his own authority in this matter. He seems, so far as the opinion shows, to have deemed himself only the mechanism for transmission of the committee's decision to the bail commissioner. The statute, however, contemplates a decision by the sheriff.

The plaintiff complained that since his removal had been entirely initiated and ordered by the committee on bail, he had not been removed by the sheriff with the approval of the Superior Court. The Supreme Judicial Court found this "immaterial." The order of the Superior Court, acting by its committee on bail, was effective to grant approval, and the sheriff, by notifying the plaintiff of the latter's removal, exercised his statutory power. The Court thus chose to view the sheriff's almost mechanical transmission of an "order" by the committee on bail as a decision on the sheriff's part to remove the commissioner. This analysis is perhaps best explained as springing from a desire to give the committee on bail the maximum possible power over appointments and removals of bail commissioners.

What if the sheriff had refused? The Guarante opinion does not deal with the possibility that the sheriff might choose to regard the committee's order as a mere request for his action, and decline to honor it. This latter situation would oblige the Supreme Judicial Court to draw more precisely the lines defining the inherent power of the judiciary to police its own house. It would appear from the statute that the sheriff could properly decline to remove a bail commissioner notwithstanding an "order" from the committee on bail to do so. But in Matter of DeSaulnier the Supreme Judicial Court found that it had "inherent" power to order that, "as a matter of judicial administration," a judge of the Superior Court should not perform any of the duties of a judge. Perhaps it would sanction an order by the Superior Court, acting by its committee on bail, that prohibited a bail commissioner from performing any of the duties of his office. In O'Coin's, Inc. v. Treasurer of the County of Worcester the Court expanded on its view of the inherent powers of the judiciary and it requires no great leap of imagination to presume that these inherent powers might include the power to remove an ancillary officer such as a bail commissioner notwithstanding a statute conferring that power upon another.

The O'Coin's case was a petition for a writ of mandamus. The peti-

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5 Id.
6 Id. at 1607, 289 N.E.2d at 889.
tioner was the vendor of a tape recorder. A judge of the Superior Court, sitting in Worcester, had purchased the recorder and three tapes for the sum of $86 in order to perpetuate testimony in a criminal session when an official stenographer was unavailable. The judge approved the invoice for payment, then forwarded it to the county treasurer to be paid. The treasurer refused to honor the invoice, asserting that the Superior Court had no authority to bind a county for the payment of goods and services except under G.L. c. 213, §§8, 9 and that that statute did not apply where a purchase by the court was involved. The Supreme Judicial Court, in an opinion written by Chief Justice Tauro, disagreed with both those contentions and ordered that the writ issue commanding the county treasurer to make the controverted payment.

On the law involved, the holding in the O'Coin's case is hardly startling. The statute itself is far from helpful but strain would be required to read it as a prohibition on the purchase of a tape recorder or other item of personal property. It seems likely that the county treasurer was more concerned that the purchase had not been budgeted, and that no appropriation had been made to cover it than with the nature of the purchase itself. The Supreme Judicial Court, however, was at pains to declare that the absence of an appropriation was no bar to the proper exercise of the inherent power of the judiciary to provide for its own needs, which power included the authority to purchase a tape recorder where the alternative was to close a criminal session.

The opinion, in fact, is an essay on the subject of the inherent powers of courts as an independent third branch of government, and the holding is appropriately general:

We hold, therefore, that among the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required goods or services by appropriate means, including arranging himself for their purchase and ordering the responsible executive official to make payment.11

The Court cautions that "inherent" powers are to be exercised with restraint. Neither this caution, however, nor the modest amount of money actually at stake in the O'Coin's case should be allowed to obscure the broad possibilities in the holding. Particularly noteworthy is the refer-

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9 The statute reads:

The courts shall, respectively, receive, examine and allow accounts for services and expenses incident to their sittings in the several counties and order payment thereof out of the respective county treasuries.

10 Its wording, as the Court observed, is virtually unchanged since 1808.

ence to "facilities," presumably courthouses. The inadequacy of courthouses is known to be a subject of concern to the Supreme Judicial Court. The Legislature must now be on notice that the Court asserts power in the judiciary to provide for itself in this regard.

§15.3. Elections: Political affiliations. Political affiliations and the notation thereof on the ballot played a part in two cases involving the election laws decided by the Supreme Judicial Court during the 1973 Survey year. In Johnson v. State Ballot Law Commission the Court considered the statutory requirement that a candidate wishing to appear on the ballot in a party primary file a certificate furnished by his registrar of voters attesting to his party enrollment, along with nomination papers supported by the requisite number of signatures. The petitioner, who sought to be listed on the ballot as a candidate for the Republican nomination for Congress at the party primary election, had seasonably filed nomination papers but omitted to file the certificate of party affiliation. He had in the past run three times as a Republican for other nominations and had filed such certificates; these filings, he said should suffice to identify him as a Republican and so satisfy the purpose of the statute which is to provide "some assurance that a candidate belongs to the party whose primary he wishes to enter." The state ballot law commission declined to accept anything less than perfect compliance with the statute and ruled that Johnson's name should not appear on the ballot. The Superior Court upheld this ruling, and the Supreme Judicial Court affirmed on appeal, finding the petitioner's contention to be without merit. Since party affiliations are fully revocable, Johnson's earlier certificates did not give assurance that he was still a member of the Republican party as of the date on which he filed nomination papers for the election which he wished to enter. Earlier filings did not survive the primaries for which they were made.

The Johnson case illustrates the Supreme Judicial Court's conventional approach to disputes arising from the application of election statutes, an approach characterized by strict application of procedural requirements and attentiveness to the language of statutes in an area extensively and minutely controlled by statute. The same approach was taken in Teixeira v. Board of Election Commissioners of Boston, al-

12 McIntyre v. County Commissioners of the County of Bristol, 356 Mass. 520, 254 N.E.2d 242 (1969); see also recent annual reports of the Executive Secretary to the Supreme Judicial Report, e.g., 1972 Report at 40-41.

4 Id. at 1605, 287 N.E.2d at 598.
though with a different result. Teixeira sought declaratory and injunctive relief from a decision of the Board of Election Commissioners refusing to accept nomination papers bearing the political designation "Communist." The Board had been guided by G.L. c. 53, §8, which prohibits the use of the name of a political party which has been found to be subversive under relevant statutes.6 Appealing the dismissal of the bill by Superior Court, Teixeira asserted, inter alia, that "Communist" was a statement of political principle, not a party designation. The Court agreed, holding that since Teixeira had not been nominated by a political party and was therefore precluded by G.L. c. 53, §8 from designating a political party on his nomination papers, and since he had not used the words "Communist Party," the nomination papers did not contravene G.L. c. 53, §8. The Court thus found that the Board had wrongly refused the nomination papers and ordered a final decree entered requiring the Board to accept them. Having disposed of the case through statutory construction, the Court saw no need to discuss Teixeira's constitutional claims or to re-examine the constitutionality of statutes reflecting the hysteria of a former day.

§15.4. Public employment: Residence and citizenship requirements.
Restrictions which limit public employment to residents of the employing jurisdiction or to citizens of the United States are common in Massachusetts and throughout the United States.1 Only in the last few years have these come under serious attack, and only quite recently has this attack been based upon constitutional grounds. As a result of the decision of the United States Supreme Court in Sugarman v. Dougall,2 indiscriminate restrictions prohibiting the employment of non-citizens cannot be sustained. This is almost certainly true of indiscriminate restrictions prohibiting the employment of non-residents.

In Sugarman the Supreme Court struck down a provision of the New York state civil service law which required employees in the classified civil service to be citizens of the United States, sustaining the decision of a three-judge court in the Southern District of New York3 and substantially adopting the position taken in the concurring opinion.4 This provision, said the Court, denied to aliens the equal protection of the laws.

Older cases sustaining a citizenship requirement had sometimes turned

6 G.L. c. 264, §18.

§15.4. 1 See generally Goldstein, Residency Requirements for Municipal Employees: Denial of a Right to Commute? 7 U. San Fran. L. Rev. 508 (1973).
2 413 U.S. 634 (1973).
4 Id. at 911. In the concurring opinion, Judge Lumbard emphasized that the case turned on the irrationality of a blanket requirement for citizenship as a condition of civil service employment and not on the unlawfulness per se of such a restriction.
on the distinction between a government-granted privilege, which might be made subject to a requirement of citizenship, and a government-protected right, which could not.\(^6\) Public employment, according to these cases, was a privilege and not a right. However, in Sugarman the Supreme Court reaffirmed its rejection of the right-privilege distinction.\(^6\) In so treating the matter the Court skirted the issue of whether or not public employment was a *fundamental* right, the infringement of which would trigger a higher standard of review in an equal protection case.\(^7\) The Court did explain that it was subjecting the New York statute to "close judicial scrutiny" but it avoided use of the term "compelling state interest," the rigorous test to be met by any state-imposed restriction upon a so-called fundamental right, e.g., the right to vote.\(^8\) The Court also carefully limited its holding to an invalidation of the *indiscriminate* restriction in the New York law, and specifically declined to hold that an alien might not be refused employment or discharged "on the basis of an individualized determination . . . if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee."\(^9\) Also, the Court specifically adverted to the possibility that a state might lawfully impose a requirement of citizenship upon "an appropriately defined class of positions" which, it suggested, might include "persons holding state elective or important nonelective executive, legislative, and judicial positions . . . ."\(^10\)

Even before its affirmance by the Supreme Court, the decision of the lower court in Sugarman had been followed in Massachusetts. In an opinion dated November 15, 1972, the Attorney General of the Commonwealth advised the state Director of Civil Service that statutes establishing citizenship and residency requirements for applicants for state civil service employment were unconstitutional.\(^11\) In 1973 the United States District Court for the District of Massachusetts struck down on equal protection grounds an ordinance of the city of Boston which required citizenship as a condition of municipal employment.\(^12\)

Closely analogous to statutes and ordinances that restrict public employment to citizens are provisions such as G.L. c. 31, §19 which give preference to residents or domiciliaries or exclude altogether from public employment those who are not residents or domiciliaries of the political

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\(^5\) The leading case was Crane v. New York, 239 U.S. 195 (1915).


\(^7\) Dunn v. Blumstein, 405 U.S. 330 (1972).

\(^8\) See, e.g., Dunn v. Blumstein, note 7 supra.

\(^9\) 413 U.S. at 646-47.

\(^10\) Id. at 647.


jurisdiction—state or local—in which they seek employment. Here too there is older authority, often founded upon the right-privilege distinc-
tion, sustaining such restrictions even against the assertion that they infringed upon the constitutional right to travel and choose one's own domicile.18 Public employment being a privilege, the state could grant or withhold the privilege so long as there was a rational relationship between the limitation of the privilege and the state's interest. Along with rejection of the right-privilege distinction, the Supreme Court struck down welfare residency time requirements in Shapiro v. Thomp-
son14 and reiterated the principle that the right of interstate and intra-
state travel is a fundamental one which can not be infringed in the absence of a compelling state interest. Following Shapiro a line of cases has developed voiding residence requirements on equal protection grounds. In Stevens v. Campbell15 the United States District Court in-
validated a Massachusetts statute requiring veterans to satisfy domicile or residence requirements in order to obtain veterans' preference for civil service employment. In other jurisdictions it has been recognized that the "compelling state interest" test is the proper standard against which to measure residence requirements, although the test has been deemed met in three cases sustaining requirements that police officers live within the municipality in which they are appointed.16 In New Hampshire, an ordinance requiring school teachers to live within the city that employed them was held unconstitutional by that state's Supreme Court.17 It seems safe to predict that the decision in Sugarman would control any case brought to the Supreme Court involving restrictions upon public employment based upon residence. A city or town may thus require residence of its principal officers (those "officers who participate directly in the formulation, execution, or review of broad public policy"), of its public safety personnel, and probably of discrete other classes of employees where a compelling state interest can be shown, but not indiscriminately upon all employees or upon all persons seeking employ-
ment.

§15.5. Amendments to Fiscal Cycle Reform Act. In the 1971 Annual Survey the transition from a January-December fiscal calendar to a July-June fiscal calendar for cities and towns in Massachusetts was discussed at length.1 This transition at last took place during the 1973

16 Krzewinski v. Kugler, 388 F. Supp. 492 (D.N.J. 1972) (three-judge panel) (police-
men and firemen); Detroit Police Officers Association v. City of Detroit, 385 Mich. 519,
190 N.W.2d 97 (1971), appeal dismissed, 405 U.S. 950 (1972); Ahern v. Murphy, 487
F.2d 963 (7th Cir. 1972).
Survey year. By chapter 849 of the Acts of 1969, as amended, it commenced with an eighteen-month transitional fiscal year that lasted from January 1, 1973, through June 30, 1974, and is fully effective as of July 1, 1974, the date of commencement of the first of the new July-June fiscal years.2

The principal purposes of the fiscal cycle revision were to harmonize the local fiscal cycle with the July-June fiscal year already in use in federal and state government and to facilitate fiscal planning by providing that most of the annual municipal budget and fiscal decisions would be made before the start of the fiscal year in which they were to be carried out. A third and somewhat independent purpose was to ease the chronic municipal problem of inadequate cash flow by providing that taxes should be collected in two semi-annual installments rather than in one annual payment.

Under the old system the municipal fiscal and calendar years were identical. Town meetings and city councils fixed annual budgets each spring. By then the year had already begun, and annual appropriations were often not finalized until April or even May, by which time as much as a third of the year might already have elapsed. These appropriations, moreover, were to be paid for by a property tax levy that was not actually collected until November—in effect in one lump sum—with the result that short-term borrowing was necessary to pay current expenses for ten or eleven months of the year. This antique fiscal system is best explained by reference to history; the annual November tax bill, for example, is a remnant of an agrarian past when taxes were deferred until after crops had been harvested. After 1918, the year the Municipal Finance Act,3 predecessor to most of the present chapter 44 of the General Laws, was passed, the January-December fiscal year was an anachronism. In 1941 the Commonwealth adopted a July-June fiscal year4 and thereupon the January-December cycle for local governments became doubly irrational. The persistence of the old practice and the surprising amount of opposition to the introduction of the new illustrate the difficulty of introducing managerial reform to local government.5

During the 1973 Survey year the basic fiscal cycle reform legislation,6

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2 The July 1 to June 30 fiscal year is imposed upon cities (G.L. c. 44, §56A), towns (G.L. c. 44, §56), counties (G.L. c. 35, §16), and districts (G.L. c. 41, §120).
3 Acts of 1913, c. 719.
5 Opponents included many who might have been expected to welcome the rationalizing of municipal budgeting. For example, in 1972 the Massachusetts Selectmen's Association sponsored legislation (1972 House bill no. 1824) to repeal the entire reform package. The combination of resistance to change on the part of those most immediately affected by it and self-interest in the status quo on the part of others is in the writer's opinion the commonest cause of failure of proposals for managerial reform in government.
as amended, was again amended by chapter 52 of the Acts of 1973. Some sections of this legislation deal with problems unique to the eighteen month transitional fiscal year which lasted from January 1, 1973 through June 30, 1974. Other sections of chapter 52 affect the July-June fiscal years of the future, however, and accordingly merit comment. Section 1 further amends G.L. c. 41, §54A to provide that the annual report of receipts (other than from taxes, loans, and trust funds) which is made by city auditors and town accountants and treasurers to local assessors by February 1 in each year shall show such receipts as of the previous calendar year instead of showing such receipts for the first six months (July-December) of the current fiscal year and providing an estimate of such receipts for the ensuing six months. This serves the goal of certainty in fiscal affairs by ensuring that the amounts so reported are sums certain. Sections 2 and 3 of chapter 52 make a minor adjustment in provisions of G.L. c. 58, §18A, repealing a change which actually never became effective in the manner of payment of machinery tax distributions to local governments by the state. This will, as a result of the latest amendment, continue to be paid in an annual lump sum on or before March 31.

Section 4 of chapter 52 sets back from February 15 to a more realistic March 1 the date for notification to cities and towns of the amounts they can expect to receive from the Commonwealth under the several local reimbursement and assistance programs such as education subsidies, veterans' programs, and urban renewal subsidies.

Section 5 of chapter 52 unhelpfully recasts G.L. c. 59, §23 (the statute authorizing the assessment of the local property tax and prescribing the computation of the amount of the levy so to be raised) by striking out the amendments originally inserted by the fiscal cycle reform legislation in 1969 and its amendment in 1971 and rewriting only the first paragraph. It thus appears that the second, third, fourth and fifth paragraphs of G.L. c. 59, §23, are left as they were before the 1969 fiscal cycle reform legislation. These latter paragraphs appear to dictate procedures which are inconsistent with the new fiscal cycle. Section 6 of chapter 52 amends G.L. c. 59, §57, to provide that a notice be sent out not later than February 1 showing the amount of the second installment of the property tax, the effective due date of which is May 1.

Problems requiring further corrective action. In addition to the

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[w]henever a city, town or district votes to grant a salary increase to all or any of its employees, such increase may be made retroactive to a date not earlier than the beginning of the fiscal year prior to the date of such vote.

Among recent statutes in the area of local government this is surely one of the least felicitously drafted. Does it apply to wage increases reached in collective bargaining agreements, or only to increases actually "voted" by city councils and town meetings? Collective bargaining agreements under G.L. c. 149, §1781, are not "voted" upon by city councils and town meetings although, of course, any necessary appropriation must be so voted. Does the phrase "not earlier than the beginning of the fiscal year prior to the date" of the vote mean that wage increases may be made retroactive to the beginning of the current fiscal year, or to the beginning of the prior fiscal year? The former is more sensible, but the latter demands a less strained reading of the language. (Under the latter reading a wage increase granted in April 1975, could be made retroactive to January 1, 1973, a nonsensical result). Above all, the statute does not address the question of where the money is to be found to pay increases, retroactive or not, agreed to after the beginning of a fiscal year. If appropriations have been made in a timely manner and the tax rate has been declared before the beginning of the fiscal year to commence July 1, then there will be no way in which to make appropriations for the purpose of wage increases. It will be necessary to transfer money from a reserve fund or from some account which seems to be running a surplus, or else to budget annually a sum for "wage increases not yet negotiated." In any case, chapter 47 and retroactivity in wage increases substantially reduce the certainty in municipal affairs which the fiscal cycle reform legislation was intended to enhance.

**STUDENT COMMENT**

§15.6. Legislative power and section 8 of the Home Rule Amendment: *Belin v. Secretary of the Commonwealth.* A group of Cambridge citizens filed a petition in the county court seeking a writ of mandamus to prevent the enforcement of section 3 of chapter 596 of the Acts of 1972 on the grounds that it was in violation of the Home Rule Amend-

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2 Acts of 1972, c. 596, §3 states:
   The state secretary shall cause the following questions to be placed on the official ballot to be used at the biennial state election in each city in which voting by proportional representation or preferential voting is in effect:—
   “Shall the elective officers of this city be nominated by preliminary election and elected by ordinary plurality voting?” [Blocks provided for the registering of a vote.]
§15.6  STATE AND LOCAL GOVERNMENT

ment (HRA). Section 3 of the challenged Act directed that the question of whether elections by proportional representation should continue to exist in a given city or town be submitted at the biennial election to the voters of the cities and towns where proportional representation currently existed. Cambridge was in fact the only city in the Commonwealth which elected its municipal officials by proportional representation at the time of passage of chapter 596. The case was reserved and reported by a single justice without decision for determination by the full Supreme Judicial Court. Because this case raised an issue of public importance and urgency (the biennial state election was to be held in November of 1972) the court directed that the case be placed on the list for argument at the October 1972 sitting, and that printing of the record and briefs be waived.

Chapter 596 was passed by the House of Representatives on May 16, 1972 and by the Senate on July 8, 1972 over the veto of the Governor.

The state secretary shall cause the following question to be placed on said ballot in each town in which voting by proportional representation or preferential voting is in effect:—

"Shall the elective officers of this town be elected by ordinary plurality voting?"

[Blocks provided for the registering of a vote.]

If a majority of the votes in answer to such question by any such city or town is in the affirmative elective officers in such city or town shall thereafter be nominated and elected in the manner provided in said question.

If a majority of the votes in answer to said question is in the negative those elective officers who, on the date of said election, were elected by proportional representation or preferential voting shall be continued to be so elected.

The method of electing by proportional representation has been described as follows:

In an election by [proportional representation] there is a separate form of ballot, of a different color for each body to be elected. The voter does not use the traditional 'X.' Instead, he makes his choices by numbers, indicating his first choice by placing a '1' beside that person's name, and a '2' beside his second choice, etc., down the list of candidates. He may indicate any number of choices. The ballot boxes are sent to a central counting place, where the city council vote is counted first and the school committee second. The distinctive features of [proportional representation] is that a candidate is not credited with more votes than are necessary to elect him. When a candidate has received enough votes to be elected, all further ballots marking that candidate as first choice will be sorted according to second choice. If a voter's first two choices have been elected, then his third choice vote will be counted, etc.

This method of voting has been described as limited, since even if there are, for example, nine candidates, only one of the voter's choices will be counted. It is also described as preferential, since the voter may make a choice and that choice will be given practical effect.


The constitutionality of proportional representation was upheld in Moore v. Election Commissioners, 309 Mass. 303, 35 N.E.2d 222 (1941).


6 Governor Francis W. Sargent vetoed the bill largely on the grounds that c. 596
The Act appears to be a reaffirmation of a legislative policy against the desirability of proportional representation as a method of electing municipal officials. The City of Cambridge has a Plan E form of government (Council-Manager Charter) which provides for the election of members to the city council and the school committee by proportional representation.

Section 1 of chapter 596 would have repealed G.L. c. 43, §115, which states that any city which has adopted the Plan E charter is required to elect its officials by proportional representation. It should be noted that by a series of legislative acts, G.L. c. 43, §115 was in effect applicable only to Cambridge. Section 2 would have repealed G.L. c. 54A, which established the system of proportional representation and the procedure for counting ballots in those elections.


7 Through a series of acts, the Legislature has expressed a policy of the undesirability of proportional representation. The Acts of 1949, c. 661, §1 amended G.L. c. 43, §115 by repealing part of Plan E that provided for proportional representation. The Act also provided that cities which had adopted Plan E could do away with the proportional representation feature. Acts of 1949, c. 661, §2. The effect of this Act was that the proportional representation feature of the Plan E charter was prospectively abolished. No city after this date would be able to adopt the Plan E charter with the proportional representation feature. See Mayor of Gloucester v. City Clerk, 327 Mass. 452 (1951). Acts of 1954, c. 152 made it possible for those cities which had done away with proportional representation by accepting the 1949 Act to restore it by accepting this one. Acts of 1957, c. 725 abolished proportional representation in the City of Lowell. Acts of 1960, c. 176 had the same effect for the City of Worcester. As of this writing five Massachusetts cities are under a Plan E charter (Cambridge, Gloucester, Lowell, Medford, Worcester), with only Cambridge having proportional representation.

8 G.L. c. 43, §§93-116. Chapter 43 is the law enacted by the General Court in 1915 which, as amended, provides six model charters from which a city may choose a form of government. The six charters are: Plan A—Government by Mayor and City Council Elected at Large ("Strong Mayor Charter") (G.L. c. 43, §§31, 46-55); Plan B—Government by Mayor and City Council Elected by Districts and at Large ("Weak Mayor Charter") (G.L. c. 43, §§31, 56-63); (Plan C—Commission Form of Government ("Commission Charter") (G.L. c. 43, §§31, 64-77); Plan D—City Council and City Manager ("City-Manager Charter") (G.L. c. 43, §§31, 79-92A); Plan E—Government by City Council Including a Mayor Elected from its Number and a City Manager ("Council-Manager Charter with Mayor Elected from the Council") (G.L. c. 43, §§31, 93-116); Plan F—Government by Mayor and Council Elected by Wards and at Large and Nominated at Party Primaries ("Partisan Strong Mayor Charter") (G.L. c. 43, §§31, 117-127). Eighteen of the present thirty-nine cities utilize one or another of the six model charters. Report Relative to Revising the Municipal Home Rule Amendment, 1972 Mass. Legis. Doc., S. No. 1455, at 51-55 [hereinafter cited as 1972 Report].


10 See note 7 supra.

Section 3 of chapter 596 directed the Secretary of the Commonwealth to place on the ballot to be used at the biennial state election in each city or town in which voting by proportional representation or preferential voting is in existence, a question which asks the voters whether "the elective officers of this city [should] be elected by ordinary plurality voting." Section 3 further provided that if a majority of votes on the question was in the affirmative, the elective officers in such city or town would thereafter have been nominated at a primary election and elected by plurality voting.

According to section 8 of the HRA, the Legislature has the power to "act in relation to cities and towns by general laws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two [cities or towns]." Thus, by implication, a special law (HRPA), G.L. c. 43B, enacted by the General Court on December 28, 1966, the option of adopting proportional representation under G.L. c. 54A is no longer available. G.L. c. 43B, §18. Chapter 54A provides that in any city or town (except a town in which official ballots are not used in town elections) ten percent of the registered voters may request a referendum on the question whether certain elective officers shall be chosen by proportional representation. However, §18 of the HRPA precludes any city or town after Dec. 28, 1966 from following such a procedure. After this date the charter of a city or town can be changed only by a charter commission following the procedures outlined in the HRPA or by a general or special law enacted after Nov. 8, 1966.

12 Acts of 1972, c. 596, §3. For text of §3, see note 2 supra.
13 Mass. Const. amend. art. II, as amended by art. I, §8, states:

The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns or to a class of not fewer than two, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters.

Subject to the foregoing requirements, the general court may provide optional plans of city or town organization and government under which an optional plan may be adopted or abandoned by majority vote of the voters of the city or town voting thereon at a city or town election provided, that no town of fewer than twelve thousand inhabitants may be authorized to adopt a city form of government, and no town of fewer than six thousand inhabitants may be authorized to adopt a form of town government providing for a town meeting limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

This section shall apply to every city and town whether or not it has adopted a charter pursuant to section three.

14 Id.
is a law affecting a single city or town. A special law may be enacted in either of two ways: (1) a petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body of a city, or the town meeting of a town, or (2) a two-thirds vote of each branch of the General Court following a recommendation of the Governor. The issue raised in the Belin case was whether a statute which by its language may refer to a class of two or more cities or towns, but in fact only applies to one city, is a general law for the purposes of section 8 of the HRA. Petitioners contended that section 8 of chapter 596 was not a general law but a special law since it did not apply to a class of not fewer than two cities or towns, but was limited to Cambridge.

Both parties were in agreement that chapter 596 was not enacted according to the procedures applicable to the enactment of special laws. The bill which became chapter 596 was not introduced by legislators from Cambridge nor did it have the approval of the Cambridge City Council. The city council had voted by a majority vote against the proposed legislation. The voters of Cambridge have in the past voted five times against the abolition of proportional representation. Since these procedures applicable to special laws were not followed, chapter 596 was invalid unless it could be characterized as a general law.

The Commonwealth, of course, argued that chapter 596 was a general law and that its enactment did not contravene the provisions of the HRA. The contention was that chapter 596 represented a legislative judgment that proportional representation is not a desirable election procedure. It was further argued that the fact that proportional representation existed only in Cambridge at the time of passage of chapter 596 was of no consequence in deciding whether the statute was a general or special law. The Commonwealth relied upon an earlier interpretation of section 8 of the HRA, found in Opinion of the Justices, 356 Mass. 775, 250 N.E.2d 547 (1969) (the Stadium Opinion). In that case, the issue before the court was whether proposed legislation specifically referring to the construction of a stadium in Boston should be considered special legislation under section 8. In resolving the issue, the court enunciated a judicial test to be used in deciding cases where a statute expressly relates to only one city or town:

15 Id.
17 These facts were cited by the Governor in his veto message, 1972 Mass. Legis. Doc., H. No. 5759, at 2. See note 6 supra.
18 Brief for Respondent, supra note 16, at 5-12.
19 Id. at 8.
20 Id. at 6-7.
We do not interpret the words ‘to act in relation to cities and towns’ as precluding the Legislature from acting on matters of State, regional, or general concern, even though such action may have special effect upon one or more individual cities or towns. If the predominant purposes of a bill are to achieve State, regional, or general objectives, we think that, as heretofore, the Legislature possesses legislative power, unaffected by the restrictions in art. 89, §8 [the HRA].

The court concluded in the Stadium Opinion that the proposed legislation was not special legislation merely because it affected Boston solely, provided that this “statewide concern” test was met. On the basis of the “statewide concern” test set forth in the Stadium Opinion, the Commonwealth argued in Belin that chapter 596 should be considered a valid enactment, since “[t]he purposes of St. 1972, c. 596 are clearly ‘to achieve . . . general objectives’” and thus “the power of the General Court to enact c. 596 [is] unaffected by the provisions of section 8.” Rejecting this view by unanimous decision, the Supreme Judicial Court HELD: Acts of 1972, c. 596, §3 is not a general law applicable to a class of not fewer than two cities and towns and therefore is invalid. The writ of mandamus was consequently issued.

Essentially, the court viewed chapter 596 as special legislation due to the fact that it presently affected Cambridge alone. The possibility that another municipality may adopt proportional representation appears unlikely under present Massachusetts law and in any event section 3 of chapter 596 did not direct itself to that situation. The court thus stressed the “class of two” limitation in section 8 in reaching its decision. A possible explanation for the court’s reiteration of this statutory standard may be found in the legislative history behind the adoption of

21 856 Mass. at 777-78, 250 N.E.2d at 554.
22 Id.
23 Brief for Respondent, supra note 16, at 12.
24 Id.
26 Id. at 1668, 288 N.E.2d at 289.
27 Id.
28 G.L. c. 596, §3 directs the question to be put on the ballot at the “biennial state election.” For text of §3, see note 2 supra. This phrase refers to the state election to be held on Nov. 7, 1972. Had the Legislature intended this question to be placed on the ballot at every future biennial state election, it could have used specific language to express this intent. Further, §3 directs the Secretary to place the question on the ballot “in each city in which voting by proportional representation or preferential voting is in effect.” [Emphasis added.] The use of the present tense appears to imply that the question is not to be placed on the ballot in cities or towns which may at some future date adopt proportional representation. See Brief for Petitioners, supra note 16, at 7.
section 8 of the HRA. The General Court exhibited a clear intent to guard against so-called "class of one" legislation which has been employed in other states to circumvent constitutional prohibitions against special legislation.

The "statewide concern" test, enunciated in the Stadium Opinion in order to preserve legislation which did not fulfill the "class of two" limitation, was not expressly utilized in the Belin decision although the test was sub silentio considered as applied to the facts of this case. The court emphasized that proportional representation was a "crucial feature of municipal government." Thus it may be inferred that the court did not find the method of electing municipal officials a matter of sufficient statewide concern to merit classifying chapter 596 as a general law. In conclusion it was found that the HRA was "adopted by the people to prevent precisely the type of legislation which is represented by [chapter 596,] §3 ."

This comment will consider the status of legislative power in reference to state-local relationships in light of the court's recent interpretation of section 8 of the HRA in Belin. As part of this analysis, it will be necessary first to consider the legislative history behind the adoption of the HRA. The text of the HRA will then be analyzed in order to elucidate further its effect on the scope of legislative power; a closer scrutiny will then be given to the Belin decision with the submission that the decision was a correct one. Finally, the note will discuss some of the conceptual problems arising from the Belin decision with relation to the distribution of power between state and local governments. Two specific questions which will arise are: first, whether the Legislature may enact a general law unaffected by the provisions of section 8 whose effect would be to abolish proportional representation in Cambridge; and second, what the status is of legislative power to enact general laws which affect at the time of enactment a class of one but which class may be expanded at a later date without subsequent legislation.

I. LOCAL-STATE RELATIONS PRIOR TO THE HRA

On November 8, 1966, the voters of Massachusetts approved a Home Rule Amendment to its Constitution by a vote of 1,186,608 to 207,087. The adoption of the amendment was the fulfillment of a home rule move-

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30 Id.
32 Id. at 1669, 288 N.E.2d at 290.
ment in Massachusetts that dates back to the early part of this present century. Since World War II no less than fifty-eight proposals and reports were presented to the General Court with reference to the extension of home rule power.

Before 1966, the source of the authority of the state over municipalities was found in the predecessor to the HRA, namely, Article II of the Amendments to the Constitution, approved in 1821. The Supreme Judicial Court, referring to Article II, once made the succinct statement that "the towns of the Commonwealth possessed no inherent right to self-government." Municipalities were consequently required to seek the assistance of the Legislature in the form of general and special laws in order to carry out their municipal functions. Under the constitutional

34 In a statement to the Joint Special Committee on City Charters in 1914, Governor David I. Walsh urged consideration of home rule arrangements as a means of bringing municipal government closer to the people, and stimulating the interest of the local electorates in their local administration.


35 For the disposition of these various proposals, see 1965 Report, supra note 29, at 99-115.

36 Mass. Const. amend. art. II states:
[T]he general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution as the general court shall deem necessary or expedient for the regulation and government thereof and to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise for the election of officers under the constitution, and the manner of returning the votes given at such meetings. . . . [A]ll by-laws made by such municipal or city government shall be subject, at all times to be annulled by the general court.

1971 Report, supra note 34, at 72 states:
Before 1821, a city form of government was not possible because the State Constitution required election of state officers at public meetings of town inhabitants, envisaged town meetings as the basic legislative bodies of towns, and lacked provisions authorizing the General Court to incorporate cities.


38 This process can at times be both tedious and detrimental to the effectiveness of municipal government. The situation has been described as follows:
Frequently the absence of clear authority involves relatively minor matters: whether, for example, the municipality has power to prohibit the use of roller skates, bicycles, and scooters on sidewalks, to require installation of reflectors on the rear of automobiles, or to sell peanuts at a municipally owned pier. Lack of authority concerning any one of these minor matters may not seriously hamper municipal government, but frequent repetition of the same theme constitutes a substantial impediment to effective day-to-day operations. The problem is more acute when the municipality lacks power to undertake a program designed to meet an important new problem. Chicago, for example, has at times in the past been unable to regulate various occupations and businesses vitally affecting the welfare of its residents or to license automobile operators even though the legisla-
authority of Article II, forty-three towns adopted city charters after individual authorization by the General Court, all of them prior to the ratification of the HRA in 1966.89

Although the proposals for home rule presented in the first two decades of this century were unsuccessful,40 it became apparent to the Legislature that due to changing economic, technological and social circumstances, it would be required to enact numerous bills conferring additional powers on town and cities.41 Thus in 1915,42 while not seeking to confer on cities any broad grant of home rule powers, the Legislature enacted G.L. c. 43, §§1-92 which provided four model "plans of governments" or charters, any one of which could be adopted by any city except Boston.43 It was the intent of the Legislature that these model charters would revitalize city government in Massachusetts and reduce the volume of "petitions submitted by cities and towns" to the General Court for charter acts and laws amending these acts.44 These four standard plans were subsequently increased in number to six by enactments in 193845 and in 1959.46 The 1938 enactment allowed proportional representation in a Plan E (Council-Manager Charter) city and was the legislative basis for the present form of municipal government in Cambridge.47 In 1949, legislation was enacted48 which prospectively abolished proportional representation as a feature of the Plan E model after the effective date of the 1949 Act. Ordinary plurality voting was substituted for proportional representation. The 1959 enactment provided for a Plan F form of government.49 Thus, until November 8, 1966, any degree of autonomy which a municipality could enjoy existed under the six model city charters prescribed by chapter 43.50 Since chapter 43 was amendable at any time by
the Legislature, the position of municipalities in reference to the state Legislature was, until November 8, 1966, determined by acts of legislative grace.⁶¹

Before the adoption of the HRA, the judicial climate in the Commonwealth was one which was receptive to the concept of legislative supremacy over municipalities. The Supreme Judicial Court adopted a policy of construing the powers of municipalities narrowly. This doctrine has been referred to as "Dillon's rule," named for the Iowa judge who enunciated the doctrine in the late nineteenth century. Dillon's rule stood for the proposition that municipalities are subordinate instrumentalities of the state which exist wholly by sufferance and at the convenience of the state government.⁶² Any doubt as to the power of a municipality to exercise a particular function was to be resolved by the courts against the municipality.⁶³ In Massachusetts, this restrictive judicial doctrine was enunciated in at least twenty-seven opinions of the Supreme Judicial Court between 1804 and 1964.⁶⁴

meetings "limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the towns . . . ."

⁶¹ In Mayor of Gloucester, the court stated that "[n]o municipality has any vested right in its forms of local government. All such matters are subject to the paramount authority of the Legislature, which may change, and even abolish, at will." 927 Mass. at 464, 99 N.E.2d at 455. The court in Belin concluded that the "relevance of this and other cases decided prior to 1966 has been considerably diminished, if not erased." 1972 Mass. Adv. Sh. at 1669, 288 N.E.2d at 290.

⁶² 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 accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is to be resolved by the courts against the corporation, and the power is denied . . . . J. Dillon, Commentaries on the Law of Municipal Corporations §237 (5th ed. 1911) (emphasis added). See also City of Clinton v. Cedar Rapids & Mo. Riv. R.R., 24 Iowa 455 (1868).

⁶³ Id.

⁶⁴ See, e.g., Hood v. Lynn, 83 Mass. 103 (1861); Commonwealth v. Hudson, 315 Mass. 525, 52 N.E.2d 566 (1943); Paddock v. Town of Brookline, 347 Mass. 230, 197 N.E.2d 321 (1964). In Hudson, an effort was made by the municipality to overturn a special statute on a theory of inherent local rights. For an analysis of this theory, which has had limited acceptance in some jurisdictions (Cal., Ind., Iowa, Ky., Mich., Neb. and Tex.), but is presently rejected by all, see 1965 Report, supra note 29, at 37-41. In refuting this argument, the court threatened to hold the officials and voters of the town of Hudson in contempt en masse if they did not appropriate funds to chlorinate the town water supply, as ordered by the State Department of Public Health pursuant to a general law.

In Paddock, although the court acknowledged Dillon's rule, it did find a limitation on the control which the Legislature may exercise over municipalities flowing from the constitutional clause requiring legislation to be "for the good and welfare of this commonwealth." Mass. Const. pt. 2, c. 1, §1, art. 4. The court used this clause to invalidate c. 519 of the Acts of 1960. This act purported to suspend for a named indi-
The home rule movement developed in Massachusetts and in the rest of the country as the principal legal device for municipalities to obtain some measure of freedom from state control. Although home rule defies definition and has been referred to by one observer as a "state of mind," a recent study performed by the Legislative Research Council has come up with a definition which is illustrative of the problems involved in defining home rule. The Council defines home rule as "the autonomy of local government . . . over all purely local matters." Such a definition is suggestive of a grant of power to municipalities coupled with an awareness that the municipality is a subordinate of the state.

The home rule provision which Massachusetts adopted on November 8, 1966, made the Commonwealth the fortieth state to adopt home rule, and, as of this writing, forty-two states have some type of home rule. The form of home rule adopted by Massachusetts has been described as the "residual" model, whereby the constitutional provision is based on a "sharing" of state legislative power between the state and local legislative bodies, rather than on the older home rule concept of separated "state" and "local" powers. In the residual model, full legislative authority is

individual certain statutory requirements necessary for the filing of certain types of suits by individual citizens against municipalities.

55 See generally C. Antieau, Municipal Corporation Law ch. 3 (1968); Bromage, Home Rule—NML Model, 44 Nat'l Mun. Rev. 132 (1955); Vanlandingham, Municipal Home Rule in the United States, 10 Wm. & Mary L. Rev. 269 (1968); F. Michelman & T. Sandalow, supra note 58, ch. 2.


59 Id. at 67.

60 See Vanlandingham, supra note 55, at 283-96; Bromage, supra note 55, at 133-36. Vanlandingham points out that constitutional home rule provisions adopted before 1912 tended to approach the "separated" model. Under the separated model, matters of purely local concern are held to prevail over conflicting state laws. The first judicial opinion recognizing such an approach was under the Missouri Constitution, Mo. Const. art. IX, §§16, 23 (1875). Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S.W. 943 (1897). A good illustration of this type of provision is found in the Colorado Constitution. A provision gives cities and towns with populations in excess of 2,000 the power to make charters dealing with "all . . . local and municipal affairs" and pro-
granted to localities, subject to control by the state Legislature through "positive" enactments which restrict local legislative action or which deny power to local governments to act in certain subject areas.\(^6\) Thus it is said that localities acquire "residual" state legislative powers, or that there is a "devolution of state legislative power upon communities of the state qualifying to receive the same."\(^6\) This formula resembles the federal practice of allowing states to act in areas of federal concern until Congress preempts such areas with a federal statute.\(^6\)

The presence of the ultimate legislative veto has been attributed to the fact that the area of governmental relations which is involved is dynamic in character.\(^6\) Attempts to assign some areas of governmental activity as within the exclusive control of localities\(^6\) and other areas as within

vides that these charters and "ordinances made pursuant thereto in such matters shall supersede . . . any law of the state in conflict therewith." Colo. Const. art. XX, §6. Vanlandingham suggests that after 1912 most constitutional provisions emphasized legislative supremacy. Under this approach, the provision may grant home rule within a limited sphere, such as "property affairs, or government," subject to control by general laws (N.Y. Const. art. IX, §26(2); R.I. Const. amend. XXVIII, §2) or leave determination of the quantity of home rule entirely to legislative discretion. See Conn. Const. art. X, which provides that "the General Assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs relative to the powers, organization, and forms of government of such political subdivisions."

The Massachusetts provision may be considered as an example of the legislative supremacy type, but with some differences when compared with either the New York or the Connecticut provisions. The Massachusetts provision differs from the traditional type of legislative supremacy provision in that it empowers the state legislature to prohibit home rule action, not to grant it. For the text of §6 of the HRA, see note 81 infra.

It should be noted that Missouri, which in 1875 became the first state to adopt a home rule amendment, has recently changed from the separated model to a residual approach to home rule. See Mo. Const. art. VI, §§19, 19a.

\(^6\) In Massachusetts both of these features are illustrated in its home rule provision. Section 8 of the HRA gives the legislature control through positive enactments as allowed by the procedures described therein for general and special laws. Section 7 of the HRA specifies subject areas in which the local government has no authority to act without prior legislative approach. Thus as regards section 7 areas, the traditional relationship between state and local governments as described by Judge Dillon still exists. See text at note 87 infra.

\(^6\) 1972 Report, supra note 8, at 67.


\(^6\) See note 60 supra. It should be noted that the separated model was perhaps appropriate in the era in which it was introduced, that is, an era of comparatively fewer urban problems and consequently of restrained governmental activity at both the local and state levels. At the end of the last century, home rule proponents were attempting to combat the effect of living under legislative supremacy provisions and the judicial doctrine of Dillon's rule. See text at note 52 supra. Thus these proponents thought
the exclusive control of the state have been correctly criticized for creating an undesirable rigidity in governmental arrangements, which demand flexibility and adaptability.  

A specific example of the benefit accruing to Massachusetts due to the adoption of the residual approach may be illustrated by the recent change in the management of public assistance programs in the Commonwealth. Historically, these programs have been local in nature. In 1967, the Legislature reorganized these programs under state government and assumed their full cost during the 1967 session.

III. THE MASSACHUSETTS HOME RULE AMENDMENT

In order to understand fully the home rule provision which Massachusetts ultimately adopted, and the nature of legislative power after the adoption of section 8, it is necessary to consider briefly the full text of the constitutional amendment.

Section 1 reaffirms "the customary and traditional liberties of the people" with respect to the conduct of their local government, and grants to the people of every municipality "the right of self-government in local matters." The exercise of that right is subject to standards and requirements prescribed by both the constitution and laws enacted by the Legislature. Section 1 resembles provisions in the New York and Rhode Island Constitutions to some extent, but the latter differ from the Massachusetts provision in that they attempt to define a zone of local autonomy in the term "local matters." The Massachusetts provision can be distinguished in that no attempt is made in the remainder of the amendment to define "local matters."

the best approach was to specify areas beyond legislative control or subject to very limited legislative control.

66 Fordham, supra note 64, at 137, 140.
68 Under the separated approach (see note 60 supra), such a change would not have been possible without a constitutional amendment. M. Curran, The Home Rule 35 (E. Gere & M. Curran ed. 1969).
70 Mass. Const. amend. art. II, as amended by art. LXXXIX, §1.
71 Id.
72 N.Y. Const. art. IX, §12; R.I. Const. amend. XXVIII, §1. The Rhode Island provision is almost identical with the Massachusetts provision: "It is the intention of this article to grant and confirm to the people of every city and town in this state the right of self-government in all local matters." Id.
73 In both constitutional provisions, the zone of local autonomy becomes identified with matters relating to the "property, affairs and government" of the municipality. See N.Y. Const. art. IX, §12; R.I. Const. amend. XXVIII, §2.
74 It has been suggested that the best way to view §1 is as a preamble, with the hope that courts, when construing the provisions of the HRA, will give them a broad
Sections 2 through 5 of the HRA deal with the powers of the municipality relating to the chartering process. Section 2 grants to a municipality the power to adopt, revise or amend charters. This is a new power for municipalities. Prior to this amendment, cities and towns which wished to change or modify the structure of their government were forced to petition the state Legislature for "permission" unless there was a prior existing state statute which authorized them to accomplish that change. Section 3 provides procedures for the adoption or revision of a charter by a city or town. Section 4 provides for charter amendments. Section 5 provides for the recording of charters and charter amendments in the office of the Secretary of the Commonwealth.

These sections are mainly procedural in nature and have caused relatively few controversies.

Section 6 contains the key "residual" or "devolution of powers" provision. A distinguishing feature of this section is that its grant of home rule powers is immediately extended to all presently incorporated cities and towns in the Commonwealth, without regard to whether the local government has adopted a charter. This provision differs from both the National League of Cities' proposal, in which it is based, and many proposals for reform of these sections include: (1) empowering local legislative bodies to propose election of charter commissions rather than depending on a response to a local voter initiative petition, as is provided for by §3 of the HRA; (2) reducing the signature requirements for charter commission election as provided for by §3 of the HRA; (3) extending time allowed for completion of charter commission studies as provided for by §3 of the HRA; (4) including some provision on frequency of adoptions of new municipal charters (none are now provided for in §3 of the HRA); (5) removing mayoral concurrence requirement in council-manager cities as provided for by §4 of the HRA. Report Relative to Revising the Municipal Home Rule Amendment, 1972 Mass. Legis. Doc., S. No. 1455, at 104-26, 168-90 [hereinafter cited as 1972 Report].

Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter ....

Id.

American Municipal Association (the present National League of Cities), Model Constitutional Provisions for Municipal Home Rule (1953). This material is largely the work of Jefferson Fordham, former Dean of the University of Pennsylvania Law School, who has been the leading advocate of the residual home rule approach.
residual model constitutional grants presently existing in other states, all of which require the local governmental units to adopt charters before obtaining home rule powers. An advantage of the Massachusetts approach is that municipalities did not have to labor through the process of adopting a charter, which may be very lengthy and may prove unsuccessful in the end.

Sections 7 and 8 considered together sharply limit the residual doctrine enunciated in section 6. Section 7 affirms "Dillon's rule" with respect to the subject matters spelled out therein. Section 7 is thus a retreat from the residual doctrine to the extent that it adopts the subject matter approach employed in the traditional home rule provisions. In accord with section 7, local home rule powers do not extend to (1) the regulation of elections, (2) taxation, (3) municipal borrowing, (4) the disposal of local park land, (5) the enactment of civil law and (6) the definition and punishment of felonies. Local authority in these six areas depends entirely upon state enabling laws.

Section 8, the section with which the court was primarily concerned in Belin v. Secretary of the Commonwealth, is probably the most complex of all the provisions of the HRA. This complexity can be attributed to the fact that there are three kinds of powers enumerated in that section. The first powers enumerated are general law powers. The Legislature is authorized to act in relation to cities and towns by general laws without limit as regards to subject matter, provided the general law applies alike to a class of at least two municipalities.

The second kind of powers enumerated are special law powers. The Legislature may enact special laws relating to just one city or town either upon the city or town's request or upon the Governor's recommendation and by a two-thirds vote of each branch without any prior request or subsequent consent. Had the Legislature enacted a law under these special law powers in the Belin case, there would have been no

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84 Vanlandingham, supra note 55, at 280-81.
85 Id.
86 1972 Report, supra note 80, at 71.
87 Mass. Const. amend. art. II, as amended by art. LXXXIX, §7. It should be noted that "financial responsibility" bills, which seek to restrain the General Court from passing either general or special laws imposing additional costs on cities and towns without providing either for (1) local consent or (2) state assumption of such added costs, were not considered areas of local discretion under the HRA. This restriction on municipal initiative is consistent with home rule provisions in other jurisdictions. See, e.g., N.Y. Const. art. IX, §2; Ohio Const. art. XVIII, §13; Wis. Const. art. XI, §3. But see Cal. Const. art. XI, §12.
88 "It was felt, even by the proponents of home rule, that in these areas as a matter of general principle there was an existing overriding state concern which should be preserved." M. Curran, supra note 67, at 33.
89 Mass. Const. amend. art. II, as amended by art. LXXXIX, §8. For text of §8, see note 13 supra.
90 Id.
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question about the validity of such an enactment. The controversy in *Belin* was whether the Legislature could enact what effectively was a special law under the guise of a general law.

Also classified under the special law powers of the Legislature under section 8 is the Legislature's authority to establish and regulate regional or metropolitan entities, and to merge, abolish and consolidate existing municipalities, alter their boundaries or incorporate new municipalities. These latter provisions of section 8 have been recommended as ones which other states should consider adopting. By these provisions, the HRA allows the Legislature the flexibility presumably needed to meet urban and metropolitan problems. These provisions of section 8 pave the way for the creation of regional-type authorities to cope with emerging problems such as air and water pollution and refuse disposal.

Finally, in the second paragraph of section 8, model charter powers are provided. Just as the Legislature was before empowered to provide optional plans of city and town government under chapters 43 (for cities) and 43A (for towns) of the General Laws, so it is now under the HRA. This power is presently, however, subject to the requirements regarding the power of the Legislature to enact general and special laws. The main purpose of the second paragraph of section 8 is to make it clear that the General Court may by general law offer a series of optional plans, and to provide procedures for adoption or abandonment which procedures are different from those set forth in the first paragraph of section 8, concerning the power of the Legislature to establish metropolitan entities and to incorporate new municipalities.

In evaluating the overall influences of section 8 on the HRA as drafted, it appears that the intent of the draftsmen was to avoid the detrimental effects of the so-called "separated model" as much as possible. Under a separated model, matters of purely local concern are held to prevail over conflicting state laws absolutely. Frequent experience under that model has led to a judicial construction whereby areas in which the localities have control have been narrowed and areas in which the state controls have been broadened by constitutional interpretation. In contrast, the

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91 Id.
92 M. Curran, supra note 67, at 36.
93 Id.
94 Id. at 36-37.
95 Mass. Const. amend. art. II, as amended by art. LXXXIX, §8. See text at note 13 supra.
96 See notes 8 & 50 supra.
97 See text at note 13 supra.

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residual approach, adopted in the HRA, grants considerable power to the Legislature. So long as the Legislature is prepared to enact according to general law standards, i.e., to meet the "class of two" requirement, there would appear to be no effective limit on what it might do.

Section 9 is the last section of the HRA. The effect of section 9 is to continue in force existing special laws relevant to given localities until those localities change them by the charter procedures specified by the other sections of the HRA. For example, in accordance with section 9 of the HRA, the 1948 special law which provides the form of government for the city of Boston will remain in force until changed by the procedures set out in the HRA and related legislation.

IV. THE Belin CASE

In the Belin case, the central issue before the Supreme Judicial Court was whether the General Court had enacted a general law in accord with section 8 of the HRA when Cambridge was the only municipality to which chapter 596 in fact applied. The importance of this issue was foreseen by one commentator on the HRA, who suggested that the purpose behind some general laws could well be to thwart the HRA and render it ineffectual and that the judiciary might well strike down such legislation.

One of the preliminary questions with which the court dealt was whether chapter 596 was an "act in relation to cities and towns" and therefore subject to the restrictions of section 8. The court found that legislation which is concerned with altering a "crucial feature of municipal government" is clearly the type intended to be included in section 8. An additional point with which the court dealt rather quickly was whether chapter 596 was a general or a special law. Since it was stipulated by both parties in dispute that chapter 596 was not a special law under the provisions of section 8, the central question in Belin came down to whether chapter 596 was a general law applicable "to a class of not fewer than two" cities and towns.

In the opinion itself, the court does not elaborate on why chapter 596 fails to meet the "class of two" limitation. It merely indicates that

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100 Mass. Const. amend. art. II, as amended by art. LXXXIX, §9.
102 See note 11 supra.
103 M. Curran, supra note 67, at 36.
the Act "was applicable in fact only to Cambridge."\(^{107}\) A suggested line of reasoning for the court's holding is that nothing could be found in chapter 596 which made it applicable to any municipality other than Cambridge either then or later.\(^ {108}\) A possible answer to this is the Commonwealth's argument that chapter 596 represented a legislative judgment against the desirability of proportional representation as an election procedure,\(^ {109}\) but the question then arises as to whether it is superfluous legislation. The 1938 legislation\(^ {110}\) which allowed a Plan E city to adopt proportional representation was prospectively abolished by 1949 legislation.\(^ {111}\) Subsequent special legislation was enacted in 1957\(^ {112}\) and 1960\(^ {113}\) to abolish proportional representation in the Plan E cities of Lowell and Worcester respectively. At the time of adoption of the HRA, the only Plan E city which had proportional representation was Cambridge.\(^ {114}\) The possibility of a municipality other than a Plan E city adopting proportional representation under G.L. c. 54A was effectively disallowed by the passage of the Home Rule Procedures Act (HRPA).\(^ {115}\) Section 18 of the HRPA temporarily "froze" existing city and town charters in the form they were in 1966.\(^ {116}\) After that date the charter of a city or town could be changed only by a charter commission following the procedures outlined in the HRA and the HRPA, or by a general or special law enacted after November 8, 1966.\(^ {117}\) It should be noted that the charter process has not been employed very often since the adoption of the HRA.\(^ {118}\) A recent legislative study indicates that only two municipalities have altered their charters by use of the HRA and HRPA, and neither municipality adopted proportional representation.\(^ {119}\)

Consequently, the only manner in which a municipality could, if it so desired, adopt proportional representation would be through the charter process as set forth in the HRA and the HRPA. Chapter 596 was not phrased in language which would prohibit the adoption of proportional representation through this process. It simply could not be logically argued that chapter 596 was potentially applicable to cities in addition to Cambridge at some indefinite future time for two reasons: first, proportional representation could not be adopted in the future under

\(^{108}\) See note 11 supra; see also text at notes 27-28 supra.
\(^{109}\) Brief for Respondent, supra note 105, at 8.
\(^{110}\) Acts of 1938, c. 378. See note 45 supra.
\(^{111}\) Acts of 1949, c. 661. See note 48 supra.
\(^{112}\) Acts of 1957, c. 725. See note 7 supra.
\(^{113}\) Acts of 1960, c. 176. See note 7 supra.
\(^{115}\) G.L. c. 43B. See note 11 supra.
\(^{116}\) G.L. c. 43B, §18.
\(^{117}\) See note 11 supra.
\(^{118}\) 1972 Report, supra note 80, at 55, Table 3.
\(^{119}\) Id.

http://lawdigitalcommons.bc.edu/asml/vol1973/iss1/18
chapter 43; and second, although there is a remote chance of adoption of proportional representation through the charter process, section 8 of chapter 596 was not directed to this situation.\footnote{120 See note 28 supra.} In Belin the court indicated that even if such an argument were accepted, it would "not [be] sufficient to meet the [class of two] test which [section] 8 of art. 89 establishes."

The final question raised by the Belin decision is whether the Stadium Opinion could have been applied to save chapter 596 from being classified as a special law. It should be noted at the outset that under section 8 of the HRA, if proposed legislation affects two or more municipalities, then the issue of the "statewide concern" test is not reached. The legislation is a valid general law. For example, a statute might be passed which, by its terms applied only to Pittsfield and Plymouth, and yet be a valid general enactment under section 8.\footnote{122 Brown, Home Rule in Massachusetts: Municipal Freedom and Legislative Control, 58 Mass. L.Q. 29, 56 n.70 (1973).} Although it has been indicated that such legislation is unlikely,\footnote{123 Id.} the point to be considered in analyzing the Belin case is that the "statewide concern" test is employed by the court only in cases where an attempt is made to preserve legislation as general enactments which do not fulfill the "class of two" requirement.

Thus, in accordance with this reasoning, the Commonwealth, perhaps realizing that chapter 596 could not meet the "class of two" limitation, argued that the judicial "statewide concern" test used by the court in two earlier opinions, \textit{Opinion of the Justices}, 356 Mass. 775, 250 N.E.2d 547 (1969) (the Stadium Opinion) and \textit{Opinion of the Justices}, 357 Mass. 831, 258 N.E.2d 731 (1970) (the Water Supply Opinion), be applied to the Belin case.\footnote{124 Brief for Respondent, supra note 105, at 12.} The Water Supply Opinion dealt with proposed legislation\footnote{126 1970 Mass. Legis. Doc., H. No. 885.} concerning a controversy between the Town of Southwick and the Town of West Springfield relating to the water supply land which the latter community owned in the former town, and the water being drawn therefrom. The legislation called for the enactment of a special law, petitioned for by authority of a town meeting in the Town of Southwick, to restrict the statutory power of the Town of West Springfield to take water from land in Southwick. The proposed legislation encountered the objection that it related to the Town of West Springfield and lacked prior consent of the town meeting thereof.\footnote{128 357 Mass. at 832, 258 N.E.2d at 731.} In response to a request by the House of Representatives for an advisory opinion, the Supreme Judicial Court ruled that the proposed legislation related to water supply and the allocation of water resources which are matters of
regional and statewide concern, that the bill at issue was not addressed predominantly to but one municipality, and that the prior local consent requirements of section 8 of the HRA did not control the legislature's resolution of the subject matter of the contemplated legislation.\textsuperscript{127}

In discussing the \textit{Water Supply Opinion}, the court in \textit{Belin} did not emphasize the finding that the allocation of water resources are matters of statewide concern. Rather the court distinguished \textit{Belin} by indicating that the legislation involved in the \textit{Water Supply Opinion} actually involved two towns.\textsuperscript{128}

In considering the \textit{Stadium Opinion}, the court first quoted the language of the opinion which indicated that the legislature has the power to act in accordance with statewide or regional purposes, even though such action may only affect one municipality.\textsuperscript{129} The court then quoted the following excerpt from the \textit{Stadium Opinion}:

\begin{quote}
On the other hand, in instances where the primary purpose of a major and severable portion of a bill, otherwise enacted for State, regional, or general purposes, is to legislate 'with respect to . . . [the] local, government,' or 'local matters,' of a particular city or town, it may be necessary to consider whether in the particular circumstances that severable major portion complies with §8 of art. 89.\textsuperscript{130}
\end{quote}

The court then went on to state that this section of the \textit{Stadium Opinion} "is fully applicable to c. 596, §3."\textsuperscript{131} One commentator has offered two possible interpretations of the court's action in quoting this sentence from the \textit{Stadium Opinion}.\textsuperscript{132} The first is that the court rejected the applicability of the "statewide concern" test on the grounds that local elections do not fall under this heading.\textsuperscript{133} The second interpretation is that the court in \textit{Belin} may have indicated a willingness in the future to sever "local" provisions from general laws, including general laws "in relation to cities and towns."

For the purposes of the \textit{Belin} case, both interpretations could be accepted as consistent with the decision. The first interpretation, however, has stronger support from an analysis of the \textit{Belin} decision itself and thus warrants extensive discussion at this point. In reviewing the facts in \textit{Belin}, it appears that the court could not find a sufficient basis for a statewide interest in the method of election employed by the City of Cambridge. On the basis of the subject matter involved, it would seem

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{127} Id. at 855, 258 N.E.2d at 733.
\item \textsuperscript{128} 1972 Mass. Adv. Sh. at 1669, 288 N.E.2d at 289.
\item \textsuperscript{129} 256 Mass. at 777-78, 250 N.E.2d at 554.
\item \textsuperscript{130} 1972 Mass. Adv. Sh. at 1668, 288 N.E.2d at 289, quoting 256 Mass. at 778, 250 N.E.2d at 554.
\item \textsuperscript{131} 1972 Mass. Adv. Sh. at 1668, 288 N.E.2d at 289.
\item \textsuperscript{132} Brown, supra note 122, at 50.
\item \textsuperscript{133} Id.
\end{itemize}
\end{footnotesize}
that the statewide concern test has more applicability when discussing whether the water supply of one town is of concern to other towns, or whether the construction of a stadium in one city is of concern to other cities, than when discussing whether the method of municipal elections in one city is of concern to other cities.

Perhaps underlying the court's emphasis on the "class of two" distinction in Belin is the legislative history behind the adoption of section 8 of the HRA. The legislative history indicates that the purpose behind the adoption of section 8 was to eliminate the so-called "one city or one town" classes which had been common legislative devices to circumvent constitutional prohibitions against special legislation in other states. Before the adoption of the HRA, examples of "one city or one town" legislative classifications would be the special acts which led to the abolition of proportional representation in the Plan E cities of Lowell and Worcester. With the adoption of the HRA such legislation, since it is "in relation to cities and towns," would be governed by section 8.

Had chapter 596 been phrased in language directed expressly toward the City of Cambridge, there would have been no question about the proposed statute being special legislation which would be governed by section 8 of the HRA. The issue before the Court in Belin was whether the general language employed in chapter 596 would make the statute a general law. The court emphasized that the determining factor in deciding whether the proposed statute was a general law was the applicability of the statute to only one municipality and not the language of the statute. "That it was phrased in general or specific terms does not control under §8, which prescribes a clear and simple test ["class of two"] of minimum applicability." Thus the Belin case may be viewed as an affirmation of the legislative intent behind the adoption of section 8. As the court stated in its opinion, the HRA "was adopted by the people to prevent precisely the type of legislation which is represented by St. 1972, ch. 596, §3."

V. Questions Posed

Two questions arise as a result of the Belin decision. First, can the Legislature constitutionally enact a general law, unaffected by the provisions of section 8, whose effect would be to abolish proportional repre-

135 Id.
136 Acts of 1957, c. 725, See text at note 112 supra and note 7 supra.
139 Id., 288 N.E.2d at 290.
sentation in Cambridge? More specifically, if the Legislature had enacted a "statewide ban" on proportional representation which would have included a prohibition on local charter commissions from adopting such a system, would such legislation be valid?

Professor George Brown has contended that the Legislature's enactment of such a general law would represent a statewide policy against the proportional representation method of election. If such a statewide policy was enacted, it is argued that it would be incumbent on the City of Cambridge to make the necessary changes in the method of electing its municipal officials as an incident of this legislative exercise of power. The most persuasive argument for this result is that the method of election in Cambridge should not be "frozen" when the people of the Commonwealth have, through the political process, made a decision against cities and towns having proportional representation. Professor Brown offers a hypothetical argument that had the City of Somerville enacted local legislation which was responsible for the creation of day care centers and subsequently the state Legislature (due perhaps to criticism of the operation of the centers in Somerville), enacted a general law which prohibited any city or town from operating a day care center or appropriating money for the same, a necessary result of such legislation would be the discontinuance of the day care centers in Somerville.

In both of these situations, the central issue is the power of the General Court to stop a practice existing in only one municipality by a general law enactment. However, as the following discussion will demonstrate, it is submitted that to allow the Legislature to enact a general law that applies in reality to only one city may negate a fundamental objective behind the adoption of the HRA, namely, a restriction on the power of the Legislature in this area.

To accommodate the two important policies of section 8—ultimate legislative control over cities and towns and the limitation on legislative power affecting a single municipality—the Supreme Judicial Court developed the "statewide concern" test, first enunciated in the Stadium Opinion, as a guide to be used in evaluating various legislative enactments which may only affect a single municipality. In order to employ such an approach, the subject matter of the proposed legislation has to be considered. Although this approach may not be totally consistent with the residual concept of the HRA, it should be noted that even the residual model recognizes certain activities which by their very nature are of state concern, and thus precludes the municipality from exercising

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140 Brown, supra note 122, at 44.
141 Id.
142 Id. at 50.
143 Id. at 48.
144 Id. at 43.
power in those areas. Section 7 of the HRA delineates these areas. The exercise of section 8 powers themselves frequently turns on the question of whether the subject matter involved in proposed legislation would be considered an "act in relation to cities and towns." With reference to the "statewide concern" test, it is appropriate to consider whether proportional representation should be considered a matter of state concern. Even before the adoption of the HRA, the election of local officials was regarded primarily a local matter for which there was no requirement of state conformity. The National League of Cities' proposal, on which the HRA is substantially based, concedes that the structure of municipal government is a matter of uniquely local concern. The court itself in Belin stated that section 8 of chapter 596 was concerned with "altering a crucial feature of municipal government." In contrast, it is appropriate to reconsider Professor Brown's "day care center" hypothetical, mentioned above. An argument that day care centers are mainly a local matter would not have as strong a precedent. There could be a counterargument that day care centers are a good example of an activity involving the interdependence of state and local concerns. If an analogy were made to the field of education, it could then be argued that matters involving day care centers are areas of primarily state concern.

In response to the argument that Cambridge may be "frozen" with proportional representation, it should be noted that the General Court has extensive special law powers to achieve what is essentially a special law task. One procedure allows a special law to be enacted upon the request of the Governor plus a two-thirds vote of each branch of the General Court without prior or subsequent approval. Such reasoning is consistent with the residual approach which stresses the need for flexibility in dealing with such matters.

In summary, it is submitted that the Legislature could not enact a

146 See text at note 88 supra.
149 American Municipal Association, Model Constitutional Provisions for Municipal Home Rule §6 (1953) states that "charter provisions with respect to municipal, executive, legislative and administrative structure ... are of superior authority to statute."
151 See text at note 144 supra.
152 See 1965 Report, supra note 138, at 83.
153 See text at note 15 supra.
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general law whose effect would be to abolish proportional representation in Cambridge. Except for the remote possibility that a local charter commission may recommend proportional representation,\textsuperscript{184} there is little doubt that the example of this so-called general law, considered in its entirety, would still, in reality, have applied only to Cambridge and would therefore not have met the "class of two" test either then or later. Once failing the "class of two" test, the "general legislation" taken as a whole would have to meet the "statewide concern" test. But, as discussed previously, the "statewide concern" test is not met by the insertion of a general policy statement in a piece of legislation. Rather, the "statewide concern" test is a specific test for a specific situation. Once it is decided that the act under question applies to only one municipality, the question arises as to whether the activities relating to that municipality concern other localities. As the \textit{Belin} decision seems to say, the method of municipal elections in one city is not of statewide concern.\textsuperscript{185} Therefore one option a court would have when confronted with this sort of "general" legislation is to hold simply that it is not general legislation.

The value of the second interpretation offered as to the \textit{Belin} case—that is, that the court may have indicated a willingness to sever "local" provisions from general laws, including general laws "in relation to cities and towns"\textsuperscript{186}—is also an option to be considered when discussing whether the Legislature may enact a general law unaffected by the provisions of section 8 whose effect would be to abolish proportional representation in Cambridge. It is submitted that should the Legislature attempt to enact a law whose partial effect would be to abolish proportional representation in the City of Cambridge, the court may conclude that the law as a whole is a general law but then "sever" that part of the statute which attempts to abolish proportional representation in Cambridge. The court in \textit{Belin} kept this option open by quoting the original \textit{Stadium Opinion} in this regard.\textsuperscript{187}

In conclusion, for proportional representation to be abolished in the City of Cambridge, such action must be accomplished in accordance with the special law provisions of section 8. Any other result would be contrary to the legislative intent behind the adoption of section 8.

A second question to be analysed as a result of the \textit{Belin} decision deals with the status of legislative power to enact laws which affect at the time of enactment a class of one, but which class may be expanded without subsequent legislation. The court pointed out in \textit{Belin} that the fact that chapter 596 is "potentially applicable to cities in addition to Cambridge at some indefinite future time is not sufficient to meet the test which §8

\textsuperscript{184} See text at notes 27-28 supra.
\textsuperscript{186} Brown, supra note 122, at 50.
An analysis of this question may clarify some of the problems raised in the "day care center" hypothetical. The proposed day care center legislation would apply without additional legislation to all future municipalities which may consider adopting such a program, but presumably this legislation would be valid on the basis of the "statewide concern" test and not the "class of two" test. An enactment which initially applies to only one municipality but has the potential of acquiring more members into its class has been held to be a valid general law in other jurisdictions. There is no Massachusetts case law on this question, but the court in *Belin* appears to emphasize the applicability of the statute at the time of passage in contrast to any future applicability the statute may have.

An example of legislation which may be discussed in regards to this second question would be the enactment of future laws under a classification system based on population. The Legislature may enact a law which at the time of passage applies only to cities whose population exceed 500,000. Since such a law would presently only apply to Boston, the question arises whether such legislation should be maintained as a valid general law. It has been suggested that such legislation is valid even though it fails to meet a classification requirement such as the "class of two" limitation of section 8 of the HRA. The reasoning would be that once a given municipality reaches a certain size, certain activities of the municipality become of more interest to the state. Thus the activities of Boston are more of interest to the Commonwealth than are those of Stockbridge, and would therefore pass muster on the basis of the "statewide concern" exception.

On the basis of the *Belin* case, it appears that general laws which apply to only one municipality at the time of passage would be held invalid. However, the court has developed the judicial "statewide concern" test in home rule cases to save perhaps otherwise invalid "class of one" legislation. Consequently, a statute that could not be preserved on the basis that it will apply in fact to more than one municipality in the future may be acceptable on the grounds that it is presently an act of statewide concern.

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158 Id.
159 See text at note 144 supra.
160 See cases cited in Winters, Classification of Municipalities, 57 Nw. L. Rev. 279, 287 (1963).
161 The court states: "[T]hat c. 596, §3 is phrased in general terms, and is, arguably, potentially applicable to cities in addition to Cambridge at some indefinite future time, is not sufficient to meet the test which §8 of art. 89 establishes." 1972 Mass. Adv. Sh. at 1668-69, 288 N.E.2d at 289 (emphasis added).
VI. CONCLUSION

In evaluating the Belin decision, it is important to emphasize the role the court will have in determining the effect of the HRA on state-local relationships. Contrary to the position of some commentators who have indicated an apprehension that the court may narrowly construe the HRA, the Belin decision points in the other direction.

In the final analysis, the Belin decision should stand for the proposition that the court plans to follow through on the policy of restricting special legislation as enunciated in the HRA. To those who may believe that the question of proportional representation in the City of Cambridge as a political issue, which is outside the responsibility of the court, the Belin decision indicates a role for the court in evaluating this question. The status of legislative power under section 8 as a result of the Belin decision may be described as follows: "If the problem is confined to a particular city or town, it is now harder for a city or town to obtain, and for the General Court to volunteer, a solution by a state enactment."

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164 In terms of method of analysis, it appears that a two-step process will be employed as a result of Belin and other recent home rule decisions. Legislation "in relation to cities and towns" will first be analyzed on its present applicability under the "class of two" requirement. If this requirement is not met, then the court will consider the applicability of the "statewide concern" test.