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JUDICIAL NULLIFICATION OF A DEMOCRATIC POLITICAL PROCESS— THE RIZZO RECALL CASE

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In the case of *Citizens Committee to Recall Rizzo v. The Board of Elections*¹ the Supreme Court of Pennsylvania rendered one of the most extraordinary decisions of recent memory. The court declared unconstitutional a provision of the Home Rule Charter of Philadelphia for recall of elective officers at the behest of a mayor who had twice sworn to "support" the charter as provided by that instrument. In doing this the court ignored the elementary and patent distinction between recall—a political process—and removal for legal cause. Reliance was placed upon provisions of the Pennsylvania Constitution of 1874 as to removal of public officers, without any express reference to the fact that the 1922 home rule amendment to the constitution was later in adoption, and might modify inconsistent existing provisions of the constitution.

Beyond all this, the court, without benefit of participation of any other local units, laid it down *ex mero motu* for all such units that they could not constitutionally provide for recall in home rule charters, and did so without reference to the language of the broad, self-executing home rule amendment of 1968, and without examination of the home rule concept as to either the structure or powers of local government.

All that the court need have done to dispose of the case as it did was to hold that the board of elections, in rejecting the recall

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¹ 470 Pa. —, 367 A.2d 232 (1976).

petition, had not abused its discretion by acting arbitrarily or fraudulently or pursuant to an erroneous view of the law. This is not to say that such a conclusion would have been well supported. That is a matter for further consideration in this commentary. It is enough to say that had the court exercised such restraint the current recall effort would have failed, but that would have been all. Instead, the court moved at large into the constitutional domain and, by a judicial *tour de force*, removed any legal basis for another recall try by concerned citizens short of adoption of an enabling state constitutional amendment.

The recall, like the initiative and referendum, is an expression of commitment to popular government that excited great interest in this country early in this century. The three are described in an early work on the subject:

By the *initiative* is meant the right of a stated percentage of the voters, in any state or municipality, to propose both constitutional and ordinary laws, and to require that, if these be not enacted forthwith by the state or municipal legislature, they shall be submitted for ratification to the whole body of voters. By the *referendum* is meant the right of a stated percentage of the voters to demand that measures passed by the ordinary lawmaking bodies of the state or municipality shall be submitted to the whole body of voters for acceptance or rejection. By the *recall* is meant the right of the electors in any state or municipality to end by an adverse vote the term of any elective officer before the expiration of the period for which he was elected.²

In the aggregate, the three processes expressed the conception that both lawmaking and holding of elective public office are subject to the popular will.

Of course, direct democracy is of ancient origin and has been characteristic of American local government, particularly in New England states, from the early days.³ The complex condition of contemporary society certainly does not preclude popular voice in policy-making but does bespeak primary reliance upon elected representatives. Even in New England, large towns have had to resort to representative town meetings. The recall is keyed to representation as a mechanism by which an officer who does not have popular support may be removed. All of this is elementary to students

² Munro, *Introductory* in *THE INITIATIVE, REFERENDUM AND RECALL* 1-2 (1912).

³ See, e.g., J. SLX, *TOWN GOVERNMENT IN MASSACHUSETTS* (1930).

of American state and local government. It appears necessary to express it here since the majority in *Citizens Committee to Recall Rizzo* ignored it.

Some further descriptive reference, in the light of state and local experience, is in order. The recall process is more commonly confined to elective offices for the obvious reason that incumbents are directly accountable to the voters. This is clearest as to officers in the executive branch, but availability as to members of the legislative branch, particularly at the local level, is not uncommon. In some jurisdictions even judicial officers are subject to recall.⁴ Application to appointive officers does not consist with the line of accountability and may weaken the position of a responsible executive officer.⁵

It is common knowledge, of course, that the recall does not exist as to officers of the United States.⁶ Some thirteen state constitutions provide for it at the state level.⁷ Availability at the local level is much more extensive.⁸ Local recall does not generally depend upon express constitutional recognition because, apart from express constitutional limitations or devolutions of authority to local units, state legislative supremacy over local government is very broad, if not complete.⁹

⁴ See Fordham, *The Utah Recall Proposal*, 1976 UTAH L. REV. 1, 35 nn.26 & 27. Application to judges may be questioned as at odds with independence of judicial action from influences other than the merits on the law and facts. Doubtless this is why six states, in their constitutional provision for recall, except judges. *Id.* n.28.

⁵ Pennsylvania constitutional provisions as to removal ordain that appointive officers, other than judges of courts of record, may be removed at the pleasure of the power by which they shall have been appointed. PA. CONST. art. VI, § 7. This contrasts with recall of elective officers by the voters as a matter of accountability.

⁶ Recently there was the prospect of an impeachment trial of a president. Resignation ended Congressional action. The experience led to suggestions of other methods of removal. Representative Henry Reuss of Wisconsin came forward with a vote-of-no-confidence proposal borrowed from parliamentary systems. This idea was discussed in *Symposium on the Reuss Resolution: A Vote of No Confidence in the President*, 43 GEO. WASH. L. REV. 327 (1975). This writer took note in that commentary of the possibility of recall of a president without espousing it. Fordham, *The No Confidence Vote Proposal is a Dubious Idea*, *id.* 372.

⁷ ALAS. CONST. art. XI, § 8; ARIZ. CONST. art. VIII, §§ 1-6; CAL. CONST. art. II, §§ 1-6; COLO. CONST. art. XXI §§ 1-2; IDAHO CONST. art. VI, § 6; KAN. CONST. art. IV, §§ 3-5; LA. CONST. art. X, § 26; MICH. CONST. art. II, § 8; NEV. CONST. art. 2, § 9; N.D. CONST. art. 33; ORE. CONST. art. II, § 18; WASH. CONST. art. I, §§ 33-34; WIS. CONST. art. XIII, § 12.

⁸ No attempt has been made to identify all the states in which local recall exists, but a review of the case law confirms that the number is very considerable.

⁹ The proposition was put in the strongest terms in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). More recent experience dictates considerable qualification. For example, changes in local governmental jurisdiction and structure may be found not to consist with federal constitutional guarantees, notably those of the post-Civil

Whether recall is a meritorious device under any standard is not the direct concern of this paper. Once adopted, it may well be said that the courts should embrace the view that the law governing recall should be liberally interpreted in favor of the exercise of political voice by the electorate. The basis for this is that the recall is a democratic process that affords the voters structured opportunity to review the position of incumbent elective officials. It is obvious that the probabilities of some departure from the strict letter of the law in the pre-election recall process are substantial. Judicial exaction of rigid compliance with the letter of the law can have the effect of suppressing voter voice. It is doubtless such considerations that have led the courts generally to engage in liberal interpretation of law governing recall.¹⁰ A contrary view has been taken in Louisiana on the basis that recall is a harsh remedy.¹¹ This is hardly compelling; the object of recall is not to punish or to provide redress but to serve the public interest as the voters perceive it.

Some of the legal questions of current concern with respect to the recall were raised in the early years of recall experience. The principal ones had to do with whether the recall was a political process not keyed to legal cause and the authority of the cognizant officer with respect to the sufficiency of a recall petition. It can be safely said that for the most part the judicial response was (1) that recall is a political process, not grounded in legal cause,¹² and (2) that the cognizant officer's determination as to sufficiency of a recall petition was final subject only to judicial correction of action that was capricious or arbitrary and, as such, abuse of discretion, or was plainly erroneous as a matter of law.¹³

The Philadelphia experience does not suggest that the overhang of amenability to recall has been a significant factor in the political life of that large city. The petition signatories requirement of twenty-five per centum of the number who voted for mayor

War Amendments. *Comillion v. Lightfoot*, 364 U.S. 339 (1960). (Legislation so redrawing Alabama city boundary as to exclude black citizens held violative of fifteenth amendment. Patently, equal protection of the law was denied as well.)

¹⁰ This view was taken in the leading cases of *Dunham v. Ardery*, 43 Okla. 619, 143 P. 381 (1914) and *Topping v. Houston*, 94 Neb. 445, 143 N.W. 796 (1913). See also *In re Rice*, 35 Ill. App. 2d 79, 94, 181 N.E.2d 742, 749 (1962) & cases cited therein.

¹¹ *Cloud v. Dyess*, 172 So. 2d 528 (La. App. 1965).

¹² This was clearly perceived in early cases. *Dunham v. Ardery*, 43 Okla. 619, 143 P. 381 (1914); *Topping v. Houston*, 94 Neb. 445, 143 N.W. 796 (1913); *Hilzinger v. Gillman*, 56 Wash. 228, 105 P. 471 (1909). It finds support in the more recent cases as well. *In re Bower*, 41 Ill. 2d 277, 242 N.E.2d 252 (1968); *Westpy v. Burnett*, 82 N.J. Super. 239, 197 A.2d 400 (1964); *Wallace v. Tripp*, 358 Mich. 668, 101 N.W.2d 312 (1960).

¹³ *Dunham v. Ardery*, 43 Okla. 619, 143 P. 381 (1914).

in the latest preceding mayoralty election is a reasonably demanding one. The effort to recall Rizzo is the first genuine recall battle, so far as the writer is advised, in twenty-five years under the charter.

I. THE RECALL PROCESS

Briefly put, it can be said that there are three principal elements in recall. The first is the filing of a petition by voters for a recall election against an identified public officer. The second is administrative review of the petition to determine its sufficiency. The third is the holding of a recall election.

The Philadelphia Home Rule Charter makes any person holding an elective office of the city subject to removal from office at a recall election. Action is initiated by petition signed by registered electors. To be sufficient, a petition must contain, in the case of an officer elected from the city at large, signatures equal in number to at least twenty-five per centum of the vote cast for mayor in the latest preceding mayoralty election, collected within a sixty day period.¹⁴ Once a Philadelphia recall petition has been accepted by the cognizant board for filing, the incumbent may elect to resign and, thus, put an end to the process.¹⁵ Further provisions govern the conduct of recall elections, a matter not pursued here since the Rizzo proceeding did not get that far.¹⁶

What happened was that the cognizant board of elections, after obtaining several extensions of time from the Court of Common Pleas, ruled the petition invalid and rejected it. Whereupon the Citizens Committee to Recall Rizzo, which spearheaded the recall movement, sought mandamus in the Court of Common Pleas to compel the board to file the recall petition and order a recall election. Shortly thereafter Mayor Rizzo was permitted to intervene as a defendant. The trial court granted the writ.

There was no basis for objection to the standing of the incumbent mayor to challenge the sufficiency of the recall petition. He was, and is, free to insist that the charter requirements as to a recall petition be met as a condition to the holding of a recall election and to litigate the issues, as well. The challenge of the mayor to the constitutionality of the home rule charter provisions for the recall was another matter. He was twice elected subject to the provisions of the home rule charter and in both instances took the charter-mandated oath "to support" the charter. He had en-

¹⁴ PHILADELPHIA HOME RULE CHARTER, §§ 9-100 to 9-101.

¹⁵ *Id.* § 9-103.

¹⁶ *Id.* §§ 9-101 to 9-103.

joyed the benefits of the office of mayor under the charter. On what basis was he to be heard to challenge the validity of the organic law within the framework of which he was elected to and occupied the office of mayor? The answer must be "none." And so it was held in the only pertinent case that the writer has been able to identify.¹⁷ Surely it is most extraordinary that a court would entertain and uphold attack by a public officer upon the very organic law that was the foundation of his office and his tenure.

Unlike recall systems that exist in some states, that of Philadelphia does not exact that petitioners make charges or set out reasons or grounds for recall. Where there is such a requirement, it is likely to be accompanied by a provision for response by an officer who is the object of a recall petition. So it is under the Nevada Constitution.¹⁸ All this is not a matter of proof. The voters are given something to go upon and they can make of it what they will.¹⁹ The petitioners must state reasons or grounds but they bear no burden to prove. In short, the process remains plainly a political one as distinguished from legal action grounded upon cause.²⁰ The State of Washington dispensation is of interest here. The constitution of that state requires that a recall petition charge conduct that constitutes malfeasance, misfeasance, or violation of oath of office.²¹ The state courts pass upon the sufficiency of a petition in this respect but do not go into the question of the truth of the charges, or even of whether the charges were made in a good faith belief that they were true.²² In the Philadelphia situation there is no requirement of articulation of charges, grounds or reasons. The system simply fits the good old straight-issue—in or out—recall model.

It is appropriate to inquire, at an early stage, whether recall in any way transgresses limitations to be found in the Federal Constitution. The first thing to be noted is that there is no property or contract element in a public office.²³ Of course, an incumbent may

¹⁷ *Roberts v. Brown*, 43 Tenn. App. 567, 310 S.W.2d 197 (1957).

¹⁸ NEV. CONST. art. 2, § 9.

¹⁹ See *Batchelor v. Eighth Judicial Dist. Court*, 81 Nev. 629, 408 P.2d 239 (1965).

²⁰ It is of interest that the Michigan Constitution provides expressly that any statement of reasons or grounds procedurally required in the recall process shall be a political question. MICH. CONST. art. II, § 8.

²¹ WASH. CONST. art. I, §§ 33-34.

²² *Bocek v. Bayley*, 81 Wash. 2d 831, 505 P.2d 814 (1973); *Citizens Against Mandatory Bussing v. Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972).

²³ *Higginbotham v. City of Baton Rouge*, 306 U.S. 535 (1939).

obtain legal protection against unlawful interference,²⁴ but, so far as the Federal Constitution is concerned, the state may abolish an office outright with impunity at mid-term. The due process and contract clauses are no bar.²⁵ As for procedural due process, there may well be a serious question if removal is for legal cause, the determination of which may reflect upon the individual, as, for example, where removal is pursued on the ground of extortion.²⁶ But this has no relevance to removal as political action. Yet in *Citizens Committee to Recall Rizzo* the Chief Justice perceived the recall process as a denial of due process, presumably based upon the notion that due process exacted that there be legal cause and opportunity to be heard.

This reasoning was rejected in the leading case of *Gordon v. Leatherman*.²⁷ There the United States Court of Appeals for the Fifth Circuit rejected a due process attack in a Florida local recall case comparable to *Citizens Committee to Recall Rizzo* on the obvious basis that recall is political action by the voters, who may be guided by whatever considerations, just as in the case of election in the first instance. In *Leatherman* the court made the further sententious observation:

Furthermore, there is a fundamental difference between the expulsion or removal of a public official by the state and that same activity by the voters. The presence of governmental action in *McCarley* and the other cases cited in the district court opinion is alone sufficient to distinguish them from the present case. Any governmental body is required to act fairly, but that is not true as to a voter. Insofar as the United States Constitution is concerned, an elector may vote for a good reason, a bad reason, or for no reason whatsoever. That principle applies to recall elections as it does to all other elections.²⁸

II. JUDICIAL REVIEW

From the early days of recall in this country there has been judicial authority that a signatory to a recall petition has standing

²⁴ See Jarrett, *De Facto Public Officers: The Validity of Their Acts and Their Rights to Compensation*, 9 S. CAL. L. REV. 189, 231-34 (1936) (de jure officer may recover from de facto officer such compensation as has been paid the latter).

²⁵ *Higginbotham v. City of Baton Rouge*, 306 U.S. 535 (1939).

²⁶ See, e.g., *McCarley v. Sanders*, 309 F. Supp. 8 (M.D. Ala. 1970). The court in *McCarley* held that plaintiff state senator, who was charged with corruption, had been denied due process in expulsion proceedings before a senate committee.

²⁷ 450 F.2d 562 (5th Cir. 1971).

²⁸ *Id.* 567.

to seek mandamus against the cognizant officer or body to compel the calling of a recall election.²⁹ By definition, of course, the writ may not be used to control the exercise of discretion, but it may be issued to correct arbitrary or fraudulent action or an erroneous view of the law.³⁰ There is authority that the action of the officer charged with passing upon the sufficiency of a recall petition may not be challenged after a recall election.³¹ This rests upon a presumption that the officer acted according to law and that, in any event, the voters acquiesced.

A. Sufficiency of the Petition

In *Citizens Committee to Recall Rizzo*, the majority concluded that the trial court had, in effect, arrogated the board's discretion as to determination of the sufficiency of the recall petition. It was undisputed that 145,448 valid signatures were necessary to satisfy the charter requirement. The total signatures submitted were 210,806. For purposes of this commentary it is not considered essential that the administrative and judicial proceedings as to the sufficiency of the petitions be reviewed in detail. All told, the board rejected some 121,902 signatures. As appears from the opinions at the supreme court level, there were two principal categories of identified imperfections on the basis of which signatures were rejected.

(1) The board rejected 22,159 signatures on the basis that the affidavits attached to the petition sheets upon which signatures were subscribed were irregular. The majority disagreed with the trial court, and upheld the board, in excluding all signatures on sheets which contained between one-fourth and three-fourths irregular signatures, some of which were patently forgeries or otherwise irregular. The rationale was that the board could properly conclude that the affidavits themselves were false and unacceptable in view of the evident irregularities. This was supported by a negative inference the court thought the board might properly draw from

²⁹ *Dunham v. Ardery*, 43 Okla. 619, 143 P. 381 (1914). In another early case the council of the city had refused to call a recall election on the ground that the petition and the clerk's certification of its sufficiency were actually insufficient. As is not uncommon, the process involved the election of a successor to the officer being recalled. The candidate for the succession sought mandamus to compel the members of the council to convene and call an election on the basis that the petition was sufficient. He prevailed, there being no showing of fraud or mistake on the part of the city clerk. *Topping v. Houston*, 94 Neb. 445, 143 N.W. 796 (1913).

³⁰ As a general proposition this is elementary and was recognized in the early recall cases cited *supra* note 29.

³¹ *Laird v. Hall*, 49 N.D. 11, 186 N.W. 284 (1921).

the failure of the affiants to respond to the board's subpoenas and explain the discrepancies.³² The dissenting opinions of Justices Pomeroy and Roberts made the obvious and arresting point that this involved outright rejection of thousands of signatures that were valid on their faces and had not been shown to be other than genuine. The effect, as they noted, was to nullify the participation of the affected voters in the particular electoral process.³³

The perception that the questioned affidavits might, as a matter of law, be a basis for rejection of all signatures to which they related has some rational appeal, but it is blunderbuss in character. The established fact of considerable irregularities does not engender overwhelming confidence but neither does it factually establish that all "signatures" are defective. Instead of ruling all signatures out, the board was faced with the admittedly difficult task of differentiating between the good and the bad. Plainly one may swear that *A* and *B* are true when only *A* is. In that case the oath is well taken as to *A*.

(2) The Supreme Court overruled the court below, and upheld the action of the board, in rejecting 115,818 signatures on the ground that the notarization as to them was by sixteen people associated with the recall movement. These included the attorney for the recall committee, the coordinator, two salaried employees who were also petition circulators, and twelve persons who were only circulators.

The state Notary Public Law provides: "No notary public may act as such in any transaction in which he is a party directly or pecuniarily interested."³⁴ The court not only deemed this provision to apply, but gave it the effect of invalidating all the signatures so notarized, even though the statute itself created no such sanction. This is hardly more rational than to say that those who vote for recall in a recall election are serving self-interest in trying to give political effect to their views and, thus, that their votes should not be counted, statute or no statute. Is one who votes for a candidate for public office "directly interested" by that action alone in the election of that candidate? How can it be said that

³² The lower court noted that the board made no effort to enforce the subpoenas, assumed that the board had halted the inquiry, and refused to draw an unfavorable inference from the failure of the circulators to appear. *Citizens Comm. to Recall v. Board of Elections*, No. 3466 at 46 (C.P. Phila. Co., Sept. 16, 1976), *rev'd*, 470 Pa. —, 367 A.2d 232 (1976).

³³ 470 Pa. at — —, 367 A.2d at 271-72 (Pomeroy, J., dissenting); *Id.* at — —, 367 A.2d at 278-79 (Roberts J., dissenting).

³⁴ PA. STAT. ANN. tit. 57, § 165(e) (Purdon 1964).

there is such interest even if he is actively working for the election of a candidate of whom he warmly approves? This is a far cry from notarization of an act in which one has a financial or other interest affecting his individual relationships as distinguished from interest in expressing political voice. Cases involving notarization of affidavits of circulators of one's own nomination petition are distinguishable. They involve a political process, it is true, but one in which the notary is working for his own preferment to be attended usually by financial elements. A notary public law is hardly to be perceived as regulation of political activity. For a court to give a doubtful interpretation of a law as to notarial conflict of interest, unsupported by any express sanction, with so devastating an impact upon the action of over 100,000 voters in the political sphere, is nothing short of astounding. It simply makes no sense. The ruling was plainly in error.

*B. The Bearing of State Constitutional Provisions
as to Removal of Public Officers*

In holding the recall provisions of the charter unconstitutional in the state dispensation, the members of the majority rested upon varying interpretations of article VI, section 4, of the Constitution of 1874. That section, amended in 1966 and renumbered as section 7, reads:

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed. All civil officers elected by the people, except the Governor, Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.³⁵

The initial question whether the section applies to local as well as state officers has long since been determined in the affirmative.³⁶

³⁵ PA. CONST. art. VI, § 7.

³⁶ *Finley v. McNair*, 317 Pa. 278, 176 A. 10 (1935); *In re Georges Township School Directors*, 286 Pa. 129, 133 A. 223 (1926); *Vesneski v. Reid*, 265 Pa. 328, 108 A. 829 (1919).

One does not find in the record of the Constitutional Convention of 1873 specific focus upon the question. There were comments that simply assumed application to local officers.³⁷

In the principal opinion, the Chief Justice interpreted the section to mean that the methods of removal articulated therein were not exclusive as to non-constitutional officers. He went on to declare that non-constitutional elective officers were removable only for cause. The court had committed itself to the first point in an earlier case.³⁸ Justice Nix, in a separate opinion, declared the interpretation as to non-constitutional officers insupportable and insisted that the decision should be overruled.³⁹ He regarded the constitutional provisions as being fully preemptive. Justice O'Brien agreed with this; he saw no distinction between constitutional and non-constitutional officers.⁴⁰ Thus, as Justice Roberts noted, in dissenting,⁴¹ there was no majority of the seven member court supporting any particular rationale for the decision insofar as it rested on state constitutional grounds.

If the view of the Chief Justice that the methods of removal provided in the state constitution applied only to constitutional officers is correct, why is it that there must be the element of cause in other methods? As Justice Eagen pointed out,⁴² this is not expressly laid down, and the court has recognized that an officer may be ousted by abolition of the office at mid-term.⁴³

The constitution uses the word "shall." It mandates removal upon conviction of "misbehavior in office or of any infamous crime" and removal by the governor on address of two-thirds of the Senate for reasonable cause after due notice and full hearing. It could be said that these provisions simply require removal under the stated circumstances and are not limiting or preemptive language. Just such an interpretation was given language similar to the first clause in a recent Georgia case in which a recall statute for a particular county was involved.⁴⁴

³⁷ See 5 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 374 (1873) (remarks of Mr. Buckalew); 7 *id.* 560 (remarks of Mr. Buckalew).

³⁸ *Milford Township Supervisors' Removal*, 291 Pa. 46, 139 A. 623 (1927).

³⁹ 470 Pa. at —, —, —, 367 A.2d at 249, 251-54.

⁴⁰ *Id.* at —, 367 A.2d at 247.

⁴¹ *Id.* at —, —, —, 367 A.2d at 273, 287, 299 (Roberts, J., dissenting).

⁴² *Id.* at —, —, 367 A.2d at 254-55.

⁴³ *Milford Township Supervisors' Removal*, 291 Pa. 46, 139 A. 623 (1927).

⁴⁴ *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975). The case is discussed in a valuable article by Professor R. Perry Sentell, Jr. Sentell, *Remembering Recall in Local Government Law*, 10 GA. L. REV. 883, 906-11 (1976).

III. HOME RULE

While the four justices who constituted the majority in *Citizens Committee to Recall Rizzo* did not agree upon a rationale, they stood on common ground as to a central element in the case—home rule. In three opinions they simply ignored the home rule concept and the constitutional provisions on home rule.⁴⁵ Not so the dissenters.

Municipal home rule is not a concept with fixed, unvarying content. Historically the home rule movement has had two principal thrusts: (a) provision of local unit freedom from legislative tinkering as to structure, personnel responsibilities and powers and (b) assurance of freedom from dependence upon enabling legislative action as to structure and authority.⁴⁶ This puts the matter rather tersely. It is in the context of familiar American governmental and political experience.

Back in the nineteenth century there was a major attack upon legislative abuse in relation to local government in the form of state constitutional limitations upon special legislation.⁴⁷ This had some effect despite extensive ingenious and ingenuous legislative resort to narrow classifications that were designed to "get around" the limitations, and relate particularly to the larger urban local units. Thus, Philadelphia long has been, by population classification, the only Pennsylvania city of the first class. But this development did not respond to the desired extent to the interest in local autonomy. So today there is some sort of constitutional recognition of municipal home rule in over thirty-five states⁴⁸ and county home rule in over fifteen.⁴⁹

It is to be noted here that the home rule movement was given impetus by a rather strict constructionist judicial attitude concerning the law governing local entities. The central figure in this was Judge John F. Dillon, the first great American legal expert on municipal finance, whose major treatise on Municipal Corporations remains the greatest general legal treatise in the field. The

⁴⁵ The majority was not helped by the briefs, where home rule appears not to have been argued.

⁴⁶ Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948).

⁴⁷ Pennsylvania was among the states that enacted such limitations. PA. CONST. art. III, § 32 (1874, amended 1967). For a discussion of such abuses, see J. FORDHAM, *LOCAL GOVERNMENT LAW* 20 (rev. ed. 1975).

⁴⁸ See J. FORDHAM, *supra* note 47, at 73.

⁴⁹ *Id.*

celebrated Dillon rule of strict construction,⁵⁰ is one of the most quoted passages to be found in the reports of decisions of state courts of last resort. There is hardly any doubt that the influence of the Dillon rule upon the state courts strengthened the movement for constitutional recognition of local home rule.

Traditional home rule theory makes the availability of substantive home rule powers depend upon the adoption of a home rule charter.⁵¹ So conceived, a home rule charter is an instrument of grant and not of limitation. The governing constitutional provision may make an allocation of power to local units in terms of authority over local affairs as distinguished from state concerns⁵² and may, in addition, place some specific functions and powers beyond legislative control.⁵³ The provision may be self-executing with the effect that local units may adopt home rule charters and exercise home rule powers without dependence upon implementing legislation.⁵⁴

A variant, which has been articulated in a set of Suggested Constitutional Provisions for Home Rule by this writer, makes a direct constitutional devolution of substantive home rule powers dependent only upon the adoption of a home rule charter.⁵⁵ It does not place any substantive power or function beyond legislative control by general law. Under this approach a home rule charter is an instrument of limitation and not of grant.

The first Pennsylvania constitutional response was relatively late. It came in 1922. The amendment provided for home rule for cities:

Cities may be chartered whenever a majority of the electors of any town or borough having a population of at least ten thousand shall vote at any general or municipal election in favor of the same. Cities, or cities of any particular class, may be given the right and power to frame and adopt their own charters and to exercise the powers and authority of local self-government, subject, however, to such restrictions, limitations, and regulations, as may be imposed by the Legislature.⁵⁶

⁵⁰ J. DILLON, *MUNICIPAL CORPORATIONS* § 237 (5th ed. 1911) *quoted in* J. FORDHAM, *supra* note 47, at 58.

⁵¹ *See generally* H. MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916).

⁵² *See, e.g.,* OHIO CONST. art. XVIII.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Fordham, *Model Constitutional Provisions for Municipal Home Rule* (1953), *reprinted in* J. FORDHAM, *supra* note 47, at 76-84.

⁵⁶ PA. CONST. art. XV, § 1 (1922, repealed 1968).

Obviously this was not self-executing as to either charter-making or substantive powers. Implementing legislation was not enacted until 1949.⁵⁷ It was applicable only to cities of the first class of which Philadelphia is, by population definition, the only one. The Philadelphia Home Rule Charter was adopted pursuant to this act in April, 1951.

Since the 1922 home rule amendment is amendatory of the Constitution of 1874, it must, as an elementary rational matter, be regarded as controlling over provisions of the Constitution of 1874 with which it is inconsistent. The question here is whether the home rule grant, as effectuated by the enabling act, empowered the city to provide for recall of elective officers.

The reference in the 1922 amendment to framing and adoption of charters is very general. How broad is it as to governmental structure and personnel? One suggests that it is very broad in keeping with a purpose to pave the way for cities to be enabled to have free range in their governmental arrangements.⁵⁸ Thus, there is constitutional basis here for a home rule charter to provide for recall under general enabling legislation. The only substantial question is whether the 1949 enabling act imposed governing restrictions that exclude recall. Certainly it did not do so expressly. Section 17 of that act provides in part:

The charter of any city adopted or amended in accordance with this act may provide for a form or system of municipal government and for the exercise of any and all powers relating to its municipal functions, not inconsistent with the Constitution of the United States or of this Commonwealth, to the full extent that the General Assembly may legislate in reference thereto as to cities of the first class, and with like effect, and the city may enact ordinances, rules and regulations necessary and proper for carrying into execution the foregoing powers and all other powers vested in the city by the charter it adopts or by this or any other law.⁵⁹

Here the first question is whether the limitation as to extent of legislative power to act applies to governmental form or system as well as substantive powers. It is open to that interpretation but

⁵⁷ PA. STAT. ANN. tit. 53, § 13101 (Purdon 1957).

⁵⁸ It seems fair to say that provision for adoption of home rule "charters" contemplates as a basic component the erecting of a structure of government, because that is a characteristic element of a charter government.

⁵⁹ PA. STAT. ANN. tit. 53, § 13131 (Purdon 1957) (footnotes omitted).

that is not an end to this matter. As this writer perceives the 1922 home rule amendment, the legislature derives from that amendment plenary power to enable cities to adopt their own charters. This is basic. The legislature is fully empowered to effectuate the amendment. The enabling act makes a plenary grant as to form and system of government subject, at most, to largely substantive power limitations in section 18, which do not have any bearing on recall.⁶⁰ Thus, the city had power to provide by home rule charter for recall.

The enabling act expressly treated power to amend a home rule charter on the same footing as authority to adopt such a charter in the first instance. Thus, there was no evident bar to changing the pattern of municipal offices by charter amendment in a way that might even eliminate an existing office at mid-term. If this be so, how may one logically treat local charter provision for recall any differently?

There is an early decision in the State of Washington, *Hilzinger v. Gillman*,⁶¹ duly noted in the dissenting opinions of Justices Pomeroy and Roberts,⁶² that upheld recall as a political process in a constitutional dispensation not unlike that involved in *Citizens Committee to Recall Rizzo*. The state constitution provided as to officer removal that "[a]ll officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office in such manner as may be provided by law."⁶³ That instrument provided for city home rule in these terms: "[a]ny city containing a population of twenty thousand inhabitants, or more, shall be permitted to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state" ⁶⁴ The suit was one by a councilman to enjoin the city clerk of the City of Everett from certifying to council the sufficiency of a recall petition. Plaintiff contended that there was lack of constitutional or statutory authority for recall. As to consistency with the constitutional provisions concerning removal, the court observed that there was no real inconsistency between provision for removal for cause and independent provision for removal by political action, such as recall.

⁶⁰ The limitations of § 18, PA. STAT. ANN. tit. 53, § 13133 (Purdon 1957), have been considered to relate only to "substantive matters of State-wide concern." *Lennox v. Clark*, 372 Pa. 355, 379, 93 A.2d 834, 845 (1953).

⁶¹ 56 Wash. 228, 105 P. 471 (1909).

⁶² 470 Pa. at —, 367 A.2d at 266 (Pomeroy, J., dissenting); *id.* at —, 367 A.2d at 286 (Roberts, J., dissenting).

⁶³ WASH. CONST. art. V, § 3.

⁶⁴ *Id.* art. XI, § 10 (1889, amended 1964).

On the home rule issue, the court wrote:

The people of the city of Everett in framing the charter intended that their representatives should be held strictly amenable to both the existing and changing public sentiment on all local measures, and that if the official conduct of any elective officer failed at any time to so respond, he was subject to recall if the majority of the electorate in his district so determined. The [plaintiff] accepted the trust subject to this power in his constituency, and the duration of his term of office is dependent upon the wish of the majority as expressed at the polls. The removal sought is not of the character provided for in the constitution. Whether the interests of the city will be better subserved by a ready obedience to public sentiment than by a courageous adherence to the views of the individual officer on questions of public concern is a political, and not a legal question.⁶⁵

It is to be noted that there is a Minnesota precedent which lends ambivalent support to the *Citizens Committee to Recall Rizzo* position that the general constitutional provision as to removal of public officers for malfeasance or nonfeasance exacts that that element be present in the recall process.⁶⁶ In that case the court declared that it was necessary that a recall petition, under a home rule charter that called for statement of grounds for removal in a recall petition, set out grounds that constituted malfeasance or nonfeasance. The court expressly recognized that the final determination would be made by the voters. This was rather incongruous because it involved no system of pleading, proof or adjudication. But it did not outlaw the recall.

Perhaps the most astounding aspect of the instant case is the gratuitous action of the majority in laying it down that recall could not constitutionally be provided by a home rule charter under the home rule amendment of 1968. Article IX, section 2 reads:

Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or re-

⁶⁵ 56 Wash. at 235, 105 P. at 474.

⁶⁶ *Jacobsen v. Nagel*, 255 Minn. 300, 96 N.W.2d 569 (1959). See also *Williams v. State*, 197 Ala. 40, 72 So. 330 (1916) (constitutional provision for removal of local officers for cause by judicial action precludes removal by recall). The reasoning in the latter case is certainly open to question. The majority seemed to find great significance in the distinction between shortening the term of an office prospectively and ousting an incumbent by recall. The merit of such a distinction is doubtful given that a nonconstitutional office is subject to legislative abolition at any time.

peal of a home rule charter shall be by referendum. The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors. If the General Assembly does not so provide, a home rule charter or a procedure for framing and presenting a home rule charter may be presented to the electors by initiative or by the governing body of the municipality. A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.⁶⁷

Plainly the direct constitutional grant of power is self-executing. The section embraces the writer's home rule theory. Neither enabling nor implementing legislation is required. There is reserved to the legislature power to deny to a home rule charter unit authority to exercise a power or function, but there is no express reservation of that sort as to governmental structure and administration. Thus, home rule power as to the latter appears to be plenary. The legislature had not undertaken, in any event, to deny a home rule charter unit power to provide for recall.

The result for Philadelphia, after the ruling of the Pennsylvania Supreme Court, was not only that the particular effort to recall failed, but also that there was left no constitutional basis for any further effort, however impeccable the conformity with the prescribed recall process. The opinion of the court and the concurring opinions do not even cite the 1968 amendment, let alone refer to its text and consider the meaning and effect of its language with specific reference to the nature and scope of home rule powers directly granted by this constitutional amendment.

One is brought to make the observation that the court's brave talk about due process in putting the quietus upon recall is the antithesis of its treatment of general function units in the state other than Philadelphia. They had no hearing on the important constitutional issue that the court went on to settle for them. What renders this all the more distressing is that the court had no discernible basis for departing from the wise policy of confronting constitutional questions only when genuinely necessary to the disposition of a case. As a matter of basic fairness, as well as proper performance of the judicial function, the court's action deserves no better mark than a failing grade.

⁶⁷ PA. CONST. art. IX, § 2. "Municipality" is defined by the Pennsylvania Constitution to cover "a county." *Id.* art. IX, § 14.

There is an interesting question as to whether the 1968 home rule amendment is to be considered as having validated the recall provisions of the Philadelphia home rule charter, in any event. Certainly validating effect could not be denied had the 1968 amendment contained express validating language.

The home rule provision in the Pennsylvania Constitution—article XV, section 1—that under which the Philadelphia Home Rule Charter was adopted—was repealed in the process of adoption of the 1968 amendment. The home rule grant is in article IX, section 2, of the largely amended constitution. The repeal was dealt with in a schedule. Neither in the new home rule section nor in the schedule was there any express saving clause or validating language.

The home rule charter law enacted in 1972 is by way of implementation of the 1968 amendment.⁶⁸ It is expressly provided in the act that it does not apply to any city or county of the first class.⁶⁹ The upshot of all this appears to be that Philadelphia is operating under the broad 1968 grant which must be, in effect, a validation of its charter, there being no other constitutional source of authority.

IV. THE FUTURE

One makes the obvious suggestion that the Constitution of Pennsylvania be so amended as to provide a legal basis for the recall of local elective officials in the executive and legislative branches. The choice should be there if home rule is to be broadly meaningful.

In Philadelphia a mayor is elected for a four-year term. This is a substantial period that affords time for significant leadership and service. It is also a long period to have in office a mayor who is not measuring up to the expectations of the voters. Surely there is basis for serious doubt that the overhang of the electorate's recall option would render a mayor of any quality too cautious to assert vigorous leadership.

If notions of local autonomy embrace anything, they comprehend local selection of local officers. This rationally covers not only initial selection but also continuance in office. This is not to say that the recall has an indispensable quality. It is simply to respect local voice in local government.

⁶⁸ Home Rule Charter and Option Plans Law of 1972, PA. STAT. ANN. tit. 53, §§ 1-101 to 1-1309 (Purdon 1974).

⁶⁹ *Id.* § 1-1301.