

Local Government Autonomy

Needs for State Constitutional Statutory, and Judicial Clarification



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Needs for State Constitutional
Statutory, and Judicial Clarification

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EXECUTIVE SUMMARY

Local government in the United States has a rich history. Cities, counties, towns, townships, boroughs, villages, school districts, and a host of special purpose districts, authorities, and commissions make up the **86,743** units of local government counted in the 1992 Census of Governments. These local governments have many different forms and organizational structures. Variations in the numbers and forms of local government arise from each state's unique political culture.

Local self-government has been institutionalized in thousands of compacts, charters, special acts, statutes, constitutional provisions, resolutions, ordinances, administrative rulings, and court decisions. Among these enactments, state constitutional provisions are singled out for special attention in this report.

State constitutional provisions that speak directly to the allocation of authority between state and local government embody a judgment about the preferred allocation of power within the state. These provisions have been created, revised, and refined over time as a popular political response to empirical conditions. As such, they are the cornerstones on which any sound theory of local government autonomy can be built.

The Commission's findings on the relationship of the states and local government autonomy are as follows:

Home rule for municipal and county governments is now available in most states. By state constitutional and/or general law provisions, **48** states grant home rule authority to municipalities and **37** states grant such powers to counties.

Two legal concepts of local government have contended for ascendancy in the American federal system: home rule and creatures of the state. The home rule concept of granting greater discretionary authority to local governments has been gaining ground on the creatures-of-the-state concept of strict limits on local discretionary authority. Most states have adopted a system of devolved powers for local governments within which they can act freely.

Local government autonomy consists of degrees of discretionary authority separately established for cities and counties in four basic areas: (1) structure—determining their form of government and internal organization;

(2) function—choosing the functions they perform; (3) fiscal—raising revenue, borrowing, and spending; and (4) personnel—fixing the numbers, types, and employment conditions of their employees.

The most common form of home rule grants initiative to local governments. Local governments, however, are not immune from constitutional and/or statutory limits on these grants of initiative. State restrictions do not present local government immunity in strongly positive terms, allowing the courts to rule in favor of the state more often than not.

Home rule is jeopardized if the state legislature is free to impose unfunded mandates on local governments. Sometimes, these state mandates are the result of federal mandates. States have not always relaxed the restrictions on the fiscal autonomy of local governments or provided them with additional resources to cope with mandates. This double burden places financial pressures on local governments and reduces their ability to make choices about local priorities—effectively reducing local autonomy.

As home rule has become a common feature of state constitutions and general state law, the relationship between the states and their local governments has become more complicated. Increasingly, state courts are serving as arbiters of state-local relations. Courts have begun to recognize local governments as “juridical persons” able to sue their parent state government. In addition, courts have played a major role in defining the constitutional framework of interlocal cooperation.

There is no single best model of constitutional language that states can apply to clarify the extent and limits of local government autonomy. Different state courts can, and often do, interpret identical constitutional language differently. A state's civic culture, legislative traditions, and judicial temperament all affect such interpretations. Local governments in some states prefer a statutory rather than constitutional approach to the definition of local government autonomy.

Based on these findings, the Commission recommends the following:

(1) *That the states increase and clarify local home rule*

by adopting constitutional and/or statutory provisions granting broad powers of structural, functional, fiscal, and personnel authority to local governments and authorizing joint exercise of authority.

- (2) *That the states review their constitutional provisions and/or statutes governing the powers of local governments and consider amending them as appropriate to clarify the extent of local power, the degree of immunity ~~from~~ state statutes, liberal rules of construction to be followed by the courts in interpreting constitutional or statutory provisions in favor of local governments, the status of local governments as juridical*

persons, and the extent to which autonomy and discretion are to be accorded to different types of local governments.

- (3) *That the statewide local government organizations and their national counterparts cooperate to provide legal support to advocating local assertion of initiative powers and immunity from the reach of state government.*
- (4) *That state and federal courts reconsider local government as entailing citizen rights of local self-government, not merely as creatures of the states.*

PREFACE

The importance of local self-government in the United States, and its relationship to state governments through constitutional and statutory provisions, needs reexamination. Agreement on the principles, purposes, and roles of local governments is not universal. This lack of consensus is most apparent in the pronouncements of state and federal courts.

There are two competing legal concepts of local government in the American federal system, which can be summed up by Dillon's Rule ("creatures of the state") and the Cooley Doctrine ("home rule"). A survey of recent court decisions indicates that many state constitutional and statutory provisions may not contain the degree of local government legal autonomy desired by home rule proponents.

In this report, the Commission recommends that local self-government requires clarification of state constitutional and statutory formulations of home rule to refocus the debate over how to balance state control and local autonomy.

The Commission also reviews the historical underpinnings of the American tradition of local self-government. **This** historical dimension provides a basis for rethinking the allocation of authority between local governments and the states in state constitutions, statutes, and court decisions.

The development of American local self-government is inextricably linked to an expansive concept of citizenship. Local government is a key institutional mechanism

for securing citizen participation in designing the instrumentalities for making public policy decisions. State constitutions and statutes reveal that citizenship encompasses empowering local citizens to create structures of governance to define and solve common problems. Each state must clarify its state-local government relationship. If states enact unfunded mandates and regulatory restrictions on local governments, they impose a serious restraint on the ability of those governments to exercise even a modicum of autonomy.

The historical relationship between states and local governments developed in the twentieth century into a complex web of shared responsibilities. The courts have played an ever larger role in interpreting the limits of the exercise of local powers and state legislative powers. Local governments are being recognized more and more as "juridical persons" able to sue the state. The Commission recommends that the organizations representing local governments coordinate resources to provide effective legal support to local governments in meritorious suits when their initiative and immunity are threatened by state action.

The Commission reiterates its support for well-defined powers of local autonomy. The long and thriving tradition of local government can encourage and strengthen local autonomy. The clarification of home rule by the states can help restore the state-local balance in the system.

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FINDINGS AND RECOMMENDATIONS

Findings

The States and local Government Autonomy

1. Home rule for municipal and county governments is now available in most states.

Forty-eight states grant home rule authority to municipalities and 37 states grant such powers to counties. These grants of authority are provided by the state constitutions and/or by general law.

For municipalities, 37 states grant home rule by constitutional provision and 34 by general law (24 states have both types of provisions, 13 use the constitution only, and 10 use general law only).

For counties, 23 states grant home rule authority by constitutional provision and 25 by general law (12 states have both types of provisions, 11 use the constitution only, and 13 use general law only).

Between 1978 and 1992, five states granted home rule authority to municipalities. On the county side, nine more states provide home rule authority now than in 1978.

2. Two legal concepts of local government have contended for ascendancy in the American federal system: home rule and creatures of the state. The home rule concept (granting greater discretionary authority to local governments) has been gaining ground on the creatures-of-the-state concept of strict limits on local discretionary authority.

The idea of local governments as creatures of the state is embodied in Dillon's Rule, which holds that the political subdivisions of a state owe their existence to grants of power from the state. Therefore, local governments possess no inherent sovereignty. Their powers are construed strictly to be no more than what is expressly permitted by state statute. No room can be made for discretionary authority or even incidental powers.

The home rule concept was initially articulated in the Cooley doctrine, holding that local government is a matter

of absolute right, which cannot be taken away by the state. Few states have followed this rule, however. Instead, most states adopted what became known as the Fordham Rule, which sets out an area of devolved powers for local governments within which they can act freely. This approach provides home rule localities with a liberal construction of their powers, limiting state court imposition of a doctrine of implied preemption.

3. Local government autonomy consists of degrees of discretionary authority separately established for cities and counties in four basic areas: (1) structure—determining their form of government and internal organization; (2) function—choosing the functions they perform; (3) fiscal—raising revenue, borrowing, and spending; and (4) personnel—fixing the numbers, types, and employment conditions of their employees.

In most states, the amount of discretionary authority differs for cities and counties and for the four different types of power. Grants of structural and functional authority frequently exceed grants of financial and personnel powers. These imbalances can create difficulties for local governments.

4. Home rule can (1) empower local governments to take initiative, (2) confer immunity on local governments from the reach of state legislation, and (3) instruct the state courts to interpret grants of local authority liberally in favor of local discretion. States have focused most of their authorizations on initiative; few state grants of home rule authority include or adequately address immunity and liberal construction.

The most common form of home rule grants initiative to local governments, subject to constitutional and/or statutory limits. Such limitations are frequently substantial. Immunity from such limitations often are weak or absent. Also, instructions to the courts to interpret liberally in favor of local governments are frequently absent. Without these provisions, the courts generally rule in favor of the state.

5. Home rule is jeopardized if the state legislature is free to impose unfunded mandates on local governments.

State legislatures have imposed an increasing number of mandates and regulatory restrictions on local governments as the result of statewide policies. Sometimes, these state mandates are the result of federal mandates. At the same time, states have not always relaxed the restrictions on the fiscal autonomy of local governments or provided them with additional resources to cope with mandates. **This** double burden places severe financial pressures on local governments and reduces their ability to make choices about local priorities—effectively reducing local autonomy.

6. As home rule has become a common feature of state constitutions and general state law, the relationship between the states and their local governments has become more complicated. Increasingly, therefore, state courts are serving as arbiters of state-local relations.

During the colonial era, the royal executive granted local government charters, following the English tradition. After the Revolution, state legislatures ordinarily exercised this responsibility by special acts that provided local governments with individualized powers—always subject to legislative revision. By the 1870s, however, misuse of the legislative power to create local governments led to reform movements seeking general laws for local government authority and constitutional recognition of home rule outside the scope of state legislative discretion.

As a result, state-local relations have become more complex. Today, in any one state, the scope of home rule or local autonomy is often difficult to discern. Moreover, constitutional and statutory protections of local autonomy do not eliminate legislative authority. State courts, therefore, have taken on a key role in interpreting the limits of the exercise of local powers and state legislative powers.

In several states, the courts have begun to recognize local governments **as** “juridical persons” able to sue their **parent** state government, thus conferring (or at least asserting) state constitutional claims against the state sovereign. **Also**, some state courts have scrutinized more closely legislation intended to affect specific local governments and have heard challenges to these acts as special or local laws. In addition, courts have played a major role in defining the constitutional framework of interlocal cooperation. In each area of local discretionary authority—structural, functional, fiscal, and personnel—state courts have made major contributions to the definition of state-local relations.

Nevertheless, state courts across the nation take very different approaches to home rule. Even the same state court may issue confusing dicta on the subject of state-local relations. Thus, although there is a discernible trend toward a greater recognition for local government autonomy, the guidance for local governments is far from clear.

7. There is no single best model of constitutional language that states can apply to clarify the extent and limits of local government autonomy.

Different state courts **can**, and often do, interpret identical constitutional language differently. A state’s civic culture, legislative traditions, and judicial temperament all affect interpretations of constitutional language. Thus, constitutional language with respect to local government must be adapted to the civic culture and traditions of each state. Indeed, because of prevailing traditions, local governments in some states prefer a statutory rather than constitutional approach to the definition of local government autonomy.

Recommendations

Recommendation 1

Reaffirming the Need for Local Discretionary Authority While Preserving State Responsibilities

The Commission finds that its previous recommendations encouraging states to formalize a thriving system of local self-government are as important as ever. To be effective and accountable, local governments need the flexibility and autonomy to undertake the responsibilities allocated to them and the responsibilities chosen for them by their citizens.

The Commission reaffirms, therefore, its previous recommendations to the states to increase and clarify local home rule by adopting constitutional and/or statutory provisions granting broad powers of structural, functional, fiscal, and personnel authority to local governments and to authorize them to exercise their authority jointly with other governments as they deem best.

Recommendation 2

Strengthening local Immunity from State Preemptions and Mandates

The Commission finds that the provisions for local home rule and discretionary authority in many states are being eroded by increases in regulatory and statutory control of local government functioning through enactment of federal and state mandates and preemption of local decisionmaking. The state courts have increasingly asserted their power to adjudicate state-local relations, supplying their own solutions in the absence of clear constitutional and/or statutory direction. Thus, ambiguity in state-local relations places substantial political decisionmaking authority in the hands of the judiciary.

The Commission recommends, therefore, that the states review the local government articles in their constitutions and/or statutes governing the powers of local governments, and

consider amending them **as** appropriate to clarify:

- (a) *The extent of local power intended to initiate structural, functional, fiscal, and personnel matters without prior permission of the state, and to ensure a proper balance among these powers;*
- (b) *The degree of immunity from the reach of state statutes intended, including limitations on the right of the state to preempt local authority and to mandate functions without giving local governments the fiscal resources to carry out required functions;*
- (c) *Liberal rules of construction to be followed by the courts in interpreting these constitutional or statutory provisions in favor of local governments;*
- (d) *The status of local governments as juridical persons having the same capacity and rights to assert legal claims against the state as natural persons and private corporations; and*
- (e) *The extent to which autonomy and discretion are to be accorded to different types of local governments, including counties, municipalities, townships, school districts, and special districts.*

Recommendation 3

Enhancing the Ability of Local Governments to Challenge State Governments in Suits over Powers

The Commission finds that, in virtually all states, local government interests are represented in the state capital by local government associations or leagues. Their effectiveness in challenging state legislation that affects local governments adversely varies across states. Some statewide local government associations possess strong in-house counsel that monitors state legislative activities actively and represents local interests quickly and thoroughly in court. Others, however, **rely** on private ad hoc expert counsel, leaving the results very much to chance. Moreover, individual local governments rarely have the time and resources to match the

state's legal resources in specific cases. Such **an** inconsistent arrangement for professional counsel is **not** conducive to sustained local government advocacy.

The Commission recommends, therefore, that the statewide local government organizations and their national counterparts cooperate to provide continuous, well-financed, and well-staffed legal support devoted to advocating the local government assertion of local initiative powers and local immunity from the reach of state government.

Recommendation 4

Recognizing an Alternative Theory of Local Government Autonomy

Although the United States Supreme Court has sanctioned the view that local governments are essentially the legal creatures of the states, the Commission finds that there is another, equally persuasive, theory of local government status in America. Best articulated by Judge Thomas Cooley of Michigan in the late nineteenth century, this theory holds that American local government has an inherent right to self-rule, that is, a sovereignty of its own. This concept was embodied in some early state constitutions, such as Massachusetts, that gave local governments representation in the state legislature.

Nevertheless, such a view has not been favored by the federal courts and many state courts. Given the historical strength of this alternative view of American local government, the Commission finds that the courts are distorting a vibrant chapter in the American history of local government.

*The Commission recommends that the courts begin to look more seriously again at an alternative view of local government in America, which stresses the primacy of local government sovereignty. Such a view should be evaluated **as** the basis for making decisions about the powers of local governments, thus challenging the authority of the creatures-of-the-state theory confirmed by the U.S. Supreme Court.*

Part I

***LOCAL GOVERNMENT LEGAL AUTONOMY:
THE ISSUE OF CONSTITUTIONAL CHOICE***

DEFINING LOCAL GOVERNMENT LEGAL AUTONOMY

Local government in the United States has a rich history of variety, both in type and form. Cities, counties, towns, townships, boroughs, villages, school districts, and a host of special purpose districts, authorities, and commissions make up the 86,743 distinct units of local government counted in the 1992 Census of Governments. These local units of government have many different forms and organizational structures. In New Jersey, for instance, local governments can adopt one of **12** different organizational forms of government. Variations in the numbers and forms of local government arise from the unique political cultures and forces that created and shaped local self-government in each state.

Experience with local government, which is shared by all Americans, **has** rarely given **rise** to sustained and systematic reflection about the relationship between local government and the state.¹ Instead, the desire for local self-government has been institutionalized in thousands of compacts, charters, **special** acts, statutes, constitutional provisions, resolutions, ordinances, administrative rulings, and court decisions since the earliest dates of settlement of this country.² Among these enactments, state constitutional provisions are singled out for special attention in this report.

Analysis of state constitutional provisions can further our understanding of the complex relationships between state government and its political subdivisions in the American political system. Today, local government autonomy is understood to be an important part of this system, and no account of American federalism that omits the dynamic interplay of local governments with the federal and state governments does justice either to historical experience or contemporary practice.

Indeed, state constitutional provisions that speak directly to the allocation of authority between state and local government embody a judgment about the preferred allocation of power within the state in the most authoritative way. These provisions, of course, have been created, revised, and refined through time, as a popular political response to empirical conditions. **As** such, then, they are the cornerstones on which any sound theory of local government autonomy can be built.

Autonomy as Determined by Initiative and Immunity

This report begins by examining the legal definition of local government autonomy. One of the most useful classifications of local self-government is Gordon Clark's principles of autonomy. These principles distinguish between a local government's power of initiative and its power of **immunity**.³ By initiative, Clark means the power of local government to act in a "purposeful goal-oriented" fashion, without the need for a specific grant of **power**.⁴ By immunity, he means "the power of localities to act without fear of the oversight authority of higher tiers of the state."⁵

There are four variations in the exercise of these two components to autonomy:

- (1) Powers of both initiative and immunity;
- (2) Power of initiative but not immunity;
- (3) Power of immunity but not initiative; and
- (4) Neither power of initiative nor immunity?

Powers of Both Initiative and Immunity

Initiative and immunity powers as expressed in state constitutions vary considerably from one state to another. The Colorado Constitution, for example, confers both initiative ("the people of each city and town of this state . . . are hereby vested with, and they shall always have, power to make, amend, add to, or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters") and immunity ("such charters and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith").⁶ These texts both empower the home rule unit to exercise initiative **as** to all local and municipal matters and immunizes the home rule unit from state legislative interference in all local and municipal matters.

Power of Initiative but Not Immunity

Pennsylvania's home rule provision exemplifies how states afford a charter unit the authority to "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." It grants initiative but not immunity? In this formulation, known as the Fordham-American Municipal Association devolution-of-powers approach to local governance? the state legislature has a free hand in defining and limiting the scope of local initiative.

Power of Immunity but Not Initiative

State constitutions contain several types of provisions conferring immunity, but not initiative, on local government. For example, the Utah Constitution prohibits the legislature from passing any law granting the right to construct and operate a street railroad, telegraph, telephone, or electric light plant within any city or incorporated town "without the consent of local authorities."¹⁰ Thus, a Utah municipality cannot be forced to accommodate certain state-franchised utilities, but may not otherwise have any affirmative regulatory authority over these enterprises.

Virginia's prohibition of state taxation for local purposes does not, for example, provide thereby its political subdivisions with affirmative taxing authority." In several states, the "ripper clause"¹² forbids the legislature from delegating "to any special commission, private corporation, or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects . . . or to levy taxes or perform any municipal function whatsoever" without conferring on protected municipalities any correlative power to initiate action in any of the enumerated policy areas.¹³ Also, state constitutional prohibitions against special or local laws are aimed at conferring immunity, but not initiative, on local governments.¹⁴

Neither Power of Initiative Nor Immunity

The Connecticut Constitution illustrates the strict control by the state over its political subdivisions. It states:

The General Assembly shall . . . delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs relative to the powers, organization, and form of government of such political subdivisions.¹⁵

The apparent utility of this type of provision is to defeat challenges to a broad allocation of authority to local governments based on a delegation doctrine or due process claims.¹⁶

Shortcomings of the Immunity and Initiative Concepts

Although Clark's classification of these concepts helps in understanding local legal autonomy, it is both inadequate and overly general.

Sho Sato and Arvo Van Alstyn help fill this gap, using the example of the practical, everyday problems of those who give legal advice about home rule:

From the viewpoint of the attorney—whether he represents a public agency or a private client—the significant issues relating to home rule ordinarily cluster around three distinguishable problems: (1) to what extent is the local entity insulated from state legislative control; (2) to what extent in the particular jurisdiction does the city (and in some states the county) have home rule power to initiate legislative action in the absence of express statutory authorization from the state legislature; and (3) to what extent are local home rule powers limited, in dealing with a particular subject, by the existence of state statutes relating to the same subject?"

It is this third aspect of home rule, the preemption question, that is important in determining the true scope of local government autonomy.

The Illinois Constitution speaks directly to this preemption issue when it asserts that "home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."¹⁸

One other difficulty that initiative and immunity models of local government autonomy face is the ability to cope with collaboration in intergovernmental relations, intergovernmentally (among federal, state, and local governments), interjurisdictionally (among counties, cities, and special districts), and with the private sector.¹⁹ The collaborative perspective has undoubtedly influenced the entrenchment of rules concerning interlocal cooperation and transfer of functions in state constitutions.²⁰ Thus, the Illinois Constitution provides that:

Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations,

and corporations in any manner not prohibited by law or ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.²¹

Structural, Functional, Fiscal, and Personnel Autonomy

The notion of autonomy as both initiative and immunity is not specific enough to facilitate the task of constructing indices of local discretionary authority;²² additional tools are needed.

These tools were presented in a report of the U.S. Advisory Commission on Intergovernmental Relations (ACIR) entitled *Measuring Local Discretionary Authority* (1981). In this report, ACIR defined local discretionary authority as:

the power of a local government to conduct its own affairs—including specifically the power to determine its own organization, the functions it performs, its taxing and borrowing authority, and the numbers and employment conditions of its personnel.”

Examining these four dimensions of local government discretionary authority—structure, function, fiscal, and personnel²⁴—helps citizens and public officials get a clearer picture of local government autonomy and the trends affecting it. It enables the observer—whether trained in law, public administration, or political science—to organize and synthesize the otherwise unwieldy universe of state constitutional provisions, and court cases interpreting them, that bear on the question of local autonomy.

There is much debate as to whether courts are unduly hostile or friendly to local autonomy.²⁵ This debate parallels the perennial discussion on the merits of centralization versus decentralization in American government.²⁶ A careful study of state constitutions can reveal how much and to what extent constitutional provisions have been shaped in reaction to judicial decisions concerning the division of powers between states and their units of local government.

Thus, the four categories of discretionary authority defined in the 1981 report are reviewed in the next chapter to determine their fruitfulness in analyzing local government autonomy.

Notes

¹ Exceptions include: Arthur Maass, ed., *Area and Power* (Glencoe, Illinois: The Free Press, 1959); Anwar Syed, *The Political Theory of American Local Government* (New York: Random House, 1966); W. Hardy Wickwar, *The Political Theory of Local Government* (Columbia: University of South Carolina Press, 1970).

² A comprehensive account of the allocation of authority between state and local government, even in a single jurisdiction, has never been written. The complexities involved are well illustrated by Joseph Zimmerman's discussion of how advisory opinions by the attorney general and comptroller of the State of New York constrict or broaden the statutory powers of local governments. Joseph F. Zimmerman, *State-Local Relations: A Partnership Approach* (New York: Praeger Publishers, 1983), pp. 34-37.

³ Gordon L. Clark, *Judges and the Cities, Interpreting Local Autonomy* (Chicago: University of Chicago Press, 1988), and "A Theory of Local Autonomy," *Annals of the Association of American Geographers* 74 (Spring 1984): 195.

⁴ Clark, "A Theory of Local Autonomy," p. 197.

⁵ *Ibid.*, p. 198.

⁶ *Ibid.*, p. 199. He then goes on to relate these ideal types to several concrete examples of local governments: (1) the autonomous city-state (ancient and medieval); (2) decentralized liberalism; (3) local discretionary implementation of centrally defined tasks; and (4) local government under Dillon's Rule.

⁷ Colorado Constitution, Art. XX, 36.

⁸ Pennsylvania Constitution, Art. IX, §2.

⁹ American Municipal Association, *Model Constitutional Provisions for Municipal Home Rule* (Chicago: American Municipal Association, 1953). Jefferson Fordham was hired by the National Municipal League to prepare a model state constitution including home rule provisions.

¹⁰ Utah Constitution, Art. XII, 38.

"Virginia Constitution, Art. X, §10.

¹² See David O. Porter, "The Ripper Clause in State Constitutional Law—An Early Urban Experiment," *Utah Law Review* 69 (April and June 1969): 287 and 450.

¹³ Pennsylvania Constitution, Art. III, §20.

¹⁴ C. Dallas Sands, Michael E. Libonati, and John Martinez, *Local Government Law* (Wilmette, Illinois: Callaghan & Company, 1982), Volume 1, 3.25-3.34.

¹⁵ Connecticut Constitution, Art. X, §1.

¹⁶ *Bottonne v. Town of Westport*, 209 Conn. 652 (1989).

¹⁷ Sho Sato and Arvo Van Alstyne, *State and Local Government Law*, 2nd ed. (Boston: Little, Brown and Company, 1977), p. 136.

¹⁸ Illinois Constitution, Art. VII, 6(i). See David C. Baum, "A Tentative Survey of Illinois Home Rule: Legislative Control, Transition Problems, and Intergovernmental Conflict," *University of Illinois Law Forum* 3 (3, 1972): 559.

¹⁹ Daniel J. Elazar, *The American Partnership* (Chicago: University of Chicago Press, 1962); Joseph F. Zimmerman, *State-Local Relations: A Partnership Approach* (New York: Praeger Publishers, 1983); U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Metropolitan Organization: The St. Louis Case* (Washington, DC, 1988); William G. Colman, *State and Local Government and Public-Private Partnerships* (Westport, Connecticut: Greenwood Press, 1989); and E. Blaine Liner, ed., *A Decade of Devolution: Perspectives on State-Local Relations* (Washington, DC: The Urban Institute Press, 1989).

²⁰ Comment, "Interlocal Cooperation: The Missouri Approach," *Missouri Law Review* 33 (Summer 1968): 442; ACIR, *State Legislative Program #2, Local Government Modernization: Interlocal Contracting and Joint Enterprise* (Washington, DC, 1975)

²¹ Illinois Constitution, Art. VII, 10(a); Mark A. Hall and Jerry B. Wallack, "Intergovernmental Cooperation and the Transfer of Powers," *University of Illinois Law Review* 3 (1981): 775.

²² James W. Fesler, ‘Approaches to the Understanding of Decentralization,’ *Journal of Politics* 27 (Summer 1965): 536.

²³ ACIR, *Measuring Local Discretionary Authority* (Washington, DC, 1981), p. 1.

²⁴ *Ibid.*, p. 6.

²⁵ Gerald Frug, ‘The City as a Legal Concept,’ *Harvard Law Review* 93 (April 1980): 1059; Richard J. Briffault, ‘Our Localism:

Part I—The Structure of Local Government Law,’ and ‘Our Localism: Part 11—Localism and Legal Theory,’ *Columbia Law Review* 90 (January and March 1990): 1 and 346. See also Frank J. Macchiarola, ‘Local Government Home Rule and the Judiciary,’ *Journal of Urban Law* 48 (2, 1971): 335.

²⁶ Michael E. Libonati, ‘Home Rule: An Essay on Pluralism,’ *Washington Law Review* 64 (January 1989): 51.

ANALYZING LOCAL GOVERNMENT AUTONOMY

A Closer Look at the Definition of Autonomy

A more detailed analysis of autonomy in local government should start with a reexamination of the four types of local autonomy identified in the previous chapter—structural, functional, fiscal, and personnel.

Structural Autonomy

Several elements affect the degree of structural autonomy provided to local governments. These include:

- (1) Barriers to the enactment of impermissible state legislation;
- (2) Approval of the local electorate as a check on the state legislature;
- (3) Local voter initiatives as a counterweight to state power;
- (4) Constitutional restrictions on the scope of home rule authority;
- (5) Geographic reach of local government powers; and
- (6) Constraints on collaborative action.

Barriers to the Enactment of Impermissible State Legislation.

Autonomy in the sense of immunity from state legislative interference preceded affirmative grants of local initiative. Many early state constitutions, for example, made the filling of certain local offices the prerogative of local electors.⁷ The New Jersey legislature might define the contours of the office of county sheriff, for instance, but the state constitution of 1776 required that the sheriff be elected by the inhabitants of the county⁸

Connecticut's first constitution required the annual election of town selectmen "and such offices of local police as laws may prescribe."⁹ A similar provision in the 1850 Michigan Constitution was used by the Michigan Supreme Court to strike down a statute substituting state-appointed boards for locally elected officials in order to manage service provision in the City of Detroit.⁴ The Ohio Constitu-

tion of 1851 prohibited the legislature from "creating new counties, changing county lines or removing county seats" without referendum approval of the electors of the affected counties.⁵

Many nineteenth and early twentieth-century state constitutions sought to immunize local governments from state legislatures enacting local or special laws affecting local government structures and the duties of local officials. Pioneering provisions of the 1851 Indiana Constitution prohibited state regulation of:

- (1) Jurisdiction and duties of justices of the peace and of constables;
- (2) County and township business;
- (3) Election of county and township officers and their compensation;
- (4) The assessment and collection of taxes for . . . county, township, or road purposes;
- (5) Fees or salaries; and
- (6) The opening and conducting of elections of . . . county or township officers and designating the places of voting. . . .⁶

The Missouri Constitution of 1875 contained a more elaborate and systematic set of prohibitions crafted to protect local structural autonomy and the accountability of local officials. It barred:

- (1) Locating or changing county seats;
- (2) Incorporating cities, towns, or villages or changing their charters;
- (3) Erecting new townships or changing township lines or the lines of school districts;
- (4) Creating offices or prescribing the powers and duties of officers in counties, cities, townships, election, or school districts;
- (5) Regulating the fees or extending the powers and duties of alderman, justices of the peace, magistrates, or constables;
- (6) Regulating the management of the public schools. . . ;
- (7) Extending the time for the assessment or collection of taxes or otherwise relieving any as-

essor or collector of taxes from the due performance of their official duties or their securities from liability; and

- (8) Legalizing the unauthorized or invalid acts of any officer or agent . . . of any county or municipality. . . .

In addition, Alabama's 1901 Constitution defined a local law as one "which applies to any political subdivision or subdivisions of the state less than the whole" in creating a similar enumeration of impermissible legislative enactments.⁸

It should be noted, however, that prohibitions against local or special legislation create only a permeable barrier to state legislative actions affecting local government decision-making structures. They reach only statutes that do not meet the constitutionally prescribed level of generality and uniformity. The legislature is ordinarily still free to classify local governments by population or some other general criterion?

Thus, the Missouri legislature retained the capacity to interfere in structural matters by enacting legislation generally applicable to home rule cities." Nonetheless, the Missouri Constitution was changed to prohibit the legislature from creating more than four classes of cities and towns."

To protect the autonomy of Boston, the Massachusetts Constitution requires that general laws apply to a class of not fewer than two cities and towns.¹² In North Dakota, a statute denying powers must apply to all home rule cities and villages.¹³ The Rhode Island General Assembly has the power to enact general laws applicable to all cities and towns provided they do not affect "the form of government."¹⁴ The South Carolina Constitution expressly limits the authority of home rule entities to set aside "the structure and the administration of any governmental service or function, responsibility which rests with State Government or which requires statewide uniformity."¹⁵

Not all state constitutions take an inflexible position against state legislative interference in local matters. Often, state constitutional provisions governing local or special legislation may provide for flexibility through local choice. For example, home rule governments in New York may opt out of the protection otherwise afforded by the constitutional ban on local or special laws on request of either a super-majority of its legislative body or its chief executive officer with a concurrence of a legislative majority.¹⁶ The New Jersey Constitution permits private, local, or special laws affecting the internal affairs of a local government on petition of its governing body, with the approval of a super-majority of each house of the state legislature. The law becomes operative only if adopted by an ordinance of the governing body or a local referendum."

Approval by the Local Electorate as a Check on the State Legislature. State constitutions are sprinkled with provisions that allow state legislative power over a variety of structural issues only with local electoral approval. In North Dako-

ta, for example, the legislature must provide counties with optional forms of government, including the county manager plan, but no optional form may become operative without the approval of 55 percent of those voting in a local election.¹⁸ Local voters in Montana periodically must be offered an opportunity to review their existing local government structure.¹⁹

Several state constitutions contain rules requiring that fundamental changes in county government structure, such as consolidation, dissolution, and shifts in boundaries or county seats, must be approved by a majority of voters in each affected county."

The ripper clause also is a device for assuring a negative liberty of local government (that is, freedom from control by a state-created agency appointed by the legislature without the direct consent of the local electorate).²¹

Local Voter Initiatives as a Counterweight to State Power. A more robust guarantee of voter choice is found in state constitutions that entrench not only the blocking power of the local referendum but also the power for citizens to initiate municipal or county legislation.²² The constitutions of Ohio, Oklahoma, and Oregon provide examples of this approach.

Constitutional Restrictions on the Scope of Home Rule Authority. With regard to autonomy in the sense of initiative, no state constitutions limit the ambit of home rule power simply to matters of structure.²³

The constitutions of 16 states (California, Colorado, Florida, Georgia [cities only], Illinois, Iowa, Kansas, Louisiana, Maine, Michigan [counties only], Ohio, Oregon [counties only], Rhode Island, West Virginia, Wisconsin, and Wyoming) contain terms like "municipal affairs," "municipal matters," and "powers of local self-government," which would appear to convey discretion over the structure and methods of operation of local government.²⁴ This hypothesis is apparently confirmed in the case law of California, wherein matters concerning local elections, procedures for enacting and enforcing ordinances, forms of government (e.g., city manager, strong mayor, or weak mayor), and the establishment and operation of local administrative bodies fall within the ambit of municipal affairs.²⁵

The force of these provisions, however, is weakened considerably when the question presented for decision involves a relevant state statute arguably in conflict with a charter provision.²⁶ Thus, when an agreement entered into by a California home rule city under a state statute providing for the joint exercise of powers was challenged as violating its charter, the state supreme court sustained the agreement. It stated, "If the conceivably conflicting charter provisions of all the contracting cities were held to be applicable and relevant, the effect would be to vitiate the statute authorizing joint and cooperative action."²⁷

Courts in California and other jurisdictions where a constitutional grant of home rule initiative is qualified by

the adjective “local” or “municipal” have not been shy in holding that the subject matter in question is susceptible to redefinition as a matter of statewide concern when the state legislature has so spoken.²⁸

The Louisiana Constitution guarantees structural autonomy by prohibiting the legislature from changing or affecting the structure and organization or the distribution of powers of a home rule entity.” The constitutions of Georgia (counties only), Michigan (cities only), New York, and Rhode Island have language that conveys power over matters concerning “property, affairs or government.”³⁰ Maryland, Nebraska, Nevada, Oklahoma, Utah, and Washington each have constitutions that employ the term “its own government” to delineate the scope of local initiative.³¹ As in the case of texts using the arguably broader terms of municipal affairs or local self-government, the scope of structural autonomy afforded will be subject to the vagaries of judicial interpretation as well as to the preemptive effect of general state statutes.

The Oregon and Texas constitutions grant eligible Cities comprehensive power to formulate the contents of their home rule charters, limited only by the preemptive powers of the legislature.³² Eleven states (Alaska, Connecticut, Massachusetts, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Pennsylvania, and South Dakota) embrace the devolution-of-powers model, making the extent of powers afforded local governments dependent on state enabling legislation, which may or may not confine the scope of structural autonomy.³³

Four state constitutions speak unambiguously to the issue of structural initiative. The Colorado Constitution empowers home rule counties to provide for the organization and structure of county government consistent with state statutes.³⁴ Tennessee authorizes each home rule entity to provide for “the form, structure, personnel and organization of its government.”³⁵ South Carolina grants the power to frame a charter “setting forth governmental structure and organization. . . .”³⁶ Finally, the South Dakota document achieves clarity on the issues of initiative and immunity by stipulating that:

[T]he charter may provide for any form of executive, legislative and administrative structure which shall be of superior authority to statute, provided that the legislative body so established be chosen by popular election and that administrative proceedings be subject to judicial review.³⁷

Geographic Reach of Local Government Powers. Home rule powers are not generally interpreted to extend beyond the territorially defined boundaries of the home rule unit.³⁸ Thus, except in Minnesota and Texas, a home rule entity cannot, on its own initiative, change its boundaries.³⁹ A home rule city in Alaska, however, could be dissolved at the behest of the state legislature.⁴⁰

Constraints on Collaborative Action. Similarly, express constitutional or statutory grants of power are required to allow home rule units to engage in collaborative activities and agreements with other units of government.⁴¹

Functional Autonomy

Government is not simply a question of form and structure. It exists for a purpose, usually the identification and resolution of common problems.⁴² It is predictable that functional autonomy, in the sense of initiative, predominates over autonomy, in the sense of immunity, in various state constitutions.

Current Constitutional Approaches. A study of early constitutional home rule provisions indicates that the power to create a charter “for its own government” was granted to local governments along with the power to regulate and the power to provide services.⁴³ For example, the Michigan and Ohio constitutions resolved the debate over municipal ownership of public utilities by expressly permitting it.”

The Bill of Rights provision of the local government article of the New York Constitution includes a compendious grant of regulatory authority over “the government, protection, order, conduct, safety, health and well-being of persons or property,” as well as an express power to acquire, own, and operate transit facilities.⁴⁵ Under the Florida Constitution, home rule municipalities “shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services.”⁴⁶

Local regulation of private conduct may, of course, be problematic in the 16 states that employ a qualifying adjective like “local” or “municipal” in conveying discretion to local governments over their structure and administration. Thus, a home rule city’s power to enact a rent control ordinance was struck down in Florida but sustained in California.⁴⁷ In the ten states adopting the devolution-of-powers model, the scope of regulatory authority is limited by the charter, state law, or the constitution itself.⁴⁸ Home rule regulatory powers are subject to the preemptive effect of state statute in these ten jurisdictions. In California and other states that provide concurrent powers of the state with their local governments, home rule regulatory powers are subject to preemption if the matter in conflict is of statewide concern.⁴⁹

In any event, autonomy in the sense of immunity cannot be conferred on home rule regulatory activities because individuals subject to such regulation possess procedural and substantive constitutional rights against governmental regulatory overreach? Local governments, like the state and federal governments, exercise their regulatory authority subject to judicial review. This restriction always applies.

Authority to Provide Services. Nevertheless, states have authorized specific functions as responsibilities that local governments may wish to or must undertake. Oklahoma and Arizona empower municipal corporations to “engage in any business or enterprise” that may be engaged in by the private sector.⁵¹ The Arizona Constitution vests special purpose service provision districts “with all the rights, privileges, benefits . . . immunities and exemptions” afforded Arizona municipalities and political subdivisions.⁵² Home rule units in South Carolina can undertake to provide gas, water, sewer, electric, and transportation services if the local electorate consents.⁵³ The Illinois Constitution established only two unlimited powers of home rule cities: the power to make local improvements by special assessments and the power to impose taxes for the provision of special services.⁵⁴

Intergovernmental Relations. A sampling of the constitutions of California, Florida, Illinois, Missouri, New York, Ohio, Pennsylvania, and Texas yields a good snapshot of contemporary variations in state constitutional law on intergovernmental relations. The Ohio text, unrevised since 1912, is silent on this topic. A series of ad hoc amendments to the Texas Constitution permits specific collaborative projects between counties.⁵⁵ The California Constitution speaks only to the issue of whether a county may perform municipal functions. But the California Supreme Court assured a broad competence to collaborate when it sustained a state statute providing for joint exercise of powers in dealing with matters of statewide concern which could, therefore, lawfully override conflicting charter provisions.⁵⁷

The New York Bill of Rights confirms that local governments have the power, as authorized by the legislature, “to provide cooperatively, jointly or by contract any facility, service, activity or undertaking which each local government has the power to provide separately.”⁵⁸

Pennsylvania even allows local voters in the areas affected to compel local governments to cooperate with or transfer functions to other governmental units, including special districts, the state, and the federal government.⁵⁹

Other states have broadly phrased language permitting collaboration in the provision of public improvement, facilities, and services.⁶⁰

Fiscal Autonomy

Fiscal autonomy, whether in the sense of initiative or immunity, traditionally has not been considered a necessary component of home rule.⁶¹ Dillon’s Rule of strict construction of empowering legislation is riddled with qualifications, but not as to the subjects of borrowing and taxation.⁶² ACIR’s recent study *State Laws Governing Local Government Structure and Administration: A Comparison of the Laws in 1978 and 1990* reveals that, for local

government, financial management is a realm of constraint.⁶³ Forty-eight states, for example, impose debt limits on cities, 40 on counties. Other detailed restrictions cover referendum requirements (40 states); maximum duration of bonds (41 states); and interest ceilings (24 states). Thirty-eight states impose property tax limits on cities and 35 do so on counties. Forty-eight states establish the method of property tax assessment for local governments.

Only a handful of states have provisions that directly address the question of fiscal initiative. Nine state constitutions expressly provide autonomy with respect to borrowing and taxation.⁶⁴ Tennessee and Iowa expressly preclude additional taxing authority. Massachusetts and Rhode Island do so for both borrowing and taxation.⁶⁵

Vague constitutional grants of power couched in terms like “municipal matters” or “local self-government” are unsparingly criticized in the legal literature.⁶⁶ Yet, such provisions of the California, Missouri, Ohio, and Oregon constitutions have been interpreted by courts to empower home rule units to diversify their portfolio of revenue generating measures beyond the property tax.⁶⁷ Despite the success in these four states, the courts did not approve municipal income taxes in two states with similar constitutional language, Missouri and Colorado.⁶⁸ Also, taxation, like other exercises of home rule powers in states giving substantial local autonomy, even if somewhat vaguely stated, may be preempted by statute on the grounds that the subject is of statewide concern.⁶⁹

State mandates are the only area of fiscal policy in which state constitutions confer a degree of immunity from the otherwise plenary power of the state legislature.⁷⁰ Mandate provisions range from Alaska’s, which imposes a local referendum requirement on local acts of the state legislature necessitating appropriations by a political subdivision, to the cost-sharing approach of Tennessee and Hawaii to the broader strictures of the California, Massachusetts, Michigan, Missouri, New Hampshire, and New Mexico constitutions.⁷¹

Personnel Autonomy

In *State Laws Governing Local Government Structure and Administration*, ACIR also delineates the scope of personnel autonomy: “Personnel matters include:

- (1) The hiring, promotion, discipline, and termination of public employees;
- (2) Civil service and the merit system;
- (3) Levels of compensation and entitlement to fringe benefits, such as pensions;
- (4) Collective bargaining; and
- (5) Conflict-of-interest requirements, disclosure requirements, and restrictions on partisan political activity.⁷³

This area of the law annually produces a flood of court cases, few of which turn for their resolution on the home rule status of the public employer.⁷⁴

Constraints Imposed by Federal Law. Autonomy in the sense of immunity is hard to come by in personnel matters because public employees' claims are increasingly sheltered by individual rights provisions of the state and federal constitutions applicable to all governments, regardless of home rule status. A home rule public employer is just as limited as any other public employer by constitutional strictures forbidding patronage hiring, sex discrimination, or termination for exercising protected freedoms of speech or association.⁷⁵ Similarly, a public employee's due process rights to procedural fairness bind all governments in the federal system.⁷⁶

State Judicial Activism. An activist state judiciary may fashion protection for public employees that exceeds the floor provided by federal courts, as, for example, in the area of drug or polygraph testing.⁷⁷

Pension and Benefits. Public employee pension and benefit rights also may be protected by an express provision of the state constitution or a judicial interpretation of a provision forbidding the impairment of contracts.⁷⁸ In Florida and New Jersey, public employees are constitutionally guaranteed the right to organize.⁷⁹ Financial disclosure by Illinois public employees and officials is mandated by the state constitution; in California, however, the extent of disclosure by public employees is limited by their constitutional privacy rights.⁸⁰

Merit Systems. New York became "the first state to constitutionalize a merit system of civil service employment" in 1894.⁸¹ The New York provision, like that in Ohio's Constitution, applies to both the state and its political subdivisions.⁸²

Limited Immunity. Immunity from interference by the state legislature is a possible outcome mostly in those jurisdictions that allow for concurrent regulatory control. During 1978-1990, significant trends in the case law of California, Oregon, and New York diminished, if not extinguished, local autonomy over personnel matters.

The most recent state to entrench local autonomy over personnel matters in its constitution is Louisiana. Its 1974 constitution renders the appointment and functioning of city civil service commissions impervious to state legislative control.⁸³ The legislature is forbidden from enacting laws mandating "increased expenditures for wages, hours, working conditions, pension, and retirement benefits, vacation or sick leave benefits of political subdivision employees" unless the governing body of the affected entity approves or the state legislature appropriates and provides the necessary funds.⁸⁴

Autonomy in the sense of initiative, as is the case generally, turns on judicial decisions interpreting varied state constitutional texts as well as judicial receptiveness to claims that proper home rule enactments are preempted by state statutes. As has been observed: "It may, in fact, be the case that cities, in effect, already have expansive powers. But it would be more accurate to say that, because of the ongoing judicial interpretation, no one really knows."⁸⁵

Policymaking Concerns

The analysis above may help with the more demanding policymaking tasks that states face with regard to local government autonomy. Moreover, the influence and willingness of the courts to make their own assessment of the bounds within which local government can operate poses for the states an ever more difficult determination of what the right balance ought to be in the relationships they have with their political subdivisions.

First, the increasing fiscal pressures on government and rising service expectations by the citizenry make continued controversy and debate over state constitutional treatment of local governments inevitable. As policymakers evaluate proposals for change, they should consider six basic concerns before altering the state-local relationship embodied in their state's constitution:

- (1) Whether it is desirable to increase or decrease the restrictions, if any, imposed on the power of the state to regulate local government;
- (2) The degree of autonomy, however defined in the minds of the citizens of a particular state, to be granted to local governments;
- (3) The extent of citizen choice in local government;
- (4) Which local government units are eligible for local autonomy;
- (5) Aspects of intergovernmental cooperation; and
- (6) The role of the courts in determining issues of local autonomy.

Restrictions on the State

First, decisionmakers should consider whether any limits should be placed on the otherwise plenary power of the state legislature to arrange the activities and affairs of local government. As the United States Supreme Court made clear in 1907, it is to the state and not the federal Constitution that one must look for restraints:

Municipal corporations are political subdivisions of the State, created as convenient agencies

for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there **is** nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.⁸⁶

Nineteenth century experiments with establishing constitutional limitations on legislative power, such as the prohibitions against local, special, or ripper legislation, have not generally proved to be meaningful guarantors of local immunity. Several states with robust local self-government, notably Vermont and Virginia, prefer the flexibility and adaptability to local circumstance offered by a regime of local or special legislation? Other states, through such devices as local option laws and classification by population, have been able to accommodate varied local preferences, even where local or special legislation is forbidden.

The decision to provide for the powers of local government in the state constitution clearly shows a consideration for a healthy and viable local government. The manner in which it is presented depends on the basic state

attitude toward its political subdivisions (as expressed by the people of that state, who must approve such constitutions). On the one hand, local governments are seen as somewhat independent actors in a statewide framework, making and implementing decisions with a fair degree of autonomy. On the other, local governments seem to derive their authority from grants of power—sometimes general, sometimes specific—and are constrained to act within a state-initiated delegation of power.

With regard to the former, a measure of immunity from state interference in local government has been hard to preserve, as is revealed in the trend of judicial decisions during the **1978-1990** period (discussed later in this report). Local immunity may be easily overridden by a state statute treating the policy problem as one of “statewide” rather than exclusively “municipal” concern. Local initiative may be quashed by a narrow construction of the scope of “municipal” powers or by giving broad preemptive effect to state statutes dealing with the policy problem.

As for the latter attitude, the state legislature may be afforded too much flexibility, particularly in an era of fiscal stress.

In addition to these practical considerations, a judicially determined “one person—one vote” rule has drastically limited the historic practice of assuring a strong nexus between state legislative district boundaries and local governments, thus attenuating the influence of identifiable local political communities in the state legislature? The emergence of organized interest groups capable of mobilizing a statewide constituency may further dilute the force of claims to local government autonomy—California is a prime example.⁸⁹

The Degree of Local Government Autonomy

That there is a complex patchwork of local government autonomy is demonstrated throughout this report. Variety exists in every category of autonomy. Existing state constitutional provisions exhibit every conceivable permutation of initiative and immunity as to structural, functional, fiscal, or personnel matters.

If the policy of affording a constitutionally protected sphere of immunity to local government is to be a serious one, it needs to be addressed in each of the policy areas discussed earlier in this report: structural, functional, personnel, and fiscal autonomy.

The Role of Citizen Choice

State constitutions teach concern not only for the role of institutional actors but also for citizen choice. **An** exclusive focus on entrenching rules relating to the roles of state and local institutions may divert attention from the claims of local citizens to participation in decisions with respect to structural, functional, personnel, or fiscal matters.

The “tax revolt” in California in 1978 may well have come about over the perceived loss of citizen control in local taxing policy.⁹⁰ Even in the Missouri Constitution of 1875, there was a marked shift in the locus of consent concerning the institutional form and functional powers of local government.

A local government article of the state constitution could facilitate citizen choice either by specifying the rules for direct citizen participation in local decisionmaking or by making it clear that the home rule charter can employ any of the devices of direct democracy—referendum, recall, and initiative.⁹¹

Eligibility for Local Autonomy

State constitutions have extended various forms of autonomy to general purpose units of government. Counties, as well as municipalities, have been recognized increasingly as appropriate candidates for home rule.⁹² Special districts, including school districts, have played a significant role in furthering local self-government through collective action.⁹³ Consideration may be given to making their powers of initiative constitutional, as in *Arizona*, or immunity, as in *Virginia*.⁹⁴

There is no question that the statutory powers given to a wide variety of local government units presents serious issues of jurisdictional overlap. State policies concerning the impact of the grant of autonomy to a whole host of political subdivisions need clarification in most states.

Intergovernmental Cooperation

Almost as a necessary concomitant to the issue of eligibility, intergovernmental cooperation will become a powerful resource in resolving the questions raised by local government autonomy. Intergovernmental cooperation provides various local governments with options to expand the scope of discretionary authority in a wide range of services provided to the public. As such, it must be reviewed as a possible constitutional fixture in state-local and local-local government relations.⁹⁵ It also allows for the consideration of public-private partnerships in service delivery and government organization. Indeed, it is, perhaps, one of the most flexible of tools in meeting the ever changing demands of a local citizenry.

The Role of the Judiciary

Home rule policies in state constitutions are shaped to a significant degree by the judiciary. Because judicial review is an inevitable part of the American constitutional framework, policymakers are obliged to take into account juridical problems that predictably occur when power is diffused among political subdivisions. These juridical issues include:

- (1) How is the constitutional text to be interpreted?
- (2) Do political subdivisions have the authority to assert constitutional claims against the state and its agencies?
- (3) How are conflicts between state statutes and home rule charters or ordinances to be resolved?

Failure to think through whether or not decisions concerning these recurrent topics are appropriate to include in state constitutions may lead to the kinds of unanticipated consequences that beset the implementation of complex policies.⁹⁶

The Legal Content of Local Autonomy

Translating the concepts of local government autonomy into statutory or constitutional language will no doubt tax the ingenuity of the drafters because the language must not only articulate agreed-on policy decisions but also must be sensitive to factors concerning the way in which the text will be interpreted. The most important of these are:

- (1) Clarity of the text;
- (2) Principles of construction;
- (3) Judicial perspectives on local autonomy;
- (4) Citizen demands to expand, constrict, or clarify existing texts; and
- (5) Official and institutional demands to expand, constrict, or clarify existing texts.

Clarity of the Text

The process of selecting language for incorporation into a state constitution should be based on a careful consideration of the precise intention of that language. Thus, the use of the adjective “local” or “municipal” in the context of empowering local governments invites both a limiting interpretation and a body of interpretive case law focusing on whether the matter in question is of local rather than statewide concern. The elimination of a qualifying adjective, however, incurs the risk that a home rule unit will seek to extend its policy reach to areas generally recognized as falling within the competence of state or national, rather than local, authorities, as those who drafted the Illinois Constitution recognized?

An ideal text is one “in which the author’s intended meaning is always the way the words are read by any reader.”⁹⁸ But a judge is not just any reader. A judge occupies a

constitutionally prescribed role as an authoritative interpreter of language in a constitutional document. **This** is why the language of the text **has** to be formulated clearly to facilitate its reception and application within the legal, **as** well as political, culture of a given state. Indeed, it may well be that **explanatory** language in a document that precedes the drafting is necessary to aid in clarifying intent. Such is the role of convention documents, which contain speeches, debates, articles, and other such references to written material on the principles and details of the subject under discussion.

Off-the-shelf language borrowed from model or sister state constitutions may create the illusion that knotty problems of constitutional choice can be resolved by experts unfamiliar with local contexts. There are no right answers about how a state constitutional text should be phrased, only carefully considered ones.

Principles of Construction

The legal profession enjoys no monopoly when it comes to appreciating the role that judges play in determining the success or failure of efforts to implement new understandings of local **self-government**.⁹⁹ Indeed, court decisions have frequently sparked constitutional reform. Thus, the **1896** amendment to the California Constitution that sought to create a protected realm of immunity against state legislative intrusion into the municipal affairs of a charter city was designed to overturn several decisions of the California Supreme Court interpreting the **1879 text**.¹⁰⁰

Twelve states have included a constitutional provision rooting out Dillon's Rule by mandating liberal interpretation of grants of power either to municipalities in general or to home rule **units**.¹⁰¹ The Florida legislature tried to change case law exhibiting a narrow and ungenerous view of home rule powers by passing an interpretive statute stating that the term "municipal purpose," as used in the state constitution, "means any activity or power which may be exercised by the state or its political **subdivisions**."¹⁰²

On the other hand, state courts may interpret even cryptic language in a state constitution so expansively that an interpretive provision is superfluous. The Texas Constitution, for example, confers charter-making authority on cities of over 5,000 population "subject to such limitations as may be prescribed by the Legislature and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State or of the general laws enacted by the Legislature of this **State**."¹⁰³ **This 1912 text** has been viewed generally by Texas courts as tantamount to a plenary grant of local legislative authority, including the power to expand the boundaries of the home rule city through annexation and the power to **tax**.¹⁰⁴

One thoughtful commentator has summed up the track record of the New York judiciary as follows:

In both home rule and reapportionment policies, the role of the State's high court, the Court of Appeals, **as** a guardian of State sovereignty against City incursions cannot be overstated. Strict interpretation or broad, the court read New York's constitution **so as** to assure State **dominance**.¹⁰⁵

This is despite the fact that the New York Constitution has a provision directing interpreters to construe the powers of home rule units in favor of the locality.

Such directives do have an impact on the state judiciary. For example, the Alaska Supreme Court, after floundering about with a local activity rule, finally recognized the force of the liberal interpretation **rule**.¹⁰⁶ Utah's Supreme Court considered the statement in its state constitution barring the use of a negative implication in construing grants of power as a repudiation of Dillon's Rule.¹⁰⁷ William Valente cites case law in California, Ohio, and Wisconsin that substitutes liberal (pro-local) for strict construction of home rule powers in light of the recognition of local autonomy by the state **constitution**.¹⁰⁸

Judicial Perspectives about Local Autonomy

There is a debate in the academic literature on local government autonomy as to whether judges are predisposed to localism or **centralization**.¹⁰⁹ Richard Briffault grounds his indices of localism in judicial decisions sustaining autonomy with respect **to** land use, schools, and property **taxes**.¹¹⁰ Gerald Frug, however, bases his indices of centralization in judicial decisions that have disempowered cities by applying rigid concepts drawn from a unitary theory of sovereignty like Dillon's **Rule**.¹¹¹

This report takes a different tack. It describes an evolving conception of state-local relations in which such judge-made doctrines as Dillon's Rule and the nondelegation doctrine, the public purpose doctrine, and the implied preemption doctrine have been discarded or modified by inserting ratifying provisions in the constitutions of many states. Those constitutional provisions seem to indicate that the framers of some state constitutions believed that the legal culture fostered by the state judiciary needed to be changed.

Nevertheless, no one disputes the proposition that judicial perspectives play a significant role in determining the legal content of local autonomy.

Citizen Demands to Expand, Constrict, or Clarify Home Rule Provisions

The state constitution is, by definition, the appropriate vehicle for the exercise of constitutional choice by state citizens. **As** such, citizen demands to expand, constrict, or clarify constitutional provisions for local auto-

my have a significant impact on the constitution's contents. **This** is particularly true in jurisdictions that permit citizens to initiate amendments to the state constitution. California voters, for example, are responsible for the formulation of their particular style of home rule.¹¹² The state's electorate may **shrink** local autonomy as well as **expand** it, as Californians chose to do with respect to property tax rates and assessment practices.¹¹³

Many detailed and specific amendments to state constitutions are designed to clarify state policy by specifically overruling decisions of the state supreme court. For example, the North Carolina Supreme Court struck down, for want of a proper public purpose, legislation purporting to authorize county industrial development agencies to issue revenue bonds to finance industrial manufacturing and pollution control facilities.¹¹⁴ The state constitution was amended in response.¹¹⁵

Official and Institutional Demands to Expand, Constrict, or Clarify Home Rule Provisions

Local governments are institutions with continuity and their own agendas of power, which may or may not correspond to the interests of their constituents.¹¹⁶ Furthermore, local government officials may prefer existing political arrangements instead of constitutional change.

Both the Virginia Municipal League and the Virginia Association of Counties, for example, opposed proposals of the Commission on Constitutional Revision that would have empowered any charter city or county "to exercise any power or perform any function not denied to it" by the constitution, its charter, or general law.¹¹⁷ These organizations preferred the existing regime of special legislation and strict construction to the devolution-of-powers model recommended by the commission. They were instrumental in excising the contested language from the document submitted to and ratified by the voters.¹¹⁸

In contrast, the Florida League of Cities sponsored a state constitutional amendment concerning state mandates whose "thrust is to further the 'home rule' movement through which local government has been given increasing autonomy from legislative action."¹¹⁹

In Illinois, local officials, particularly Chicago's Mayor Richard J. Daley, actively promoted the concept of home rule and shaped its unique language with regard to local revenues and preemption.¹²⁰

Good government is not always good politics, as proponents of Maryland constitutional reform learned when county officials mobilized to defeat a new constitution that would have streamlined county government by eliminating certain elective offices, including sheriffs. The officials to be eliminated, it turned out, were "of considerable importance to the local political structure almost every-

where."¹²¹ On the other hand, inclusion of home rule for Chicago materially assisted the successful campaign for adoption of the Illinois Constitution.¹²²

Conclusion

Almost 30 years ago, ACIR concluded its first report on local autonomy by stating, "Evidence points to the conclusion that units of local government with enlarged jurisdiction should be encouraged and that all such units and levels of government should work federatively."¹²³ It recommended further, "The variety of local government problems is almost infinite. Solutions related to the locale should be sought persistently along a broad front in 50 states."¹²⁴

As American government moves toward the 21st century, those recommendations have just as much validity, if not more, than when they were first issued.

Notes

¹ Howard Lee McBain, "The Legal Status of the American Colonial City," *Political Science Quarterly* 40 (June 1925): 177, 207-208. (See the early constitutions of Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, and Pennsylvania.)

² New Jersey Constitution, Art. XIII (1776). Today, New Jersey has four elected county line officers—sheriff, county clerk, surrogate and register of deeds. (Only five counties have a register of deeds.)

³ Connecticut Constitution, Art. X, §2 (1818).

⁴ See, supra, Chapter 2, Endnotes and accompanying text.

⁵ Ohio Constitution, Art. 11, §30 (1851).

⁶ Indiana Constitution, Art. IV, §22 (1851).

⁷ Missouri Constitution, Art. IV, §53 (1875).

⁸ Alabama Constitution, §110, §104 (5), (6), (11), (15), (21), (22), (23), (24), (29), (31).

⁹ C. Dallas Sands, Michael E. Libonati, and John Martinez, *Local Covenanted Law* (Wilmette, Illinois: Callaghan and Company, 1981), Vol. 1, §§3.25-3.34.

¹⁰ Kansas City v. Stegmilller, 151 Mo. 189, 52 S.W. 723 (1899).

¹¹ Missouri Constitution, Art. IV, §15.

¹² Massachusetts Constitution, Art. II, §8.

¹³ North Dakota Constitution, Art. VII, §1.

¹⁴ Rhode Island Constitution, Art. XXVIII, §4.

¹⁵ South Carolina Constitution, Art. VIII, §14(6).

¹⁶ New York Constitution, Art. IX, §2(b)(2)(a).

¹⁷ New Jersey Constitution, Art. IV, §VII, para. 10.

¹⁸ North Dakota Constitution, Art. VII, §6.

¹⁹ Montana Constitution, Art. XI, §9.

²⁰ Texas Constitution, Art. 3, §63, §64; North Dakota Constitution, Art. VII, §3, §4; Nevada Constitution, Art. IX, §2; Missouri Constitution, Art. VI, §§3-5; Michigan Constitution, Art. VII, §13; Colorado Constitution, Art. XIV, §3; California Constitution, Art. XI, §1; Arkansas Constitution, Art. XII, §2; Kansas Constitution, Art. 9, §1; and Kentucky Constitution, §64.

²¹ California Constitution, Art. XI, §13; Colorado Constitution, Art. V, §35; Missouri Constitution, Art. VI, §22; Montana

- Constitution, Art. V, §; New Jersey Constitution, Art. IV, §VII, para. 9(12); Pennsylvania Constitution, Art. III, §31; South Dakota Constitution, Art. 111, §26; Utah Constitution, Art. VI, §29; and Wyoming Constitution, Art. 3, §37.
- ²² Ohio Constitution, Art. II, §12 and Art. X, §1, §3; Oklahoma Constitution, Art. V, §5 and Art. XVIII, §4(a); and Oregon Constitution, Art. IV, §1(5).
- ²³ Colorado delineates “the organization and structure of county government” as part of a more general enumeration of home rule competencies (see Colorado Constitution, Art. XIV, §15(1)).
- ²⁴ California Constitution, Art. XI, §5; Colorado Constitution, Art. XX, §6; Florida Constitution, Art. VIII, §1(9) (counties have all powers of local self-government), Art. VIII, §2(b) (cities); Georgia Constitution, Art. IX, §11, para. II (cities); Illinois Constitution, Art. VII, §6(a); Iowa Constitution, Art. III, §38A (cities) and §39A (counties); Kansas Constitution, Art. 12, §5(b); Louisiana Constitution, Art. VI, §5(E); Maine Constitution, Art. VIII, Part Second §1; Michigan Constitution, Art. VII, §2; Ohio Constitution, Art. XVIII, §3; Oregon Constitution, Art. VI, §10; Rhode Island Constitution, Art. XXVIII, §1; West Virginia Constitution, Art. VI, §39(a); Wisconsin Constitution, Art. XI, §3; and Wyoming Constitution, Art. 13, §1(b).
- ²⁵ Sho Sato, “ ‘Municipal Affairs’ in California,” *California Law Review* 60 (June 1972): 1055, 1079-1081.
- ²⁶ *Ibid.*, pp. 1082-1090.
- ²⁷ *City of Oakland v. Williams*, 15 Cal. 2d 542, 103 P. 2d 168 (1940).
- ²⁸ Connecticut Advisory Commission on Intergovernmental Relations, *Defining Statewide v. Local Concerns: Can It Be Done and Is It Necessary?* (Hartford, 1989).
- ²⁹ Louisiana Constitution, Art. VI, Part I, §6.
- ³⁰ Georgia Constitution, Art. IX, §II, para. I(a); Michigan Constitution, Art. VII, §22; New York Constitution, Art. IX, §2(c)(i); and Rhode Island Constitution, Art. XXVIII, §2.
- ³¹ Maryland Constitution, Art. XI A; Nebraska Constitution, Art. XI, §2; Nevada Constitution, Art. VIII, §8; Oklahoma Constitution, Art. XVIII, §(3)(a); Utah Constitution, Art. XI, §5(a); and Washington Constitution, Art. XI, §10.
- ³² Oregon Constitution, Art. XI, §2 and Texas Constitution, Art. 11, §5.
- ³³ Alaska Constitution, Art. X, §1; Connecticut Constitution, Art. X, §1; Massachusetts Constitution, Art. II, §6; Missouri Constitution, Art. VI, §19(a); Montana Constitution, Art. XI, §6; New Hampshire Constitution, Art. I, §39; New Mexico Constitution, Art. X, §6D; North Dakota Constitution, Art. VII, §1; Pennsylvania Constitution, Art. IX, §2; and South Dakota Constitution, Art. IX, §2.
- ³⁴ Colorado Constitution, Art. XIV, §15(1).
- ³⁵ Tennessee Constitution, Art. XI, §9.
- “South Carolina Constitution, Art. VIII, §11.
- ³⁷ South Dakota Constitution, Art. IX, §2.
- ³⁸ See Frank S. Sengstock, *Extraterritorial Powers in the Metropolitan Area* (Ann Arbor, Michigan: Legislative Research Center, 1962); *City of Pueblo v. Flanders*, 122 Colo. 571, 225 P. 2d 832 (1950); *Marcus v. Baron*, 57 N.Y. 2d 862, 442 N.E. 2d 437 (1982); Comment, “The Exercise of Extraterritorial Powers by Municipalities,” *University of Chicago Law Review*, Vol. 45 No. 1, 1977, p. 151.
- ³⁹ Frank S. Sengstock, *Annexation: A Solution to the Metropolitan Area Problem* (Ann Arbor, Michigan: Legislative Research Center, 1960); Robert R. Ashcroft and Barbara Kyle Balfour, “Home Rule Cities and Municipal Annexation in Texas: Recent Trends and Future Prospects,” *St. Mary’s Law Journal* 15 (Summer 1984): 519; *Independent School District No. 700 v. City of Duluth*, 170 N.W. 2d 116 (Minn. 1969).
- ⁴⁰ *City of Douglas v. Juneau*, 484 P. 2d 1040 (Alaska, 1971).
- ⁴¹ See U.S. Advisory Commission on Intergovernmental Relations (ACIR), *A Handbook for Interlocal Agreements and Contracts* (Washington, DC, 1967); Comment, “Interlocal Cooperation: The Missouri Approach.”
- ⁴² See John Dewey, *The Public and Its Problems* (Athens, Ohio: Swallow Press, 1985); Vincent Ostrom, Charles M. Tiebout, and Robert L. Warren, “The Organization of Government in Metropolitan Areas: A Theoretical Inquiry,” *American Political Science Review* 55 (December 1961): 831.
- ⁴³ Colorado Constitution, Art. XX, §6 (1902) and Washington Constitution, Art. XI, §10 (1889).
- ⁴⁴ Ohio Constitution, Art. XVIII, §4, §5 (1912) and Michigan Constitution, Art. VII, §24.
- ⁴⁵ New York Constitution, Art. IX, §2(c)(7), (10).
- ⁴⁶ Florida Constitution, Art. VIII, §2(b).
- ⁴⁷ *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla., 1972); *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P. 2d 261 (1984).
- ⁴⁸ For example, Pennsylvania Constitution, Art. IX, §2.
- ⁴⁹ *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P. 2d 261 (1984).
- ⁵⁰ See, generally, Louis L. Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown and Company, 1965).
- ⁵¹ Arizona Constitution, Art. XIII, §5 and Oklahoma Constitution, Art. XVIII, §6.
- ⁵² Arizona Constitution, Art. XIII, §7.
- ⁵³ South Carolina Constitution, Art. VIII, §16.
- ⁵⁴ Illinois Constitution, Art. VII, §6(1)(1), (2).
- ⁵⁵ Texas Constitution, Art. 9, §§4-9, 11-13.
- ⁵⁶ California Constitution, Art. XI, §8.
- ⁵⁷ *City of Oakland v. Williams*, 15 Cal. 2d 542, 103 P. 2d 168 (1940).
- “New York Constitution, Art. IX, §1(c).
- ⁵⁹ Pennsylvania Constitution, Art. IX, §5.
- ⁶⁰ Florida Constitution, Art. VIII, §4; Illinois Constitution, Art. VII, §10; Missouri Constitution, Art. VI, §14, §16, §30(a); and Pennsylvania Constitution, Art. IX, §§5-7.
- ⁶¹ Harvey Walker, “Toward a New Theory of Municipal Home Rule,” *Northwestern University Law Review* 50 (May 1955): 571.
- ⁶² Sands, Libonati, and Martinez, *Local Government Law*, Vol. 4, §23.02, 525.01.
- ⁶³ The state totals given in this paragraph are taken from ACIR’s 1992 report, pp. 38-41.
- ⁶⁴ Colorado Constitution, Art. XX, §6(e), (g); Illinois Constitution, Art. VII, §6(a); Kansas Constitution, Art. 12, §5(b)(tax); Louisiana Constitution, Art. VI, §30; Maine Constitution, Art. VIII, Pt. Second §2 (industrial development bonds only); Michigan Constitution, Art. VII, §2, §21; New York Constitution, Art. IX, §2(c)(4), (8); Utah Constitution, Art. XI, §5(a), (d); and Wyoming Constitution, Art. 13, §1(c).
- ⁶⁵ Iowa Constitution, Art. 111, §38A, §39A; Massachusetts Constitution, Art. II §7, (2), (3); Rhode Island Constitution, Art. XXVIII, §5; and Tennessee Constitution, Art. XI, §9.
- ⁶⁶ See, for example, Howard Lee McBain, *The Law and Practice of Municipal Home Rule* (New York: Columbia University Press, 1916).
- ⁶⁷ *Weekes v. City of Oakland*, 21 Cal. 3d 386, 579 P. 2d 449 (1978) (occupation and business tax measured by gross receipts); *St. Louis v. Sternberg*, 69 Mo. 289 (1879); *Zielonka v. Carrell*, 99 Ohio St. 220, 124 N.E. 134 (1919) (occupation tax); *Multnomah*

- Kennel Club v. Department of Revenue, 295 Or. 279, 666 P.2d 1327 (1983) (power to impose business income tax implied out of grant of power over matters of "county concern")
- ⁶⁸ City and County of Denver v. Sweet, 329 P.2d 441 (Colo. 1958); Carter Carburetor Corp. v. City of St. Louis, 203 S.W. 2d 438 (Mo. 1947).
- ⁶⁹ C. Emory Glander and Addison E. Dewey, "Municipal Taxation: A Study of the Preemption Doctrine," *Ohio State Law Journal* 9 (January 1948): 72.
- ⁷⁰ Jon A. Baer, "Municipal Debt and Tax Limits: Constraints on Home Rule," *National Civic Review* 70 (April 1981): 204.
- ⁷¹ Alaska Constitution, Art. II, §19; California Constitution, Art. XIII B, §10; Florida Constitution, Art. VII, Sec. 18; Hawaii Constitution, Art. VIII, §5; Louisiana Constitution, Art. VI, §14; Maryland Constitution, Art. XI E, F; Michigan Constitution, Art. IX, §2; Missouri Constitution, Art. X, §21, Art. XII, §2(b); New Hampshire Constitution, Art. 28(a); New Mexico Constitution, Art. X, §8; and Tennessee Constitution, Art. II, §24.
- ⁷² ACIR, XX, pp. XX.
- ⁷³ Sands, Libonati, and Martinez, *Local Government Law*, Vol. 2, ch. 10.
- ⁷⁴ Ibid.
- ⁷⁵ Elrod v. Burns, 427 U.S. 347 (1976); Monell v. New York City Department of Social Services, 436 U.S. 658 (1978); Pickering v. Board of Education, 391 U.S. 563 (1968).
- ⁷⁶ Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Owen v. City of Independence, 445 U.S. 622 (1980).
- ⁷⁷ Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School District, 70 N.Y. 2d 57, 510 N.E. 2d 325 (1987); Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation, 746 S.W. 2d 203 (Tex. 1987).
- ⁷⁸ Alaska Constitution, Art. XII, §5; Illinois Constitution, Art. XIII, §5; Michigan Constitution, Art. IX, §24; New York Constitution, Art. V, §7; See, also, Gauer v. Essex County Division of Welfare, 108 N.J. 140, 528 A. 2d 1 (1987).
- ⁷⁹ Florida Constitution, Art. I, §6, and New Jersey Constitution, Art. I, para. 19.
- ⁸⁰ City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225 (1970); Stein v. Howlett, 52 Ill. 2d 570, 289 N.E. 2d 409 (1972).
- ⁸¹ Peter J. Galie, *The New York State Constitution* (Westport, Connecticut: Greenwood Press, 1991), p. 114; New York Constitution, Art. V, §9 (1894).
- ⁸² New York Constitution, Art. V, §6, and Ohio Constitution, Art. XV, §10.
- ⁸³ Louisiana Constitution, Art. X, §4, §10. Civil Service Commission of New Orleans v. Guste, 428 So. 2d 457 (La. 1983).
- ⁸⁴ Louisiana Constitution, Art. VI, §14.
- ⁸⁵ Stephen L. Elkin, *City and Regime in the American Republic* (Chicago: University of Chicago Press, 1987), p. 176.
- ⁸⁶ Hunter v. City of Pittsburgh, 207 U.S. 161 at 176-7 (1907).
- ⁸⁷ Virginia Constitution, Art. VII, §2.
- ⁸⁸ See, for example, Mahan v. Howell, 410 U.S. 315 (1973).
- ⁸⁹ See Mancur Olson, Jr., *The Logic of Collective Action*, Rev. Ed. (New York: Schocken Books, 1971).
- ⁹⁰ See David O. Sears and Jack Citrin, *Tax Revolt* (Cambridge, Massachusetts: Harvard University Press, 1985).
- ⁹¹ See Citizens Committee to Recall Rizzo v. Board of Elections of City and County of Philadelphia, 470 Pa. 1, 367 A. 2d 232 (1976) (recall provisions of home rule charter are unconstitutional).
- ⁹² Tanis J. Salant, *County Home Rule: Perspectives for Decision-Making in Arizona* (Tucson: University of Arizona, Office of Community and Public Service, 1988); Blake R. Jeffery, Tanis J. Salant, and Alan L. Boroshok, *County Government and Structure* (Washington, DC: National Association of Counties, 1989); David R. Berman, Lawrence L. Martin and Laura A. Kajfez, "County Home Rule: Does Where You Stand Depend on Where You Sit?" *State and Local Government Review* 17 (Spring 1985): 232.
- ⁹³ Robert B. Hawkins, Jr., *Self-Government by District: Myth and Reality* (Stanford, California: Hoover Institution Press, 1976); Elinor Ostrom, *Governing the Commons* (New York: Cambridge University Press, 1990); Elinor Ostrom, *Crafting Irrigation Institutions: Social Capital and Development* (Burlington, Vermont: Associates in Rural Development, 1990).
- ⁹⁴ Arizona Constitution, Art. XIII, §7. Virginia Constitution, Art. VIII, §7; School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E. 2d 468 (1978).
- ⁹⁵ ACIR, *The Organization of Local Public Economies and Residential Community Associations: Private Governments in the Intergovernmental System?* (Washington, DC, 1987 and 1989); Joseph F. Zimmerman, *State-Local Relations: A Partnership Approach* (New York: Praeger Publishers, 1983); and William G. Colman, *State and Local Government and Public-Private Partnerships* (Westport, Connecticut: Greenwood Press, 1989).
- ⁹⁶ Jeffrey L. Pressman and Aaron Wildavsky, *Implementation*, 3d Ed. (Berkeley: University of California Press, 1984), pp. 220-223.
- ⁹⁷ Record of Proceedings, Sixth Illinois Constitutional Convention, p. 1621, as quoted by Daniel R. Mandelker, Dawn Clark Netsch, Peter W. Salsich Jr., and Judith Welch Wegner, *State and Local Government in a Federal System*, 3d ed., (Charlottesville, Virginia: The Michie Company, 1990), p. 134.
- ⁹⁸ Donald S. Lutz, "The United States Constitution as an Incomplete Text," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 23, 27.
- ⁹⁹ Gordon L. Clark, *Judges and the Cities, Interpreting Local Autonomy* (Chicago: University of Chicago Press, 1985); Gerald Frug, "The City as a Legal Concept," *Harvard Law Review* 93 (April 1980): 1059.
- ¹⁰⁰ Fragley v. Phelan, 126 Cal. 383; William C. Jones, "Municipal Affairs in the California Constitution," *California Law Review* 1 (January 1913): 132, 132-134.
- ¹⁰¹ Alaska Constitution, Art. X, §1; Illinois Constitution, Art. VII(m), §96; Iowa Constitution, Art. III, §38A, §38B; Kansas Constitution, Art. 12, §4(d); Michigan Constitution, Art. VII, §34; Montana Constitution, Art. XI, §4(2); New Jersey Constitution, Art. IV, VII, para. 11; New Mexico Constitution, Art. X, §6; New York Constitution, Art. IX, §3(c); South Carolina Constitution, Art. VIII, §17; South Dakota Constitution, Art. IX, §2; and Wyoming Constitution, Art. 13, §1(d).
- ¹⁰² Florida Stat. 166.021(2); City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) (Florida Constitution, Art. VIII, §2).
- ¹⁰³ Texas Constitution, Art. XI, §5.
- ¹⁰⁴ Millard H. Ruud, "The Legislative Jurisdiction of Texas Home Rule Cities," *Texas Law Review* 37 (June 1959): 682; Ashcroft and Balfour, "Home Rule Cities and Municipal Annexation in Texas," p. 519.
- ¹⁰⁵ Gerald Benjamin, "The Political Relationship," in Gerald Benjamin and Charles Brecher, eds., *The Two New Yorks: State-City Relationships in the Changing Federal System* (New York: Russell Sage Foundation, 1988), p. 146.
- ¹⁰⁶ *Liberati v. Bristol Bay Borough*, 584 P.2d 1115 (Alaska, 1978).
- ¹⁰⁷ *State v. Hutchinson*, 624 P.2d 1116 (Utah, 1980).
- ¹⁰⁸ William D. Valente, *Local Government Law* (St. Paul, Minnesota: West Publishing Company, 1987), p. 67; *City of Grass Valley v. Walkinshaw*, 34 Cal. 595, 212 P. 894 (1949); *Bazell v. City of Cincinnati*, 13 Ohio St. 2d 63, 233 N.E. 2d 864 (1968);

- Beardsley v. Darlington**, 14 Wis. 2d 369, 111 N.W. 2d 184 (1961). For the view that Dillon's Rule is on its way out, see Richard Briffault, "Our Localism: Part I—The Structure of Local Government Law," *Columbia Law Review* 90 (January 1990): 8.
- ¹⁰⁹ The chief protagonists in this debate are Richard Briffault and Gerald Frug.
- ¹¹⁰ Richard Briffault, "Our Localism: Part II—Localism and Legal Theory," *Columbia Law Review* 90 (March 1990): 440.
- ¹¹¹ Gerald Frug, "The City as a Legal Concept."
- ¹¹² William C. Jones, "Municipal Affairs in the California Constitution."
- ¹¹³ Sears and Citrin, *Tax Revolt*.
- ¹¹⁴ Stanley v. Department of Conservation and Development, 284 N.C. 15, 199 S.E. 2d 641 (1973).
- ¹¹⁵ North Carolina Constitution, Art. V, §9.
- ¹¹⁶ Clark, *Judges and the Cities, Interpreting Local Autonomy*, p. 6.
- ¹¹⁷ Commission on Constitutional Revision, *The Constitution of Virginia* (Charlottesville, Virginia: The Michie Company, 1969), p. 228.
- ¹¹⁸ A.E. Dick Howard, *Commentaries on the Constitution of Virginia* (Charlottesville: University Press of Virginia, 1974), Vol. 2, pp. 811-812.
- ¹¹⁹ Talbot D'Alemberte, *The Florida State Constitution* (Westport, Connecticut: Greenwood Press, 1991), p. 119.
- ¹²⁰ Elmer Gertz and Joseph P. Pisciotte, *Charter for a New Age* (Urbana: University of Illinois Press, 1980), pp. 248-260.
- ¹²¹ John P. Wheeler, Jr., and Melissa Kinsey, *Magnificent Failure—The Maryland Constitutional Convention of 1967-1968* (New York: National Municipal League, 1970), p. 203.
- ¹²² Gertz and Pisciotte, *Charter for a New Age*, p. 328.
- ¹²³ ACIR, *State Constitutional and Statutory Restrictions upon the Structural, Functional, and Personnel Powers of Local Government* (Washington, DC, 1962), p. 79.
- ¹²⁴ *Ibid.*, p. 80.

Part II

The Historical Framework: Toward a Legal Theory of Local Government Autonomy

The Historical Legacy

Background

This chapter has two objectives. The first is to review briefly the classical and medieval European experience of local government and the English antecedents of American local government. Ideas drawn from the European experience played a role in the legal development of local government in the United States, especially during the nineteenth century when legal scholars looked to Europe for precedents. The founding and development of local government, however, particularly its practices, were deeply influenced by Americans' understanding of their biblical heritage and their own experiences in actually establishing local governments in North America.⁷

Secondly, the chapter is an examination of the historical contribution of early state constitutions to local government and autonomy. This second objective involves a detailed discussion of the tensions between state and local government that developed in America from the colonial period to the framing of the 'home rule' provisions of the Missouri Constitution in 1875.

Particular emphasis is placed on the role that state courts have played in either facilitating or hindering a policy of local self-government. This survey shows how a tradition of "localism" developed in America, despite the position of the state as the legally dominant partner.

A common legal view of the relationship between state and local governments has emphasized:

- (1) The hierarchical form (i.e., the state is at the apex of a power pyramid and local governments are at the base);
- (2) The monopolization of power (i.e., power flows from the state to localities); and
- (3) Centralization (i.e., state institutions promulgate the rules for local government action)?

The forces of localism, however, have helped shape a reevaluation of the role of local government autonomy in the American political system.

Ancient and Medieval Local Government

Classical Roots: Greece and Rome

The framers of America's state and federal constitutions drew in part from the legacy of classical antiquity in their search for concepts and examples that could shape their work.⁷ In addition to the classical heritage, James Madison's records of the Constitutional Convention of 1787 in Philadelphia show that the Bible was quoted and referenced more frequently than any other individual work by the delegates to the Convention.⁴

The Greek city-states, in associating with each other for the purposes of their own defense and, sometimes, aggression, developed a concept termed "autonomy," which they used in treaties to characterize what were **for** them external power relationships. Autonomy portrayed a world of competing and collaborating city-states.⁵ It defined varying degrees of political independence from their league allies?

It is with the rise of Roman power and its conquests, however, that a developing notion of "state-local" relations begins to appear in the West. This issue became ever more pressing on the minds of Roman thinkers and political actors as the Roman state evolved from republic to empire.⁷ The predominant forms of local governments during this period are classified according to their origin, character, and juridical relation to Rome, as *colonia*, *municipium*, *praefectura*, and *saltus*.⁸

The *colonia* was a city authorized by Rome, made up of settlers who were Roman citizens and "autonomous in the matter of local affairs."⁹ The *municipium* resulted from the incorporation of a conquered town into the Roman state, and its degree of autonomy was based on the charter granted by the Roman state.¹⁰ *Praefectura* was a "generic term applicable to any community which lacked the full right of self-government."¹¹ It was, in effect, an administrative arm of the Roman Empire.¹² *Saltus* was an estate directly administered by the emperor with no self-government.¹³

Another nomenclature emerged with Roman expansion. Cities in lands outside Italy were classified according to whether or not their internal affairs were subject to the supervision and control of the Roman governor of the province and whether or not they were obligated to pay tribute to Rome.

Civitates liberae et immunes were both granted immunity from tribute and afforded a variety of functional privileges (e.g., to govern under their own laws, to administer justice in local courts, to coin money, and to hold land free from the provincial land tax).¹⁴ If these privileges originated in a treaty (*civitas foederata*), they were regarded as irrevocable.¹⁵

Most cities, however, looked to a law or Senate decree applicable only to that city to fix the scope and limits of local prerogative. These cities (*civitates sine foedere liberae et immunes*) were unprotected against changes in Roman policy.¹⁶ Gradually, the functional attributes and prerogatives that differentiated free cities from tributary cities (*civitates stipendariae*) attenuated through changes in law and custom. Thus, a variety of enactments by the Roman people, the Senate, the emperor and the provincial governor authorized tributary cities to retain and administer their local laws, to operate local organs of government, to levy local taxes and to make contracts.¹⁷ Indeed, under the empire, the city of Rome itself was reduced to the same status as other cities.¹⁸

Municipal status in the early empire was expansive, predicated on a conscious imperial policy of promoting a robust practice of local self-government.¹⁹ Its results have been described as follows:

Municipal institutions spread far and wide until the empire became in great part an aggregate of city-states. In each of these, the citizens displayed an intense pride in public welfare, and endowed their native town with splendid monuments, buildings, and gifts for special purposes, such as libraries and schools. Offices and honors were eagerly sought, and lavish contributions were made in attaining them. Public spirited citizens, civic pride, and keen urban rivalries combined to produce a brilliant municipal life throughout the empire.²⁰

Although the view that the Roman empire was a confederation of cities persisted into the fourth century A.D.,²¹ the municipality primarily had become a medium to facilitate Rome's collection of revenues.²² Rome interfered increasingly in municipal administration and established an elaborate bureaucratic machinery to superintend and control municipalities.²³

By the time of Justinian's compilation of Roman law in 529 A.D., there was no doubt as to where the sovereignty of the Empire lay, despite a previous practice of lax control over what could be loosely termed "home rule."²⁴ The Roman Empire brought forth a conception of the supremacy of the state.²⁵

The Civic Republic: Italian Medieval Cities

The intellectual climate that fostered the American Revolution was clearly aware of the example of the Italian medieval city-states.²⁶ The peculiar juridical status achieved by the Italian *civitas* demonstrates the conflict between an "ascending conception of law and government according to which law creating power may be ascribed to the community . . . and a descending conception according to which "governmental authority and law-creating competency descend from one supreme organ."²⁷

These cities existed in spite of what were by the Middle Ages generally accepted principles of Roman public law, which made the legitimacy of all forms of civic association contingent on Rome's authority.²⁸

Italian jurists of the time, such as Bartolus and Baldus, sought to reconcile local claims of autonomy with the Roman public law doctrine. Bartolus (1313-1357) interpreted Roman law texts to focus on popular consent as the element from which both customary and statutory law derived their validity." Given that the people could make law by tacit consent, they could do so, also, expressly by statute. Bartolus, therefore, recognized that the people had the power to constitute themselves as a civic community and to legislate concerning their own internal concerns without the consent of the emperor or pope.³⁰ As a result, city autonomy was both territorially limited and subject to the authority of empire and Papacy. Of course, the *civitas* could also draw on a parallel set of rights, privileges, powers, and immunities established by imperial charters or papal concessions.

Baldus (c. 1327-1400) went further and made a claim for independence from the Papacy and imperial rule. As Joseph P. Canning says of Baldus, "natural reason, in the form of its product, the *jus gentium*, not only brought the city-people into existence, but endowed them with autonomous powers of self-government without the need for the authorization of a superior."³¹ There is no question that the cradle of secular Renaissance thinking about a rising individualism was to be found in the Italian city-states of the late fourteenth and early fifteenth centuries.

As historian Susan Reynolds points out, the vibrancy of local collective action to run the daily affairs of both townspeople and rural communities, such as they were, abounded.³²

The English Antecedents of American Local Government (1066-1688)

The immediate precursor of American local government, however, can be found in England. The history of English local government is characterized by a colorful

variety of institutional forms, such as towns, boroughs, cities, manors, parishes, and counties.³³ Nevertheless, there was no clearly defined or anciently rooted doctrine of local self-government in **England**.³⁴ What English history discloses from the time of the Norman conquest until the Glorious Revolution is something more of a patchwork of hard-won privileges, liberties, and charter **rights**.³⁵ This patchwork of local government foreshadows the complex and intricate relationship between the provincial legislatures and local government that shaped the American colonial experience.

Susan Reynolds' survey of the emergence of the English local polity during this period deemphasizes the causal significance of the Norman **conquest**.³⁶ Urban liberties were granted piecemeal, and varied from town to town. Towns began to purchase from the king local autonomy over the collection of revenues due the royal exchequer (*firma burgi*).³⁷ An analysis of clauses contained in royal charters extant at **1150 A.D.**, for example, reveals the following additional liberties:

- (1) A distinctive form of land tenure (burgage tenure) largely free from feudal encumbrances;
- (2) Mercantile privileges exempting townsmen from interlocal tolls and fees that hampered trading;
- (3) Recognition of borough custom as a source of binding law; and
- (4) Allowing townsmen freedom to form guilds.³⁸

Thereafter, local governments began to petition formally and receive additional grants of individual local prerogatives, creating the patchwork of state-local relations that was to characterize England at the turn of the **sixteenth century**.³⁹

With the advent of the Stuart monarchy and the developing political struggle with the Parliament, there arose a need to coordinate and systematize an amorphous local government **structure**.⁴⁰ As a result, by **1650**, localities could be classified as administrative institutions, which "the sovereign could create, transform or abolish in light of his own free judgment as to their utility."⁴¹

The escalating tension between king and Parliament, which resulted in the Glorious Revolution of **1688**, encompassed state-local relations as **well**.⁴² After their successful rise to preeminence, the Parliament established local government in England as an essential element of government administration.⁴³

Settlements in America and their Local Governments

It must be remembered that local government in the American colonies had to cope with two competing external governments. First, there was the relationship of the colonies to **England**,⁴⁴ in which the colony itself was viewed as local government within the terms of the Empire. Second, there was the relationship of local government to the colony.

The Relationship of Colonies to England

Settlement of the American colonies brought with it, at least after a while, a need for the orderly organization of daily affairs. As such, colonial charters and royal commissions specified the range of powers to be exercised by settlers. Typically, clauses in the royal commissions of colonial governors empowered them "to summon and call General Assemblies of the . . . Freeholders and Planters within their Government, according to the Laws and Usages of Our said Province" and to exercise, with colonial assemblies, "full Power and Authority to make, constitute, and ordain **Laws**, Statutes and Ordinances for the Public Peace, Welfare and good Government of Our said Province, and of the People and Inhabitants thereof,"⁴⁵ subject to the qualification that colonial enactments could "not be repugnant" to the laws and statutes of **Great Britain**.⁴⁶

The king and the Parliament were occupied during the seventeenth century in a constant battle over prerogative. Although this battle, to a certain extent, involved the developing American colonies, they were left free of overbearing administration from London. That was all to change, starting in **1696** with the creation of the Board of Trade and Plantations, a subagency of the Privy Council. During the eighteenth century, the impact of parliamentary rule (particularly through this board) began increasingly to be felt. As early as **1754**, in what was known as the Albany Plan, submitted by Benjamin Franklin, the colonies had responded with a proposal to develop a more formal relationship between **Great Britain and America**.⁴⁷

Jack P. Greene neatly summarizes the situation facing colonial governments by **1760**:

Notwithstanding this lack of theoretical resolution or agreement as to the actual and customary distribution of power within the empire, the empire continued to function in practice with a clear demarcation of authority, with virtually all internal matters being handled by the colonial governments and matters of general concern by the metropolitan government.⁴⁸

That the events after **1761** broke this delicate balancing

act and reduced the parties to “**first principles**” is fortuitous for American local government. After 1776, the previous question of Great Britain’s relationship to the Colonies now had to be resolved in the newly independent American states as the state’s relationship to local governments.

The Relationship between Colony and locality

Variety rather than uniformity characterized the relationship between provincial and local government in colonial America.⁴⁹ An examination of this relationship between colonial government and its localities runs the risk of failing to distinguish between a juridical autonomy in local government and the construction and achievement of a corporate sense of local identity.⁵⁰ Juridical autonomy involves the extent to which a locality can make decisions over a variety of local matters that are presumed to be within its prerogative.

The crucial question was whether or not a colony was empowered, in its relation to Great Britain, to establish subgovernments and, if so, what kinds.

Much has been made of the Town Law of 1636 passed by the General Court of the Massachusetts Bay Colony? A perusal of its text, however, indicates “the strictly and traditionally circumscribed nature of town powers.”⁵²

Whereas particular townes have many things, which concerne only themselves, and the ordering of their owne affaires, and disposing of business in their owne towne, it is therefore ordered, that the Freemen of every towne, or the major parte of them, shall onely have power to dispose of their owne lands, and woods, with all the previlidges and appurtenances of said townes, to graunt lotts, and make such orders as may concerne the well ordering of their owne townes, not repugnant to the lawes and orders here established by the Generall Court; as also to lay mulks and penaltyes for breach of theis orders, and to levy and distreine the same, not exceeding the some of. . . [20 shillings]; also to chuse their owne particular officers, as constables, surveyors for the highwayes, and the like; and because much business is like to ensue to the constables of severall townes, by reason they are to make distresses, and gather Fynes, therefore that every towne shall have two constables, where there is neede, that soe their office may not be a burthen unto them, and they may attend more carefully upon the discharge of their office, for which they shalbe lyeable to give their accompts to this Court when they shalbe called thereunto.⁵³

The General Court was legally circumspect in creat-

ing borough corporations because to have attempted to do so “would have been flagrantly illegal, because the Massachusetts Company, as a corporation, had no authority to create other corporations.”⁵⁴

Nonetheless, the existence of self-created, self-defined local polities in colonial America is undeniable.⁵⁵ Many scholars believe that the dominant political culture in colonial America was localist and decentralized.⁵⁶ However, these practices took place within an overarching framework that required some kind of royal warrant from the colony or benign neglect allowing local power to develop and be exercised.

Sometimes, local government was mandated, as in the 1669 Fundamental Constitutions of Carolina, drafted by John Locke, which contained a detailed blueprint for local government, including incorporated towns? A proprietary charter sometimes expressly granted the competence to incorporate cities, towns, and boroughs, as did the 1681 charter to William Penn.⁵⁸ Sometimes, a local government unit was created directly by royal charter, as was the borough of Westchester, New York, in 1696.⁵⁹

The lack of express powers, however, did not prevent colonial assemblies from enacting legislation recognizing and empowering local communities to act in town meetings for purely local matters, as the Massachusetts Town Act shows. Nevertheless, colonial legislation was increasingly subject to oversight by the Board of Trade and Plantations.⁶⁰ That board began to monitor the legislative output of colonial assemblies and, in so doing, sought the advice of the king’s counsel on questions of law?

As an example of the imperial government’s attitude toward the powers of colonial legislatures, the first special counsel to the Board of Trade was asked in 1723 to decide whether an act of the South Carolina Assembly purporting to incorporate Charlestown should be sustained against objections by local inhabitants.⁶² He had no objection to the grant of privileges and powers “usually granted to new erected corporations.” Nevertheless, he recommended disapproval of the enactment both because it created a closed oligarchic municipal government and because it was approved by the colonial legislature in apparent defiance of the majority of the inhabitants of Charlestown.⁶³ This opinion is an example of the willingness Great Britain had to pay deference in the colonies to the wishes of local consent and respect broad participation in local elections.

Two institutional devices for assuring the integration of local polities and the colony become significant. The first was the practice of affording local governments the corporate right to elect a representative to the colonial legislature. In Massachusetts, for example, each town had the right to elect its own representative to the General Court.⁶⁴ Each Virginia county became a constituency of the House of Burgesses.⁶⁵ In Maryland, the county delega-

tions to the provincial assembly gained power to pass laws for individual **counties**.⁶⁶ This conception of local government privilege is at the base of what is commonly described today as “home rule.”

The second device was the right of local electors to instruct their delegates to the colonial **legislature**.⁶⁷ A delegate was bound to abide by the decisions of his own community in Pennsylvania and Virginia, as well as in the New England **colonies**.⁶⁸

Local Self-Government in Colonial America

Whatever the legal status of local government, the custom and practice of local self-governance was strong and **pervasive**.⁶⁹ Three distinctive types of local government emerged in the colonies:

- (1) A mercantile community mirroring the structure and function of the English **borough**;⁷⁰
- (2) A covenanted community founded on moral principles and devoted to the tasks of social control and civic **betterment**;⁷¹ and
- (3) The predominantly agricultural county governed by an enlightened, property-owning elite formally appointed by the colonial governor but self-governing and self-perpetuating in **practice**.⁷²

A narrow focus on that which is typical, however, neglects the inevitable irregularities. For example, Philadelphia’s municipal corporation was governed by a closed, self-perpetuating elite preoccupied with matters of trade and **commerce**.⁷³ Public demands for increased municipal services were rejected by the corporation. The provincial assembly sometimes responded to these demands by establishing separate statutory authorities to perform such functions as laying out and maintaining **streets**.⁷⁴ In areas where the assembly failed to establish a statutory authority, voluntary associations, such as fire fighters, **emerged**.⁷⁵

Although the Connecticut town was undoubtedly a covenanted community, it also was far from being a simple consolidated local government. By 1733, all towns in Connecticut held:

- (1) Proprietors’ meetings, which had jurisdiction over the use of town land and unreviewable discretion as to whether or not to confer the status of proprietor on newcomers;
- (2) Freeman’s meetings at which deputies to the General Assembly and statewide officers were elected (the town selectmen possessed formal power to admit to the status of freemen);
- (3) Militia meetings mandating all men between the ages of 16 and 60 to bear arms, to take

part in regular training exercises, and to elect their own officers, subject to confirmation by the state; and

- (4) Town meetings in which inhabitants who were neither freeman nor proprietors also had a **vote**.⁷⁶

In addition, local congregational societies were separately established in a defined territory often coextensive with the town. They were empowered to levy and collect taxes for the support of the minister, the meetinghouse, and the **school**.⁷⁷ Because these societies were the political arm of the local church congregation, eligibility for participation in society’s affairs depended on whether one had been admitted as a member of the church.

County government in New York and Pennsylvania exhibited an intricate structure in which some officials were elected locally, some were nominated locally but appointed by the governor, some were appointed by the governor with the advice and consent of his council, and some were appointed by locally elected **officials**.⁷⁸

The nature and extent of actual local autonomy depended on both formal authority and local circumstance. During the course of the eighteenth century, duly constituted municipal corporations, like Philadelphia and New York, exhibited a tendency toward exercising the specifically enumerated rather than the broad general powers granted in their charters.⁷⁹ As Hendrik Hartog observes:

chartered power was implicitly viewed not as a source of innovation but as a restraint against externally imposed change. Regulations and other invocations of public power were valid only insofar as they rested on the consent of a local public or on absolute property **rights**.⁸⁰

As a practical matter, the autonomy available under the Massachusetts Town Law to “make such orders as may concerne the well ordering of their owne townes, not repugnant to the laws and orders here established by the General Court” may well have exceeded that at the disposal of the mayor and council of an incorporated *municipality full of dissenters willing to challenge city hall*.⁸¹ Colonial legislatures often responded to local claims for more autonomy by granting exemptions from general law or by delegating greater discretionary powers to town officials.⁸²

There were instances, also, of laws regulating municipal affairs and imposing obligations on municipal officials. No protected sphere of local autonomy can be discerned from a detailed examination of the hodgepodge of provincial **legislation**.⁸⁴ Rather, there is a repetition of the uneasy relationship between the central government and localities, translated into the competing claims of province and local government.

The Constitutional Dimension to Colonial Local Government

Local Autonomy in the First State Constitutions

Local government was clearly in the minds of the leading figures of the day when they formulated the first state constitutions.

For example, a publication issued in Philadelphia containing the first printing of the Declaration of Independence in book form included an extensive set of recommendations for an intergovernmental separation of powers based on a model provided by the free Saxon communities of antiquity.⁸⁵ The author urged that the first care of the approaching state constitutional convention ought to be “to incorporate every society of a convenient extent into a Township, which shall be a body politic and corporate by itself. . . .”⁸⁶ Massachusetts, in its constitution of 1780, dealt specifically with the issue of towns and their incorporation.

Many framers of the state and federal constitutions were adherents of a theory that local self-government had its origins in the Teutonic polities described by Tacitus in the first century A.D.⁸⁷ Though scholars have discounted its validity with regard to the American experience of local government, the Teutonic theory was revived in the late nineteenth century in the United States and influenced Judge Thomas Cooley of Michigan, who advocated a theory of the inherent right to local self-government in an 1871 concurring opinion of the Michigan Supreme Court.

Thomas Jefferson, for instance, believed that “there ought to be four centers of republican government in the country: the general federal republic for all foreign and federal concerns; the state republics for matters which relate to the citizens of each state exclusively; the county republics for the duties and concerns of the counties; and ‘ward republics, for the small, and yet numerous and interesting concerns of the neighborhood’.”⁸⁸

Thus, careful scrutiny of early state constitutions shows that they were not silent on the subject of local government.

The state constitutions (and, subsequently, the federal) emphasized the predominance of the legislative branch of government.⁸⁹ At the time of the American Revolution, “municipal charters were almost invariably granted by the executive rather than the legislature,” following the British custom of royal prerogative in granting such charters.⁹⁰ Under the new state constitutions, however, this power was transferred to the legislative branch. For example, Pennsylvania expressly granted its General Assembly the power to grant charters and to constitute towns, boroughs, cities, and counties.⁹¹ The executive’s role was confined more specifically to the administration of the state.

As such, the early state constitutions curtailed the executive’s powers to “only such limited powers as were expressly conferred on him; while the legislature became the repository of all powers not expressly or impliedly denied.”⁹² Even so, the question of the incorporation of municipalities was politically controversial in some states, particularly with regard to representation in the state legislature. The Massachusetts Constitution of 1780 was expressly amended to make clear that the “general court shall have full power and authority to erect and constitute municipal and city governments” and “to grant to the inhabitants thereof such powers, privileges, and immunities . . . as the general court shall deem necessary or expedient for the regulation and government thereof.”⁹³ During the nineteenth century, the absence of such an express constitutional provision led to the judicial invalidation of laws delegating broad powers to cities in several states.⁹⁴

As to local charters already granted, the states were usually content to continue their validity. The Declaration of Rights of the Maryland Constitution confirmed Annapolis’ charter rights, privileges, and benefits subject to future alteration by the legislature.⁹⁵ New York’s Constitution confirmed the continuing validity of royal charters.⁹⁶

Finally, and probably the most important aspect of state-local relations to emerge from the first constitutions in many states, local government units were given a corporate right of representation in the legislature? For example, the 1776 North Carolina Constitution gave each county equal representation in the Senate and allocated two seats in the lower house to each county and one to each town.⁹⁸ Similar schemes existed in Georgia, Maryland, South Carolina, and Virginia.⁹⁹ Town representation in the lower house of the legislature was entrenched in the constitutions of Massachusetts and New Hampshire.¹⁰⁰ Connecticut and Rhode Island also used towns as the basis of apportionment.¹⁰¹

The Declaration of Rights provisions of the Massachusetts, New Hampshire, and North Carolina constitutions institutionalized an even more far-reaching prerogative of localism, with the right of the locality to give binding instructions to its corporate representative to the state legislature.¹⁰² Eight of the eleven original colonies, creating constitutions between 1776 and 1780, provided for the election of local officials.

In addition, the sharp distinction between private and public corporations did not exist during this period.¹⁰³ Hence, the North Carolina Supreme Court held that a corporation erected for a public purpose qualified for protection against an uncompensated state legislative taking of its “property,” “privileges,” and “liberties.”¹⁰⁴ Strong dicta in three U.S. Supreme Court cases indicated that public corporations could possess property and even contractual interests, which the state legislature could not divest without local consent.¹⁰⁵

Thus, as corporate entities, local governments had a firm existence in the structure of early state constitutions. Clearly, they had a role to play in the unfolding drama of American state government.

Organizing State and Local Government Relations: From the Northwest Ordinance to Dillon's Rule (1789-1868)

Northwest Ordinance

In a manner similar to the state legislatures, the Congress, under the Articles of Confederation, addressed the complicated issue of the "territories" through the Northwest Ordinance of 1787. The ordinance established a method for dealing with territorial administration.¹⁰⁶

Section 7 of the ordinance authorized the territorial governor to "appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same."¹⁰⁷ The presence of 5,000 free male inhabitants in the territory triggered a right "to elect representatives from their counties or townships to represent them in the general assembly" which, when organized, was empowered to regulate and define the "powers and duties" of local officials.¹⁰⁸ Territorial legislatures soon created "a fabric of local government."¹⁰⁹

The impact of the Northwest Ordinance on local self-government was extensive. Merle Curti points to this impact from the following description of Trempealeau County, Wisconsin:

Self-government did not have to be created or recreated on the Trempealeau frontier—because it existed there already. We are confronted with the semantic absurdity . . . of the frontier being self-governing before it was settled. We find that the apparatus of county and township government was readily available when the first comers arrived, and that the county fathers promptly made good use of it.

Wisconsin law regulating the kinds and duties of local officers, the collection of numerous taxes, and the expenditure of funds was (and still is) most specific. Trempealeau's various officers spent nine-tenths of their time in meeting the requirements of a code emanating from Madison. . . Trempealeau carefully conformed. One looks in vain in Trempealeau for a frontier effort to circumvent a law defining county or township gov-

ernment. . . . The people of Trempealeau seem to have governed themselves contentedly within a county "constitution" they had neither drafted nor ratified."¹¹⁰

In states previously settled under the aegis of the Northwest Ordinance, state legislative omnipotence over the activities and affairs of local government was an historical, juridical, and practical reality. In the older states, historical and practical impediments to state legislative omnipotence muddied state-local relations. In these states, four elements of local government privileges and responsibilities came into play:

- (1) Local custom and practice;
- (2) Community autonomy, particularly in New England;
- (3) Corporate status; and
- (4) Subordination to the legislative sovereign."¹¹¹

Dillon's Rule

Some observers believe that the legal doctrine that cities are subordinate to the state was developed only after the Civil War.¹¹² Joan Williams' careful reconstruction of case law in the leading jurisdictions of New York and Massachusetts in the early nineteenth century, however, offers persuasive evidence to the contrary.¹¹³ This early case law displays the subjection of royally chartered municipalities to the will of the legislature in Maryland, Pennsylvania, and Virginia.¹¹⁴ Much of what became Dillon's Rule apparently derives from a line of Massachusetts cases decided before 1820. It stems from a theory concerning the juridical subordination of corporate entities to the sovereign, which is rooted in medieval law.¹¹⁵

In some respects, however, it is possible to argue that local governments were less subject to the state per se than to the state constitution. From this argument, the state itself was subject to the constitution, though authorized by it to set rules and regulations for local government.

The leading case that supports the view that Dillon's Rule is embedded in early state legal thinking was *Stetson v. Kempton*.¹¹⁶ This case concerned the corporate capacity of towns under a 1785 Massachusetts statute, which had conferred the status of "a body politic and corporate" on every town in the Commonwealth.¹¹⁷ This statute vested towns with the power to legislate for managing and ordering the "prudential" affairs of the town and to make "necessary" charges.¹¹⁸

The plaintiff was a citizen of Fairhaven, Massachusetts. The case arose during the War of 1812 when the town, it appeared, was in imminent danger of enemy attack. A town meeting was held on August 2, 1814, during which residents voted to raise funds to pay the town militia and make other expenditures related to the immediate

protection and defense of the town and its inhabitants. The plaintiff, who did not attend the town meeting, refused to pay. Consequently, the town's assessors seized his property to collect his portion of the charges. The claimant then sued the town's assessors for trespass, questioning whether the town had a "lawful right and authority, in their corporate capacity, to raise money, and to cause it to be assessed upon the polls and estates within the town, for the purpose **stated**."¹¹⁹

Chief Justice Isaac Parker, speaking for the Massachusetts Supreme Judicial Court, cut through the complex colonial legacy of historical and political localism by asserting that towns are "the creatures of legislation," which enjoy "only the powers expressly granted to **them**."¹²⁰ In so doing, Parker showed his concern to preserve not only the sovereign prerogatives of the legislature but also "to prevent the minority from being at the disposal of the majority" in the **town**.¹²¹ As a result, Parker denied that "a corporation of limited powers" could take upon itself a duty to defend against "an enemy in time of war" because that duty "is devolved upon the national government" **by** the Constitution of the United **States**.¹²²

This rule of interpretation ultimately came to be known as Dillon's Rule; named for Judge John Dillon of the Iowa Supreme Court, who established it firmly in a landmark 1868 case. This rule was refined in later Massachusetts **cases**¹²³ and was adopted in many **states**.¹²⁴

Chancellor James Kent formulated his version of the rule in his 1827 treatise on American law:

As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode, and manner, and subject matter **prescribed**.¹²⁵

Kent's formulation was cited as controlling in an 1863 decision of the Iowa Supreme **Court**,¹²⁶ which Judge Dillon was bound to follow when he first enunciated the rule as Chief Justice of the Iowa Supreme Court:

In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corpo-

ration—against the existence of the **power**.¹²⁷

Dillon further refined his views in subsequent editions of his treatise on the law of municipal corporations. He later wrote:

The extent of the power of municipalities, whether express, implied, or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is, that while the construction is to be just, **seeking first** of all for the legislative intent in order to give it fair effect, yet any ambiguity or fair, reasonable, substantial doubt **as** to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee. The rule of strict construction of corporate powers is not **so** directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities **as** it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal **and** public bodies which are out of the usual range, or which grant franchises, or rights of that nature, or which may result in public burdens, or **which**, in their exercise, touch the rights to liberty or property, or, **as** it may be compendiously expressed, any common-law right of citizen or inhabitant. . . . The rule of strict construction does not apply **to** the mode adopted **by** the municipality to carry into effect powers expressly or plainly granted, where the mode is not limited or prescribed by the legislature, and is left to the discretion of the municipal authorities. In such a case the usual test of the validity of the **act** of a municipal **body** is, whether it is reasonable? and there is no presumption against the municipal action in such **cases**.¹²⁸

There is no support in Dillon's formulation for the mistaken supposition that it is a rule of strict construction, therefore, that a locality can do nothing for which a warrant cannot be found in the language of applicable law. Indeed, Dillon stated that a local government "may exercise all powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly **granted**."¹²⁹ In that respect, Dillon's Rule is better characterized as one calling for fair or reasonable construction of grants of power to localities, taking into account all relevant factors bearing on legislative intent, including the entire context of legislation pertinent to the asserted grant of **power**.¹³⁰

Should the search for the fair and reasonable intent of the legislature fail to resolve the matter, the next step is to determine whether the language of the grant is ambiguous or gives rise to a fair, reasonable, substantial doubt as to the extent of powers granted. When an ambiguity or substantial doubt is present, then the nature of the power

granted is subject to scrutiny. If that power is out of the range of those normally or customarily devolved upon localities, or operates to confer a franchise or other monopolistic restraint on competition, or imposes burdens on the public (e.g., debt or taxation), or infringes on the liberty or property interests of individuals, then and only then is the grant of power to be construed strictly.

Scrutiny of every case cited by Dillon in support of his discussion reveals that his formulation is less restrictive than that which prevailed in most states, including his own Iowa **decisions**.¹³¹ For example, his discussion does not support the tactic adopted by judges in several states of narrow construction of broad legislative grants of power to localities.¹³² Furthermore, Dillon adopted and extended the individual rights focus of *Stetson v. Kempton*. In so doing, he artfully joined discourse about the attributes of sovereignty to discourse about individual rights characteristic of the liberal **tradition**.¹³³

An Increasing Role for the Judiciary

The emergence of a rule of interpretation aimed as much at the state legislature as at local governments is characteristic of the transition in this period of state constitutional law from legislative dominance or omnipotence to an increased role for the judicial branch of **government**.¹³⁴ An activist concept of judicial review, coupled with various state constitutional amendments placing procedural and substantive restraints on the legislature,¹³⁵ accounted for:

- (1) Judicial protection of municipal property rights under the state constitution;
- (2) Judicial protection of the local treasury from some state-mandated expenditures;
- (3) Judicial development of the delegation doctrine to block broad grants of state legislative power to localities;
- (4) Judicial creation of the public purpose doctrine as a restraint on the power of state and local government to tax and spend;
- (5) Emergence of the doctrine of an inherent right to local self-government;
- (6) State constitutional prohibitions on special local laws affecting one jurisdiction only;
- (7) Insertion of the “ripper clause” (prohibiting the imposition of state-created organizations over the power of municipalities without accountability to the people of those municipalities) in state constitutions; and
- (8) Express state constitutional limits on the power to tax and to incur debt.

Judicial Constraints on State Interference with Local Autonomy

During this period, American courts became active in both a positive and a negative manner regarding local government autonomy. Some judges sought to restrain state interference with local government powers; others restricted home rule authority.

Noteworthy in its positive impact on local governments was Justice Joseph Story’s dictum in *Dartmouth College v. Woodward*, arguing that state legislative power did not encompass taking the private property of such corporations as “towns, cities, and **counties**.”¹³⁶

Later, that view was adopted in Kent’s Commentaries. Kent stated that such entities “may also be empowered to take and hold private property for municipal uses, and such property is invested with the security of other private **rights**.”¹³⁷ Accordingly, state supreme courts invalidated state statutes purporting to divest municipalities of property held in their private or proprietary character without their **consent**.¹³⁸

At this time, several state supreme courts invalidated state statutes obligating municipalities to levy local taxes or to make expenditures for “purposes not of a municipal **character**.”¹³⁹ This line of cases invoked a variety of rationales based on creative readings of a miscellany of state constitutional provisions. In 1858, one court seized on the governmental-proprietary distinction in holding that a municipal corporation is not subject to the absolute control of the legislature when acting in its private capacity.¹⁴⁰

In another case, the Michigan Supreme Court emphasized that the state could require a municipality to levy taxes only for a local purpose, that is, a purpose in which the people of the political subdivision have “special and peculiar interests” such that “they should bear the burden rather than the state at **large**.”¹⁴¹ In resolving another dispute, the Wisconsin Supreme Court found in **1872** that the taxing power could not be exercised “for purposes not of a municipal character without the consent of the **town**.”¹⁴²

Eventually, this judicially crafted restraint on state legislative prerogatives was entrenched in the constitutions of one-fifth of the states in the form of a provision forbidding the imposition of state taxes for local or municipal **purposes**.¹⁴³

Judicial Restraints on Home Rule

Another set of cases from this period demonstrates that the same judicial activism also was employed to strike down efforts of the state legislature to empower local government. Thus, “Free Trade and the Bible walking hand-in-hand together” inspired the Georgia Supreme Court in **1853** to deny the legislature the capacity to confer on a “subordinate authority” the power to enact ordinances that repeal state **statutes**.¹⁴⁵ The Missouri Su-

preme Court held that the provision of the state constitution vesting the state General Assembly with legislative power rendered unconstitutional a statutory clause delegating to the county governing **body** local choice **as** to whether to suspend the statute's **operation**.¹⁴⁶ Lawyerly caution deriving from these and similar **cases**¹⁴⁷ led to the view that a broad grant of home rule or charter-making power to local governments could be safely effectuated only by amending the state constitution to permit it.”

Another restraint on the powers of the state legislature emerged out of the willingness of state and, eventually, federal courts to review state legislation authorizing taxation, borrowing, or the taking of property, to determine whether the governmental action was for a valid **public purpose**.¹⁴⁹ The public-purpose doctrine was predicated on “implied reservations of individual **rights**.”¹⁵⁰

In the leading case, *Loan Association v. Topoka* (1874),¹⁵¹ the power of the Iowa legislature to authorize local governments to incur debt to aid in the establishment of a privately owned manufacturing facility was denied by the **court**. Contemporaneously, state courts held unconstitutional efforts of the legislature to empower local governments to provide services traditionally performed by the private **sector**.¹⁵² State constitutional provisions expressly permitting state and local borrowing for the purpose of industrial development¹⁵³ or empowering local governments to operate public **utilities**¹⁵⁴ are a tribute to the tenacity of the judicial doctrine. This doctrine became so entrenched that it could be rooted out only by amending the state constitution to overturn state supreme court decisions.

An Inherent Right to Local Self-Government? The Cooley Doctrine

Debate over local home rule was enlivened by judicial interest in the doctrine of an inherent right to local self-government. This doctrine stems from an 1871 concurring opinion of Michigan Supreme Court Judge Thomas Cooley in *People v. Hurlbut*.¹⁵⁵ The statute under attack had created a board of public works for the city of Detroit, appointed by the state legislature. This legislation removed the city and its elected leaders from responsibility for and control of public sewer and water services as well as public property, including buildings, streets, and **parks**.¹⁵⁶

Cooley had recently written *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the America Union*.¹⁵⁷ He framed the question presented for decision “broadly and nakedly,” asking “**whether** local self-government in this state is or is not a mere privilege, conceded **by** the legislature at its discretion, and which may be withdrawn at any time at **pleasure?**”¹⁵⁸

Viewing the state of Michigan as a “polity,” Cooley examined the context of “traditions, practices, and expectations” surrounding the framing of the state constitution in

light of the writings of Alexis de Tocqueville, Francis Lieber, and Thomas Jefferson, as well as the colonial struggle for the right of self-government against **centralization**.¹⁵⁹ Cooley’s discussion next drew on the notion that assets held **by** a municipal corporation to provide local necessities and conveniences for its own citizens qualify **as** constitutionally protected property interests.¹⁶⁰ The judge then invoked a “living and breathing spirit” of “mutual responsibility in neighborhood interests” and sentiments of “independence and **self-control**”¹⁶¹ **as** guides to the interpretation of the following section of the Michigan Constitution: “Judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed, at any such time and in such manner as the legislature may **direct**.”¹⁶²

Cooley viewed this language **as** establishing the civil and political rights to vote and to hold **office**.¹⁶³ He concluded:

[L]ocal government is a matter of absolute right; and the state cannot take it away. It would be boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call the system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.¹⁶⁴

Rebuking the legislature for introducing “into its legislation the centralizing ideas of continental Europe” and for ignoring the message of the framers of the 1850 Michigan Constitution, who were “intent on localizing and popularizing authority,” Cooley struck down the statute, which reminded him of the worst practices of the English Stuarts, “antagonistic to liberty and subversive of corporate **rights**.”¹⁶⁵

Although Cooley’s views were unequivocally adopted only in Indiana, Nebraska, Iowa, Kentucky, and Texas,¹⁶⁶ they articulated a resurgence of values that would soon be embodied in institutional reforms designed to widen the scope of local **choice**.¹⁶⁷

State Constitutions and Restrictions on State Supremacy

Regardless of judicial interest in the subject, the states themselves began to be subject to constitutional limitations on the exercise of power over local government, by constitutional amendment.

The Indiana Constitution of 1851 apparently contained the first state constitutional provision prohibiting local or special **legislation**.¹⁶⁸ Although the **provision** did not exclusively address the relationship between the legislature and local government, the Indiana document enumerated several categories involving local government.¹⁶⁹ The broadest of these prohibitions was aimed at local or *special* laws “regulating county and township **business**.”¹⁷⁰ Prohibitions in this

and many other state constitutions on special and local legislation were viewed as aiding “local self-government to this extent, that whatever rights of government or power of regulating its own affairs a community may have can be neither increased nor diminished without affecting in the same way the power or rights of all similar communities.”¹⁷¹

Another state constitutional innovation affecting the sovereign prerogative of the legislature was the ripper clause.¹⁷² A ripper clause was inserted by the 1872 Pennsylvania constitutional convention in response to the legislature’s creation of the Philadelphia Building Commission. That commission was a state-appointed body charged with building city hall. It had been vested with nearly unlimited authority to exact local taxes to fund its operations.¹⁷³ The first ripper clause read as follows:

The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or levy taxes or perform any municipal function whatsoever.¹⁷⁴

Like the language of provisions concerning local or special legislation, the ripper clause is significant because these provisions are evidence of a conscious attempt to make a crucial distinction between purely local, internal, or municipal matters and those of statewide concern.

The ripper clause soon found its way into the constitutions of seven other states, normally as part of a policy package that included restrictions on special or local legislation concerning the internal affairs of local governments.¹⁷⁵

State and local borrowing was another area in which the public restricted state-local action, particularly on behalf of private enterprise.¹⁷⁶ In the Ohio Constitution of 1851, for example, the General Assembly was forbidden from authorizing any county, city, town, or township from either investing in, or borrowing on behalf of, private enterprise.¹⁷⁷ By 1880, 28 of the 38 states had incorporated similar restrictions in their constitutions.¹⁷⁸

Conclusion

The position of the states vis-a-vis their relationship to local government had moved from legislative supremacy—itsself gained as the result of independence from Great Britain—to an increasing circumscription of state legislative powers with respect to local governments. There was a growing recognition by the courts, through prescriptive judicial interpretation, and by the people, through constitutional amendment, that local government, once created, had to have a persona and viability of its own.

Notes

- ¹ See Daniel J. Elazar, “Are We a Nation of Cities?” in Robert A. Goldwin, ed., *A Nation of Cities: Essays on America’s Urban Problems* (Chicago: Rand McNally, 1968), pp. 89-114.
- ² C. Dallas Sands, Michael E. Libonati, and John Martinez, *Local Government Law* (Wilmette, Illinois Callaghan and Company, 1981) Vol. 1, ch. 3. Law books are a useful source because of the tendency of lawyers to incorporate into their work “the commonplaces of the political thought of their time.” R. W. and A. J. Carlyle, *A History of Medieval Political Theory in the West* (London: William Blackwood and Sons, 1909), Vol. 2, pp. 34-35, 77-78.
- ³ Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W. W. Norton, 1972), pp. 48-53; Meyer Reinhold, *Classica Americana* (Detroit: Wayne State University Press, 1984), pp. 94-115; Paul A. Rahe, *Republics Ancient and Modern* (Chapel Hill: University of North Carolina Press, 1992).
- ⁴ See Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1937).
- ⁵ Martin Ostwald, *Autonomia: Its Genesis and Early History* (New York: American Philological Association, 1982), p. 1.
- ⁶ For example, the Charter of the Second Athenian Confederacy of 377 B.C. imposed the following restrictions on Athens in its dealings with confederacy members. It could not (1) impose a form of government; (2) assert military or political control over an allied state by dispatch of troops or of governors; or (3) exact tribute from its allies. Ostwald, *Autonomia: Its Genesis and Early History*, p. 48.
- ⁷ Documentary evidence for this can be found in Frank F. Abbott and Alan C. Johnson, *Municipal Administration in the Roman Empire* (New York: Russell and Russell, 1926, reissued 1968).
- ⁸ *Ibid.*, pp. 39, 247-571.
- ⁹ *Ibid.*, pp. 4, 9.
- ¹⁰ *Ibid.*, p. 8.
- ¹¹ *Ibid.*, p. 10.
- ¹² Napoleon used this format in creating administrative regions of France, which exist to this day.
- ¹³ *Ibid.*, p. 17.
- ¹⁴ *Ibid.*, pp. 43-45.
- ¹⁵ *Ibid.*, p. 41.
- ¹⁶ *Ibid.*, p. 46.
- ¹⁷ *Ibid.*, p. 57.
- ¹⁸ *Ibid.*, p. 54.
- ¹⁹ *Ibid.*, pp. 177-196. “The secret of government without bureaucracy was the Roman system of cities which were self-governing and could provide for the needs of empire.” Peter Garnsey and Richard Saller, *The Roman Empire: Economy, Society, and Culture* (Berkeley: University of California Press, 1987) p. 26.
- ²⁰ *Ibid.*, p. 197. An extended study of the social and cultural climate created by political pluralism is found in Paul Veyne, *Bread and Circuses* (Harmondsworth, Middlesex: Penguin Press, 1990).
- ²¹ John Procope, “Greek and Roman Political Theory,” in James H. Burns, ed., *The Cambridge History of Medieval Political Thought, c.350-c.1450* (New York: Cambridge University Press, 1988), p. 33.
- ²² Abbott and Johnson, *Municipal Administration in the Roman Empire*, p. 194.
- ²³ *Ibid.*, p. 209.
- ²⁴ P. D. King, “The Barbarian Kingdoms,” in Burns, ed., *The Cambridge History of Medieval Political Thought*, pp. 124-125.
- ²⁵ R. Van Caenegem, “Government, Law and Society,” in *Ibid.*, p. 179.

- ²⁶ See generally, J. G. A. Pocock, *The Machiavellian Moment* (Princeton, New Jersey: Princeton University Press, 1975).
- ²⁷ Walter Ullmann, *Principles of Government and Politics in the Middle Ages*, 2d ed. (London: Methuen and Company, 1966), pp. 20-21.
- ²⁸ Alan Watson, ed., *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 1985), Vol. 1, p. 96. Thus, the Emperor Trajan quashed a request by the inhabitants of Nicomedia in the province of Bithynia in Asia Minor to form a communal fire brigade. See Arnold H. M. Jones, *A History of Rome through the Fifth Century* (New York: Walker and Company, 1970), Vol. 2, pp. 244-245.
- ²⁹ Bartolus' teaching is summarized in Joseph P. Canning, "Law, Sovereignty, and Corporation Theory," in Burns, ed., *The Cambridge History of Medieval Political Thought*, pp. 470-471.
- ³⁰ C.N.S. Woolf, *Bartolus of Sassoferrato* (Cambridge: Cambridge University Press, 1913), pp. 113-114.
- ³¹ Joseph P. Canning, "Law, Sovereignty, and Corporation Theory," p. 473. For a fuller discussion, see Joseph P. Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge: Cambridge University Press, 1987), pp. 93-158, 185-208.
- ³² *Ibid.*, pp. 138-139, 152.
- ³³ Sidney and Beatrice Webb, *English Local Government from the Revolution to the Municipal Corporations Act* (London: Longmans Green, 1906-1922).
- ³⁴ W.J.M. Mackenzie, *Theories of Local Government* (London: London School of Economics, 1961), pp. 9-12.
- ³⁵ Frederick W. Maitland, *Township and Borough* (Cambridge: Cambridge University Press, 1898).
- ³⁶ Susan Reynolds, *An Introduction to the History of English Medieval Towns* (Oxford: Clarendon Press, 1977).
- ³⁷ *Ibid.*, p. 102.
- ³⁸ *Ibid.*, pp. 103-108.
- ³⁹ See J. C. Holt, *Magna Charta* (Cambridge: Cambridge University Press, 2d edition, 1992), pp. 61-67, 274, 279-280; John E. Bebout, *An Ancient Partnership: Local Government, Magna Charta, and the National Interest* (Charlottesville: University Press of Virginia, 1966). Localities were able to select purely local officials, such as "mayors." See Susan Reynolds, *An Introduction to the History of English Medieval Towns*, p. 109. Urban places were able to receive status as independent counties, consolidated local court jurisdictions and incorporation. See, Reynolds, pp. 113-114. Further privileges ensued in the fifteenth century, including perpetual succession, a common seal, the right to sue and be sued, to hold lands and to issue by-laws. Urban courts asserted jurisdiction over merchant law, town property deeds, wills and nuisance cases. See *ibid.* Also, urban legislative bodies issued by-laws regulating trade and public health and exacted tolls for a variety of public works including paving, bridge building, and wall building. See *ibid.*, p. 126.
- ⁴⁰ The works of Christopher Hill ably discuss seventeenth century England and the development of its political system. In particular, for a broad overall view, see *The Century of Revolution: 1603-1714*, 2nd ed. (New York: W. W. Norton, 1982), *passim*.
- ⁴¹ Otto Gierke, *Natural Law and the Theory of Society* (Boston: Beacon Press, 1960), p. 67. It is interesting to note that this period of English history saw an attempt on the part of central government to direct and control local governments both in England and in the emerging colonies. See J. H. Sacret, "The Restoration Government and Municipal Corporations," *English Historical Review* 45 (April 1930):232; James R. Jones, *Die Revolution of 1688 in England* (New York: W. W. Norton, 1972), p. 43; Michael G. Hall, Lawrence H. Leder, and Michael G. Kammen, eds., *The Glorious Revolution in America* (New York: W. W. Norton, 1972), pp. 14-18.
- ⁴² See, for example, the legal actions brought by the king against local government in the Proceedings between the King and the City of London, *State Trials*, Volume 8, pp. 1040-1358 (1682). The controversy between king and Parliament affected the colonies also. See Hall, Leder and Kammen, *The Glorious Revolution in America*, pp. 24-25.
- ⁴³ See, E. Neville Williams, *The Eighteenth Century Constitution: 1688-1815* (Cambridge: Cambridge University Press, 1970), p. 4.
- ⁴⁴ See generally, Jack P. Greene, *Peripheries and Center* (Athens: University of Georgia Press, 1986). Much of the subsequent discussion of this topic summarizes Greene's work.
- ⁴⁵ *Ibid.*, p. 20.
- ⁴⁶ *Ibid.*, pp. 29-30.
- ⁴⁷ Even as late as 1774, Joseph Galloway, who later turned out to be a loyalist, offered a similar plan to the Continental Congress of divided responsibilities between Great Britain and the American colonies. Though it had no chance of success by then, it had suggested an American Parliament, responsible for all internal matters and leaving international trade to Great Britain.
- ⁴⁸ *Ibid.*, p. 76.
- ⁴⁹ See Bruce C. Daniels, ed., *Town and Country* (Middletown, Connecticut: Wesleyan University Press, 1977). This book contains essays on local government in colonial Massachusetts, Connecticut, Maryland, Virginia, South Carolina, and Pennsylvania.
- ⁵⁰ Jack P. Greene, "Changing Identity in the British Caribbean: Barbados as a Case Study," in Nicholas Canny and Anthony Pagden, eds., *Colonial Identity in the Atlantic World, 1500-1800* (Princeton, New Jersey: Princeton University Press, 1987), pp. 214-215.
- ⁵¹ Donald S. Lutz, *Popular Consent and Popular Control* (Baton Rouge: Louisiana State University Press, 1980), p. 156.
- ⁵² David T. Konig, "Origins of Local Government in Northern Massachusetts," in Bruce C. Daniels, ed., *Town and Country*, p. 29.
- ⁵³ *Ibid.*
- ⁵⁴ *Ibid.*, pp. 29-30.
- ⁵⁵ Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), pp. 42-48; Bruce C. Daniels, *The Connecticut Town* (Middletown, Connecticut: Wesleyan University Press, 1979), pp. 11-13; Amasa Eaton, "The Right to Local Self-Government," *Harvard Law Review* 13 (April 1900): 570-588; and Michael Zuckerman, *Peaceable Kingdoms* (New York: Alfred A. Knopf, 1970).
- ⁵⁶ Lutz, *Popular Consent and Popular Control*, pp. 150-171; Joshua I. Miller, *Local Autonomy in Early American Politics: Decentralist Ideas and Practices 1630-1789* (Ph.D. Dissertation, Princeton University, Department of Politics, 1984); Timothy H. Breen, "Persistent Localism: English Social Change and the Shaping of New England Institutions," *William and Mary Quarterly* 32 (3d ser. 1975): 3-28.
- ⁵⁷ Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, D.C. U.S. Government Printing Office, 1909), Vol. 5, p. 2712.
- ⁵⁸ *Ibid.*, p. 3040.
- ⁵⁹ Robert Bolton, Jr., *History of the County of Westchester* (New York: A. S. Gold, 1848), Vol. 2, pp. 184-195.
- ⁶⁰ George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (Buffalo, New York: William S. Hein Company, 1987), p. 10.
- ⁶¹ Greene, *Peripheries and Center*, pp. 13-18.
- ⁶² Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence*, p. 10.

- ⁶³ *Ibid.*, p. 395.
- ⁶⁴ *Ibid.*, pp. 396-397.
- ⁶⁵ Jack R. Pole, *Political Representation in England and the Origins of the American Republic* (Berkeley: University of California Press, 1971), pp. 38-50.
- ⁶⁶ Lois Green Carr, "The Foundations of Social Order. Local Government in Colonial Maryland," in Daniels, ed., *Town and Country*, p. 99.
- ⁶⁷ Lutz, *Popular Consent and Popular Control*, p. 162.
- ⁶⁸ Jack R. Pole, *Political Representation in England and the Origins of the American Republic*, pp. 72, 80, 94, 162-163; Lutz, *Popular Consent and Popular Control*, p. 163.
- ⁶⁹ Pole, *Political Representation in England and the Origins of the American Republic*, p. 38.; Lutz, *Popular Consent and Popular Control*, pp. 150-151; Breen, "Persistent Localism: English Social Change and the Shaping of New England Institutions"; Miller, *Local Autonomy in Early American Politics: Decentralist Ideas and Practices, 1630-1789*; and George E. Howard, *An Introduction to the Local Constitutional History of the United States* (Baltimore: Johns Hopkins University Press, 1889).
- ⁷⁰ Ernest S. Griffith, *History of American City Government—The Colonial Period* (New York: Oxford University Press, 1938), pp. 58, 65, 69, 100-102; Jon Teaford, *The Municipal Revolution in America* (Chicago: University of Chicago Press, 1965).
- ⁷¹ Stephen L. Schechter, "The Founding of American Local Communities: A Study of Covenantal and Other Forms of Association," *Publius: The Journal of Federalism* 10 (Fall 1980): 165; George Lee Haskins, *Law and Authority in Early Massachusetts* (New York: The Macmillan Company, 1960).
- ⁷² Robert Wheeler, "The County Court in Colonial Virginia," in Daniels, ed., *Town and Country*, pp. 111-133; Richard Waterhouse, "The Responsible Gentry of Colonial South Carolina: A Study in Local Government, 1670-1770," *ibid.*, pp. 160-185; Jack P. Greene, *The Quest for Power* (New York: W. W. Norton, 1972), pp. 251-65.
- ⁷³ Judith Diamondstone, "Philadelphia's Municipal Corporation, 1701-1776," *Pennsylvania Magazine of History and Biography* 90 (April 1966): pp. 183-201.
- ⁷⁴ Judith Diamondstone, "The Government of Eighteenth Century Philadelphia," in Daniels, ed., *Town and Country*, pp. 249-253.
- ⁷⁵ *Ibid.*, pp. 253-256.
- ⁷⁶ Daniels, *The Connecticut Town*, pp. 119-139.
- ⁷⁷ *Ibid.*, pp. 94-118.
- ⁷⁸ Nicholas Varga, "The Development and Structure of Local Government in Colonial New York," in Daniels, ed., *Town and Country*, pp. 186-215; Wayne L. Bockelman, "Local Government in Colonial Pennsylvania," *ibid.*, pp. 216-237.
- ⁷⁹ Judith Diamondstone, "The Government of Eighteenth Century Philadelphia"; Hendrik Hartog, *Public Property and Private Power* (Chapel Hill: The University of North Carolina Press, 1983).
- ⁸⁰ Hartog, *Public Property and Private Power*, p. 19.
- ⁸¹ Zuckerman, *Peaceable Kingdoms*, pp. 36-45; See, for example, the 1714 protests against a proposed incorporation of Boston reprinted in *Publications of the Colonial Society of Massachusetts*, Vol. 10, April 1906, pp. 345-352.
- ⁸² Zuckerman, *Peaceable Kingdoms*, and Daniels, *The Connecticut Town*, pp. 87-91.
- ⁸³ Daniels, *Town and Country*, p. 200.
- ⁸⁴ Howard Lee McBain, "The Legal Status of the American Colonial City," *Political Science Quarterly* 40 (June 1925): 177, 192-197.
- ⁸⁵ Demophilus, *The Genuine Principles of the Ancient Saxon or English Constitution* (Philadelphia: Robert Bell, 1776), reprinted in Charles S. Hyneman and Donald S. Lutz, *American Political Writings during the Founding Era 1760-1805* (Indianapolis: Liberty Press, 1983), Vol. 1, pp. 340-367.
- ⁸⁶ *Ibid.*, p. 350.
- ⁸⁷ H. Trevor Colbourn, *The Lump of Experience: Whig History and the Intellectual Origins of the American Revolution* (Chapel Hill: University of North Carolina Press, 1965), pp. 26, 110-111, 126-128, 190-192. The Teutonist thesis is that democracy is neither the product of revolution nor derived from abstract doctrines concerning the rights of man. Instead, democracy was viewed as the distinctive ethnic heritage of people who had learned self-government by running their own affairs and by defending local liberties against centralized power. The Teutonist thesis revived in intellectual circles in the 1870s and produced several books on local government, the most notable of which is George Howard's *An Introduction to the Local Constitutional History of the United States*. John Higham, "Herbert Baxter Adams and the Study of Local History," *American Historical Review* 89 (December 1980): 1225. It also influenced the view expressed by Judge Thomas Cooley in *People v. Hurlbut* 22 Mich 44 (1871) that American citizens have an inherent right to local self-government. Both Colbourn and Higham take the position that the Teutonist thesis is a myth. A brief discussion of the thesis proponents (Gneist, Redlich, and Joshua Toulmin Smith) in English historiography is found in Mackenzie, *Theories of Local Government*, pp. 9-12.
- ⁸⁸ Anwar Syed, *The Political Theory of American Local Government* (New York: Random House, 1966), p. 40.
- ⁸⁹ Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York: W. W. Norton, 1972), pp. 150-161.
- ⁹⁰ McBain, "The Legal Status of the American Colonial City," p. 187.
- ⁹¹ Thorpe, ed., *The Federal and State Constitutions*, Vol. 5, p. 3085. (1776 Pennsylvania Constitution, §9)
- ⁹² *Ibid.*, p. 200.
- ⁹³ Thorpe, ed., *The Federal and State Constitutions*, Vol. 3, p. 1911. (1780 Massachusetts Constitution, Am. 11)
- ⁹⁴ Howard Lee McBain, "The Delegation of Legislative Powers to Cities," *Political Science Quarterly* 32 (March and June, 1917): 276, 391.
- ⁹⁵ Thorpe, ed., *The Federal and State Constitutions*, Vol. 3, p. 1690. (1776 Maryland Constitution, Article XXXVII)
- ⁹⁶ *Ibid.*, Vol. 5, p. 2636 (1777 New York Constitution, Art. XXXVI). See also Joan C. Williams, "The Invention of the Municipal Corporation: A Case Study in Legal Change," *American University Law Review* 34 (Winter 1985): 369, 394-397.
- ⁹⁷ Wood, *The Creation of the American Republic, 1776-1787*, pp. 184-188.
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- ⁹⁹ Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776-1860* (New York: W. W. Norton, 1966), p. 83.
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- ¹²⁵ James Kent, *Commentaries on American Law* (New York O. Halsted, 1827), Vol. 1, p. 240.
- ¹²⁶ *Clark, Dodge and Co. v. Davenport*, 14 Iowa 494, 498 (1863).
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- ¹²⁸ John F. Dillon, *Commentaries on the Law of Municipal Corporations*, 5th ed. (Boston: Little, Brown and Company, 1911), 239.
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- ¹³¹ For example, *Commissioners of Gallia County v. Holcomb*, 7 Ohio Part I 232 at 233 (1835) (Corporations are "limited to exercise of powers specifically conferred on them by law"); *Leonard v. City of Canton*, 35 Miss. 189, 191 (1858) (a municipal corporation's powers must be strictly construed and confined to those subjects "specially enumerated"); *Louisiana State Bank v. The Orleans Navigation Co.*, 3 La. Ann. 294 at 314 (1848) (the means adopted to effectuate an express power must be authorized expressly or be essential to the exercise of that power).
- ¹³² *Ex parte Burnett*, 30 Ala. 461, at 467, 468 (1857) (Narrow construction of statutory grant of "power and authority to make and establish all such rules, bylaws, and ordinances respecting the . . . police of said town that shall appear to them required and necessary for the security, welfare, and convenience of said town or for preserving health, peace, order, and good government within the same"); *Commonwealth v. Turner*, 55 Mass. 493 (1848) (Narrow construction of statute permitting towns to make all bylaws necessary "to preserve the peace, good order and internal police").
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- ¹⁶⁹ Thorpe, ed., *The Federal and State Constitutions, Vol. 2, p. 1080.* (Indiana Constitution, **Art. IV, 22 (1851)**)
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- ¹⁷⁶ A. James Heins, *Constitutional Restrictions against State Debt* (Madison: University of Wisconsin Press, 1963), pp. **8-9**; Harry N. Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy 1820-1861* (Athens: The Ohio University Press, 1969).
- ¹⁷⁷ Thorpe, ed., *The Federal and State Constitutions, Vol. 5, p. 2926* (Ohio Constitution **1851, Art. VIII, §4, §6**). For good measure, the state was barred from assuming local government debts. *Ibid.* (Ohio Constitution **1851, Art. VIII, §5**)
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THE DEVELOPING CONCEPT OF HOME RULE IN TWENTIETH CENTURY AMERICA

Americans, during the twentieth century, have sought to define a workable model for providing local governments with a modicum of local autonomy. From 1875 onwards, debate and deliberation in the states began to shift from placing restraints on their legislatures to empowering local citizens with the ability to articulate their preferences over institutional forms and functional powers within their local communities.

Some of the best examples of the early development of home rule ideas can be seen in the **Missouri** Constitution of 1875 and, then, in the models for devolving powers on local government created by California, New York, the American Municipal Association (AMA), New Jersey, and Illinois.

The Missouri Experiment

The shift from constitutional restraints on the state legislature to constitutional local empowerment began with the home rule provisions of the **Missouri** Constitution of 1875.

Use of the label home rule is questionable here, however, because the debates of the Missouri Constitutional Convention, which expressly conferred charter-making power on the city of St. Louis, do not use that term.⁷ Apparently coined about 1870 in connection with the movement to obtain local autonomy for Ireland,⁸ the term home rule was used to refer to proposals affording greater autonomy for London by 1890,³ before later becoming a general phrase applying to “all forms of local or regional self-determination.”⁴

When the Missouri Constitution was adopted in 1875, corruption and favoritism by the state legislature in the management of the affairs of the city of St. Louis was as pervasive a theme in the debates as was recourse to the principle of local self-government.⁵ Indeed, the principle of home rule did not carry much influence because the proposed and adopted text applied only to a single, named *city—St. Louis.*⁶

The generalized remedy for state legislative mischief provided by the convention consisted of a substantive prohibition of local or special laws changing the charters of cities, towns, or villages, and a procedural provision requiring a three-month notice to the inhabitants of a county or city prior to the passage of any local laws.⁷ These rules were designed to curb the legislature’s propensity “to make changes in the charter and organization of that city [St. Louis], which were not endorsed by the people of the city.”⁸

The innovative part of the package was a provision delegating “to the people of St. Louis a power that has heretofore been possessed alone by the Legislature,” namely, the power to make a charter.⁹ This delegation, however, was replete with conditions to be met by the city in framing and adopting the charter and any subsequent amendments.¹⁰ It also mandated the type of local government organization that could be adopted in the home rule charter: “[A] chief executive and two houses of legislation, one of which shall be elected by general ticket.”¹¹

That the state had not chosen to relax its grip on St. Louis is demonstrated by two clauses. First, charter provisions had to be “in harmony with and subject to the Constitution and laws” of **Missouri.**¹² That is, whatever principle of local self-government was embodied in the constitutional text had neither the scope nor the dignity accorded other constitutional provisions. Local initiatives were subject to challenge and, thereby, judicial scrutiny not only on constitutional grounds but also on the ground that they were not in harmony with general laws. The charter clearly was subordinate, also, to any general law, including those laws that classified cities by population. **As** one delegate remarked:

The General Assembly is the only law making power of the state & if they find that this scheme does not work well all they need to do is to pass a general law that in all cities or counties having over 100,000 inhabitants the law shall be so & so; & it will operate directly upon the city & county of *St. Louis.*¹³

To remove any doubts about legislative supremacy, the convention adopted a second saving clause: "Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State."¹⁴

When the validity of this provision was challenged, the Missouri Supreme Court held that home rule cities constituted a class concerning which the legislature was free to enact legislation without violating constitutional prohibitions against local or special legislation." Despite the ruling, a leading commentator, Howard Lee McBain, adjudged the Missouri experiment to be a failure because Missouri cities under home rule charters did not "enjoy even the constitutional guarantee that is extended to all other cities." "It is manifest," he said, "that in any strict interpretation of terms, the provisions of the Missouri constitution upon this subject are so utterly contradictory as to be practically meaningless."¹⁶

Nevertheless, it should be stressed that the Missouri Constitution was the first to contain a separate article devoted to local government and its relationship to the state legislature. Although the constitution did not shield charter cities from state legislative intervention,¹⁷ it generally succeeded in providing charter cities with "the power to act without prior authorization by the state legislature" such that from its adoption until 1905 "the Missouri Supreme Court approved every exercise of municipal initiative. . . which was authorized by charter, did not conflict with a statute, and did not run afoul of a constitutional prohibition,"¹⁸ including the power to tax.¹⁹

Finally, the principle of local diversity embodied in the 1875 constitution defeated a challenge predicated on the equal protection and republican form of government clauses of the federal Constitution.²⁰ A unanimous U.S. Supreme Court affirmed in 1879 that "each State has the right to make political subdivisions of its territory for municipal purposes and to regulate their local government" and that "diversities . . . are allowable in different parts of the same State."²¹

Missouri's actions sparked debate about institutional policy in other states, which broadened and deepened reflection about local home rule. In 1879, for example, the California Constitutional Convention debated a proposal delegating charter-making powers to the City and County of San Francisco. Its drafter copied the provision from Missouri." Proponents of the provision argued that an express text was necessary to resolve "a very serious question with regard to the power of the Legislature to delegate its authority."²³ Opponents, dubbed sycophants of centralism by their adversaries,²⁴ invoked the specter of secession²⁵ and the flagrant corruption of big city government.²⁶ These charges widened the debate from the particular status of San Francisco to the principles of localism as expounded by de Tocqueville²⁷ and the theory and spirit of the principle that "local legislation ought to be left to the

localities which it is intended to affect."²⁸ To resolve this dispute, the convention adopted a provision that gave any city the option of framing a charter "consistent with and subject to the Constitution and laws of this state."²⁹

The Early Twentieth Century and Home Rule

Moving into the twentieth century, states struggled with decisions about the structure of their relationships to local governments and the powers that should be granted to those political communities. Ultimately, states adopted one of three versions of home rule powers: (1) the city republic; (2) a local bill of rights; or (3) devolution of powers.

The City Republic

The complex task of creating a framework to express the demand for differentiating between state and local spheres of influence can be traced to a series of amendments to the California Constitution. Between 1894 and 1902, amendments were enacted regarding city-county consolidation (1894); county boards of education (1894); county organization (1894); organization of municipal corporations (1896); the contents of corporate charters (1896); local government debt limits (1900); establishment of a decentralized, fiscally autonomous public school system (1902); tax exempt status of state and local government bonds (1902); tenure of municipal officials (1902); and empowering each city of more than 3,500 inhabitants to frame a charter for its own government, subject to approval by the state legislature, the provisions of which shall become the "organic law thereof and supersede . . . all laws inconsistent with such charter" (1902).³⁰

The combination of language in the 18th amendment to the California Constitution stating that "all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws,"³¹ with the 1905 provision eliminating the requirement of legislative approval of charters,³² gave California's local governments a limited but definite autonomy.³³ Such a sense of autonomy has been in common currency in American political discourse since colonial times.³⁴ The colonies demanded, at least after 1774, possession of an "exclusive right of internal legislation" while leaving external affairs (or trade matters) to the English Parliament.³⁵

As explained in the previous chapter, however, the states resisted adopting a similar attitude toward their own political subdivisions. Little by little, the importance of local government for its own and the state's sake began to be recognized. Thus, the provisions of the California, Colorado (1902), Oregon (1906), and Ohio (1912) constitutions,

adopted during a period when the Progressive movement emphasized autonomy for urban **communities**,³⁶ can be viewed as a major step forward in establishing local autonomy, however limited. These provisions allowed for two basic grants of power:

- (1) Widen the scope of local choice over municipal affairs, local and municipal matters, or all powers of local self-government; and
- (2) Immunize local charter provisions within the protected sphere of local autonomy from state legislative intervention.

A local Bill of Rights

New York. New York went one step further than Missouri and pursued in greater detail an effort to delineate the respective spheres of responsibility for the state government and its local governments.³⁷

The state constitution combined a bill of rights for local governments with explicit definitions of the respective roles and duties of the legislature and local governments with regard to local government matters. The bill of rights, for example, guaranteed:

- (1) Popular participation in the selection of local officials;
- (2) County option in regard to forms of county government;
- (3) Allocations of local government functions as between counties and cities, towns, villages, districts, or other units of government; and
- (4) The right of people in an affected area to veto annexation by a neighboring local government by withholding majority approval in a **referendum**.³⁸

The bill set limits, also, on the legislature's power to regulate public utility operations conducted by local governments. Then, it conferred power on local governments to:

- (1) "Adopt local laws as provided by this article" [Article IX];
- (2) Enter into contracts with other local, state, and federal government agencies;
- (3) Exercise eminent domain, subject to legislative regulations of its exercise outside the local government's boundaries; and
- (4) Apportion the "cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature."

The next section of the constitution required the legislature to provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges, and immunities granted to

them by the constitution and, "subject to the bill of rights of local government," to enact legislation "granting to local government powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article."

Those powers, once granted, "may be repealed, diminished, impaired or suspended only by" a statute enacted twice in successive years. The constitution required that legislative action "in relation to the property, affairs, or government of any local government" must be by general law, subject to certain **exceptions**.⁴⁰ Another part of that section gave local governments power to adopt and amend local laws not inconsistent with the provisions of the constitution or any general law relating to its property, affairs, or government. They also may legislate on any of the following subjects:

- (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare, and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers;
- (2) In the case of a city, town, or village, the membership and composition of its legislative **body**;
- (3) The transaction of its business;
- (4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature;
- (5) The presentation, ascertainment, and discharge of claims against it;
- (6) The acquisition, care, management, and use of its highways, roads, streets, avenues, and property;
- (7) The acquisition of its transit facilities and the ownership and operation thereof;
- (8) The levy, collection, and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature;
- (9) The wages or salaries, the hours of work or labor, and the protection, welfare, and safety of persons employed by any contractor or subcontractor performing work, labor, or services for it; and
- (10) The government, protection, order, conduct, safety, health, and well-being of persons or property **therein**.⁴¹

The Difficulty of Construing Local Autonomy. Implementing and adjudicating disputes over the division of powers that

local governments had gained in the early twentieth century in New York and several states presented some difficulties. In one California *case*, for example, Justice McFarland of the California Supreme Court said, ‘The section of the constitution in question uses the loose, indefinable wild words ‘municipal affairs’ and imposes upon the courts the almost impossible duty of saying what they **mean**.’⁴²

Problems emerged even when the constitutional language spoke only to the empowerment question as, for example, the provision of the Washington Constitution conferring on “any county, city, town, or township” power to “make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws.”⁴³ In a series of cases between 1901 and 1914, the Washington Supreme Court applied Dillon’s Rule to this constitutional grant of powers. It announced that it would review charter provisions for their reasonableness; held that state regulation of a policy arena preempted local regulation; and refused to recognize that powers traditionally associated with sovereignty, such as eminent domain and taxation, were granted to **localities**.⁴⁴

Insofar as state constitutional provisions sought to shield charter cities from legislative interference, Judge Timlin of the Wisconsin Supreme Court made the following observation in 1912

[I]f the legislature could be constantly prohibited from any interference with the so-called home rule charter adopted by the city so far as the same related to municipal affairs, this would substitute the interference of the judicial department of government for that of the legislative department, and every section of the charter and every ordinance must in time come before the courts in order to ascertain whether it related to a municipal affair only and if so whether subject to repeal or amendment by the state legislature.⁴⁵

Simply put, charter cities would be freed from the tutelage of the state legislature only to find themselves subject to the guardianship of the state judiciary. That guardianship produced one of two results. In the first instance, judicially sanctioned home rule resulted, as in Ohio, where courts, on a case-by-case basis, exercised a legislative function of determining what was or was not a permissible power for local governments to exercise, leaving home rule cities in doubt as to the extent of their powers.⁴⁶ Secondly, it resulted in a presumption of state responsibility that led to “a precipitous contraction of home rule powers,” as in New York.⁴⁷

The Devolution-of-Powers Approach

The third approach to local home rule, setting out an area of devolved powers, seemed to avoid the difficulties

inherent in delineating a constitutional division of powers between the state and local government. This devolved power provided local government with an area in which to operate freely, subject to the ultimate purview of the state legislature. Sometimes referred to as legislative home rule, the devolution of powers is most commonly associated with the model constitutional provision for home rule formulated in 1953 by Jefferson B. Fordham on behalf of the American Municipal Association’s Committee on Home Rule.” The operative language of the provision states:

A municipal corporation which adopts a home charter rule may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute. This devolution of power does not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent municipal power, nor does it include power to define and provide for the punishment of a **felony**.⁴⁹

This model provision for a general grant of powers subject to enumerated restrictions had been sketched out by Frank J. Goodnow in 1895.⁵⁰ Goodnow, in turn, had attributed the devolution-of-powers approach to English and continental sources, including the Prussian Municipal Corporations Act of 1808.⁵¹ The home rule model represented a turning away from “the cross-checks and intersecting lines of divided responsibility” of the federal idea in favor of “a simple pyramid” of efficient, rationalized functional **administration**.⁵²

The 1953 American Municipal Association formulation did not represent a complete abandonment of the search for a protected sphere of local autonomy. It did provide, however, that “charter provisions with respect to municipal executive, legislative, and administrative structure, organization, personnel and procedure are of superior authority to statute.”⁵³ Moreover, it squarely addressed the problem of state-mandated expenditures or programs by proposing that legislation requiring increased municipal expenditures would take effect, absent municipal consent, only on a two-thirds vote of the legislature or if the legislature funded the mandated increase.⁵⁴ These protective provisions are absent from the recommended local government article in the 1963 edition of the National Municipal League’s Model State Constitution, indicating an even sharper retreat from a strong commitment to local autonomy.⁵⁵

The devolution-of-powers model has unquestionably met with success in the marketplace of ideas. For example, both Missouri and Pennsylvania streamlined their consti-

tutional home rule provisions (e.g., “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”⁵⁶). The North Dakota provision tracks the language of the Model State Constitution cited above.⁵⁷

The home rule model makes clear that the state legislature has the authority to confer broad powers on local government units, thus precluding a challenge based on nineteenth century delegation of power doctrines. Language empowering home rule cities is drafted to leave “a charter municipality free to exercise any appropriate power or function except as expressly limited by charter or general statute.”⁵⁸ Two objectives are attempted here. First, the text eliminates the “strict constructionist presumption against the existence of municipal power” associated with Dillon’s Rule.⁵⁹ Second, state judges are stripped of the doctrine of implied preemption because a home rule entity’s powers can be impeded only by express charter or statutory limits. The devolution-of-powers model seems designed almost exclusively with an eye to reducing the role that courts have played in mediating the division of power between state and local government.

Twentieth Century Constitutional Developments in Local Autonomy

New Jersey and Home Rule

The devolution-of-powers approach, however, has brought forth its own difficulties in state-local relations. Questions concerning administrative flexibility and entrenched rights in a state constitution are not fully developed. The New Jersey Constitution, for example, has attempted to cope with some of these problems. That constitution has no local government article. Instead, provisions pertaining to local government are found in the articles dealing with the legislative branch and taxation and finance.⁶⁰ Three provisions help explain the difficulties of a devolution-of-powers approach.

First, a prohibition against local or *special* legislation regulating the internal affairs of individual municipalities and counties is qualified by an exception that allows such legislation to be enacted on petition by the affected governing body and by a two-thirds vote of the state legislature.⁶¹ This provision relaxes the rigidity inherent in the distinction between internal affairs and matters of statewide concern. Flexibility, therefore, is permitted in the constitutionally prescribed division of powers by having both a concurrent majority of the local governing body and the state legislature participate in passing special acts of the legislature.

Second, New Jersey’s constitution provides guidance to policymakers on the reading of constitutional provisions empowering local governments. For example, it states:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.⁶²

It is the stated “liberal construction” of local government powers that counteracts the effect of Dillon’s Rule and may produce a greater degree of functional autonomy than a more conventional constitutional grant of home rule. In 1973, for example, the New Jersey Supreme Court sustained a municipal rent control scheme under a statutory grant of authority to adopt such ordinances as the local governing body “may deem necessary and proper for the good government, order, and protection of persons and property, and for the preservation of the public health, safety, and welfare of the municipality and its inhabitant~. The courts even upheld the municipal creation of a rent control board as a power necessary to carry out the regulatory purpose of a rent control ordinance, even where no statute existed authorizing municipalities to establish one. By contrast, a year earlier, the Florida Supreme Court strictly construed a home rule municipality’s constitutional authority to “exercise any power for municipal purposes” when it overturned a similar ordinance.⁶⁴

A third key constitutional provision is found in the New Jersey taxation and finance article, in addition to the matters normally found in such articles. It contains a provision that makes the delivery of certain services, notably a “thorough and efficient system of free public schools,” a state responsibility.⁶⁵ This paragraph is read to mandate that the state create a funding scheme for public education that does not shift its financial burdens exclusively to local taxing jurisdictions.⁶⁶

Local or Special Legislation

Local or special legislation, a mainstay of the state legislature’s policy repertoire during the nineteenth century, has received much negative consideration during the twentieth century. Nonetheless, it may be time to review that opinion. For instance, although the recent elimination of local or special legislation from the South Carolina Constitution has been hailed as part of “the journey toward local self-government,”⁶⁷ others have viewed special legislation as “conducive to greater independence and ex-

panded self-rule” and as an “essential means for ensuring flexibility and adaptability.”⁶⁸ The framers of the Constitution of Virginia apparently thought so when they rejected the constitutional revision commission’s recommendations to restrict the General Assembly’s authority to devolve powers on local governments by special act.⁶⁹ The Virginia system apparently does deliver. In ACIR’s index of city discretionary authority, Virginia cities ranked seventh overall. By comparison, such traditional bastions of home rule as Ohio and California placed eleventh and seventeenth, respectively.⁷⁰

Interlocal Collaboration

Another significant response to the difficulties with the devolution-of-powers model is represented by the emergence of state constitutional and statutory rules governing interlocal collaboration. A recent ACIR report has identified enabling rules that determine the choices that local citizens may use to create and modify local government. In that report, the notion of a local government constitution is not limited, as it is in lawyer’s discourse, to state constitutional provisions. These enabling rules are sorted out into four types:

- (1) Rules of association (i.e., those that establish processes, such as municipal incorporation, that enable local citizens to create municipalities or other entities endowed with certain governmental powers);
- (2) Boundary adjustment rules that enable local citizens and officials to alter the boundaries of existing units;
- (3) Fiscal rules that determine local revenue-raising authority; and
- (4) Contracting rules that enable local units to enter into a variety of mutually agreeable relationships with one another and with private firms.⁷²

The departure from conventional thinking called for by these categories casts new light on the significance of inserting into state constitutions such matters as dissolution and annexation, consolidation and separation, joint participation in common enterprises, interlocal cooperation, and intergovernmental relations, as is done in Missouri.⁷³ It also clarifies rules concerning the formation, operation, and dissolution of special districts, which are embedded in the local government article of the 1974 Louisiana Constitution.⁷⁴ Finally, this approach shifts the focus of attention from a preoccupation with conflict to a recognition of the pervasive collaboration through contractual arrangements that obtains in modern state and local government.⁷⁵

Illinois and the Devolution-of-Powers Approach

The text of the local government article of the 1970 Illinois Constitution provides a particularly interesting departure from the devolution-of-powers model. The distinction is, perhaps, not so much of content but the placing of specific local government authority within a constitutional framework. In Illinois, the powers are addressed in the constitution as opposed to being addressed in statute as the result of more general constitutional provisions. Article VII of the Illinois Constitution illustrates the complex kind of decision rules that must be supplied if the goal of entrenching the rights of local governments and local citizens is to be realized. These decision rules include:

- (1) The definition of entities eligible for home rule status;
- (2) The scope of powers afforded home rule entities;
- (3) The interpretation of granted powers;
- (4) Interlocal conflict and collaboration; and
- (5) The problem of state legislative control over the scope of home rule powers.

Woven throughout the fabric of the article are requirements for local citizen choice.

The complexity of these rules reflects not only the difficulty of coming to terms with the multifaceted roles that local governments play in the division of governmental responsibilities in a modern society but also the differentiated political culture that flourishes in Illinois.⁷⁶ Neglect of the political truism that “all politics is local” undoubtedly contributed to the failure of a constitutional reform package in Maryland that sought to streamline the institutions of local governance.⁷⁷

Counties, cities, villages, and incorporated towns in Illinois are eligible for home rule status.⁷⁸ A self-executing grant of home rule powers to certain counties and to municipalities with a population of more than 25,000 is subject to repeal by referendum. Otherwise, home rule status can be acquired only by referendum.⁷⁹

In contrast to devolution-of-powers constitutions, the Illinois article distinguishes between several kinds of local autonomy: form of government and office holding, functions, and fiscal matters. A home rule unit can adopt, alter, or repeal its currently prescribed form of government subject to referendum approval.⁸⁰ Home rule municipalities and home rule counties possess diverse powers with respect to the creation, manner of selection, and terms of office of local officials.⁸¹

“A home rule unit may exercise any power or perform any function pertaining to its government and affairs,”⁸² the article states. What is pertinent to its government and affairs is defined expressly to include a copious grant of

the police power “to regulate for the protection of the public health, safety, morals, and welfare” and “to license.”⁸³ This grant of power expressly includes the power to tax and to incur debt, attributes of fiscal autonomy without which home rule would be straitjacketed in **practice**.⁸⁴

The Illinois Constitution also addresses and resolves the problem created by Dillon’s Rule: How are decision-makers to read the empowering text? The blunt answer is that “[p]owers and functions of home rule units shall be construed **liberally**.”⁸⁵ Counties and municipalities that are **not** home rule units “shall have only powers granted to them by law” plus expressly granted constitutional powers over form of government and officeholding, fiscal matters, and providing for local improvements and **services**.⁸⁶ Limited purpose units of local government, such as townships, school districts, and special districts, “shall have only powers granted by law.”⁸⁷

In addition, the article prescribes rules for resolving conflicts between legislative enactments of home rule cities and home rule counties.⁸⁸ It also is sprinkled with provisions aimed at facilitating interlocal cooperation by contract and power sharing.⁸⁹

Finally, the article speaks to the neglected but pervasive question of state preemption of home rule **powers**.⁹⁰ Courts customarily have used rules of statutory construction to resolve alleged conflicts between state and local laws, largely in favor of the state.⁹¹ Experts in local government law have pointed out the destructive impact of doctrines of implied preemption and preemption by occupation of the field on the reach of home rule **powers**.⁹² Even in jurisdictions like Alaska, which adopt the devolution-of-powers approach, the constitution speaks to the preemption issue by stating that a home rule entity may exercise “all legislative powers **not prohibited by law**.”⁹³

A fair reading of this language would seem to require some clear statement of state legislative desire to displace a home rule ordinance.⁹⁴ Lest such subtlety be as lost on the courts of Illinois as it was in Alaska, the Illinois home rule provision makes crystal clear that “home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the state’s exercise to be **exclusive**.”⁹⁵ There is no room for a doctrine of implied preemption in this language.

The express preemption question is dealt with generally as follows: “[T]he General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule **unit**.”⁹⁶ **When** the state chooses not to assert a monopoly, a three-fifths supermajority is required to deny or limit a home rule entity’s fiscal and other **powers**.⁹⁷ Significantly, only two areas of home rule autonomy are protected against legislative limitation or denial: the power to add to the stock of local capital improvements by special assessment and the power to finance the provision of special services?⁹⁸

Greater Fiscal Autonomy

A tilt toward local fiscal autonomy, proposed in the **1953 AMA** proposal and highlighted in ACIR’s studies, has come to fruition in recent amendments to several state constitutions concerning the proliferation of state mandates.⁹⁹

The **1975** California provision requires the state to reimburse local governments if any new program or higher level of service cost is **mandated**.¹⁰⁰ **Taken** in the context of the taxpayer rebellion of the **1970s**, the provision’s primary objective is to guard against a potential “smoke and mirrors” device that would enable the state legislature to evade tax and spending limits by shifting costs to local governments.

Nevertheless, an arguably unintended consequence of the reform creates a protected sphere of local fiscal autonomy. For example, the Missouri Constitution requires not only that the state fund “any new activity or service or any increase in the level of any activity or service beyond that required **by existing law**” but also that “the state cannot reduce the state financial proportion of the costs of any existing activity or service required of . . . political **subdivisions**.”¹⁰¹

The Missouri language substantially affects two common dogmas of state constitutional law: **(1)** the state **possesses** virtually untrammelled power to impose duties and obligations on local governments; and **(2)** state funding of existing programs is a matter of legislative **grace**.¹⁰²

Free-standing provisions of the Hawaii and Tennessee constitutions direct the state to share in the costs of legislation imposing increased expenditures on cities and **counties**.¹⁰³ Several states have created statutory rules directing either that the state reimburse mandates or that the fiscal impact of proposed legislation on local government be estimated and made known to legislators before they take final action on the **legislation**.¹⁰⁴

Conclusion

As local government has developed and become more important to the states, which have seen their responsibilities balloon in the twentieth century, the states have integrated local government into the complex provision of services to their citizens. To do this, the constitutional relationship between the state and its localities has undergone significant change. These changes have included:

- ▶ The **1875** Missouri constitutional provision that broadly empowered one city, St. Louis, but created no meaningful barrier to state legislative interference with municipal matters;
- ▶ California’s constitutional revision, on citizen initiative, to bar state legislative meddling with municipal affairs;

- ▶ New York's bill of rights on local governments;
- ▶ The American Municipal Association's model state constitution making the state legislature the ultimate arbiter of the scope of home rule;
- ▶ The Illinois constitution marking the reemergence of complex rules for outlining the relationship between state and local government; and
- ▶ The New Jersey statutory home rule approach.

These changes in law promoting local government autonomy make it important to look at the increasing judicial review of state-local relations that has taken place during the last decade.

Notes

¹ Isidor Loeb and Floyd C. Shoemaker, eds., *Debates of the Missouri Constitution Convention of 1875* (Columbia: State Historical Society of Missouri, 1944), Vol. 12, pp. 444-499. Hereinafter, *DEBATES*.

² *Oxford English Dictionary*, 2d edition (Oxford: Oxford University Press, 1989), Vol. 7, p. 330.

³ *Ibid.*

⁴ William B. Munro, "Home Rule," *Encyclopedia of the Social Sciences* (New York: Macmillan Company, 1930), Vol. 4, p. 434.

⁵ As Delegate Todd floridly observed:

What we are asking for a place in the Constitution is stability. It is for the purpose of establishing one local government upon a rock & not upon quicksand as it has been for the last twenty years, to be blown over by every wind & flood of bummerism, high fraud and rascally speculators.

DEBATES, pp. 470-471; see also pp. 445, 468. It should be noted that this concern appeared to quite general across the nation. Compare, for example, the constitutional amendment in New Jersey of the same year.

⁶ Missouri Constitution of 1875, Art. IX, §§20-25. These provisions were drafted, sponsored and debated largely on the initiative of the St. Louis delegation to the Convention. *DEBATES*, pp. 473, 476.

⁷ Missouri Constitution of 1875, Art. IV, §53.

DEBATES, p. 477 (remarks of Delegate Gottschalk).

⁹ *Ibid.*, pp. 449-450 (remarks of Delegate Hale).

¹⁰ *Ibid.*, p. 467 (remarks of Delegate Taylor of St. Louis); see also pp. 459-460 (remarks of Delegate Gantt).

¹¹ Missouri Constitution of 1875, Art. IX, §§20-22. Local implementation of the charter process is described in Thomas S. Barclay, *The St. Louis Home Rule Charter of 1876* (Columbia: University of Missouri Press, 1902).

¹² *Ibid.*, Art. IX, §20, 522, §23.

¹³ *DEBATES*, p. 476 (remarks of Delegate Fyan).

¹⁴ Missouri Constitution of 1875, Art. IX, §25.

¹⁵ *Kansas City v. Stegmilller*, 151 Mo. 189, 52 S.W. 723 (1899).

¹⁶ Howard Lee McBain, *The Law and Practice of Municipal Home Rule* (New York: Columbia University Press, 1916), p. 125.

¹⁷ James E. Westbrook, "Municipal Home Rule: An Evaluation of the Missouri Experience," *Missouri Law Review* 33 (1, 1968): 45.

¹⁸ Vanlandingham's assertion notwithstanding, it is simply not so, and is expressly contradicted by the cases which he cites. Compare, for instance, Kenneth E. Vanlandingham, "Municipal Home Rule in the United States," *William and Mary Law Review* 10 (Winter 1968): 278, 284-285, with *State ex rel. Kansas City v. Field*, 99 Mo. 352, 355 (1889).

¹⁹ James E. Westbrook, "Municipal Home Rule: An Evaluation of the Missouri Experience," pp. 46-47, 51.

²⁰ *St. Louis v. Sternberg*, 69 Mo. 289 (1879).

²¹ *Missouri v. Lewis*, 101 U.S. 22 (1879).

²² *Debates and Proceedings of the Constitutional Convention of the State of California* (Sacramento, 1881), Vol. 2, p. 1059-1060 (remarks of Delegate Hager), p. 1063 (remarks of Delegates Brown and Reynolds).

²³ *Ibid.*, p. 1060 (remarks of Delegate Barbour).

²⁴ *Ibid.*, p. 1063 (remarks of Delegate Howard of Los Angeles).

²⁵ *Ibid.*, p. 1061 (remarks of Delegate Hale).

²⁶ *Ibid.*, p. 1062 (remarks of Delegate Freeman).

²⁷ *Ibid.* (remarks of Delegate Howard of Los Angeles).

²⁸ *Ibid.*, p. 1063 (remarks of Delegate Winans).

²⁹ *Ibid.*, p. 1064.

³⁰ *Missouri v. Lewis*, 101 U.S. 22, at 30, 32-33.

³¹ Francis H. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, DC: U.S. Government Printing Office, 1909), Vol. 1, p. 456. (California Constitution, Art. XI, §6, adopted 1896)

³² *Ibid.*, p. 459. (California Constitution, Art. XI, §8, adopted 1905)

³³ Vanlandingham, "Municipal Home Rule in the United States," p. 279.

³⁴ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Belknap Press, 1967), p. 223.

³⁵ *Ibid.*

³⁶ Michael H. Frisch, "Urban Theorists, Urban Reform, and American Political Culture in the Progressive Period," *Political Science Quarterly* 97 (Summer 1982): 295.

³⁷ New York Constitution, Art. IX, §§1-3; Peter J. Galie, *The New York State Constitution* (Westport, Connecticut: Greenwood Press, 1991), pp. 210-211.

³⁸ New York Constitution, Art. IX, §1.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, Art. IX, §2(a) and (b).

⁴¹ *Ibid.*, §2(c).

⁴² *Ex parte Braun*, 141 Cal. 204, 213-214 (1903).

⁴³ Thorpe, ed., *The Federal and State Constitutions*, Vol. 7, p. 3995. (Washington Constitution, Art. XI, §11, 1889)

"State ex rel. Navin v. Weir, 26 Wash. 501 (1901); *Durban v. Spokane*, 27 Wash. 615 (1902); *Seattle Electric Company v. City of Seattle*, 78 Wash. 203 (1914). See McBain, *The Law and Practice of Municipal Home Rule*, pp. 429-436.

"State ex rel. Mueller v. Thompson, 149 Wis. 488, 517-518 (1912).

⁴⁶ Jefferson B. Fordham and Joe F. Asher, "Home Rule Powers in Theory and Practice," *Ohio State Law Journal* 9 (1, 1948): 18.

⁴⁷ James D. Cole, "Constitutional Home Rule in New York: The Gist of Home Rule," *St. John's Law Review* 59 (Summer 1985):

- 713,716. See Connecticut Advisory Commission on Intergovernmental Relations, *Defining Statewide vs. Local Concerns: Can It Be Done and Is It Necessary?* (Hartford, 1989).
- 48 Kenneth E. Vanlandingham, "Constitutional Municipal Home Rule Since the AMA (NLC) Model," *William and Mary Law Review* 17 (Fall 1975): 1.
- 49 American Municipal Association, *Model Constitutional Provisions for Municipal Home Rule* (Chicago, 1953), p. 19.
- 50 Goodnow, *Municipal Home Rule*, p. 253.
- 51 *Ibid.*, pp. 252-4. The Prussian enactment was the creation of Baron von Stein. W. Hardy Wickwar, *The Political Theory of Local Government* (Columbia: University of South Carolina Press, 1970), pp. 32-37. See Guy Stanton Ford, *Stern and the Em of Reform in Prussia* (Princeton, New Jersey: Princeton University Press, 1922).
- 52 Kenneth Fox, *Better City Government* (Philadelphia: Temple University Press, 1977), pp. 39-41; Robert H. Wiebe, *The Search for Order 1877-1920* (New York Hill and Wang, 1967), p. 170; Samuel F. Hays, "The Politics of Reform in Municipal Government in the Progressive Era," *Pacific Northwest Quarterly* 55 (October 1964): 157 and "The Changing Political Structure of the City in Industrial America," *Journal of Urban History* 1 (November 1974): 6.
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- 54 *Ibid.*, pp. 23-24.
- 55 National Municipal League, *Model State Constitution*, 6th ed., (New York, 1963), pp. 94-100.
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- 63 *Ingramort v. Borough of Fort Lee*, 62 N.J. 521 (1973).
- 64 *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (1972) (Florida Constitution, Art. VIII, §2(b)).
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- 68 Don C. Teaford, *The Unheralded Triumph: City Government in America, 1870-1900* (Baltimore: Johns Hopkins University Press, 1984), p. 94.
- 69 See "Report of the Commission on Constitutional Revision," *The Constitution of Virginia* (Charlottesville, Virginia: The Michie Company, 1969), p. 228. Compare that with the Virginia Constitution, Art. VII, §3.
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- 93 Alaska Constitution, Art. X, §11 (emphasis added).
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- 95 Illinois Constitution, Art. VII, §6(i).
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- 98 *Ibid.*, Art. VII, §6(l).
- 99 American Municipal Association, *Model Constitutional Provisions for Municipal Home Rule*; ACIR, *State Mandating of Local Expenditures* (Washington, DC, 1978).

¹⁰⁰ California Constitution, Art. XIII, B§6.

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¹⁰³ Hawaii Constitution, Art. VIII, §5; Tennessee Constitution,

Art 11, §24, discussed in Lewis L. Laska, *The Tennessee State Constitution* (Westport, Connecticut: Greenwood Press, 1990), pp. 82-83.

¹⁰⁴ U.S. General Accounting Office, *Legislative Mandates* (Washington, DC, September 1988).

RECENT TRENDS IN JUDICIAL DECISIONS AFFECTING LOCAL AUTONOMY: 1978-1992

The 1978-1992 period did not produce the sweeping changes in local initiative that were seen in the modernization of state constitutions in 16 states between 1956 and 1978. State courts in this later period came to grips with more mundane problems of applying revised state constitutional provisions to a wide variety of significant issues in state-local relations. This chapter examines cases decided between 1978-1992 concerning local government autonomy in determining general issues as well as issues of governmental structures, functions, fiscal matters, and personnel.

General Issues

Significant state supreme court decisions have been rendered during this period concerning:

- (1) Local government capacity to sue the state;
- (2) Constitutionality of local or special legislation;
- (3) The scope of protection afforded by the ripper clause; and
- (4) Interlocal cooperation.

A brief review of recent trends in these decisions follows.

Capacity to Sue

State constitutional texts apparently grant powers of both initiative and immunity to local governments, just as they provide the same to individuals. Yet, in 1978, the doctrine concerning the juridical status of local government units centered on the belief that the state constitution conferred no rights on a local government unit as against the sovereign state. Consequently, a local government had no capacity to assert state constitutional claims against the state sovereign.²

Several state supreme courts, however, have begun to take a new look at whether local government units possess

at least a minimal attribute of structural autonomy (i.e., the capacity to have constitutional rights and to invoke them against infringing state agencies and instrumentalities). New York's highest court broke with precedent in 1976 when it heard a town's challenge to a statute that allegedly stripped the jurisdiction of authority guaranteed by the state constitution's bill of rights for local government. The Colorado Supreme Court held in 1987 that a home rule city could stand in the shoes of its citizens to question whether a state statute violated state constitutional prohibitions against local and ripper legislation? In a carefully reasoned decision in 1985, the Utah Supreme Court ruled that a local government may invoke the state constitution against the state if it meets the traditional tests applied to private parties claiming standing to sue; namely, a sufficiently adverse interest and a legally protected interest in the controversy.⁵

Utah (1985) and Massachusetts (1988) now recognize that a local government unit has the capacity to vindicate claims on issues of great public importance lest the matter otherwise be effectively insulated from constitutional scrutiny.⁶ The scope of potential state constitutional claims now subject to judicial review at the behest of local government units includes taking of property without compensation,⁷ deprivation of procedural due process,⁸ and state failure to meet constitutional funding obligations?

Constitutionality of Local or Special Legislation

The subject of local or special legislation is a vexing one. In states that prohibit local or special laws that affect individual jurisdictions only, state supreme courts have tended historically to defer to the state legislature's judgment in determining whether a statute is general (and, therefore, constitutionally valid) or local (and, probably, constitutionally invalid).¹⁰ Indeed, some state constitutions have had to be amended to require courts to exercise the power of judicial review over the validity of classifications adopted by the state legislature."

Some jurisdictions continue to follow the rule that the

prohibition against local legislation does not reach legislation dealing with a matter of statewide concern, even though it applies to only one community.¹² Others apply a rational-basis test, under which the statute is deemed general if the classification principle limiting its application relates to the objective of the statute. Thus, the Tennessee Supreme Court (in 1985) sustained a statute mandating that the largest county in the state establish a civil service system because of the size and complexity of its personnel organization.¹³

Nevertheless, during 1978-1992, there was a discernible trend toward a more searching judicial scrutiny of legislation challenged as local or special. The Arkansas Supreme Court in 1984 began to enforce that state's constitutional prohibition after a long period of judicial indifference.¹⁴ Constitutional revision in South Carolina thrust its Supreme Court into the fray in 1982 after nearly two centuries as a jurisdiction permitting local or special legislation.¹⁵ The Ohio Supreme Court held in 1986 that statutes treating one local government unit differently from similar localities in the state are subject to invalidation on state equal protection grounds.¹⁶ In addition, the Wisconsin Supreme Court in 1988 replaced its formerly slack review of legislative classification challenged as local with a more stringent test, while the Illinois Supreme Court did exactly the reverse.¹⁷

In 1985, Washington, Colorado, and Pennsylvania, which normally sustain classifications based on population as rational without further debate, made it clear that some statutes could and did flunk the rationality test.¹⁸ In 1989, the Rhode Island Supreme Court applied provisions of its constitution that are specifically worded to protect home rule entities against state legislative incursions into local matters when those incursions do not bind all cities and towns in the state.¹⁹ The Commonwealth of Massachusetts' highest court (in 1981) protected Boston's autonomy from state legislation, which applied to Boston alone, in accordance with the home rule amendment to the state constitution.²⁰ That amendment limits the legislature's power to act in relation to cities and towns by creating a class of fewer than two.

Ripper Clauses

The ripper clause, like the prohibition against local or special legislation, confers immunity but not initiative on local governments by banning state legislation that delegates municipal functions to a special commission.

During 1978-1992, the Utah Supreme Court softened its previously robust construction of this clause. Originally, in 1957, it had struck down a statute authorizing a state agency to regulate municipal sewer systems on the ground that the provision was "intended to assure the city freedom from outside supervision and control 'over' any activity properly engaged in by the city or municipality whether governmental or proprietary."²¹ In a 1988 decision, howev-

er, the court substituted a balancing approach that renounced its previous efforts to erect "mechanical conceptual categories that, without serving any substantial interest, may hobble the effective government which the state constitution as a whole was designed to permit."²²

In another case, the Pennsylvania Supreme Court (1980) ruled that legislative powers were improperly delegated if a state agency or instrumentality compelled a local government to legislate, to levy taxes, or to appropriate funds.²³

Interlocal Agreements—Service Transfers

A state constitutional provision setting forth rules for interlocal collaboration undoubtedly facilitates such arrangement. Local consent may be called for, as in Florida, where the Supreme Court interpreted the pertinent constitutional provision to require dual referenda to approve a proposed transfer of service provision powers or functions from municipality to county.²⁵

Where a statutory policy requiring interlocal cooperation is inserted into a state constitution that has not been carefully reviewed for conformity with a policy encouraging such activities, the results are often unpredictable. Accordingly, a statute transferring regulatory powers from a county to a town was judged in 1989 to be an unconstitutional local law regulating county business in Nevada.²⁶ An attempt in Texas to transfer functions to the county was held in 1989 to be an unconstitutional deprivation of the right of school district voters to withhold local consent to a proposed consolidation of governmental functions.²⁷

Autonomy of Governmental Structure

In the area of governmental structure, the state supreme courts have made some important decisions on (1) delegations of power by the state legislature to local governments and (2) home rule.

What follows is a short description of the judicial trends in these areas.

Delegations of Power

The North Carolina Constitution states, "The General Assembly . . . may give such powers and duties to counties, cities, and towns, and other governmental subdivisions as it may deem advisable."²⁸ One would suppose such a provision to be superfluous in view of the normal interpretation that a state constitution is a document limiting the otherwise plenary powers of the legislature.²⁹ This assumption, however, fails to take into account the strength and persistence of the delegation doctrine in the states.

For example, the Kentucky Supreme Court held in 1977 that the state legislature did not have the authority to delegate broad home rule powers to **counties**.³⁰ In addition, the Nebraska (1988) and Rhode Island (1987) supreme courts invalidated a grant of legislative power over licensing that did not impose adequate standards to guide a local government body's exercise of discretion.³¹ Connecticut's Supreme Court in 1989 intimated that a broad grant of police powers to local government would be constitutionally problematic were it not for a provision in the state constitution expressly permitting the legislature to do so.³² In **Kansas**, the legislature is permitted by a 1985 decision to vest general purpose units of local government with legislative powers only as to "matters of local concern."³³

Home Rule

A canvass of recent cases reveals that courts are more likely to read constitutional grants of home rule power as conferring the initiative on local governments to arrange their own structures and procedures locally. Indeed, the Oregon Supreme Court in 1978 reinterpreted its home rule provisions in this manner.³⁴

Along the same lines, a court in Louisiana in 1988 declared that a home rule county could create a department of juvenile services without permission of the legislature.³⁵ Furthermore, New York in 1987 and Colorado in 1988 sustained local measures designed to facilitate the effective performance of administrative tasks, such as tax collection and the provision of services.³⁶ In the late 1980s, the Illinois, Kansas, Louisiana, and Ohio Supreme Courts upheld home rule ordinances and charter provisions regulating local legislative procedures.³⁷ Pennsylvania's Supreme Court (1986) ruled that a two-term limit for mayor was within a city's home rule power.³⁸

The Louisiana Supreme Court in 1984 invalidated a state statute for infringing on a home rule government's constitutionally protected initiative to organize itself with respect to matters of structure and procedure.³⁹

Courts in two other jurisdictions, however, rejected similar home rule claims on the basis of a purported state interest. The California Supreme Court held in 1988 that a statute empowering city councils to impose development fees dealt with a matter of statewide concern. According to the court, that statute carried with it the "authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum."⁴⁰ In the second instance, in 1980, the Oregon Supreme Court did not allow the home rule provisions of the state constitution to prohibit general laws from imposing procedural constraints on home rule units.⁴¹ In 1988, the court also held that home rule units cannot impose duties on county and state election officials regarding procedures for conducting an advisory vote on proposed ordinances.⁴²

When it is determined that a particular subject falls within the scope of home rule powers, courts must still decide if the local action should be preempted by state law. That is, "to what extent are local home rule powers limited, in dealing with a particular subject, by the existence of state statutes relating to the same subject?"⁴³ In making this judgment, some state courts, in jurisdictions that employ terminology like **local** or municipal to distinguish the types of activities over which local governments may exercise control, fail to distinguish two severable issues, namely,

- (1) Whether or not the matter is of local or municipal concern and is, therefore, appropriate for home rule action, and
- (2) Whether or not the matter, even if within the scope of home rule initiative, is preempted by state law.⁴⁴

State courts may limit sharply the scope of home rule initiative over procedural matters by finding that a tangentially related state law implies preemption of a home rule charter or ordinance. For example, the Hawaii Supreme Court ruled in 1988 that a charter provision authorizing the local prosecutor to issue investigative subpoenas without the procedural restrictions conditioning a similar statutory grant to the state attorney general was inconsistent with and, therefore, by implication preempted by the more stringent state law standards.⁴⁵

Autonomy of Function

Autonomy of function embraces every regulatory and service aspect of local government. A comprehensive treatment of every development in this area is, therefore, unworkable. One may, however, focus on a specific trend discernible in the case law during this period: the tendency of courts to rethink their position on the doctrine of regulatory preemption.

In order to understand what is taking place, following is a brief review of provisions pertinent to preemption and of some significant preemption decisions. When it is determined that a particular subject falls within the scope of home rule powers, policymakers often confront the preemption question.

Preemption encompasses both express and implied preemption.⁴⁶ As to express preemption, legislative home rule provisions do not protect home rule entities from state statutes expressly limiting their powers and functions. In states that confer home rule over municipal affairs, a statute expressly limiting home rule functions raises a state constitutional law issue. That issue is whether or not the home rule unit has the exclusive right to regu-

late the function. That is to say, can the function serve as a “municipal affair,” free from legislative interference?⁴⁷

No decisions were issued between 1978-1992 in which the home rule unit successfully claimed that a regulatory matter was of exclusively municipal concern. The Colorado Supreme Court, however, muddied the waters of state predominance in regulatory affairs by ruling in 1988 that the control of outdoor advertising signs within a home rule municipality was of mixed state and local concern. Nevertheless, the state enactment prevailed over the local ordinance.⁴⁸ This case dovetails with the trend found in cases involving claims of immunity from state legislative interference as to personnel and structural matters, where the protected sphere of freedom for home rule entities has been eroded.

In cases involving implied preemption, the courts are more unwilling to displace assertions of local regulatory initiative. Implied preemption analysis comes into play when the state legislature enacts a regulatory statute that is silent as to whether political subdivisions are or are not permitted to create supplementary local legislation or to enter into the field covered by state law.⁴⁹

Many state constitutional grants of home rule authority are consciously phrased to exclude the application of implied preemption to home rule entities. For example, the Montana Constitution says that “a local government unit adopting a self-government charter may exercise any power *not prohibited by* this constitution, law, or charter.”⁵⁰ The Illinois Constitution, as has been mentioned already, states that:

Home rule units may exercise and perform concurrently with the state any power or function of a home rule unit *to the extent that the General Assembly does not by law specifically limit the concurrent exercise or specifically declare the States’ exercise to be conclusive.*⁵¹

In other states, pertinent constitutional language invites the judiciary to establish a doctrine of preemption along the lines indicated by the language employed. Thus, in Iowa, “municipal corporations are granted home rule power and authority, *not inconsistent with* the laws of the general assembly, to determine their local affairs and government.”⁵² Washington’s constitution states, “any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are *not in conflict with* general laws.”⁵³

In Texas, judicial interpretation has turned every empowerment question into a preemption problem:

Cities. . . may. . . adopt or amend their Charters, subject to such limitations as maybe prescribed by the State legislature, and providing that no Charter or any ordinance passed under said Charter shall contain any provision inconsistent with the

Constitution of this State, or of the general laws enacted by the legislature of this State. . . .⁵⁴

In 1979 and 1984, the Illinois Supreme Court issued two significant decisions recognizing concurrent regulatory jurisdiction of the state and a home rule county over environmental matters.⁵⁵

In addition, the Pennsylvania Supreme Court in 1984 characterized an alleged conflict between a state agency and a local government as “not a contest between superior and inferior governmental entities, but instead a contest between two instrumentalities of the state.”⁵⁶ The court rejected the balancing approach adopted by other state courts as “an ad hoc judicial legislation of authority to the governmental unit which, in the circumstances, seems to have the most compelling case.”⁵⁷ Rather, the court chose, in the absence of “more certain legislative direction,” to give effect to the legislative powers conferred on both the home rule city and the state by recognizing the municipality’s concurrent regulatory jurisdiction even over the site location decisions of a state agency.⁵⁸

The California Supreme Court in 1989 also reframed the preemption issue in terms that mark a significant change in judicial thinking. The court was faced with an asserted preemption of local regulatory authority by a state statute.⁵⁹ The court rejected the assumption that unitary, centralized regulation should prevail over multiple regulation. Instead, it viewed the matter as one involving a conflict between two equally legitimate assertions of regulatory authority. Accordingly, the court ruled that the appropriate mode of analysis between the provisions of two valid statutes, particularly where there is a purported conflict between them, is that both are presumed valid and effective unless the conflict is irreconcilable.⁶⁰

A lesson in the nuances of state constitutional interpretation emerged in the states with respect to the controversial subject of regulating relationships between landlords and tenants. The Illinois Supreme Court in 1981 recognized that home rule status rendered obsolete a previous decision denying local regulatory initiative over landlord-tenant relationships.⁶¹ The California Supreme Court in 1984 sustained a home rule rent control ordinance against a preemption claim based on the criterion that the legislation intended to “occupy the field,” while invalidating those parts of the local administrative scheme that conflicted with state law.⁶² On the other hand, courts have found limits to such concurrent jurisdiction, as when the Massachusetts Supreme Court ruled in 1984 that a home rule city’s condominium conversion ordinance affected “private or civil law relationships”; a power excepted by the state constitution from the reach of home rule.⁶³

The Illinois Supreme Court has provided the strongest claim yet to immunity from preemption in its 1984 decision that a home rule village’s regulation of hand guns was not only within the scope of its powers but also that

local regulation was not preempted by state law.⁶⁴ In dismissing the challenge to the ordinance, Justice Seymour Simon, who formerly headed the law department of the City of Chicago, observed that:

Home rule . . . is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs, free from veto by voters and elected representatives of other parts of the state who might disagree with the particular approach advanced by the representatives of the locality involved or fail to appreciate the local perception of the problem.⁶⁵

The language of this widely publicized decision shows that the Illinois court recognizes, as fully embedded in the home rule article of the state constitution, a policy of autonomy of function, however ill-defined it may have been.

Fiscal Autonomy

The popular image of this period is encapsulated in the phrase “tax revolt.” Indeed, changes in state constitutions following the 1978 enactment of California’s Proposition 13 did affect municipal revenue behavior.⁶⁶ Constitutional reforms engendered between 1978 and 1992, symbolized by the property tax revolt, tended toward the diminution rather than the enhancement of local fiscal autonomy.⁶⁷

The 1978 property tax limitations, now found in Article XIII A of the California Constitution, are familiar. Less attention has been paid to the Article XIII B spending limits imposed in 1979. Taken together, Article XIII A and B produced three distinctive changes:

- (1) Substitution of objective indices to govern the amount of real property tax, the valuation of real property, and the amount of local government spending for both local voter choice and official discretion;⁶⁸
- (2) Expansion of local voter choice and the concomitant diminution of local official discretion over local policy concerning objects of taxation other than real property;⁶⁹ and
- (3) Creation of a protected sphere of local fiscal autonomy from state-mandated expenditure increases.⁷⁰

Tax Indices

The first aspect of the California approach, which supplants local voter choice, has not been adopted in simi-

lar tax and spending limitation provisions of the Arizona, Michigan, or Missouri constitutions.⁷¹ The fact that other states did not adopt inflexible criteria suggests that this aspect of the California experiment runs against the grain of encouraging diverse local fiscal responses to divergent local conditions.

It is, therefore, not surprising that the California Supreme Court has adopted what would otherwise seem to be a paradoxical reading of Article XIII. That court has ruled that some provisions of Article XIII are to be construed strictly, whereas others are to be construed liberally.⁷² These holdings are consistent if one assumes that the court is pursuing a policy of liberal interpretation of Article XIII exemptions and narrow interpretation of that article’s scope. These decisions reinforce the lesson that the judiciary’s role in implementing state constitutional policy innovations must be taken into account at the drafting stage—a precautionary step not taken by those who formulated the Jarvis-Gann proposition (Proposition 13).⁷³

Local Voter Choice

The kind of exaction that are subject to voter approval vary according to the constitutional language and its interpretation. In California, only local government entities vested with the power to impose taxes on real property are subject to the constraints imposed by Article XIII A.⁷⁴ A local payroll and receipts tax for general use by local governments was not classed as a special tax requiring approval by a two-thirds majority of those voting.⁷⁵

The Missouri Supreme Court held in 1982 that the prohibition against “increasing the current levy of an existing tax, license or fee . . . without the approval of the required majority of the qualified voters,” applied not only to levies generating general revenue but also to regulatory and user charges for services.⁷⁶ The Missouri court’s broad construction of this constitutional prohibition created neither chaos at the polls nor paralysis of government operations. Voters successfully negotiated long ballots “with as many as 100 local fee increases, including leaf pickup and ice skate rentals.”⁷⁷

Restrictions on Mandates

During the 1978-1992 period, the number of state constitutions containing provisions dealing with state mandates jumped from three to ten. Hawaii (1978), Michigan (1978), California (1979), Missouri (1980), New Mexico (1980), New Hampshire (1984), and Florida (1990) joined Alaska, Louisiana, and Tennessee in this class.⁷⁸

The Hawaii provision simply provides that the state must share in the cost of any new program or increased level of service imposed on political subdivisions.⁷⁹ California’s constitution requires that whenever the state mandates a new program or higher level of service,

the state shall reimburse these expenditures unless: (1) the locality requests the mandate; (2) the legislature is defining a crime; or (3) the mandate was enacted prior to January 1, 1975.⁸⁰

The Missouri Constitution not only requires that the state fund “any new activity or service or any increase in the level of any activity or service beyond that required by existing law” but also that “the state cannot reduce the state financial portion of the costs of any existing activity or service required of . . . political subdivisions.”⁸¹

The emerging case law concerning mandate provisions has begun to diverge, as illustrated by the following cases:

- ▶ In interpreting the California constitutional provision requiring the state to reimburse local government units for new programs, the California Supreme Court in 1987 held that the term “new programs” refers to those carrying out governmental functions or imposing unique requirements on local government units.⁸² Accordingly, legislation increasing workers’ compensation benefits, which affected both public and private employers, need not be funded by the state pursuant to Article XIII B, Section 6 of the California Constitution.
- ▶ An opposing view was taken by the Missouri Supreme Court in 1987, which held that Missouri’s constitutional provision concerning restrictions on state mandates to local governments maybe applicable to a statute regulating solid waste landfills even though that statute was not aimed solely at local government ~ ? ~
- ▶ In addition, Michigan courts in 1988 interpreted the state constitution to apply only to state requirements exempting local option legislation from its purview.⁸⁴
- ▶ Similarly, in California in 1988, the courts addressed a crucial question over whether the statutory program was mandated or merely optional.⁸⁵

Not all required increases in costs run afoul of the constitutional provision. For example, a Missouri county challenged a statute requiring it to contribute additional funds to the state retirement system for past service credits of certain county employees newly enrolled in that system. The Missouri Supreme Court in 1987 sustained the statute on the ground that the challenged legislative scheme, taken as a whole, relieved the county of an existing burden of compensating circuit court clerks, although it obligated the county to pay for the past service benefits of the transfer.⁸⁶ This case suggests that courts will be slow to strike down a statute that mixes fiscal burdens with

benefits to local governments, provided there is a reasonable quid pro quo.

In 1988, the California Supreme Court ruled that an attempt by the state legislature to shift funding of an existing program from the state treasury to local governments subverted the policy underlying Article XIII B, Section 6, and, thus, imposed an impermissible new program on local school districts.⁸⁷

Home Rule and Tax Capacity

Several noteworthy cases have dealt with the problem of a home rule unit’s capacity to tax. Justice Frank Richardson of the California Supreme Court wrote an influential concurring opinion in a 1978 case discussing the scope of taxing power as incidental to power over municipal affairs.⁸⁸ He indicated that a home rule unit possesses more power in the revenue sphere than in the regulatory arena. He further observed that the constitutional grant of home rule powers conferred an independent power of taxation concurrent with, but not dependent on, state legislative grants.

As to preemption, Richardson balanced the state’s interest in uniformity and the minimizing of a local government’s extraterritorial impact against the city’s interest in increasing its revenues. In Justice Richardson’s formulation, the constitutional home rule policy trumped countervailing preemption considerations that would have invalidated the tax had it been enacted by a city without home rule.

In a 1991 case, however, the California Supreme Court specifically rejected a balancing approach. Characterizing the home rule provision as “deeply marked from the beginning by conceptual uncertainty,” the court sustained a statute expressly preempting home rule taxing authority over savings and loan associations.⁸⁹

Other cases decided during 1978-1992 have addressed this issue as well. The Oregon Supreme Court in 1980 and 1983 emphasized a similarly expansive construction of the revenue-raising authority implied in constitutional grants of home rule powers over county affairs and the power to enact charters.⁹⁰ In 1989, the Louisiana Supreme Court sustained New Orleans’ imposition of a municipal inheritance tax.⁹¹ Home rule status, however, does not normally confer initiative with respect to borrowing.⁹² The Pennsylvania Supreme Court (1988) held that the ripper clause in its constitution barred the legislature from delegating to a state agency or instrumentality the power to compel a local government to levy taxes or to appropriate funds.⁹³

Overall, the trend of decisions during the period continued to weaken reliance on the public purpose doctrine to determine the scope of a home rule municipality’s ability to spend and to borrow.⁹⁴ In that vein, in 1983, the Washington Supreme Court sustained a home rule city’s scheme to provide campaign finance funds for candidates in local elections against public purpose and preemption challenges.”

Personnel Autonomy

Autonomy as Immunity

The difficulties that state and local governments have invoking the Tenth Amendment to shield them against federal statutes governing the terms and conditions of public employment are mirrored in the difficulties that local governments have invoking home rule to block similar state enactments.⁹⁶

In 1962, Oregon offered home rule units the most protection against state legislative incursions. *State ex rel. Heinig v. City of Milwaukie* held that a statute mandating that the city council establish a civil service commission for fire personnel unconstitutionally intruded into a home rule city's protected realm of municipal affairs.⁹⁷ In so doing, the Oregon Supreme Court enunciated a test that tilted toward local immunity. It held that a general state statute predominated over local sovereignty only when the state showed that "the subject matter of the enactment is of general concern to the state as a whole."⁹⁸

The decision was regarded as establishing a high-water mark for local autonomy.⁹⁹ In 1988, the Oregon Supreme Court reconsidered its stance and limited the earlier case to its facts.¹⁰⁰ The court, in a pair of opinions authored by Hans Linde, also sustained a general statute requiring retirement system membership for city police and fire personnel and mandating life insurance policies for such personnel.¹⁰¹ The court ruled that a proper interpretation of the home rule provision of the Oregon Constitution conferred only a drastically narrowed immunity from state laws purporting to control a home rule city's choice of its form of government or its governmental processes.¹⁰² In limiting local immunity to "structural and organizational arrangements," Linde rejected the notion that courts could ever create a workable division of power between competing claims to sovereignty over matters of substance.¹⁰³

The fragility of the distinction between substance and procedure becomes apparent in a 1982 California Supreme Court ruling involving the application to charter cities of a state statute affording procedural protection to police personnel facing disciplinary action.¹⁰⁴ The court said that:

There must always be doubt whether a matter which is of concern to both municipalities and the state is of sufficient statewide concern to justify a new legislative intrusion into an area traditionally regarded as "strictly a municipal affair." Such doubt, however, must be resolved in favor of the legislative authority of the state.¹⁰⁵

Labeling the procedural protection embodied in the statute as conducive to "the maintenance of stable em-

ployment relations between police officers and their employers," the court categorized the matter as one of statewide concern because:

The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer one of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.¹⁰⁶

It is hard to discern from the California court's language how a claim to immunity for local government personnel matters can prevail over a legislative determination that the matter in question is of statewide concern.

Two other state decisions denied local claims to immunity over personnel matters. The Montana Supreme Court in 1985 held that a statute establishing standards for fire department personnel did not infringe that state's constitutional shield against interference with local government structure and organization.¹⁰⁷ Utah's Supreme Court in 1988 ruled that the ripper clause of the state constitution was not violated by a statute compelling municipalities to enter a state-administered retirement system for municipal employees.¹⁰⁸

The limited protection afforded local government units by home rule immunity is well illustrated by the Ohio Supreme Court's difficulties in ruling on a case involving a statute mandating home rule cities to enter into binding arbitration agreements with public safety workers. The court struck down the statute in 1988 and then, on rehearing in 1989, reversed itself and sustained it.¹⁰⁹ By contrast, the Pennsylvania Supreme Court in 1988 applied the ripper clause to preclude labor arbitration orders that compel local governments to levy taxes or appropriate funds.¹¹⁰

The California Supreme Court in 1979 upheld a 1970 amendment to the state constitution expressly giving charter cities plenary authority over compensation paid their employees, thereby overruling a statute that would have capped the cost of living increases to municipal employees.¹¹¹ Ohio's Supreme Court ruled in 1986 that a state agency is barred from investigating the operations of a city civil service commission on the grounds that the matter was not of statewide concern, and in 1988 that a city is privileged to limit its civil service commission's jurisdiction to city employees only.¹¹² The latter decision was predicated on a finding that the city's action had no extra-territorial effects.

Autonomy as Initiative

Autonomy in the sense of initiative was supported in California and Ohio cases (1988) dealing with police officers' off-duty employment and with filling vacancies.¹¹³ But where there was an alleged conflict between state statutes and a local enactment, local government initiative was generally preempted. The Florida lower courts found in 1989 that the state workers' compensation law preempted a home rule city's ordinance deducting those benefits from the amount of disability benefits payable by the city.¹¹⁴ The Wisconsin Supreme Court in 1989 overturned a home rule city's attempt to combine its fire and police departments on the grounds that it conflicted with state legislation separating these functions.¹¹⁵ In addition, the Ohio Supreme Court (1988) now requires an express statement in a home rule city's charter to enable a home rule city to exercise powers of local self-government in a manner contrary to state civil service laws.¹¹⁶

Assertions of home rule initiative on personnel matters are usually sustained against preemption attacks only in Illinois, where the state constitution requires a three-fifths legislative majority to assert, expressly, the state's sovereign predominance.¹¹⁷

Conclusion

State constitutional decisions do not, of course, give the whole picture of state-local relations from 1978-1992. When considered from the viewpoint of the policies attributable to statutory law, for example, it may well be that the decade of the 1980s represented a "decade of devolution."¹¹⁸ A recent guide to the reform of state-local relations, for example, focuses two-thirds of its policy checklist for improving the state-local system on fiscal matters and stresses statutory rather than constitutional change.¹¹⁹

Even so, the survey of judicial decisions in this chapter is of value for several reasons. First, state supreme courts maintain an important policymaking role as arbiters of state-local relations.¹²⁰ Second, the patterns of state supreme court opinions exhibit a striking continuity with the historical ambivalence toward the policy of local self-government outlined in Chapters 3 and 4. Finally, state supreme court interpretations of constitutional home rule policies may be significantly affected by carefully crafted provisions in the state constitution.

These concerns indicate that a policy analysis of state-local relations is a necessary prerequisite for providing sound advice to states and local governments on the structure and implementation of constitutional language dealing with local autonomy.

Notes

- ¹ Albert L. Sturm, "The Development of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 57. Proposals succeeded in Alaska, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Michigan, Montana, North Carolina, Pennsylvania, South Carolina (article by article) and Virginia. Maryland, New York, and Texas rejected proposed documents. Albert L. Sturm, *Thirty Years of State Constitution-Making: 1938-1968* (New York National Municipal League, 1970), pp. 138-155.
- ² Michael E. Libonati, "Local Government in State Courts: A New Chapter in Constitutional Law," *Intergovernmental Perspective* 13 (Summer/Fall 1987): 15; Perry E. Sentell, *Additional Studies in Georgia Local Government Law* (Athens: University of Georgia Press, 1983), pp. 1-16.
- ³ *Town of Black Brook v. State*, 41 N.Y. 2d 486, 362 N.E. 2d 579 (1976).
- ⁴ *City of Montrose v. Public Utilities Commission of State of Colorado*, 732 P. 2d 1181 (Colo. 1987).
- ⁵ *Kennecott Corp. v. Salt Lake County*, 702 P. 2d 451 (Utah 1985).
- ⁶ *Ibid.*; *La Grant v. Boston Housing Authority*, 403 Mass. 328, 530 N.E. 2d 149 (1988).
- ⁷ *City of Chester v. Commonwealth Department of Transportation*, 495 Pa. 382, 434 A. 2d 695 (1981).
- ⁸ *Scott County v. Iowa District Court*, 397 N.W. 2d 754 (Iowa 1986).
- ⁹ *Helena Elementary School District No. 1 v. State*, 769 P. 2d 684 (Mont. 1989).
- ¹⁰ John M. Winters, "Classification of Municipalities," *Northwestern University Law Review* 57 (2, 1962): 279.
- ¹¹ For instance, *Anderson v. Board of County Commissioners of Cloud County*, 77 Kan. 721, 95 P. 583 (1908).
- ¹² For example, *Kelly v. State*, 724 S.W. 2d 42 (Tex. Crim. 1987); *Town of Islip v. Cuomo*, 64 N.Y. 2d 50, 473 N.E. 2d 756 (1984).
- ¹³ *Shelby County Civil Service Merit Board v. Lively*, 692 S.W. 2d 15 (Tenn. 1985).
- ¹⁴ *Littleton v. Blanton*, 281 Ark. 395, 665 S.W. 2d 239 (1984).
- ¹⁵ *Richardson v. McCutcheon*, 278 S.C. 117, 292 S.E. 2d 787 (1982).
- ¹⁶ *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Employment Relations Board*, 22 Ohio St. 3d 1, 488 N.E. 2d 181 (1986).
- ¹⁷ *City of Brookfield v. Milwaukee Metropolitan Sewerage District*, 144 Wis. 2d 896, 426 N.W. 2d 591 (1988); *Bilyk v. Chicago Transit Authority*, 125 Ill. 2d 230, 531 N.E. 2d 1 (1988).
- ¹⁸ *Allegheny County v. Monzo*, 509 Pa. 26, 500 A. 2d 1096 (1985); *City of Seattle v. State*, 103 Wash. 2d 663, 694 P. 2d 641 (1985); *Branson v. City and County of Denver*, 707 P. 2d 338 (1985).
- ¹⁹ *Bruckshaw v. Paolino*, 557 A. 2d 1221 (R.I. 1989); (Rhode Island Constitution, Art. XIII, §4).
- ²⁰ *Mayor of Boston v. Treasurer and Receiver General*, 384 Mass. 718, 429 N.E. 2d 691 (1981).
- ²¹ *State Water Pollution Control Board v. Salt Lake City*, 6 Utah 2d 247, 311 P. 2d 370 (1957).
- ²² *City of West Jordan v. Utah State Retirement Board*, 767 P. 2d 530 (Utah 1988).
- ²³ *Franklin County Prison Board v. Pennsylvania Labor Relations Board*, 491 Pa. 50, 417 A. 2d 1138 (1980).
- ²⁴ For instance, *Roberts v. City of Maryville*, 750 S.W. 2d 69 (Mo. 1989).
- ²⁵ *Broward County v. City of Fort Lauderdale*, 480 So. 2d 631 (Fla. 1985).
- ²⁶ *Town of Pahump v. County of Nye*, 773 P. 2d 1224 (Nev. 1989).
- ²⁷ *Parker County v. Weatherford Independent School District*, 775 S.W. 2d 881 (Tex. App. 1989).

- ²⁸ North Carolina Constitution, Art. VII, §1.
- ²⁹ U.S. Advisory Commission on Intergovernmental Relations (ACIR), *State Constitutions in the Federal System* (Washington, DC, 1989), p. 11.
- ³⁰ *Fiscal Court of Jefferson County v. City of Louisville*, 559 S.W. 2d 478 (Ky. 1977).
- ³¹ *Bosselman, Inc. v. State*, 230 Nels. 471, 432 N.W. 2d 226 (Neb. 1988); *Metals Recycling Co. v. Maccarone*, 527 A.2d 1127 (R.I. 1987).
- ³² *Bottono v. Town of Westport*, 209 Conn. 652, 553 A.2d 576 (1989).
- ³³ *Cogswell v. Sherman County*, 238 Kan. 438, 710 P.2d 1331 (1985).
- ³⁴ *City of La Grande v. Public Employees Retirement Board*, 281 Or. 137, 576 P.2d 1204 (1978).
- ³⁵ *Konrad v. Jefferson Parish Council*, 520 So.2d 393 (La. 1988).
- ³⁶ *41 Kew Gardens Road Associates v. Tyburski*, 70 N.Y. 2d 325, 514 N.E. 2d 1114 (1987); *Sant v. Stephens*, 753 P.2d 752 (Colo. 1988).
- ³⁷ *Landmarks Preservation Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 531 N.E. 2d 9 (1988); *State v. Board of County Commissioners of County of Sedgwick*, 244 Kan. 536, 770 P.2d 455 (1989); *Hildebrand v. City of New Orleans*, 549 So.2d 1218 (La. 1989); *Fox v. City of Lakewood*, 39 Ohio St. 3d 19, 528 N.E. 2d 1254 (1988).
- ³⁸ *City Council of City of Bethlehem v. Marcincin*, 512 Pa. 1, 515 A.2d 1321 (1986).
- ³⁹ *Francis v. Morial*, 455 So. 2d 1168 (La. 1984).
- ⁴⁰ *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 754 P.2d 708 (1988).
- ⁴¹ *Reilly v. Paulus*, 288 Or. 573, 607 P.2d 162 (1980).
- ⁴² *City of Eugene v. Roberts*, 505 Or. 641, 756 P.2d 630 (1988).
- ⁴³ *Sho Sato and Arvo van Alstyne*, *State and Local Government Law*, 2d ed. (Boston: Little, Brown and Company, 1977), p. 136.
- ⁴⁴ For example, *Anchor Savings and Loan Association v. Equal Opportunity Commission*, 120 Wis. 2d 391 at 397, 355 N.W. 2d 234 at 238 (Wis. 1984).
- ⁴⁵ *Marsland v. First Hawaii Bank*, 764 P.2d 1228 (Haw. 1988).
- ⁴⁶ C. Dallas Sands, Michael E. Libonati, and John Martinez, *Local Government Law* (Wilmette, Illinois: Callaghan and Company, 1982), Vol. 1, 4.06.
- ⁴⁷ "Report and Recommendations of the California Commission on the Law of Preemption," *Urban Law Annual*, 1969, p. 131.
- ⁴⁸ *National Advertising Co. v. Department of Highways of State of Colorado*, 751 P.2d 632 (Colo. 1988).
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