

A COMMISSION REPORT

*State Constitutional and  
Statutory Restrictions Upon  
the Structural, Functional,  
and Personnel Powers of  
Local Government*



THE ADVISORY COMMISSION ON  
INTERGOVERNMENTAL RELATIONS

OCTOBER 1962

A-12

**ADVISORY COMMISSION ON  
INTERGOVERNMENTAL RELATIONS  
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## PREFACE

The Advisory Commission on Intergovernmental Relations was established by Public Law 380, passed by the 1st session of the 86th Congress and approved by the President September 24, 1959. Section 2 of the act sets forth the following declaration of purpose and specific responsibilities for the Commission:

SEC. 2. Because the complexity of modern life intensifies the need in a federal form of government for the fullest cooperation and coordination of activities between the levels of government, and because population growth and scientific developments portend an increasingly complex society in future years, it is essential that an appropriate agency be established to give continuing attention to intergovernmental problems.

It is intended that the Commission, in the performance of its duties, will—

(1) bring together representatives of the Federal, State, and local governments for the consideration of common problems;

(2) provide a forum for discussing the administration and coordination of Federal grant and other programs requiring intergovernmental cooperation;

(3) give critical attention to the conditions and controls involved in the administration of Federal grant programs;

(4) make available technical assistance to the executive and legislative branches of the Federal Government in the review of proposed legislation to determine its overall effect on the Federal system;

(5) encourage discussion and study at an early stage of emerging public problems that are likely to require intergovernmental cooperation;

(6) recommend, within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government; and

(7) recommend methods of coordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the levels of government and to reduce the burden of compliance for taxpayers.

Pursuant to its statutory responsibilities, the Commission from time to time singles out for study and recommendation particular problems, the amelioration of which, in the Commission's view, would enhance cooperation among the different levels of government and thereby improve the effectiveness of the federal system of government as established by the Constitution. Very soon after its establishment the Commission identified one such problem as the variety and complexity of State constitutional and statutory restrictions upon local units of government. The Commission expressed the view at that time that many of these restrictions tend to stifle local initiative and encourage the passing of responsibility from local to higher levels of government. The studies which the Commission has made so far confirm this early view.

In approaching the general subject of State restrictions upon local government it was decided to treat the question in three broad categories, namely: (a) Restrictions upon local borrowing; (b) restrictions upon local taxing powers; and (c) restrictions upon the structure, functions, and personnel of local governments. The first was dealt with in the Commission's report, *State Constitutional and Statutory Restrictions on Local Government Debt*, issued in September 1961. A report dealing with the second category will be considered by the Commission at an early date, and the report which follows treats upon the third category—"State Constitutional and Statutory Restrictions Upon the Structural, Functional, and Personnel Powers of Local Governments." In the following report the Commission sets forth what it considers key facts and policy considerations on this subject, and respectfully submits its conclusions and recommendations thereon.

This report was adopted at a meeting of the Commission held on October 10-11, 1962.

FRANK BANE, *Chairman.*

## WORKING PROCEDURES OF THE COMMISSION

This statement of the procedures followed by the Advisory Commission on Intergovernmental Relations is intended to assist the reader's consideration of this report. The Commission, made up of busy public officials and private persons occupying positions of major responsibility, must deal with diverse and specialized subjects. It is important, therefore, in evaluating reports and recommendations of the Commission to know the processes of consultation, criticism, and review to which particular reports are subjected.

The duty of the Advisory Commission, under Public Law 86-380, is to give continuing attention to intergovernmental problems in Federal-State, Federal-local, and State-local, as well as interstate and interlocal relations. The Commission's approach to this broad area of responsibility is to select specific, discrete intergovernmental problems for analysis and policy recommendation. In some cases, matters proposed for study are introduced by individual members of the Commission; in other cases, public officials, professional organizations, or scholars propose projects. In still others, possible subjects are suggested by the staff. Frequently, two or more subjects compete for a single "slot" on the Commission's work program. In such instances selection is by majority vote.

Once a subject is placed on the work program, a staff member is assigned to it. In limited instances the study is contracted for with an expert in the field or a research organization. The staff's job is to assemble and analyze the facts, identify the differing points of view involved, and develop a range of possible, frequently alternative, policy considerations and recommendations which the Commission might wish to consider. This is all developed and set forth in a preliminary draft report containing (a) historical and factual background, (b) analysis of the issues, and (c) alternative solutions.

The preliminary draft is reviewed within the staff of the Commission and after revision is placed before an informal group of "critics" for searching review and criticism. In assembling these reviewers, care is taken to provide (a) expert knowledge and (b) a diversity of substantive and philosophical viewpoints. Additionally, representatives of the American Municipal Association, Council of State Governments, National Association of Counties, U.S. Conference of Mayors, U.S. Bureau of the Budget and any Federal agencies directly concerned with the subject matter participate, along with the other "critics" in reviewing the draft. It should be emphasized that participation by an individual or organization in the review process does not imply in any way endorsement of the draft report. Criticisms and suggestions are presented; some may be adopted, others rejected by the Commission staff.

The draft report is then revised by the staff in light of criticisms and comments received and transmitted to the members of the Commission at least 2 weeks in advance of the meeting at which it is to be considered.

In its formal consideration of the draft report, the Commission registers any general opinion it may have as to further staff work or other considerations which it believes warranted. However, most of the time available is devoted to a specific and detailed examination of conclusions and possible recommendations. Differences of opinion are aired, suggested revisions discussed, amendments considered and voted upon, and finally a recommendation adopted with individual dissents registered. The report is then revised in the light of Commission decisions and sent to the printer, with footnotes of dissent by individual members, if any, recorded as appropriate in the copy.



## ACKNOWLEDGMENTS

The staff work for this report was conducted by Mr. H. Clyde Reeves of Louisville, Ky., a consultant to the Commission. The Commission and its staff are deeply indebted to Mr. Reeves for this contribution to our work. Mr. Reeves desires that the collaboration of Prof. Ralph S. Petrilli, Law School, University of Louisville, in preparing the section on "Canons of Construction" be acknowledged.

WM. G. COLMAN,  
*Executive Director,*  
MELVIN W. SNEED,  
*Assistant Director,*  
*Governmental Structure and Functions.*



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## I. INTRODUCTION

This report is concerned with the areal distribution and use of government powers at the local level. It endeavors to examine State constitutional and statutory limitations upon local government in their historical, theoretical, political, and legal context. Because very little systematic work has been done in pulling this broad area together, it was determined to review the entire field, with certain notable exceptions, even at the risk of being cursory.

This examination has had six principal objectives: (*a*) To determine the origin of restrictions; (*b*) to explore the nature of local government; (*c*) to determine why efforts to ease restrictions have been slow and disappointing; (*d*) to ascertain the character of debilitating restrictions; (*e*) to ascertain how revisions might best be implemented; and (*f*) to develop possible courses of action for eliminating unjustified restrictions.

The report confines its consideration, except incidentally, to structure, including area adjustments and form, functional powers, and officers and personnel. Local school system organization has been substantially ignored, except as it contributes to the mass of local units, on the ground that State-local relations in the conduct of public education is a subject for special inquiry. Revenue, debt and fiscal limitations, as well as grants-in-aid, have been largely excluded because the Commission has given separate attention to these subjects. Minimum attention has been focused on metropolitan areas because their governmental structure, organization, and planning were the subject of a Commission report last year and they are the object of further current study.

The present report is intended to deal with the legal restrictions associated generally with local government. It is necessarily burdened with the restrictions of omission and the effect of local governments upon each other.

If this report is useful as a point of departure for additional study, discussion, and development of definitions of the purpose of local government, as well as contributing to a greater curiosity about methodology for achieving the objectives determined for local government, it will have served some of its purposes.

Proposals for action may provide specifics for further inquiry by other agencies. The Commission encourages others to cudgel themselves with the theoretical, political, sociological, and judicial problems of local government and to voice their findings. It is only by wide participation in the search that the "Sirens," if there be any, associated with local government can be found and routed. Meanwhile the Commission solicits the continued cooperation of organizations concerned with its work in presenting to legislative and administrative officials throughout the country the major conclusions and recommendations contained in this report.

## II. HISTORICAL EVOLUTION OF LOCAL GOVERNMENT IN THE UNITED STATES

The Magna Carta (1215) was not a grant of rights, as some texts may have led us to believe. Essentially, it was an affirmation of ancient liberties. This is well illustrated in two provisions of the Charter relating to local government: <sup>1</sup>

- (13) And the City of London shall have all its ancient liberties and free customs . . . furthermore we will and grant that all other cities and boroughs, and towns and ports shall have all their liberties and free customs.
- (45) We will not make any justices, constables, sheriffs, or bailiffs, unless they are such as know the law of the realm and mean to duly observe it.

Encroachments upon the ancient governmental freedoms were not stopped by the Charter. Indeed, as feudalism decayed and as nationalism and the acceptance of the divine right of the monarch grew, these ancient freedoms were increasingly suppressed. This was the pattern of that era in Europe. In England this suppression reached its height in the 16th and 17th centuries. Monarchs of the Houses of Tudor and Stuart restricted the membership of local governing bodies, made them as nonrepresentative as possible and, by every available means, brought them under Royal influence and control.<sup>2</sup>

The courts tended to be subservient to the monarch and the King's justice was frequently administered in his personal interest. Offices were sold and often became hereditary. Franchises for local administration were acquired only by express grant of the Crown. Municipal rights, if they existed, were bought and paid for by the burghers, and public servants from the lowest to noblemen practiced gross corruption without disguise or reproach.<sup>3</sup>

<sup>1</sup> Henry Smith Williams, *Historians History of the World*, N.Y., 1904, vol. xviii, p. 351.

<sup>2</sup> Albert Shaw, *Municipal Government in Great Britain*, London, 1907, p. 23.

<sup>3</sup> Williams, *op cit*, vol. xx, p. 325.

Contemporaneously, legal concepts and rules of judicial construction were taking form. Local franchises and offices were considered *incorporeal hereditaments*, things, belonging to the Crown. The King could sell or let them to farm. Grants of these were construed in a manner favorable to the Crown.<sup>4</sup>

By the middle of the 14th century, judges were no longer members of council and they began to protect ancient usage by construing statutes strictly. The idea of legislation being subject to judicial review for conformity with a paramount law developed as an attempt to curb the power of the King in council; it was ineffective and disappeared.<sup>5</sup>

Withal, local customs, habits, modes of thought, and ordinances constituted a source of law independent of the sovereign.<sup>6</sup> The existence of administrative bodies throughout the kingdom, frequently also acting in a judicial capacity, made it impossible to more than partially suppress liberty of speech and action, and materially facilitated the Great Revolution of 1685. This resulted in a restoration of liberty. A limited monarchy of the 13th century was brought down to the 17th century, basically unimpaired.

The local laws that followed were inexactly set forth and loose political morality was rampant for decades. Officials were paid high salaries for doing little; taxes were considered oppressive; London and other cities were dark and dirty and highways were deplorable. Soon people began to change from a fear of government to a contempt for it.

Simultaneously, in an effort to provide local institutions suitable to a changing industrial organization, Parliament created a great profusion of *ad hoc* bodies for specific purposes but having no general powers of government.<sup>7</sup> The great reforms of the 19th century brought organization to local government in England.

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<sup>4</sup> Frederick Pollock and F. W. Maitland, *History of English Law*, 2d ed., Cambridge, 1898, vol. ii, p. 132.

<sup>5</sup> Theodore Plucknett, *A Concise History of the Common Law*, 4th ed., London, 1948, p. 315 ff.

<sup>6</sup> Carlton Kemp Allen, *Law in the Making*, 6th ed., Oxford, England, 1958, p. 570 ff.

<sup>7</sup> For an excellent discussion of local government during the 1700's in England see Fred H. Spencer, *Municipal Origins*, London, 1911.



This is a brief picture of our local government inheritance. Our most impressionable years, the years during which we developed our forms and our judicial and political concepts of local government, represented the peak in English history of the supremacy of the sovereign and of official corruption. The historical accident by which local government on this side of the Atlantic was organized pursuant to principles only recently developed in the mother country has had a profound influence that exerts itself upon us even today.

The early colonists came to America under grants or charters. These were in the nature of written constitutions and ran the gamut from failing to mention local government, as in the case of the Charter of Rhode Island (1663), to expressly providing that the Governor should "erect and incorporate towns into boroughs and boroughs into cities with suitable privileges and immunities," as in the Charter of Maryland (1632); or, as in the Charter of Massachusetts Bay (1629), providing that the General Court (the Governor and six associates) shall establish laws "for setting the Formes and Ceremonies of Government and Magistracy, fitt and necessary for the said Plantacon, and the Inhabitants thereof, and for nameing and setting of all sorts of Officers, both superior and inferior . . . and setting forth the several duties, Powers Lymytts, of every such office . . ." These first constitutions usually incorporated a bill of personal rights and a bar of arbitrary taxation. In any case, the establishment of local government proceeded.

In New England and parts of New York the people of rural communities set up for themselves agencies to provide for their local government needs. Soon, colonial legislatures by incorporating these agencies were assumed to be the source of their life. In the central and southern colonies, city charters were granted by the royal governors as representatives of the Crown. Royal charter cities often had undemocratic organization and the colonial legislatures sought rather unsuccessfully to control them. At it became necessary for colonial governments to exercise their powers over wider areas, counties were established in the southern colonies and in New England general government operated through the towns. Larger units were ill fitted

to exercise the local governmental powers of the time and they were frequently subdivided into townships and parishes.<sup>8</sup>

With independence, the new State legislatures became the undisputed mediums for expressing the will of government and the States assumed, as a democratic right, the control of local government that the English Crown had endeavored to acquire.<sup>9</sup> It was almost a century before well-defined constitutional theory caught up.

The first State constitutions bore similarity to the charters they replaced. The Northwest Ordinance of 1787 authorized the Governor "to appoint magistrates and other civil officers in each county or township as he shall find necessary for the preservation of peace and good order" and directed that the assembly, upon being organized when the territory achieved 5,000 free male adult inhabitants, should provide for local government. At this juncture in our history, it is clear that States assumed the prerogative of being the source of local governmental power, irrespective of whether there was express constitutional authority for local government.

As the country developed, the ebullience of pioneers and speculators involved local government and local officials in fraudulent schemes, lawless actions, and burdensome public improvements. The frontier suspicion of currency and banks and the acceptance of the Jacksonian spoils principles led State legislatures, for reasons pure and otherwise, to pass whatever laws they wished relating to local government units. The inherent rights of local government versus the primacy of the State were controverted.

By 1860, State commission management of municipal functions, such as police in New York City, had appeared in several States and special local legislation was the rule. Provisions had already begun to appear in State constitutions limiting the term and restricting the compensation of officials, barring local units from pledging their credit or becoming stockholders in

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<sup>8</sup> For a summary description of colonial local government see W. Tooke, "The Status of Municipal Corporations in American Law," *XVI Municipal Law Review*, pp. 343-360 (March 1932).

<sup>9</sup> Indeed more, because as Tooke, *supra*, points out, the Crown issued franchises by prerogative and this required acceptance; whereas, the incorporation of municipalities by States, though petitioned, was unilateral.

private corporations, limiting local debts and taxes, prohibiting the State from authorizing use of city thoroughfares by street railways without city permission, prohibiting special local laws on a wide variety of subjects, and delegating specific prerogatives as to the election of named local officers.<sup>10</sup>

Such State constitutional provisions were designed, on the one hand, to require prudence and integrity of local officials, and on the other to protect local units and officials from State legislative corruption and encroachment. Among the results of these constitutional provisions was to goad legislatures to find new ways of restricting as well as implementing local government. Local officials, doubtless often out of conviction, worked both sides of the street in this seesaw of local autonomy versus State primacy.

The concept of "welfare," or modern service functions, such as education, streets and roads, water and sewage systems, as a value or purpose of local government, grew with the development of the continent. Soon after the Dillon Rule (see p. 23) was promulgated in 1872, it became generally apparent that plenary power resided exclusively in the State—that local governments possessed only those powers expressly granted or clearly and necessarily implied. It was also becoming apparent that old forms of local government and traditional delegations of powers were inadequate to meet new needs, particularly in cities. Communities wanted to meet these needs in their own way, independent of State direction, and the agitation for home rule began.

Iowa, in 1858, took the first legislative action to grant municipalities the right to formulate and adopt their own charter. Missouri, in 1875, was the first to incorporate home-rule provisions in its constitution.

Around the turn of the century, the emphasis of reform efforts was on the form and structure of municipal government. This was caused and abetted by a recognition of the importance of management to economy in the administration of new and expanded services, by the sorry state of municipal government

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<sup>10</sup> Charles M. Kneier, *City Government in the United States*, revised ed., N.Y., 1947.

generally, and by the scandals that swept our larger cities before the turn of the last century.<sup>11</sup> Reform efforts were directed principally at electing city councilmen at large instead of from wards, adoption of the commission form of government, home-rule charters, and promotion of the city manager plan. The legal hurdles involved had not been cleared. Indeed, they have not yet. In the absence of express constitutional provision, it was often construed that home-rule charters were an improper delegation of power, as was the case in Michigan in 1899.<sup>12</sup> The ancient belief that communities had certain inherent rights that should not be subjected to the whims of sovereignty, even in a democratic State, made constitutional home rule a focal target. By 1930, 15 State constitutions had self-executing or mandatory home-rule provisions.<sup>13</sup>

When the constitution or the legislature authorized structural improvements, the battle was, unhappily, less than half won. An unnecessarily detailed procedure, either constitutional or statutory, of petition and referendum was frequently prescribed for determining whether a new form of government should be employed. Local leadership to initiate reform often was absent. Many times elections involved a contest between the "good guys" and the "bad guys." Thus, more of a schism than the facts warranted may have come into being between those purporting to represent good citizenship and professional management and the "city hall crowd." The local political power structure often opposed change and frequently won. This may have compounded bad management and certainly increased the power structure's appreciation for protective devices.

It is along these lines that the battle for municipal reform has been waged for more than a half a century. Constitutional reform has been heralded on its infrequent occurrences. When it was achieved, laws implementing it were sometimes slow to follow. When enabling legislation was enacted little may have happened. The variations in practice are well illustrated in current Missouri and Pennsylvania history.

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<sup>11</sup> For a report of these scandals see Lincoln Steffens, *The Shame of the Cities*, N.Y., 1904.

<sup>12</sup> Kneier, *op. cit.*, p. 87.

<sup>13</sup> Joseph D. McGoldrick, *Law and Practice of Municipal Home Rule*, N.Y., 1933.

Missouri is a progressive State in municipal reform and has 114 relatively strong counties and the city-county of St. Louis. Immediately following the constitutional revision of 1945, most of the provisions of preexisting statutes relating to local government organization, officials and their duties, and salaries were reenacted. Since 1945, 11 Missouri cities have adopted constitutional charters; 9 of these and 16 other cities, under third-class city law and the Kansas City Constitutional Charter, have council-manager government. Of 54 third-class cities, 8 have commission government, 16 manager government, and 30 use original mayor-council systems. The original mayor-council governments elect marshals, assessors, tax collectors, and treasurers for 2-year terms. Their councilmen are elected by wards and the salaries of these officials are fixed by the State legislature. The approximately 750 smaller cities and villages have elected administrative officials. Only St. Louis County, among the authorized counties of over 85,000 population, has adopted a home-rule charter.

Though the plain intent of the Missouri Constitution was "to foster the combining of local government facilities and services and to eliminate multiple offices"<sup>14</sup> there has not been a city-county merger, a county consolidation, or a city-county separation since 1945, and the progress of annexation has been handicapped by an act of 1953 and recent judicial interpretation.<sup>15</sup> Public reservation districts were authorized in 1917. These districts, governed by a board appointed by the Governor of Missouri, were clothed with broad power respecting parks, highways, and reservations, and would include one or more cities and were to be organized pursuant to a 5-percent electors' petition and referendum in each city and incorporated county area. The law was never used and was repealed in 1957. Other independent districts, usually related to only one county or city, are authorized for public improvements, planning, fire protection, public utilities, inspection of water and milk, smoke abatement, and garbage and rubbish disposal. There are nearly 850 of these, excluding over 325 townships.

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<sup>14</sup> Glen Moehler, "Comments on Title VII, Cities, Towns, and Villages," 5 *VAMS*, p. 1.

<sup>15</sup> *Washington University Law Quarterly*, April, 1961, p. 159 ff.

Interlocal cooperation and contracting have been substantially limited to the St. Louis and Springfield areas. St. Louis County provides many small cities within its boundary certain public health services and has agreed to establish a Joint Airport Commission with St. Louis. Springfield contracts with Greene County to collect its property taxes, exchanges hospital and nursing home services with the county, jointly appoints a head of the city and county health services, and arranges to share costs by holding elections on the same day as the county.<sup>16</sup>

Pennsylvania, which has a constitution dating from 1874, codified much of its local government law in 1953 and 1955, but the codification contained little that was new. About 25 years ago, the constitution was amended to permit optional city charters. Enabling legislation was enacted in 1957 and 15 of the 48 cities started charter commission proceedings. Proposals in nine cities were submitted to the electorate. Plans in five cities for the council-manager form were defeated. Proposals in four cities to change from a commission to a strong mayor and council passed and became effective at the beginning of 1962. Several months after the date of the change at least one of the four cities was not organized with ordinances and budget. Philadelphia operates under a special constitutional provision of 1951.

Under the Municipality Authorities Act of 1945, special units of government, with broad powers to perform special functions, have been established in most of the municipalities, including urban townships. A total of 1,130 of these authorities have been created largely because Pennsylvania municipalities have reached their general obligation debt limits. Technically these authorities are not fully independent units of government; however, their sponsoring units do not effectively monitor their activities and once operative, with bonds outstanding, they are practically independent.<sup>17</sup> They enjoy some legislatively delegated liberties not accorded municipalities.

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<sup>16</sup> *Municipal Year Book, 1958*, p. 226, published annually by the International City Managers Association, Chicago, Ill.

<sup>17</sup> The Bureau of the Census, in the 1957 Census of Government, treated these units as dependent. The 1962 census will treat them as independent with an explanation that they are an exception to the application to the general standard for determining whether a unit is independent.

The 2,545 cities, boroughs, townships, and towns in Pennsylvania have comparable municipal powers and blanket the State to effectively prevent annexation. All are seeking more "home rule." At least a third of the time of the legislature is taken up with local government problems. Eighty-three boroughs have managers. The 66 counties are weak. Relatively few non-educational special purpose independent districts exist, because units with municipal powers have created authorities with added taxing powers to perform functions which special districts often are created to do elsewhere.

Statewide organizations of municipal officials are politically powerful in Pennsylvania with respect to the consideration and enactment of local government legislation. Local government administrative expenses are high; however, interlocal cooperation and agreements, authorized by general statute and obviously needed by the many small units, are numbered in the hundreds.

These examples are of populous States and show more small units than most but are otherwise generally representative of the panorama across the land. Constitutions and statutes have created all kinds of local government and local reform efforts have been disappointing. Local government is fractionated and confusing. It is restricted territorially, financially, in structure and personnel, and sometimes directly in the functions authorized. Restrictions are of omission, or express commission, and arise from the rules of construction applied to the detailed authorizing legislation. *Ad hoc* agencies of great variety have arisen to perform the functions which the traditional local units of government failed to perform. Small local units lack appropriate incentive to cooperate and no technique for combining them has been found. The power of decision is drifting to higher levels of government. We profess great respect for local autonomy, yet hold to traditions that adversely affect our stated objectives. The Commission believes a consensus exists that this situation is handicapping community development, is prejudicial to national strength, and might jeopardize our liberty. But consensus does not seem to be made of the same stuff as decision. Why?





### III. CONCEPTS RELATING TO LOCAL GOVERNMENT

Our National Government is based on a well-defined theory, but the theory of local government has been neglected. The justification of local government has been well stated repeatedly. A great sentiment for local government exists. Numerous suggestions have been made for its improvement, and some have been adopted, but the place of local government in our scheme of things has not been concisely developed and does not seem to be settled. We extol the virtues of local determination, often while moving away from it.

Development of a theory of local government is a formidable undertaking beyond the scope of this inquiry. We shall, however, reach certain conclusions and suggest general rules for dealing with those conclusions which may be helpful in developing a philosophy and a theory.

Perhaps, to make headway, we may indulge in an analogy and think of local government and National Government as the opposite ends of a board, balanced by State Government as a center of gravity. This provides us a model of areal division of powers in keeping with the American ideology. Expressions about the ideology, however, often fail to recognize that local government to be government must be a vehicle for making decisions binding upon the area and must have power subject to the area will. The picture of local government has been clouded by the legal distinction between governmental and corporate power. Also, municipal corporations have been thought of as having ability to do business or provide services as a corporation, without general concern for the source of the power authorizing the business or service.

Governmental power is distributed in two ways—capital and areal. Capital distribution is within the structure of one unit of government, as the legislative, executive, and judicial branches of the National Government. Areal distribution is among units

having relation to area, generally thought of in terms of levels. On the local level, with varying emphasis among States, the units are municipalities, including cities, towns, villages, boroughs, and some townships, and counties, townships, special districts, and authorities. Special districts and authorities may be single or multipurpose, and special districts, particularly, may be either smaller, larger, or coterminous with other units. Townships are usually areal subdivisions of counties and may similarly subdivide cities.

It is in the determination of policy and the exercise of power relating to the functions of government that conflict, action, and stalemate occur. The functions of government are related to value concepts. Conflict is associated with and prescribed by lack of agreement about, or understanding of, values. It is helpful in considering the distribution and use of governmental power areally to identify the basic value concepts involved. We are of the opinion that there are three: (a) Liberty, (b) equality, and (c) welfare.<sup>18</sup>

*Liberty values* seek universality and relate to the freedom of the individual, the protection of minorities, and the right to enjoy and use property. These are the values men sought from government and substantially acquired in the 18th century. The pursuit of these values sent émigrés to America, knowledgeable that what they sought was secure only under the rule of law. The maintenance of liberty values was basic to constitutionalism, as reflected in bills of rights and all limitations upon authority.

*Equality values* are necessarily embodied in wide-scale participation in government, the collective wisdom of a democratic society and, also, tend toward universality. The elimination of property ownership as a voting qualification, the granting of woman suffrage, and the abolition of slavery are landmarks of the development of equality values. These concepts are newer than liberty concepts and many conflicts regarding details are still in progress. Like liberty values, equality values are acquired and protected by spelling them out in the law.

*Welfare values* are a relatively new concept. Welfare values

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<sup>18</sup> See Arthur Maass and Others, *Area and Power*, The Free Press, Glencoe, Ill., 1959, ch. 2, Paul Ylvisaker, "Some Criteria for a 'Proper' Areal Division of Governmental Power."

are concerned with government as an agency to provide modern services, to taxpayers—paying customers—or to all inhabitants of the area. The volume, extent, or quality of the service often has a direct relation to its cost, and what localities are willing to pay for, or feel they need, may vary widely. Highways, street lighting, and the watchman duties of town criers were early manifestations of welfare values, followed by public education, protective police and health regulations, and various public utility and works programs. Originally, power relating to values associated with many of these functions was considered quasi-governmental and corporate. This legal separation of welfare values from governmental power was never clear or wholly accepted and is now on the wane, even in tort actions. The use of governmental power to perform municipal-type services is the nomenclature of our day. The welfare concept is now being focused on recreation, mass transportation, planning, and land-use implementation.

Liberty and equality concepts are counter to the concentration of social, economic, and political power. They are general in character and individually applied, whereas welfare concepts, though for the benefit of individuals, are necessarily oriented to the group, the community, the area, the region, and the Nation—they are varied in character and applied in mass.

The functions of local government are historically, legally, politically, and administratively related to these value concepts, and we shall think of functions in terms of (a) liberty functions, (b) equality functions, (c) welfare functions, and (d) sustaining functions.

*Liberty functions* encompass the keeping of vital and property records and the administration of justice. State governmental power principally is involved, though local governmental power expressed in ordinances, often affecting the individual in relation to welfare values, is almost universally a subordinate increment to it. The liberty function duties of administrative officers have been defined in detail, so our rights may be known and not jeopardized by performance failure or by the unauthorized exercise of official power. Our rights in relation to Liberty-function officers are as individuals and of a nature to be asserted against the principal at law. There may be a strong tradition for keep-

ing certain of these local administrative officials within reach of their masters by elections from small units for specific terms. With certain exceptions, these officials are essentially locally elected State officers and not formally a part of the mechanism for the exercise of local power, though many have been assigned nonliberty functions.

*Equality function* administration is concerned principally with elections. Administration is periodical and usually under the jurisdiction of liberty function and special part-time officers. It does not involve problems of consequence to the subject of this report separate from liberty function administration problems.

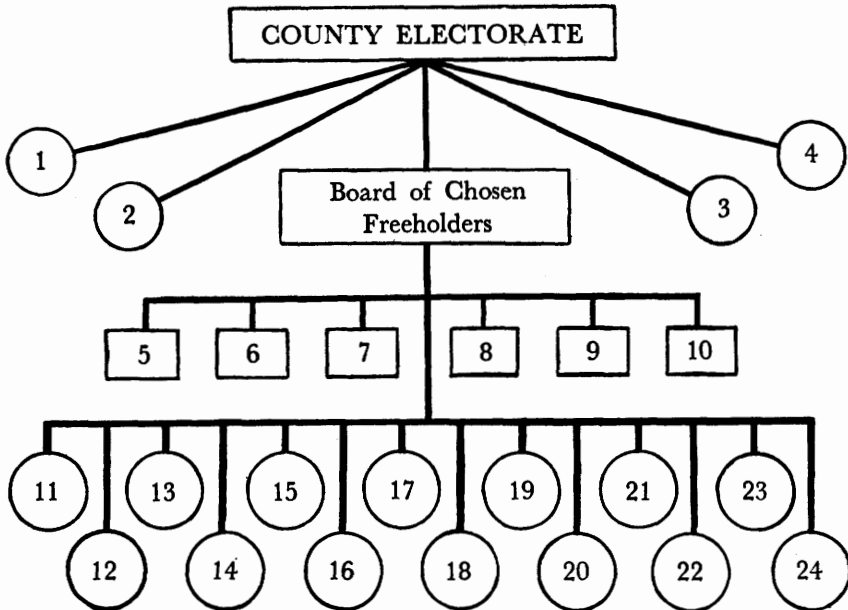
*Welfare functions* relate to modern services of government and may involve large management problems and technicalities which cannot be governed in detail by statutes. Pursuing welfare values may repress certain private interests while fostering others and require large amounts of money, which may give rise to the necessity for aid from higher levels of government and to economic conflict at all levels.

*Sustaining functions* are the housekeeping, financial, and revenue-raising functions and are subsidiary to liberty, equality, and welfare functions. When local government functions were dominantly liberty-oriented, sustaining functions were minimal and naturally administered in a manner comparable to liberty functions. Sustaining activity has increased along with the volume of welfare activity and has inherited the brunt of the conflict surrounding welfare values.

Identifying the officials principally concerned with the administration of liberty, welfare, and sustaining functions on the organization charts of a metropolitan county and a medium-large city will serve as an illustration.

Study of these charts illustrates that local government programs and activities tend to fall within distinct functional value classes but there are exceptions. Professional legal services, criminal detention, and city police activities are usually mixed; they are both liberty and welfare in nature, and functions of one are difficult to separate from functions of the other. For example, in criminal detention the conditions of imprisonment, the pun-

# GOVERNMENT OF MERCER COUNTY, N.J.



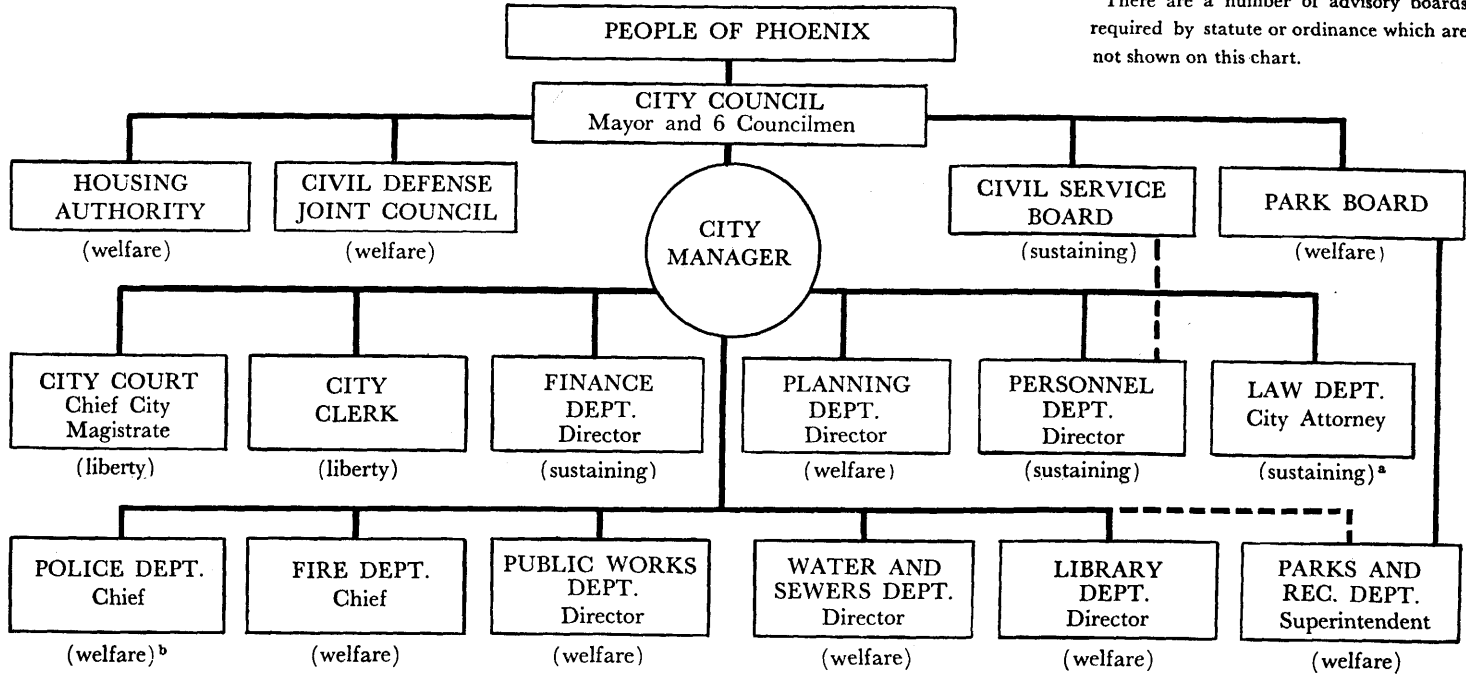
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|---|--|
| <p>1. Coroner (Liberty)</p> <p>2. Sheriff (Liberty)<sup>a</sup></p> <p>3. County Clerk (Liberty)<sup>a</sup></p> <p>4. Surrogate (Liberty)</p> <p>5. Library Commission (Welfare)</p> <p>6. Planning Board (Welfare)</p> <p>7. Welfare Board (Welfare)</p> <p>8. Shade Tree Commission (Welfare)</p> <p>9. Board of Managers of Juvenile Shelter (Welfare)<sup>b</sup></p> <p>10. Sinking Fund Commission (Sustaining)</p> <p>11. County Physician (Welfare)</p> <p>12. County Counsel (Liberty)<sup>a</sup></p> <p>13. Clerk of the Board (Sustaining)</p> | <p>14. Warden, County Jail (Liberty)<sup>b</sup></p> <p>15. Warden, County Workhouse (Liberty)<sup>b</sup></p> <p>16. Fire Marshal (Welfare)</p> <p>17. County Engineer (Welfare)</p> <p>18. Supervisor of Roads (Welfare)</p> <p>19. Treasurer (Sustaining)</p> <p>20. Auditor (Sustaining)</p> <p>21. Supervisor of Purchases (Sustaining)</p> <p>22. Supt. Weights and Measures (Welfare)</p> <p>23. Supt. Public Works (Welfare)</p> <p>24. Supt. Soldiers' Burial (Welfare)</p> |
|---|--|

<sup>a</sup> Sheriffs and county clerks are often assigned tax and license administration functions that are sustaining in nature. The duties of a county counsel are usually mixed—as a prosecutor he is liberty oriented and as a counsel for the governing body and administrative officers and boards his functions are sustaining in nature.

<sup>b</sup> Juvenile retraining is a welfare function that is closely associated with liberty values. Criminal detention is a liberty function except as it involves rehabilitation, then it is welfare in nature.

## ORGANIZATION CHART City of Phoenix, Arizona

There are a number of advisory boards required by statute or ordinance which are not shown on this chart.



July 1, 1961

\* The duties of the assistant city attorney as city prosecutor are liberty oriented.  
<sup>b</sup> Criminal investigation and serving the court are liberty oriented duties.

ishment for crime and protection of the public from criminal action, including the restraining influence of example upon others, are matters associated with liberty values. Here the governing specifications should be legally certain, but the aspects of penology relating to rehabilitation are welfare values, and how rehabilitation is accomplished is not subject to precise legal definition. Accordingly, any attempt to segregate completely the administration of liberty and welfare functions may be impracticable. On the other hand, the sheriff and the county clerk in many States are assigned tax administrator's duties that have no relation to their basic functions and are readily severable.

These charts also illustrate, as we shall see is generally true, that liberty-function officials are more numerous and more frequently elected in the county than in city government.

Influence of the traditional approach in administering liberty functions upon the administration of welfare and sustaining functions gives rise to many of the problems of local government. Distinguishing and eliminating or mitigating the undesirable aspects of this influence, so as to facilitate execution of public policy, is a substantial purpose of this report.

Bases used for judging whether a unit of local government is adapted to performing a particular function are groupable into five principal classes: (a) Economy; (b) adequacy of substantive power and area jurisdiction; (c) homogeneity of social and economic interests; (d) generalcy of diverse interests to balance decisions; and (e) irrationality, the amenities of tradition, and the lure of inertia.<sup>19</sup>

Not nearly enough is known about the cost of a given service at a given standard in relation to the size of the governmental unit providing it. There is some agreement that this cost decreases as the size of a city increases, up to a population of about 50,000, and then levels off.<sup>20</sup> The optimum scale of governmental functions has not been established. It is generally accepted, however, that

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<sup>19</sup> For related discussions see Maass, *op. cit.*, and Edward C. Banfield and Morton Grodzins, *Government and Housing in Metropolitan Areas*, N.Y., 1958.

<sup>20</sup> *Ibid.*, Banfield and Grodzins, p. 34.

the smaller units provide modern welfare functions uneconomically, unless the service can be provided by contracting with larger units.

It is generally agreed that area limitations are a severe handicap to the adequate operation of planning and related functions. Limitations of substantive power may cater to the desires of some and be useful in the interest of homogeneity.

Homogeneity and irrationality or tradition are frequent bedfellows favoring small units, and usually work against general reconciliation of diverse interests. Insofar as these factors do not operate to handicap the maintenance of services at minimum standards acceptable in the whole interrelated area, they are not prejudicial to the existence of local government. In fact, they give latitude to diversity, which is the essence of a principal reason for local government.

Minimum standards of health, education, conservation of natural resources, transportation, and a host of other functions are essential to national well being. State standards may properly raise the level of programs affected with the national interest and encompass other functions. Local government standards should bear a similar relation to State standards. So long as local government does not violate minimum standards set at a higher level, or work a hardship on the ability of other units to enjoy a similar freedom, the government should be able to be as "different" as an informed electorate desires. On the other hand, a local government must be large enough to include the conflicting components of society in the area so as to insure effective debate of issues and conclusions transcending the interests of the several components. Otherwise, decision making will ascend to a higher level of government.

It is likely that the effective point of reconciliation must be a larger area or population for some functions, now generally considered as local, than for others. In a complex and expanding society, the population for crystallization of opinion and decision relating to new functions tends to enlarge. This contributes to the flowing of government power uphill. Finding



mechanisms for pumping government power back downhill, and inventing devices for its retention and effective use on the local level, are highly complex problems at great variance with the ideological simplicity of local government.



## IV. RESTRICTIVE INFLUENCES

It has been observed that there "are two principles inherent in the very nature of things . . . the spirit of change and the spirit of conservation."<sup>21</sup> We have long been aware that the traditional forms, procedures, and other restrictions prescribed in our constitutions and statutes are a heavy hand limiting the development of local government. In their enthusiasm for change, many who saw this most clearly may have failed to give sufficient attention to influences for conservation of the status quo.

It is impossible here to analyze the spectrum of this spirit of conservation. Rather, we would endeavor to define and appraise the principal political and governmental influences that are themselves restrictive and that tend to conserve constitutional and statutory restrictions. These constitute areas of the spectrum fitting loosely in the classifications of (a) canons of construction, (b) local patterns of political response, and (c) the exercise of sovereignty.

### A. Canons of Construction

Rules of construction judicially applied to grants of local government power developed slowly. Several independent concepts of diverse origin converged in the enunciation of Dillon's Rule in 1872: "It is the general and undisputed proposition of law that a municipal corporation possess, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable."<sup>22</sup>

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<sup>21</sup> Alfred North Whitehead, *Science in the Modern World*, N.Y., October 1929 reprint, p. 289.

<sup>22</sup> J. F. Dillon, *Municipal Corporations*, sec. 55, 1st ed., 1872, emphasis by Dillon.

Local powers were limited by statute to protect minority rights from excesses of the majority.<sup>23</sup> Municipal corporations were likened to private corporations with unlimited and indefinite objects.<sup>24</sup> Any doubt about municipal power was resolved in favor of the whole people of the State, the public.<sup>25</sup> The custom and usage of our forefathers, the King's prerogative to dispose and order certain franchises as he pleased, supported keeping power in the State legislatures.<sup>26</sup> Delegated powers should be strictly construed because little care was exercised in how charter privileges were granted.<sup>27</sup>

Any vestige of inherent powers or liberality in construing delegated powers<sup>28</sup> was soon swept away by the Dillon Rule. This rule was formulated in an era when farm-dominated legislatures were jealous of their power and when city scandals were notorious.<sup>29</sup> It has been the authority, without critical analysis of it, for literally hundreds of subsequent cases.

As it arose, the strict construction doctrine applied to municipal corporations but it has been extended to local government generally and it must be faced in any approach to liberalizing local powers. This rule sends local government to State legislatures seeking grants of additional powers; it causes local officials to doubt their power, and it stops local governmental programs from developing fully. The strict construction rule stimulated home rule efforts and is largely responsible for the erosion of home rule. Because of its importance the rule should be examined critically from time to time. This was undertaken

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<sup>23</sup> *Bangs v. Snow*, 1 Mass. 181 (1804) and *Stetson v. Kempton*, 13 Mass. 272 (1816).

<sup>24</sup> *Spaulding v. Lowell*, 23 Pick. 71, 74 (Mass. 1839).

<sup>25</sup> *Minturn v. Larue*, 23 Howard 435 U.S. (1859).

<sup>26</sup> *Caldwell v. Justices*, 4 Jones Eq. 323 (N.C. 1859), citing 1 Blackstone, *Laws of England*, 274.

<sup>27</sup> *Lafayette v. Cox*, 5 Ind. (Porter) 38, 1854.

<sup>28</sup> *Willard v. Newburyport*, 12 Pick. 227 (Mass. 1831); and *Smith v. New Bern*, 70 N.C. 11 (1874).

<sup>29</sup> It is fair to conclude from the footnotes of Dillon's 1st edition (op. cit.) that he was reinforced in his statement of the rule by the anticity feeling of the time. In the introduction on p. 23 from *Rush v. Des Moines County*, 1 Woolw. CC313, 322, 1868, the following is quoted "The great increase of corruption in municipal bodies, growing out of the ability to create, by taxation, a fund which may be squandered, has made many thinking men doubt the wisdom of endowing them with the power; . . ." and on p. 24 from a then current magazine "a municipality is essentially a moneyed corporation rather than a political community or diminutive State."

by Professor Tooke in 1933. He reviewed application of the rule of strict construction to municipal powers in its historical perspective and, evincing great faith in the formal canons of statutory interpretation, concluded that the status quo is good because the alternatives are bad.<sup>30</sup>

The alternatives posed were essentially as follows: (a) Granting unlimited powers and the establishment of *imperia in imperio*,<sup>31</sup> law generates law, resulting in the city becoming a State; (b) liberally construing powers granted, leading to the establishment of a bureaucracy to restrain the exercise of local government power; or (c) reducing municipal corporations to mere subordinate administrative agencies of the State after the French and German examples.

Choosing the status quo by default evidences a belief that our form of government is frozen and will never develop beyond the present. This is palpably incorrect and offers no support in principle for the rule.

We would rather conclude that the application of the rule of strict construction to municipal and other local government is in reality the derogation of sovereignty rule<sup>32</sup> applied against local government. It is true that the derogation of sovereignty rule has been considered to be applied only where the relationship between individuals and the sovereign was involved,<sup>33</sup> but early cases were concerned about State power draining away, and the real judicial origin of the application of the strict construction to municipalities in the United States involved acceptance of principles of English law invoked to protect revenues of the Crown. Legally, local government has fully succumbed to the monarchial objective of being reduced to an

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<sup>30</sup> C. W. Tooke, "Construction and Operation of Municipal Powers," 7 *Temple University Law Quarterly* 267 (1933).

<sup>31</sup> Professor Tooke may also have had in mind *imperium in imperio*, the historian's phrase referring to the conflict between the church and the state in the 16th century and a state within a state.

<sup>32</sup> "There is an old and well known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." *U.S. v. United Mine Workers of America*, 330 U.S. 258, 67 Sup. Ct. 677 (1947). For State cases, see Sutherland, *Statutory Construction*, 3d ed., 1943, secs. 6301-6303.

<sup>33</sup> A city, as a segment of the sovereign power, in relation to an individual, will have the benefit of the derogation of sovereignty canon where a statute imposes a new duty or disability upon it. See Sutherland, *op. cit.*, sec. 6501.

administrative subdivision of the State and a corporation-like body of strictly limited authority.

When the strict construction rule was being developed, in its application to municipal powers, the courts' concern was exclusively with establishing liberty and the protection of persons and property. Federal constitutional theory was present and was used to decide the relationship of the State to city government.<sup>34</sup> States were the repositories of sovereignty, while the Federal establishment and municipalities were governments of limited power. Interpretation of Federal power under the exigence of new social, economic, and welfare problems, which States and local governments did not solve, has become more liberal. Meanwhile, with spotty and increasingly infrequent exceptions, local self-government which existed before the creation of our constitutions, deemed to have been framed in reference to it, is left with the status it had a century ago.<sup>35</sup>

Our courts, like the English courts before them, have construed the laws in favor of their coordinate principal. Since local governments have no courts of last resort, judicial interpretation has built into our system a mechanism for centralizing power. This could result in local governments becoming only subordinate administrative agencies. If it is no wrench to say that cities are segments of sovereign power for purposes of applying the derogation of sovereignty rule in their relations with individuals,<sup>36</sup> it follows that they should be considered segments of sovereign power for all purposes and that original general grants of power should be liberally construed.

It is well established that a State's legislative prerogative cannot be limited by its legislative acts; therefore any power given local government is on trust that it will be used for the public good. At any time, like a revocable trust, the State may withdraw a granted power. In this situation there is no basis for fearing *imperia in imperio*.

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<sup>34</sup> *Stetson v. Kempton, supra*.

<sup>35</sup> See A. M. Eaton, "The Right of Local Self Government," 13 *Harvard Law Review* 441, 570, and 638 (1900) and vol. 14, pp. 20 and 116 ff., for an eloquent and detailed review of reasons why local government should be recognized as having inherent powers.

<sup>36</sup> Sutherland, *op. cit.*, sec. 6501.

The historical and the stated reasons for applying the rule of strict construction to local government authority are no longer valid and thus the rule is no longer valid, *Cessante ratione legis, cessat et ipsa lex*. If this means that the State may be required to give administrative attention to how local government exercises its power, so be it. It is long overdue and now being required for exactly opposite reasons.

It is interesting to note that no similar rule is applied in England. Judicial review in the American sense is nonexistent. Powers conferred are reviewed and "unusual and unexpected" use is laid before Parliament for disposition.<sup>37</sup>

Other rules for the judicial construction of statutes contribute to the restriction of local government, apparently for lack of appreciation as to how they are applied. Principal among these is the rule of exclusion, *expressio unius est exclusio alterius*, by which it is understood that a specific enumeration operates to exclude expressly other powers of the same kind which are not mentioned. Another is that words are interpreted by reference to context, *noscitur a sociis*; thus, the meaning of a word may be narrowed to harmonize with the immediately related matter. Also, when there are different statutes relating to the same subject, though enacted at different times or even expired, and not referring to each other, they are construed together as one, explanatory of each other, to determine the scope of powers granted.<sup>38</sup>

Local government can be relieved of the onus in the objective application of rules of construction, other than the Dillon Rule, by careful drafting, granting of broad powers, and reliance upon a general welfare clause.

## **B. Local Patterns of Political Response**

The recognized local political offices, the traditional ones named in our constitutions and statutes—particularly the office of mayor, councilman, sheriff, clerk, supervisor, assessor, treasurer, and attorney—generally have been most significant in the

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<sup>37</sup> J. A. G. Griffith, "Delegated Legislation—Some Developments," 12 *Modern Law Review* 297-319 (1949).

<sup>38</sup> For a discussion of these and other rules of construction see Tooke, *op. cit.*, *Temp. L.Q.* 277-285.

local political power structure. Originally, most of the powers of State government affecting individuals were exercised locally through these offices. The powers involved the protection of persons and property, keeping the peace, maintaining public records, and the administration of justice—the “liberty functions” discussed above. Many years ago travel and communication were slow, of course, and the desire to have these functions administered close to home dictated small units. This type of governmental organization was suitable to an agrarian society and had no difficulty with the early “welfare functions” of government, such as street lighting, roads, and poor relief. These functions were simple more than a century ago and required little supervision or performance audit. They were akin to the liberty functions in that they related to elementary personal values and were not incompatible administratively with the concept of individual responsibility to the law.

But “welfare functions” grew. Educational facilities and highways were demanded; cities were forced to install paved streets, as well as water and sewage systems, and zoning and planning became imperative. The liberty-function-oriented officials often were ill equipped to cope with the problems involved and tended to turn away from them. Meanwhile, the people were more concerned with services than with general government. Members of local legislative bodies and other officials, perhaps with an eye on political and job security, tended to assume new functions without disturbing the established pattern of powers and responsibilities and by not becoming involved in the political conflict over the new functions. Officials and their associates in the local power structure helped actively or by abnegation to move decision and authority for welfare functions to somebody else.<sup>39</sup>

The avoidance of trouble and the traditional patterns of delegating specific functions to designated officials contributed to the development of *ad hoc* agencies and special function districts. The control of these, if any, by the local governing body was often politically obscured. This fragmentation of func-

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<sup>39</sup> For a description of the components of the local power structure, particularly as it relates to county government where it has remained strongest, see Lane W. Lancaster, *Government in Rural America*, 2d ed., N.Y., 1952, pp. 56–57.



tional responsibility established separate institutional structures and differentiated political roles from public service projects. This is a system in which competing interests make decisions unilaterally; less crystallization of public opinion results, and the services of government come to be looked upon as something apart from government. Hence, local government becomes a locus of diminishing importance for decision making and the local political power structure tends to become polyolithic and without general interest or responsibility.<sup>40</sup>

Many other local patterns of political response are conducive either to support for the status quo to be divisive of local government, or to support for the centralization of governmental power.

Often reflecting harmonious land use, income, education, ethnic origins, and occupations, populations seek identity, economic privileges, or the provision of public services, by creating new municipalities. This occurs most frequently around the fringes of cities where it is most prejudicial in the solution of area problems.<sup>41</sup>

For traditional and sentimental reasons, and because of the vested interests of political power structures, units of government often live far longer than their usefulness. When counties have townships as integral parts of their structures this problem is compounded.<sup>42</sup> Vested interests favored by the existing pattern of local government support the status quo.

Businesses operating across boundaries of local units, and indeed people crossing boundaries, seek uniform rules. The multiplicity of units and the variation of rules—for example, tax forms and speed limits—force these often legitimate interests to join the band marching to the State capitol.

The desire of communities to grow encourages local government to offer financial inducements—lower taxes, tax exemp-

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<sup>40</sup> Peter H. Rossi, "Power and Community Structure," *Midwest Journal of Politics*, vol. 4, pp. 390-401 (November 1960).

<sup>41</sup> Robert C. Wood, *Metropolis Against Itself*, CED., N.Y., 1959, pp. 12 and 13, summarizes this.

<sup>42</sup> See Irving Howards, "Rural Progress Step," *National Civic Review*, vol. 49, p. 286 (June 1960), concluding that Illinois townships are uneconomical, ineffective, and dedicated to the status quo, but so powerful that any contribution to rural government must be within their framework.

tions, and other financial aids—to new industries. When this is done competitively, it may weaken the financial ability of local government.

The problems of limited authority relating to functions, resources, and territory are met by creating all kinds of new units, establishing new channels to resources, and broadening relations with higher levels of government. Under these circumstances, policy determinations move upstairs and local government tends to become mere housekeeping. This inferior position always has been the role of local government in administration of the liberty functions previously described. Our dominant tradition is that administrative problems, service problems, and tax problems are the only problems at the local level.

Local government, when ill equipped with “know-how,” personnel, jurisdiction, and financial resources, turns to higher levels for financial aid. Property owners, particularly, and local taxpayers, generally, have supported this movement in the hope of shifting the tax burden.

### **C. The Exercise of Sovereignty**

In our democracy, sovereignty reposes in the people. Its exercise, however, is institutionalized. In this sense, sovereignty with us resides in the legislative branch of government subject to law—a written constitution interpreted by the judicial branch in accordance with accepted principles. Constitutionally, institutional sovereignty resides in the State. The States jointly have delegated powers to the Federal Government by approval of the U.S. Constitution and individually to local government by constitution and statutes.

The legislative process is far from an exact science. It is at best a compromise in the selection of competing values. It deals with issues in conflict, not consensus. Determination of choice by each legislative member is affected by many factors. Legislators act not only in relation to their constituencies but also in relation to their colleagues. The necessity of decision in the legislative process impels members to group. Group splits on issues show correlation with prevailing splits—party, factional, urban,

rural, etc.<sup>43</sup> Local and functional sponsor splits frequently stalemate special or functional legislation. The fact that cities, where the solution of local service problems strains continually at the limits of authority, have been relatively underrepresented in our legislatures, doubtless has had a conservative influence upon the delegation of authority to local government. In the absence of strong conflict, legislative compromises tend to moderation. Reservation in the delegation of local powers inhibits the solution of problems at the local level.

Since, in a stable society, the burden of proof must be borne by the spirit of change, following accepted patterns in drafting legislation is persuasive and facilitory of approval. Innovation is suspect and accepted slowly. Overcoming this tendency can be implemented by a stamp of authoritative approval upon innovation. Local government, by its subordinate nature, possesses no such stamp. Leagues of municipalities, bureaus of municipal research, university research centers, and like organizations, are helpful in this connection but they may be considered outsiders.

Legislative research agencies are inside and coordinate and have made a contribution to simplifying local government legislation, as well as making it less subject to restrictive interpretation. However, these organizations sometime encounter forces at odds with those that would facilitate local government. In this connection, the Commission extends the recommendation in its Metropolitan Area Study<sup>44</sup> for a State agency primarily concerned with urban affairs to include all local government. Such an agency should be advisory and facilitative in nature. It should be adequately staffed and required, among other

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<sup>43</sup> David R. Derge, "Metropolitan and Outstate Alignments and Missouri Legislative Delegations," *American Political Science Review*, vol. 52, pp. 1051-1065, December 1958; George D. Young, "Urban-Rural Conflict in the Missouri House of Representatives," Missouri Political Science Association, *Research Paper No. 2*, 1958; and Robert S. Friedman, *The Maryland County Unit System and Urban-Rural Politics*, Bureau of Governmental Research, University of Maryland, College Park, 1958, cast considerable doubt on the significance of any urban-rural conflict. Any such conflict was conspicuously absent in the 1962 General Assembly of the Commonwealth of Kentucky.

<sup>44</sup> Advisory Commission on Intergovernmental Relations, *Governmental Structure, Organization, and Planning in Metropolitan Areas*, U.S. Government Printing Office, Washington, D.C., 1961, p. 35.

things, to report to the legislature recommendations for the maintenance of effective local government. It should also be directed to review all pending legislation affecting local government.<sup>45</sup>

Counsel to be heeded by the sovereign must have an identity of purpose. Present concepts of local government are confused. When cases are up for decision, standards by which to measure them are insufficient. A restriction may be an intolerable denial of home rule to one interest, while to another it is the only refuge from irresponsible local action. It is seldom brought out in the plethora of such controversies that the frequent solution at a higher level of a lower level controversy is in itself a denial of the processes by which the lower level becomes representative and responsible. This illustrates the need of a prevailing, meaningful philosophy, a theory of local government.

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<sup>45</sup> Council of State Governments, *The States and the Metropolitan Problem*, Chicago, 1956, pp. 144-145. See also John G. Grumm, *A State Agency for Local Affairs?* Bureau of Public Administration, University of California, 1961.

## V. EXPRESS CONSTITUTIONAL RESTRICTIONS

### A. Delegations of Power and Home Rule

Nine State constitutions are over 100 years old, 27 are 50 to 100 years old, 9 are 35 to 50 years old, and only 5 have been adopted since 1944. Constitutions of the New England States are the oldest and are also the most silent about local government.

Constitutions adopted immediately before and after the Civil War were relatively free of restrictions, although tax-rate limitations, prohibitions against lending credit, and the requirement that county officials be elected were all beginning to show. These innovations were designed, respectively, to protect the people from local officials and local officials from the State. At this time, we also see the beginning of the development, in Northwest Territory States, to deny the State the right to tamper with county boundaries without consent of the local electorate, and in these, as well as in Louisiana Purchase States, specifications for minimum size of counties and the barring of local laws. Soon, rampant special legislation emanating from many legislatures brought forth general law requirements which in turn generated provisions for classification of cities and counties.

The constitutional developments of the Civil War and post-war period were widely copied in the decades that followed. Except for some type of home-rule provision in about 15 States, most frequently relating to cities, this trend was substantially unbroken until the end of World War II.

More recent constitutions have emphasized cooperation between units of local government and home rule, either by charter or by grant of powers local in nature. In addition, New Jersey has directed a liberal judicial construction in favor of local government. In the last 25 years a number of constitutions have been amended to permit local government to undertake new functions.

Constitutions have restricted local government directly by specifying the method governing how power shall be exercised and in definitions of the power. Express restrictions and delegations, although sometimes subject to varying judicial interpretations, are generally reasonably clear but frequently so interwoven as to make separate identification tedious.

Our dominant political orientation has been to define the limits of delegations to assure that local government and officers will have only the power intended. Tax or debt limitations, definition of size, prescription of form, method of election, and provisions relating to the duties, compensation, and terms of officers are examples. Tax and debt limitations were patently conceived as adequate to support local government without being burdensome to taxpayers. They have severely restricted the functions of local government and have resulted in a great variety of avoidance techniques, such as *ad hoc* districts and special taxes and bonds. Definitions of size are applicable principally to counties and were designed to prevent the creation of too many small counties. Constitutional prescription of form provides machinery with permanence, through which the State and local powers of government may operate. Methods of election were to warrant the democratic process and not infrequently to protect a political power system. Provisions relating to the duties, compensation, and terms of officers were to assure the people control over the performance of local officers. These provisions were also designed to protect the officers from the powers of the State and from being placed in jeopardy by the performance of their duties.

Constitutionally prescribed procedures are designed as essential protective devices providing order in management and in the decision process. Apparently, such provisions are intended to protect rights and the will of the electorate, which are deemed too fundamental to be subject to legislative or local change. The precise wording of these constitutional details was often the source of heated debate, with resultant compromise representing less than a deliberate choice. Confusion of terms resulted. An example may be found in the various definitions of a majority, as follows: Majority voting on the question, majority voting, majority equal to a majority of the number having voted in a

previous election, or a majority of the eligible voters. However a majority is defined, sometimes more than a simple majority is required. Unintended protective devices may have been spawned by our constitutional framers. Petition procedures may encourage minority interests by making it easy to invoke decision processes or, conversely, may protect the public from the expense and burden of unnecessary exercise of the petition process by requiring a large number of signers. Other typical procedural provisions are designed to protect the officeholder in his office and the public from official malfeasance, misfeasance, and non-feasance.

Legal detail is subject to logical and precise rules of construction and the courts have had great difficulty in finding enough flexibility in State constitutions to meet new conditions. The fact has been documented repeatedly that we have been able to amend these documents less readily than the standards against which they are measured change. Obviously, State constitutional detail is both a reason for change and an inhibitor of change.

Whether a power is delegated may be uncertain when a new need is felt and local government tries to fill it. The effort may be challenged politically and judicially. Ultimately the courts may determine whether the power to serve the need existed and whether it was exercised properly. We have seen that rules of interpretation influence the courts to a conservative role in this connection. This passes the responsibility to support the spirit of change on to the process by which written constitutions are changed, and it fits poorly. This calls for a broader constitutional delegation of powers.

The call has been answered spottily and gingerly when answered. Constitutional home rule seems originally to have conveyed the concept of the right of local units to determine their own charters and thus their form and functions. The performance of this corrective has been less than par because its adoption has not been widespread, delegations have been eroded, and it has had undesirable side effects.

Observations throughout this report point to the slow and limited adoption of local government reforms. A pertinent example of this is the failure of Wisconsin cities and villages

to adopt a single charter under home rule legislation 35 years old. Another illustration is the decision of the Massachusetts Special Commission on Municipal Home Rule that the best approach to home rule was not by charter but by an outright grant of legislative power to local governments, leaving the State legislature, "by means of a general statute, a means of restricting local government in areas where the State government deems to have an overriding interest."<sup>46</sup>

The home-rule approach of granting residual powers to local government is relatively new. It is presently under consideration in New York State. It is implied in the current American Municipal Association policy statement and contained in the latest preliminary draft of a model State constitution.<sup>47</sup> The Alaska Constitution, article X, section 11, provides that a "home-rule borough or city may exercise all legislative powers not prohibited by law or by charter."<sup>48</sup> The Texas home rule amendment, as interpreted, gives cities, but not counties, all the power belonging to the legislature not inconsistent with general law.<sup>49</sup> This approach to home rule enables the molding of local law close to local desires. It by-passes the Dillon Rule and argues for the strict construction of limitations on local power.

Earlier home rule approaches have been disappointing in operation. Powers contained in home rule charters have been eroded,<sup>50</sup> thus handicapping new ways to solve new problems.

A simple constitutional delegation of power over local affairs has not accomplished the intended objective, because functions are not subject to exclusive assignment to a level of government.

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<sup>46</sup> *Report of the Special Commission on Municipal Home Rule*, The Commonwealth of Massachusetts, Boston, Memo., January 26, 1962, p. 28.

<sup>47</sup> American Municipal Association, *The National Municipal Policy 1962*, p. 16, and *Model State Constitution*, Preliminary Discussion Draft, National Municipal League, New York City, 6th edition, 1961, memo., p. vii.

<sup>48</sup> All local power is vested in boroughs and cities. Home rule is mandatory for first class boroughs and cities and may be extended to others.

<sup>49</sup> John P. Keith, *City and County Home Rule in Texas*, Institute of Public Affairs, University of Texas, Austin, 1951, p. 74.

<sup>50</sup> For an evaluation of Wisconsin, which was referred to as exemplary in a study of the Council of State Governments, *State-Local Relations*, Chicago, 1946 p. 174, see A. Clarke Hagensick, *Municipal Home Rule in Wisconsin*, Bureau of Government, University of Wisconsin, Madison, 1961. For a recent review of developments in another State see, John C. Banks, "Forgotten Orphans in a Growing State," *Colorado Municipalities*, February 1959.



“Local affairs” provisions have been laden with litigation, expense, and delay.

The New Jersey constitutional provision, article IV, section vii, paragraph 11, requiring liberal construction, reads as follows: “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.” This provision talks too much and leaves New Jersey local governments about where they were.<sup>51</sup>

With this background, it is timely to assess generally the constitutionally restrictive situation as it exists. Any analysis of such restrictions, short of meticulous study of the judicial decisions of each State, inevitably leaves unanswered questions of powers conferred and denied by implication.

Reducing express restrictions to manageable classes necessarily assumes responsibility to select, ignore, and resolve variations found in the 50 constitutions. The frequently found provisions designed to prevent the creation of more and smaller

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<sup>51</sup> For comparison see McQuillin, *The Law of Municipal Corporations*, 3d ed., Chicago, 1949, sec. 19.05, and the following New Jersey cases citing the paragraph *Hudson Bergen County Retail Liquor Store Assn. v. Bd. of Commissioners of Hoboken*, 52 A. 2 668; *Henninger v. Board of Chosen Freeholders of Bergen County*, 64 A. 2 365; *Edwards v. Mayor and Council of Borough of Moonachie*, 68 A. 2 744; *City of Newark v. Charles Realty Co.*, 74 A. 2 630; *Lynch v. Borough of Edgewater*, 85 A. 2 191; *State v. Mundit Cork Corp.*, 86 A. 2 1; *Monmouth Lumber Co. v. Ocean Township*, 87 A. 2 9; *Magnolia Development Co. v. Coles, Mayor*, 89 A. 2 664; *Lionshead Lake v. Wayne Township*, 87 A. 2 693; *Baris Lumber Co. v. Town of Secaucus*, 90 A. 2 130; *Fred v. City and Council of Boroughs of Old Tappan*, 92 A. 2 473; *United Advertising Corp. v. Borough of Raritan*, 93 A. 2 362; *Fischer v. Bedminster Township*, 93 A. 2 378; *Ward v. Scott*, 93 A. 2 385; *Grogan v. Disapio*, 94 A. 2 316; *Yanow v. Seven Oaks Park*, 94 A. 2 482; *Jardine v. Borough of Rumson*, 105 A. 2 420; *City of Trenton v. Lenzner*, 109 A. 2 409; *Marangi Bros. v. Village of Ridgewood*, 110 A. 2 131; *Thornton v. City of Ridgewood*, 111 A. 2 899; *Marie's Launderette v. City of Newark*, 113 A. 2 190; *County of Essex v. Hindenlang*, 114 A. 2 461; *Carey v. Borough of Fair Lawn*, 117 A. 2 140; *Township of Dover v. Kassenoff*, 118 A. 2 57; *Aviation Services v. Board of Adjustment*, 119 A. 2 761; *Priory v. Borough of Manasquan*, 120 A. 2 625; *Bruno v. City of Long Branch*, 120 A. 2 760; *Adams Newark Theater Co. v. City of Newark*, 126 A. 2 340; *Denbo v. Township of Moorestown*, 129 A. 2 710; *Wagner v. Mayor and Municipal Council of Newark*, 132 A. 2 794, and *Schack v. Trimble*, 137 A. 2 22.

counties are examples of provisions that served their day but have lost their utility. Permissive restrictions, where legislative discretion determines their application, are not restrictions per se. Minor or remotely contingent requirements and liberal requirements designed to guarantee the democratic process have been disregarded as inconsequential to the mainstream of our inquiry. Some explanation of the latter category may be in order.

Specifying the details of method by which the local electorate makes decisions is misplaced in constitutions because alternative details may become more desirable. Nevertheless, detailed provisions regulating decision making are not considered restrictive unless they are stacked in favor of a conservative bias. Provisions requiring electorate approval by a simple majority vote of those voting on the question, a petition signed by 10 percent of the eligible voters to start the decision-making process, and a limitation of the frequency of petition to an interval of 4 years are considered to be in keeping with the democratic process and not restrictive. However, a constitutional provision is considered restrictive if it requires approval by more than a majority vote of the membership of the governing body.

## **B. Area Adjustment**

State constitutional provisions that prevent or make it extremely difficult to decrease the number and increase the size of local units of government include the following: (a) Freezing the existence of townships or other units smaller than counties; (b) declaring specific counties; (c) locating the county seat; (d) regulating change of county boundaries, and (e) requiring special majorities of the electorate in consolidations and mergers. Twenty-one State constitutions have one or more restrictions of this nature relating to counties. Similar constitutional restrictions relating to cities are negligible; however, the restrictions relating to counties may in some instances bar city-county merger and inhibit interlocal cooperation.

## **C. Form**

State constitutional provisions restricting election of governing bodies at large and of executive management are: (a) That county boards of supervisors be elected from townships or dis-

tricts; (b) that county government be uniform for all counties; and (c) that decisions for the adoption of optional forms be burdened by methods not essential to the democratic process. Eleven State constitutions have one or more restrictions of this nature relating to counties.<sup>52</sup> Similar restrictions relating to cities are negligible; except for home-rule provisions and provisions in several States relating to metropolitan cities, the form of city government is usually left with the legislatures.

#### D. Functions

Express constitutional denials of functional powers of local government are useless except to revoke preexisting powers or to thwart contingent delegations, and are of three types: (a) General denials in the bills of rights; (b) specific denials to grant franchises perpetually or without approval of the electorate, to lend credit to or become a stockholder in a railroad or private corporation, in 29 States; and (c) specific denials to donate to sectarian institutions. Many similar denials also have been incorporated in statutes and judicial decisions, and approach acceptance as inherent value concepts in many States.

Denial of power to lend credit has been held to restrict the power of local government to offer inducements to new industry.<sup>53</sup> Denial of power to donate to sectarian institutions, often included by construction in the denial of power to lend credit, may handicap health, welfare, and charitable programs of general rather than sectarian interest. Clearly, the restrictive impact of constitutional provisions on local government functions is indirect in many instances.

Though it is beyond the purview of this inquiry, it is impossible to escape the observation that debt and tax limitations have severely handicapped local government. These, and other limits on local revenue sources, have increased pressures for financial aid from higher levels of government. The frequent constitutional bar to the extension of State credit or the making of State appropriations to local governments has restricted local

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<sup>52</sup> Council of State Governments, *op. cit.*, p. 222, reports that 21 States have constitutional provisions tending to make the elimination of townships difficult.

<sup>53</sup> *Carothers v. Booneville*, 153 So. 670 (Miss., 1934), and *State ex rel. Beck v. City of New York*, 82 NW 2 269 (Neb., 1957).

governments' ability to respond to emerging needs and has spurred Federal aid. Financial restrictions upon local units are treated in other reports adopted by the Commission.<sup>54</sup>

### **E. Personnel**

Restrictions on municipal officials and personnel are found in provisions (a) requiring the election of administrative officials other than the mayor and councilmen, (b) fixing the term of appointed officials, (c) requiring officials to be residents of the jurisdiction of their employment, (d) specifically limiting the salaries of officials, and (e) prescribing the details of a merit system. Only seven States were found to have such restrictive provisions in their constitutions.

Restrictions upon county officials and personnel are found in the provisions (a) requiring an unnecessarily long ballot and imposing conditions that may handicap operations, viz: election of administrative officials other than the traditional "liberty" function officials discussed previously, and the naming of such officers as treasurers, tax collectors, and assessors without providing authority for consolidation of the functions of such officers; (b) requiring officials to be residents of the jurisdiction of their employment; (c) limiting the salaries of officials; and (d) prescribing the details of a merit system. Twenty-five State constitutions impose restrictions of this nature upon county government.

In personnel, as well as other categories, unusual provisions appear in a constitution, which may be restrictive or not, depending on one's point of view. The New York provision requiring local government appointments and promotions to be made according to merit and fitness through competitive examination, whenever possible, is an example. In 1937 the New York courts held that this applied to positions in towns and villages. Subsequently, in 1941, a municipal service division was created in the State civil service commission to provide classification service

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<sup>54</sup> Advisory Commission on Intergovernmental Relations, *State Constitutional and Statutory Restrictions on Local Government Debt and Local Nonproperty Taxes and the Coordinating Role of the State*; also *State Constitutional and Statutory Restrictions on the Taxing Powers of Local Government*.

and prepare and rate examinations, and certify results to local units, free of charge. Certainly the 1937 ruling restricted local prerogative; nevertheless, many believe that it has served the people of the State well.<sup>65</sup> We prefer to look upon such general provisions, when properly implemented, as an appropriate exercise of State responsibility.

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<sup>65</sup> Donald M. Neff, "Development in County Personnel Practices," *The Urban County Congress*, NACO, Washington, D.C.



## VI. EXPRESS STATUTORY RESTRICTIONS

Since in 48 States, Alaska and Texas excepted, the Dillon Rule governs—i.e., no local power exists unless it is expressly delegated or clearly implied—express statutory denials of local authority are less important generally, except for tax rate and debt limitations, than denials by omission. State statutes usually parrot the more common constitutional denials, even though they may be absent from a particular constitution.

Outside the revenue and debt areas the more serious statutory restrictions are indirect. The more debilitating indirect limitations relate to geographical and substantive jurisdiction.

Permissiveness and action are basic to geographical limitations. Statutes have permitted the creation of new units to serve a need. In New Jersey, for example, small units were carved out around commuter stations to provide additional services to the neighborhood. As the nonurban interstices were filled and the demand for services spread, municipalities with similar authority came to blanket the State and remain to complicate the rendering of public services. The statutes, by which local units are created and permitted to live, have resulted in a multitude of separate governmental units at the local level. These entities, many of them antiquated and handicapped, are frequently too thick and numerous to develop or perform the functions expected of local government.

Substantive inadequacy is related to inactivity. It arises from tardiness, absence, insufficiency, and uncertainty in delegating authority. This has not been as serious a problem, functionally, as sometimes claimed. New Jersey, again, has substantially avoided functional inadequacy. There, the general municipal act of 1917 was a broad grant which has supplied municipalities with reasonably adequate substantive powers. Municipalities could live with this. Indeed, they have lived with it so well

that generally they have failed to take advantage of permissive legislation to cooperate and combine to perform functions better. It was pointed out years ago that county functions were changing steadily and that structure was the chief problem of county government reform.<sup>56</sup>

Despite the general relevance of these observations, the adequate and normal development of local government functions has been retarded and repressed by legislative inaction or unfavorable action. New Jersey municipalities were estopped from developing parking lots under the authority by which hitching rails for horses had been provided. Wisconsin counties could not employ a technician to test cows under an act authorizing counties to employ an agricultural representative. The 1962 Kentucky General Assembly refused to authorize Jefferson County to undertake a countywide drainage program in conjunction with the city of Louisville.

And so it goes—every State has its counterpart. This uncertainty and inadequacy of power has discouraged the initiative of local governing bodies to meet local needs and often has caused those seeking service to go elsewhere.

By defining how powers may be exercised and in specifically limiting their exercise, express restrictions of legislative authority granted are of the same nature as found in the constitutions.

### **A. Area Adjustment**

An earlier report of the Advisory Commission pointed out that a tightening up of statutory standards, with respect to new incorporation, was a necessary corollary to the liberalization of annexation laws, if the proliferation and overlapping of local governmental units was to be arrested or reversed. To illustrate this relationship, we have tabulated, by States, the increase from 1942 to 1957 in the number of municipalities, and the total number of annexations of one-fourth square mile or more in cities of 25,000 population or more, as reported in the *Municipal Year Books* as occurring in 1956, 1958, and 1960. The ratio of new municipalities to the total number of annexations was

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<sup>56</sup> Kirk H. Porter, *County and Township Government in the United States*, New York City, 1929, p. 239.



computed for each State and arrayed. The array suggests that territory is becoming incorporated as it becomes urbanized.

In the array, Delaware, New Jersey, New York, Pennsylvania, South Dakota, and the New England States are medial, with little or no activity. The extremes of the array follow:

State	Ratio of new municipalities	To total number of annexations
Oklahoma.....	1	27
California.....	1	22
Illinois.....	1	10
Tennessee <sup>1</sup> .....	7	1
Missouri.....	8	1
Georgia <sup>1</sup> .....	38	1

<sup>1</sup> The territory of Nashville and Atlanta has been extended substantially.

Population pressures and the geographical solidity of local units with similar functional authority may influence the relation of incorporation to annexation. Other factors patently affect annexation and incorporation. If a city raises substantial revenue from sources applicable to all persons working or doing business in the city, and the city has a relatively low property tax, economic opposition to annexation in bedroom communities is mitigated. If the central city provides services of high standard and charges fees for water and sewage connections and other services outside its limits which are out of proportion to the fees within its limits, annexation is encouraged and incorporation will be discouraged. The States at both extremes of this array have enough in common to indicate that the statutes may be controlling. A summary of the statutes of each of the six extreme States governing incorporation and annexation follows:

Oklahoma requires for incorporation a platted area of 1,000 population 5 miles beyond the limits of a city of 2,000 or more. Annexation is accomplished by ordinance with the written consent of a majority of the resident property owners in the area to be annexed, except property adjacent on three sides to the annexing city and subdivided tracts of 5 acres or less may be annexed without consent. Annexed tracts in excess of 40 acres are exempt from city tax. Annexation by petition may be accomplished by three-fourths of the legal voters representing three-fourths of the property value of an area.

California requires approval of the majority voting on the question for the incorporation of a sixth class city. Authorization of the election is discretionary with the county commissioners upon receipt of a petition of 25 percent of the freeholders of an area of 500 or more people. Uninhabited area (less than 12 registered voters) may be annexed by council unless protested by 50 percent of the freeholders. The annexation of populated areas requires approval of a majority voting in the area at an election call pursuant to a 25-percent voter petition.

Illinois requires majority approval of those voting in a 4-square-mile area containing at least 1,000 population for incorporation of a city, and in a 2-square-mile area of 300 people for a village. Annexation statutes vary in their detail for different class cities but basically require two-thirds vote of council on petition of a majority of the freeholders. Judicial review is limited to the validity of the petition.

Tennessee incorporation is accomplished by the majority voting in an area of 100 population. Annexation requires a majority voting on the question in the area to be annexed. Alternative annexation procedures are available: (a) By election held pursuant to ordinance requested by petition of 50 resident freeholders of the area to be annexed with the expense of the election being paid by the petitioners; (b) by ordinance subject to judicial review for reasonableness and necessity; and (c) by ordinance subject to referendum in the area to be annexed and at the option of the council in the annexing city.

Missouri villages may become fourth-class cities by majority approval of those voting. The court may incorporate villages with broad powers on petition of two-thirds of the voters. Cities with approval of this voting electorate may annex by ordinance subject to judicial review for reasonableness.

Georgia municipal charters are granted by the General Assembly. The statutes governing annexation by cities of 50,000 and less, requiring approval of all the landowners in the area annexed, have been invalidated,<sup>87</sup> leaving State legislation as the only route to annexation, except in home-rule cities which may annex pursuant to approval of a majority of the qualified voters voting in the annexing city and the area to be annexed, computed separately.

In summary, the following appear to be dominant influences upon the degree to which annexation of territory is successfully pursued:

(1) In certain States the solidity of incorporated areas makes the problem of fractionated government very acute and prevents annexation. In these circumstances annexation is useless as a method to enlarge government units and functional areas.

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<sup>87</sup> *Depre v. City of Marietta*, 99 SE 2 1056 (Ga., 1955).

(2) Inhibiting the incorporation of areas near existing large municipalities is equally or more important than liberalizing annexation statutes.

(3) A buffer zone of specified radius around existing municipalities within which new municipalities are forbidden is an efficient bludgeon for annexation, and a tax bounty for annexed nonurban property may be an effective lure.

(4) As the area and population requisite for incorporation increase, protective incorporations become less attractive and annexation is fostered.

(5) Cluttering up annexation statutes by requiring multiple approval, by failing to keep the conditions for annexation precise and clear, or with any other unnecessary detail, is fatal.

For decades students of government have been strongly urging units of government to combine. In practice, very little combination has been accomplished. Such as has occurred has taken several forms: (a) Consolidation of like units; (b) merger or separation of city and county government; (c) creation of super-units to perform a particular function on an areawide basis; (d) joint enterprises; and (e) cooperative programs and contracting.

Seventeen consolidations of municipalities, in 15 States, have been reported in the *Municipal Year Books* in the last decade. No counties have consolidated since 1957. Prior to 1962, the Philadelphia and Philadelphia County consolidation of 1951 was the last major merger of this type, but two more counties in Virginia have merged with cities and two other city-county mergers are being actively considered in Virginia. The number of school districts declined sharply between 1942 and 1957. However, other special districts are increasing rapidly.

Most of the "general law" States<sup>58</sup> make statutory provision for the consolidation of municipalities. The usual method is to require agreement of city councils or a petition, or both, and majority approval of those voting in each municipality. County consolidations, as has been indicated, are frequently inhibited by constitutional provisions. Statutory provisions relating to

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<sup>58</sup> "General law" States are those which legislate upon local government affairs by a general statute applicable to all units or to all units in a class. "Special law" States are those which designate by name in the statute the unit or units to which the legislation is directed.

the consolidation of counties are sometimes more strict than those in the constitutions.

Most of the consolidations and mergers that have occurred in metropolitan areas were pursuant to special legislation and often to constitutional amendment. The municipal consolidations have been rather evenly distributed between "general law" and "special law" States. The city-county mergers in Virginia have been by special charter bills accepted by referendum, though they might have been accomplished under general law which requires a referendum only if there is objection. There is no apparent relation between the nature of the enabling legislation and the negligible consolidations and mergers of cities and/or counties.

Increasingly, enabling legislation is being enacted and pursuant to it local governments are establishing special districts and functional authorities to serve a single function or a number of functions.

Beginning with the Orleans Levee District (New Orleans) in 1890 there were in 1956 at least 79 special metropolitan districts in 27 States, several being interstate in character. These are independent entities; but may be, fiscally or administratively, or both, subordinate to State or local governments. Some are empowered to provide a large number of services, although more of them are single-purpose entities.

Intermunicipal service districts have been optional for nonmetropolitan areas in some States for many years. As noted earlier, the Missouri Public Reservations District law of 1917 was never used. The New Jersey consolidation of joint services law was passed in 1952 to accommodate the 568 municipalities, cities, towns, townships, and boroughs that blanket the State. The law required approval of a parallel referendum in all municipalities determining to act jointly. It was never employed and was amended in 1958 to permit the governing bodies to enter into joint arrangements without referendum. Now eight municipalities in Essex County are using it for garbage collection. Also in New Jersey, the Joint Municipal Water and Sewage Disposal Authority law has been employed in eight instances—

two, countywide. A review of the report of the Bureau of the Census on *Local Government Structure* in 1957 revealed that very few of the 14,405 special districts in the United States were multiunit and most of the multiunit districts were single function.<sup>60</sup>

In the last few years a number of States, including New York and Pennsylvania, both of which have a myriad of local units, are giving counties authority previously enjoyed only by municipalities. This may meet some resistance from municipal officials, and the rejection on referendum of the Lucas County (Toledo, Ohio) Home Rule Charter in 1958, which would have given the county power to cope with areawide problems, is attributed to the fact that it made the elective positions of coroner and public works director appointive.<sup>61</sup>

However, it is interesting to note that from 1942 to 1957 the number of school districts in the United States declined 54 percent. This decline was sponsored by strong National, State, and local professional leadership relating to a high-cost function where quality was close to the hearts of the people. The decline among States with a large number of small districts was generally lowest where school administration is tied in, or school administrative areas are coterminous, with small units of local government. Pennsylvania, with over 2,400 school districts, is an example. There, an attempt was made to encourage the township districts to consolidate or establish joint administration while maintaining their separate identities. An increase in State aid of \$500 per teacher unit was offered for consolidation into "union districts" and \$300 to "joint" districts. After 15 years there are only 60 union districts, while 2,100 employ joint administration. The Pennsylvania school reorganization law of 1961 endeavors to force consolidation over a period of years and is being assailed by the Pennsylvania Association of Township Supervisors as "one of the worst blows at home rule in local government ever sustained in Pennsylvania."<sup>62</sup>

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<sup>60</sup> Bureau of the Census, *Local Government Structure*, 1957 Census of Government, vol. 1, No. 3, Government Printing Office, Washington, D.C., 1958.

<sup>61</sup> *Municipal Year Book*, 1960, p. 61.

<sup>62</sup> *Pennsylvania Township News*, Paoli, Pa., December 1961.

New York approached a comparable problem with much greater success by paying consolidated buildings aid and transportation costs in central school districts. Recent legislation places all school districts on a comparable aid basis, provided the Commissioner of Education certifies that payment to a district will not impede a reasonable plan for its reorganization. This was done pursuant to a reexamination of standards, in keeping with a policy that the "State must ever be alert to exploit any evidence of interest on the part of its citizens to strengthen their local districts."<sup>63</sup>

Acting on the assumption that the functional authorities may continue to increase as a vehicle for handling areawide problems and joint enterprises, facilities, and projects, the Commission previously has recommended State legislation authorizing the creation of metropolitan service corporations for the performance of governmental services necessitating areawide handling, with the subsequent broadening of functions and responsibilities being subject to voter approval on the basis of an areawide majority.<sup>64</sup>

Obviously, there is no single or "pat" solution to problems of governmental structure in metropolitan areas. Indeed, functional authorities may be a vehicle through which communities coalesce and ultimately, directly or indirectly, bring into being units of sufficient area and general powers to make more meaningful decisions, to insure popular control, and to provide more adequate and economical service.<sup>65</sup>

Like joint school district administration in Pennsylvania, inter-local special function projects, which do not threaten the identity of units of government or affect ownership of preexisting property, and where the financial advantage is clear, seem to be growing in popularity.

Voluntary cooperative and contractual arrangements short of functional authorities, with any significant powers of government, or joint administration, of such significance as to be re-

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<sup>63</sup> Francis E. Griffen, Chief, Bureau of Rural Administrative Services, State Education Department, New York, address delivered at Conference on Centralization at St. Lawrence University, July 5, 1946, and recent correspondence.

<sup>64</sup> Advisory Commission on Intergovernmental Relations, *op. cit.*, *Metropolitan Areas Study*.

<sup>65</sup> Maass, *op. cit.*, Robert C. Wood sees this as a possibility through rapid transit for metropolitan areas.

ported in the *Municipal Year Book*, have been accomplished since 1950 in 15 States. We would like to believe that some degree of cooperation is widely practiced. There is some basis for this. "Counties and cities are entering into a host of municipal-type functions and services. The most common are public health followed closely by prisoner care, election services, and planning assistance. Over 50 percent of the (125) reporting counties provided all of these services on an agreement basis. Other services provided on an agreement basis were the following: Collection of taxes, assessment of property, library services, police services (usually the radio network), building inspection, personnel services, and recreation. Other services provided by counties for or in cooperation with cities were civil defense, welfare, and refuse disposal."<sup>66</sup> A number of central cities have provided services, particularly water, to fringe cities, and nearly 3,000 city-county contract relationships and functional consolidation arrangements exist in California.<sup>67</sup>

On the other hand, in the field of planning, where wide jurisdiction or cooperation is most essential, though not immediately felt in the pocketbook, only 79 of the 691 usable responses to a questionnaire sent 3,108 local planning organizations indicated they worked with more than one governmental jurisdiction, and about two-thirds of these were regional, metropolitan, county, or intercounty organizations.<sup>68</sup>

Many States have tucked away in functional delegations a provision for cooperation or intergovernmental contracting. Only a few States were found to have general cooperative provisions.<sup>69</sup> Contracting and informal cooperation on a reciprocal basis are done extralegally pursuant to the assumption of implied power or by authority under the general corporate powers to contract for the provision of services which a unit has authority to perform. It is entirely possible that isolated express authorizations to cooperate and contract with other units of local

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<sup>66</sup> *Municipal Year Book 1959*, p. 61.

<sup>67</sup> Letter of April 24, 1962, from William R. MacDougall, general counsel and manager, County Supervisors Association of California, Sacramento.

<sup>68</sup> Donald R. Gilmore, *Developing the Little Economies*, CED, Supplementary Paper No. 10, New York, 1959, p. 74.

<sup>69</sup> Connecticut, New York, Pennsylvania, California, Nevada, and Indiana are among the States which have such acts.

government might be construed as limiting the power to the areas specifically authorized. Because of this, as well as the encouragement which express general authorization to cooperate and contract would provide for local governments to seek to improve their services via this route, there is need for legislation by States, authorizing, without limit as to type of local government, two or more units of local government to exercise jointly or cooperatively, by contract or other mutually agreeable arrangement, any power possessed individually by the units concerned. Suggested State legislation for interlocal contracting is contained in the Commission's previously cited Metropolitan Area Study.<sup>70</sup>

The outstanding and unique example of intergovernmental cooperation is in Los Angeles County, which has provided contract services covering various municipal-type activities for 50 years. During this time, many problems of functional overlapping never occurred because each new city, or incorporation, might automatically look to the county for assessment, tax collection, health, building inspection, library, and personnel services. Lakewood mushroomed within 3 years to 60,000 and, upon being incorporated in 1954, the new city council asked the county to continue to provide all the services for the city. This brought a new philosophy to Los Angeles County—offering total municipal services to a city in one package. This has fostered incorporation, and older cities are increasing the number of selective services requested. The Lakewood plan permits a city to buy what it wants to pay for without long-term commitment. It is certainly a remarkable laboratory for determining what activities can best be performed on an areawide basis by one unit of government and what activities should be left strictly to local operation.<sup>71</sup>

A much smaller operation restricted to public health activities is the Northwest Bergen Regional Health Commission, estab-

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<sup>70</sup> This proposed legislation was developed by a Committee of State Officials on Suggested State Legislation of the Council of State Governments and included in the council's suggested State legislative program for 1957. The recommendation should be applicable statewide, for rural as well as urban areas.

<sup>71</sup> See Samuel K. Gove, *The Lakewood Plan*, Institute of Government and Public Affairs, University of Illinois, Urbana, 1961, and John R. Leach, "The Lakewood Plan," *The Urban County Congress*, NACO, Washington, pp. 26-31.



lished by the health boards of Midland Park, Waldwich, and Franklin Lakes pursuant to 1938 law, and having no purpose except to provide contract service on a voluntary basis to its constituents. It is reported to be providing superior service without loss of local autonomy.<sup>72</sup>

## **B. Form**

In 13 States, cities of certain size may determine the form of their government by home-rule charters under a self-executing provision of the constitution and, in 11 States, cities may determine their form of government by home-rule charters under legislation mandated by the constitution. In two States, the constitutions expressly permit home-rule charter legislation and two other States grant autonomy of form to certain cities under home-rule charter legislation. All municipalities in the other 22 States, and most municipalities in the foregoing 28, have legislative charters either by special act or general law. General legislation usually permits cities with general or special law charter to adopt optional forms. "General law" States usually classify municipalities and may prescribe different or optional forms applicable to different classes. Twelve State constitutions expressly authorize classification of municipalities. A few State constitutions define the methods of classification and the number of classes. Most States recognize classification or special legislation. Classification of municipalities usually relates to population, sometimes to taxable wealth and other criteria. Often a class is devised so as to include only one city, and some States have many classes.

Optional home-rule, general-law, and special-charter municipalities may exist in the same State. In some States, towns, townships, villages, boroughs, and cities may be similar in most characteristics and, in such cases, the nomenclature, usually historical, is in effect a classification.

Except in New England towns, the mayor-council is the traditional form of municipal government. However, since the turn of the century the trend has been away from this traditional

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<sup>72</sup> Frank C. Ardsley, "Home Rule in Public Health is Economical," *New Jersey Municipalities*, vol. xxxviii, pp. 5-10 (May 1961).

form—first, to the commission form which, in a decade was followed and, in two decades, surpassed by the council-manager form.

The commission form received its impetus in the job the city government did in rebuilding Galveston, Texas, after the 1900 hurricane. Shortly after this catastrophe, the Texas Legislature placed the government of the city under a commission of three members appointed by the Governor of the State and two elected by the city.<sup>73</sup> Word of the good job of the commission got around and other States decided to let cities try it. Under this form, the commission was a general governing body and responsibility for city administration was divided among the commission members. Problems arose in city commissions; members were both legislators and administrators enforcing laws they may have opposed. Cities with this form had a plural executive. The council-manager plan came with the push for expanded services and placed emphasis on the administrative process and the integration of internal organization. With the depression of the 1930's State administrative supervision of fiscal administration and relations with the Federal Government became widespread and, with the political implications of these new relationships, esteem for the strong mayor-council form rose.

About 50 percent of the 2,524 cities of over 5,000 population have the mayor-council form of government, 12 percent commission, and 38 percent manager-council.<sup>74</sup> Most of the mayor-council mayors are elected directly by popular vote. About two-thirds of them have substantial veto power and may have sufficient executive powers to be considered strong mayors. Two- and four-year terms for the mayor are usual, with two years being the most common.

Twenty-two States have all three major forms of city government. Among cities of over 10,000 population, 35 States provide for mayor-council and manager-council forms, and all States

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<sup>73</sup> Arthur W. Bromage, *Introduction to Municipal Government and Administration*, 2d ed., New York, 1957, p. 21.

<sup>74</sup> *The Municipal Year Book 1963*, table V, pp. 84-140, is the source of most of the city data contained in this section relating to city officials.

for one or the other. Forty-eight States have manager cities; all Arizona, Nevada, and Virginia cities have managers and only Hawaii and Indiana do not have enabling legislation permitting the manager form. Many States restrict the manager form to certain class cities. For example, in Pennsylvania only third-class cities, boroughs and towns may have managers and in Kentucky only second, third, and fourth of the six classes of cities.

In some respects State legislatures have more freedom to determine the form of county government than the form of city government, because self-executing and mandated constitutional home-rule provisions are less common. However, the form of county government has changed less. Only eight State constitutions have county home-rule provisions; six of these are self-executing or mandatory and four apply only to the more heavily populated counties. Four of the eight States require that county government shall be uniform or "as nearly uniform as possible," while another four provide for optional forms. Five mandatorily tie the election of the board of supervisors in with townships or districts. Classification, more commonly statutory than constitutional, is widely practiced, but it seldom affects form except in home-rule States. A group of traditional officials—sheriff, clerk, recorder, attorney, usually the assessor and tax collector, and often treasurer—are elected. These officials are polythetic. Each may be a political power, each conducts his office substantially without reference to the other, and normally there is pressure only on the assessor to do things differently.

*The 1955 Municipal Year Book*, reporting on 174 counties of over 100,000 population, showed 142 with a board of commissioners or supervisors as a governing body. The other 32, about 18 percent, have boards composed of township or town supervisors, judge and commissioners, judge and justices of the peace—ostensibly ex officio governing bodies, with membership often having subcounty area interests.

In 1947 nine different types of county governing bodies with six major methods of membership selection prevailed in the

United States. At that time the selection method of governing bodies was as follows: <sup>75</sup>

Method	Number of counties
All members elected at large . . . . .	560
All members elected at large with district residence . . . . .	629
Some members elected at large, some by district . . . . .	645
All members elected by district . . . . .	874
All members elected by township (or town) . . . . .	297
All members appointed . . . . .	22
Other method of selection . . . . .	23
Total . . . . .	3, 050

County governing body members are appointed by the Governor with approval of the county legislative delegation in several South Carolina counties, and by the grand jury in some Georgia counties. County governing bodies are elected more than one way in 20 States, often under optional forms and sometimes related to classification. In most States the presiding officer of the county general governing body is elected by the membership and, in a few States, the presiding officer is ex officio. In the first case, the ex officio presiding officer, by dint of personality, may act as head of the county and assume some general administrative responsibility. The county judge is an ex officio presiding officer in a few Southern States and has such duties, but he also has judicial duties. A relatively few counties have a secretary of the board, purchasing agent, or other official that provides some degree of coordination and centralized management. About 20 metropolitan counties, in 7 States, have a manager or other strong appointed executive. Approximately 12 counties in 6 States have an elected executive.

In five States, county fiscal policy, tax levies, appropriations, bond issues and, in some cases, care of county property are deter-

<sup>75</sup> Data are from U.S. Bureau of the Census, *County Boards and Commissions*, Government Printing Office, Washington, December 1947, as is most of the other information in this section relating to county boards. There has been no corresponding, later inventory on a nation wide basis relative to the method of selecting county boards and commissions.

mined at the State level, while six other States have county-level fiscal bodies distinct from the county governing body.

The 48 States in 1947 had authorized 761 different special-function boards of county government. Of these authorizations, 557 were optional, 625 were for a single county, 31 intracounty, 29 for city-county, and 66 intercounty. The number of functions delegated to such boards ranged among States from 2 to 23. Several New England States have no special-function county boards. Counties in other States average over 5 special-function boards, and in a number of States many have 16 or more. Any appreciable change since the 1947 census has been to increase the authorization for county special-function districts and the number of special-function boards in existence.

The method of selecting members of county special-function boards varies within each State. In a few States there is a dominant pattern, while in others every conceivable device is used. As an extreme, one State has four different kinds of local boards dealing with the same function and the membership of each kind is selected differently.

The membership of the authorized special-function boards in 1947 was selected as follows:

Method of selection of members	Number of boards
Elected.....	15
Appointed by the governing body.....	226
Appointed by a State agency.....	27
Appointed by a court.....	35
Appointed otherwise.....	17
Ex officio governing body.....	80
Ex officio otherwise.....	52
Combination of methods.....	269
Not specified.....	40
<b>Total.....</b>	<b>761</b>

Add to the general governing body of the county the special-function boards, the several elected county administrative officials normally found, plus the significant number of townships in 21 States, and there emerges a picture of county government—

a combination Ichabod Crane and Don Quixote, headless and riding in all directions.

### C. Functions

The city attorney does not know what the city can do. "Change is ulcer generating, particularly for the elected official."<sup>76</sup> "Let's get through to the next election and then, if we're reelected, we'll worry about it."<sup>77</sup> ". . . many of the problems . . . today are due in a large measure to . . . what was not done."<sup>78</sup>

These statements reflect the great burden of local government functional administration. Local officials come honestly by an uncertainty as to their authority to act and this may result in lack of enthusiasm for action. The law is much at fault.

Often, by the time communities get support for their problems and the legislature acts, the need may be far advanced. Primary delegation of substantive power for new functions comes along as soon as there is political crystallization for it on a State basis. To expedite this crystallization the delegation often is made only to a very limited classification of local governments. In any case, the delegation is faster than some communities use it but not as prompt as needed by the initiating communities. For example, at the end of 1955, well after crystallization of national policy on the subject, only 29 States had enacted urban renewal and slum clearance legislation. Projects for 218 different communities had been approved. Four years later, 44 States had enacted legislation and 1,056 localities were participating. Difference in momentum is characteristic of the diversity in local government and is to be expected. What should be deplored is denial, or unreasonable delay, in the delegation of essential powers to any community that deliberately has decided, either by referendum or through its general governing body, on a purely local course of action.

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<sup>76</sup> James R. Donohue, "Comments on Wisconsin Local Government," *The Municipality*, vol. 56, p. 199, August 1961.

<sup>77</sup> As quoted by Samuel B. Finklestein, "Newark Offers executive Training for Top Level Personnel," *New Jersey Municipalities*, vol. xxxviii, p. 12, June 1961.

<sup>78</sup> Lloyd A. Carver, "How to Do a Better Job," *New Jersey Municipalities*, vol. xxxvii, p. 19, January 1961.

Uncertainty about possession of a substantive power or about the method by which it may be legally exercised inhibits local government in carrying out functions. This type of restriction, though inherent in the canon of strict construction of implied powers of local government, has been aggravated by the legislative practice of granting powers piecemeal for specified needs. Although State enactments recently have shown a trend toward more general statement of delegated powers, delegations to general governing bodies are often more detailed than those to special function boards.

The statutes are rife with procedural and methodological restrictions upon substantive functional powers: Millage tax limitations and appropriation limits are common; cumbersome purchasing procedure often is spelled out; a 1959 survey by the National Fire Protection Association revealed that many cities under 100,000 were operating with seriously diminished fire departments due to reduced hours of firemen, frequently set by State legislation as it was in Kentucky by the 1962 general assembly. The question has been raised as to whether a decline in the percentage of convictions, while the crime rate increases, may not be due to an increase in the burden placed upon police through the restrictions imposed by appellate decisions.<sup>79</sup>

Unreasonable restrictions upon the delegation of substantive powers arise out of reaction to misuse of authority, conservatism, and a lack of awareness of the consequences of strict judicial interpretation. Once enacted, such restrictions often remain long after any purposefulness they may have had has ceased. Planning the elimination of unnecessary restrictions is a specialized staff function which State governments should provide.

Counties differ radically in their origin from municipalities. Generally they originated without consent as divisions of the State to carry out mandatory State purposes. Municipalities were discretionary in their establishment to carry out service functions and have been mandated to exercise certain functions for the State. Municipalities have corporate status. In some States counties are corporate bodies, but this quality does not seem to influence the delegation of authority to them. Historically and

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<sup>79</sup> O. W. Wilson, Dean, School of Criminology, University of Southern California, *Municipal Year Book*, 1960, p. 391.

currently the development of welfare functions is largely motivated by population density. Because of their historical difference, counties were slow to provide modern welfare functions and, in most States, undertook them only when no other agency was available to perform the services demanded. This situation continues to be prevalent. In urban areas, however, counties are getting into the race to perform functions and to preserve their identity. In many urban situations, the county is acting in a most advantageous way to provide modern government services. It is in rural areas, though, where county government most needs strength and encouragement.

#### **D. Personnel**

Arising out of our traditions to hold the local representatives of the sovereign accountable to the law in exercising jurisdiction over our persons and our property, State constitutions and statutes prescribe election, fix the term, determine the fees or other compensation, and define the duties generally of our county sheriffs, county clerks, and recorders, and other liberty-oriented local officials. In some States this is also true of a number of municipal officials. Historically, because no other standard of reference existed, the statutes have tended to do the same for sustaining officials—the treasurers, assessors, and tax collectors. As welfare functions developed, the resultant administrative duties, as well as additional sustaining functions, were sometimes added to the duties of existing officials. In other instances, for various reasons, new officers or bodies were created subject to corresponding conditions.

Outside the educational field, there are well over 2½ million local government employees and officials, part and full time. Municipalities employ over half of these. Over 325,000 are elected officials, some 45 percent of whom are township and special district officials. Counties average 21 elected officials each and municipalities 7. In counties and municipalities, an average of about seven and one elected officials, respectively, are principally engaged in welfare administration functions or as members of boards that might better be appointed by the general governing bodies. Over one-fourth of the 182,000 elected county and municipal officials are part time and serve without



pay, and the proportion in other local units is greater on both counts. Elective officials are most numerous in the north-central, rural township States.<sup>80</sup>

Determining the method and qualifications for appointment, the tenure, compensation, and fringe benefits of the 2½ million employees and officials is a complicated legislative task, made more so by special State legislation. Bills on these subjects constituted over one-fourth the business considered and accomplished during four recent sessions of the General Court of Massachusetts.<sup>81</sup>

A review of several of the summaries of legislation affecting municipalities published by State leagues of municipalities suggests that this ratio is high but that municipal personnel problems are always present and among the most vexing. Most States fix or limit the compensation of independently elected county officials. The 1961 North Carolina General Assembly passed 73 county salary bills, the lowest number in 20 years,<sup>82</sup> but this is extreme. Counties give legislatures fewer personnel problems than municipalities because they have fewer employees and the employees are less well organized.

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<sup>80</sup> Source of the data of this paragraph: Bureau of Census, *Elective Offices of State and Local Government*, 1957 Census of Governments, vol. 1, No. 4 U.S. Government Printing Office, Washington, D.C., 1958.

<sup>81</sup> Massachusetts Legislative Research Council, *Municipal Home Rule*, Senate No. 580, Boston, 1961, p. 79.

<sup>82</sup> Donald B. Haymar, "Public Personnel," *Popular Government*, University of North Carolina, Chapel Hill, September-October 1961, p. 45.



## VII. CONCLUSIONS AND RECOMMENDATIONS

The Commission has assessed the evolution of local government in the United States and the variety of restrictive influences which have come to characterize State constitutions and statutes. We are convinced that the American federal system in general, and the initiative and self-reliance of local government in particular, would be greatly strengthened by loosening many of the existing bonds upon local government.

The Commission emphasizes that the findings and suggestions for improvement which follow are set forth in full realization of the wide diversity of local government across the country. Governmental problems differ greatly among States and between urban and rural areas. Municipalities in most of the areas of some States connote small cities surrounded by rural territory. In other States small adjoining municipalities blanket large areas, including partially rural territory. Municipalities may be termed towns, villages, boroughs, townships and/or cities. Counties have been dissolved in Connecticut and Rhode Island and traditionally have been relatively unimportant in certain other north-eastern States, where towns or other municipalities are predominant, while in rural areas of the southern, central, and western regions of the Nation the county is the most significant unit of general government. Such variations point up the difficulty of making succinct generalizations that have universal application; however, we have no hesitancy in generalizing with regard to principles and objectives. Furthermore, implementation of the recommendations which follow would necessarily vary from State to State in matters of detail.

### A. Area Adjustment

In our present society it is increasingly difficult for small units of government to perform the technical and complex functions needed and demanded by the people. Units of local government overlap unnecessarily and, except for school districts, the number of special units of local government continues to increase

rapidly. In this context there are too many local units of general government in many parts of the country, and nearly everywhere there are too many independent and semi-independent special agencies of local government. Accordingly, the Commission believes that the authority by which local governments divide and incorporate, and by which independent ad hoc agencies are created, should be made more restrictive. Conversely, the authority by which local governments disestablish, consolidate, or merge, and by which the central city annexes fringe territory, should be liberalized, and the authority of ad hoc agencies should be subjected to the authority of general local government.

The essence of the following recommendations relating to area adjustment has been treated in an earlier Commission report dealing with metropolitan areas.<sup>83</sup> The recommendations of that report relating to (a) annexation of unincorporated areas, (b) voluntary transfer of functions between units of local government; (c) interlocal contracting and joint enterprises, and (d) functional authorities are also applicable to less populous areas. Our present purpose is to sharpen and extend those recommendations to a statewide basis.

1. *The Commission reiterates its recommendations of 1961 that the States examine critically their present constitutional and statutory provisions governing annexation of territory to municipalities, and that they act promptly to eliminate or amend provisions that now hamper the orderly and equitable extension of municipal boundaries so as to embrace unincorporated territory in which urban development is under way or in prospect. This recommendation is not limited to metropolitan areas—it should apply on a statewide basis although legislatures, in the interest of orderly urban growth and development may determine that liberalized authority for annexation should not be extended to the very small municipalities and that preference in annexation of a territory may be given to the larger of two or more adjacent municipalities.*

As the Commission stated earlier, we believe that the question of municipal boundary extension should be a matter of statewide policy rather than entirely a matter of local self-determination.

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<sup>83</sup> Advisory Commission, *op. cit.* (Metropolitan Areas Study), pp. 21–23.

The Commission believes that the State should define the type and character of land which should be encompassed in the boundaries of municipal corporations. Historical handcuffs upon the annexation process have contributed considerably to the complexity of local governmental structure in urbanized areas. In some situations imaginative and vigorous leadership on the part of the central city, coupled with fortuitous provisions of State annexation laws, have enabled the city to annex unincorporated territory as it became urbanized and thus to keep abreast of the population spread. Where this has occurred many of the difficulties associated with complex governmental structure in urban areas have been avoided.

*2. The Commission recommends that States enact legislation authorizing governmental units wholly within a county to transfer responsibility for specified governmental services to the county by coordinate mutual action of the governing bodies concerned in the specific instance. Conversely, States may find it desirable to broaden this proposed enactment to permit counties to transfer certain of their functions to cities, particularly in metropolitan areas.*

The evolution of local government in the United States has produced strong county government in some sections of the country and weak county government in others. The Commission recognizes that numerous county governments as they exist today are not equipped by tradition, inclination, or competence to assume municipal-type functions. On the other hand, there are many that are so equipped and the type of functional transfers suggested above are taking place with increasing frequency, especially in and around metropolitan areas.

The pressures of population and economy serve to point up the problems of conflicting and overlapping jurisdictions, particularly in urban areas. The probable greater seriousness of the problem in smaller cities and rural areas is illustrated in the 1957 Census, showing that no county in Illinois had less than 14 local governments within its boundaries and none had less than 3 municipalities.<sup>84</sup> Appropriate provision for enlargement of the

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<sup>84</sup> Lois M. Pelekondas, *Local Government in Illinois*, University of Illinois Bulletin No. 58, 1961, p. 32. In this connection it is to be remembered that many of the 82 township rural counties in Illinois may have had a substantially larger number of units.

functions of counties may be a substantial part of the answer in rural Illinois, as well as other States, but what about the Southern Appalachian area? This economically depressed region embraces 190 counties in Kentucky, Tennessee, West Virginia, North Carolina, Georgia, and Alabama. "How are local governmental and school systems to be maintained and supported? . . . Indeed, it may even be pertinent to ask whether some counties can continue as counties as they are now organized and whether some communities can continue to exist."<sup>85</sup>

3. *The Commission reiterates its recommendation of 1961 that States enact legislation authorizing two or more units of local government to exercise jointly or cooperatively any power possessed by one or more of the units concerned and to contract with one another for the rendering of governmental services; additionally the Commission recommends, as a matter of long range policy, that both National and State governments incorporate into their grant-in-aid programs appropriate incentives to small units of government to join together in the administration of the function being given grant assistance.*

Intergovernmental cooperation at the local level, either by formal written contracts or by informal verbal agreements, often provides a workable method of meeting particular problems when separate action by individual local units is uneconomical and when the consolidation or transfer of the function is not economically or politically feasible. These interlocal arrangements are of two major types—(1) the provision of governmental services on a contractual basis by one unit of government to one or more additional units, and (2) the joint conduct by two or more units of government of a particular function or the joint operation of a particular governmental facility.

It is apparent that local units of government are failing to take full advantage of opportunities available to them, without threat to their identity, to provide better service through cooperation. We believe that services of a State Office for Local Affairs, heretofore recommended,<sup>86</sup> could do much to alleviate the

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<sup>85</sup> From W. D. Weatherford, *The Southern Appalachian Region: A Survey*, University of Kentucky Press, Lexington, 1961, as quoted in the *Courier-Journal*, February 18, 1962, section 4, p. 1.

<sup>86</sup> Advisory Commission, *op. cit.* (Metropolitan Areas Study), p. 48.

apathy, apprehension, and lack of technical know-how at the local level which are hampering this kind of progress.

Constitutional and statutory provisions of many States that bar officials from holding two offices and prohibit counties and municipalities from lending credit might be construed to prohibit members of local governing bodies from sitting on boards of joint enterprises, and to invalidate long-term contractual arrangements involved in facility expansion programs. The constitutional amendment recommended to the States by this Commission and by the Council of State Governments in 1961<sup>87</sup> is broad enough to include nonurban units of government and its adoption in States having this problem is strongly encouraged.

It is undeniable that grants-in-aid, whether from the State or National government, which flow to small units of local government for the performance of particular functions often may tend to underwrite units uneconomical in size. State aid to schools has been a marked exception, since such State aid has been used effectively to encourage consolidation of small districts. The Commission believes that State governments in particular should carefully examine their local grants-in-aid with a view to so structuring them as to encourage joint exercise of functions by smaller units.

The Commission also believes that with respect to certain Federal grants-in-aid which flow directly to local units of government, care should be exercised that the grants, as a minimum, do not promote fragmentation at the local level. In certain instances, as in the case of Federal grants-in-aid for "open spaces," it may be possible, without undue Federal intrusion into local affairs, to provide encouragement for the performance of the grant-aided function over larger areas than are encompassed by separate small jurisdictions. National and State governments should also avoid requiring, as a condition to the allotment of grants, the establishment of special agencies or committees which duplicate or complicate the orderly processes of constituted authority and obscure the responsibility of established agencies.

4. *The Commission recommends the enactment of enabling legislation to permit county governments, individually or jointly,*

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<sup>87</sup> Council of State Governments, *Suggested State Legislation—Program for 1961*, pp. 63-66.

*to establish machinery for the performance of service functions desired and required by their residents. Such legislation should contain the option, to be exercised only if the use of contractual powers, functional transfers, differential assessment areas, or other arrangements do not suffice, of establishing area-wide or subarea service corporations or special districts. Such corporations should be endowed with authority to borrow and exact user charges, to provide facilities and perform governmental services, but should be made completely and directly responsible to the county governing board.*<sup>88</sup>

The Commission is cognizant that service corporations and special district devices are criticized as being a piecemeal approach to the solution of governmental problems because they create more units of government and are likely to be unresponsive to the public will. Generally, the Commission looks with disfavor upon such devices; however, there are circumstances, with certain safeguards, in which they may be needed in order to discharge a necessary function that otherwise would not be performed.

## **B. Form**

The form of local government, a structural consideration, is of significance because it may influence the powers of government to be exercised either for general and unifying purposes or for sectional and divisive purposes, and it may otherwise implement or impede efficient management.

When governmental functions were simpler, less expensive, and easier to administer, public inspection and spot remedies produced reasonably effective supervision and operation of local services. Officials of small units were adequately equipped in

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<sup>88</sup> Mr. Hummel submitted the following dissenting view on this recommendation: I must respectfully disagree with my fellow commissioners in their recommendation to grant county governments the authority to perform service functions of a governmental nature for the reasons: (1) The recommendation militates against annexation of territory to an adjacent city by permitting residents to select those urban type services for which they are willing to pay, while ignoring their overall responsibilities to the adjacent city. This will delay annexation and lead to duplication of service organizations. (2) The recommendation violates the principle of discouraging limited purpose government. (3) The recommendation makes the county government a competitor of city government, aggravating rather than improving intergovernmental relations.



this context. Now various functions extend over wider areas, their administration is highly technical, and they are competitive for the available revenue. Small units, with insufficient jurisdiction, often do not have the resources and personnel to cope with modern governmental functions.

Accordingly, the Commission believes that counties and municipalities (including New England-type towns) should be encouraged to assume and absorb the functions and identities of many existing small, independent, and special purpose units of local government. It is also apparent that a greater degree of local discretion in selecting or adapting the form and structure of local government is necessary in many States, whose constitutions and statutes are unduly restrictive in this regard.

If local government is to be made more effective and responsible and if further unnecessary centralization at higher levels of government is to be avoided, local citizens, within general guidelines provided by the States and subject to certain necessary limitations, particularly in the case of metropolitan areas, must be enabled to select the form of government adjudged by them to be the most appropriate for their peculiar circumstances. In this selection process, petition and referendum requirements should be as simple as consistent with democratic practice. The status quo is supported by inertia and, usually, by the local political power structure. Therefore, road blocks to change should be held to a minimum.

1. *The Commission recommends, as a minimum, that States provide by constitution or statute as appropriate for the adoption by municipalities, by ordinance, or pursuant to simple petition or referendum procedures, of optional forms of municipal government, including among others, the "strong mayor" form and the "council-manager" form. Such grants of power should (a) be applicable to all classes of municipalities, (b) permit discretion at the local level in determining whether to elect the legislative body at large or by districts, or both; and (c) authorize assistance by the State government, available upon request, to municipalities in the development of new ordinances and procedures involved in converting to a new form of government.*

The Commission believes that a "strong executive" form of local government—both municipal and county—should be en-

couraged. The "commission" and "weak mayor" forms of city government and large county boards of supervisors tend to confuse the legislative and executive processes and fragment management responsibilities. The strong mayor, with appointive power, and the council-manager form, separate these processes more clearly, and encourage executive leadership at the local level by uniting political leadership and administrative responsibility.

Optional forms of local government should be made available to all classes of municipalities. Elaborate constitutional or statutory classification greatly restricts local government change and results in delays and unnecessary legislative burdens. It is recalled that classification was developed to permit special treatment of different units because special local legislation was barred. This was in the era when municipal "welfare" or service functions were emerging and only the larger cities were candidates to use new powers. Today all local governments are getting practically the same powers, although it usually takes multiple State legislation spread over several legislative sessions to accomplish it. Another side of this coin, in the light of political realities, is that sometimes desirable legislation may be achieved for a class of municipality that could not be passed for all.

Over half the municipalities of 5,000 or more elect their councils at large. Election by wards is most common with the mayor-council form and in cities of from 50,000 to 500,000 population. Selection both by wards and at large is found in all but a few States, and selection of some council members at large while others are elected by wards is authorized in some cities. In general, we are persuaded that some kind of subarea selection may serve a useful purpose in large cities; but, in any event, the approach used in a particular municipality should be a local, rather than a State determination.

The foregoing recommendation represents a minimum in terms of local self-determination in selecting the form of government. Some States not now providing it may desire to authorize general home rule for municipalities. However, if this is done, the Commission would urge that sufficient authority be reserved to the legislature to allow legislative action, where necessary, to modify local government responsibilities and relationships within metropolitan areas, in the best interests of the people of

the area as a whole. As the Commission has pointed out earlier, unlimited municipal and county home rule within metropolitan areas can handicap greatly efforts to cope with area-wide functions and responsibilities.<sup>89</sup>

2. *The Commission recommends that States provide by constitution or statute as appropriate for the adoption by counties, pursuant to simple petition or referendum procedures, of optional forms of county government.*

The findings of this report substantiate the conclusions of many other studies, to the effect that county government, in many areas of the United States, is failing to provide effective and responsible local government in light of the challenges of the 20th century for all levels of government. To a significant extent, this failure can be attributed to strict constitutional and statutory limitations upon the form of county government.

Optional forms should include provisions for executive management and strengthening and making more representative the governing bodies. Attention should also be given to dissociating elected officials from the administration of "welfare" functions (i.e., all modern service functions, such as sanitation, public works, planning, recreation, etc.) and of making the administration of all such matters responsive to the general governing body.<sup>90</sup>

In the absence of adoption of the latter recommendation, the Commission recommends that, as a minimum, State legislatures provide for the establishment of well staffed and representative commissions to study county government and make recommendations suitable for legislative enactment.

### **C. Functions**

Legislatures ultimately delegate power appearing at first view adequate to perform the functions demanded of local government. The trouble arises from the fact that the delegations are

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<sup>89</sup> A recent example is the Colorado Supreme Court decision which held, in the case of *Metropolitan Capital Improvement District v. Adams County*, February 13, 1962, that the General Assembly could not create an independent governmental entity for a limited purpose to operate within the geographical confines of a constitutional home rule city.

<sup>90</sup> See National Association of Counties, "Principles of County Home Rule" *The American County Action Program*, Washington, D.C., 1962, p. 1.

(a) often tardy because legislatures wait for crystallization of opinion on a statewide basis and beyond a majority; (b) frequently splintered by being vested in independent or semi-independent agencies which elude responsiveness to general government control; (c) occasionally inadequate or, more often, circumscribed by requirements and conditions which render adoption and operation difficult; (d) sometimes expressly restricted, or encumbered with detail which hampers execution; (e) usually cautiously worded, because where the courts may later draw the boundaries of authority is not known; and (f) almost invariably confined and rendered less economical and effective in operation, because the area of the unit receiving the authority is not large enough to deal properly with the problem which the authority purports to solve.

The Commission believes that legislatures should delegate local powers in broad terms. The abuse by local government of broad powers troubles the Commission minimally. It is not currently widespread in any serious way. The fact that abuse conceivably might occur is no more reason to deny broad delegations of power than it is to deny a Boy Scout a knife because he might cut himself. Additionally, we are of the opinion that if a broad functional delegation of power is a part of the total power residing in the local governing body it will be more responsive to popular control.

The possibility of restrictive judicial interpretations bears a direct relation to the detail of the delegation, and the burden of strict construction will be relieved by broad delegations. Nevertheless, the strict construction doctrine as applied to local power should not be accepted as judicially immutable.

1. *In order to prevent further judicial erosion of the powers of local government, the Commission recommends that the States in their constitutions grant to selected units of local government all functional powers not expressly reserved, pre-empted, or restricted by the legislature.*<sup>91</sup>

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<sup>91</sup> Mr. Hummel submitted the following dissenting view on this recommendation: I must again dissent with my fellow commissioners in their recommendation to give municipalities and counties all residual functional powers of government not denied by the constitution or general laws.

I would agree that it is desirable to give this broad grant of residual power to cities, but to grant this to cities and counties concurrently will lead to competition,

The only way for States to deal effectively with inevitable legislative delay in granting local government power to discharge necessary new functions is to provide a broad, unambiguous grant of functional power. However, if this were done, constitutionally and *per se*, without the right of affirmative legislative reservation, preemption, and restriction, all kinds of problems would arise out of a lack of responsibility and prudence or from placing local decisions above the general interest. Therefore, it is important to emphasize that the delegation of residual powers should be preceded by a careful review of affirmative limitations upon the powers of local government within a State. Such delegation should occur simultaneously with the enactment of a local code, by which the State legislature places necessary limitations upon local powers and reserves other powers for the State.

It is recognized that the delegation of residual power to all units of local government would vastly complicate intergovernmental relations at the local level. Consequently, in making such a delegation, each State should select the types of local government best suited to exercise general powers. Bearing in mind the great diversity of local government from State to State, it is the Commission's judgment that the units best adapted to serve this purpose in most States are counties and municipalities. A State may wish to designate selected municipalities, depending upon the extent to which it decides to restrict the power of small urban units because, for example, of the inadequacy of economic resources necessary for the proper exercise of residual power. Instead, the State may wish to encourage such units to consolidate or cooperate in discharging various functions. Residual powers can be delegated to counties and municipalities in many

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confusion, and duplication. The city, as the historical and basic unit of government designed to provide urban type service, should be the logical recipient of this grant of power. The county, as a division of State government designed to provide rural type service, should not be re-constituted to compete for urban service responsibilities.

If the State were to attempt to segregate and parcel out areas of prime responsibilities between cities and counties in order to avoid the duplication that would result if concurrently granted, I predict that much of the progress that has been made in granting local home rule will be dissipated by the States vastly expanding their field of preempted powers. Those county representatives who view this as a recognition of the need for expanded authority by county government, I believe, will find the reverse result.

States by legislation, while in others constitutional amendment is required.

The delegation of residual powers should stimulate initiative and vigor of local self-government to meet new and expanding responsibilities. It should also free State legislatures from acting on a host of purely local and special legislation and, at the same time, bring into bold relief the existing profusion of antiquated restrictive provisions of State statutes.<sup>92</sup>

For further study and consideration leading to State constitutional revision, the following draft of an amendment is offered:

*Municipalities and counties (or selected units identified to best suit the conditions in a given State) shall have all residual functional powers of government not denied by this constitution or by general law. Denials may be expressed or take the form of legislative pre-emption and may be in whole or in part. Express denials may be limitations of methods or procedure. Pre-empted powers may be exercised directly by the State or delegated by general law to such subdivisions of the State or other units of local government as the legislature may by general law determine.*

2. *Pending the delegation of residual powers to local governments, the Commission recommends that State legislatures, as a general policy, use broad language in amending and enacting new legislation affecting the powers of local government relating to "welfare" functions (i.e., all modern service functions such as sanitation, public works, planning, recreation, etc.).*

Use of broad statutory language in the delegation of powers should substantially limit the range of opportunity for strict judicial construction of legislative intent. In making such delegations to local units, the legislature should vest power, subject to appropriate redelegation, in the general governing bodies of local government.

The Commission believes that special function districts, except those created by and plainly subordinate to local general governing bodies, should be authorized by State legislatures with

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<sup>92</sup> Excepting permission to facilitate intergovernmental cooperation, heretofore covered, the delegation of residual power as here contemplated meets the "three basic requirements of a sound local Government Article in a modern constitution for the State" determined by The Temporary Commission on the Revision and Simplification of the Constitution of the State of New York. See *First Steps Toward a Modern Constitution*, New York State Legislative Document (1959) No. 58, p. 15.

great care. Pyramiding to slough off tax and debt limitations obviously can be remedied only by providing the basic governing body with adequate flexibility and power to solve its problems. Pyramiding to expand the geographical jurisdiction is substantially caused by a problem it augments—the multiplicity of units. This type of pyramiding may be justified as an expedient and, if thoughtfully applied, might develop into a useful transitional or permanent device for enlarging units of government. Its use on other than a highly selective basis, however, seems destined to fractionalize government and foster the continuation of units too small to have a policy and too poor to afford a program.

The Commission also suggests that proposed State constitutional amendments or legislative acts to grant functional authority to local units of government should not be associated with other amendments or bills to provide home rule or optional new forms of local government. When delegations of functional power are combined with structural freedom, as in the case of home rule charters, a reason implicit for not adopting such charters is that they threaten the local power structure. This strongly suggests that much less opposition will be encountered if proposed delegations of functional power avoid any connotations of structural change. Also, home rule charters which combine both basic powers and governmental organization complicate the problems that may be posed for review by the courts and may result in expanding judicial limitations of home rule powers.

#### **D. Personnel**

1. *The Commission recommends that States study the application of statutory provisions relating to the election, term, eligibility and compensation of local officials engaged in administration of "welfare" (all modern services, such as sanitation, public works, planning and recreation) and "sustaining" (e.g., tax administration) functions and of the other administrative and non-administrative functions of these officials, and enact general legislation placing the administration of these functions in separate hands to the extent practicable and lodge responsibility for appointment, tenure, and salary determinations of welfare and sustaining function officials in the general governing bodies of the appropriate units of local government.*

Local elected officials engaged in “liberty” and “equality” administrative functions—judges, recorders, sheriffs, officers of the court, etc.—should be clearly distinguished from other elected officials engaged in “welfare” and “sustaining” functions—treasurers, engineers, surveyors, assessors, tax collectors, public works executives, and others—to avoid continuing their widely prevalent dominance of the former over the entire official and personnel structure of local government. This is particularly the case in nonmetropolitan counties and smaller cities, where it is handicapping the development of functional professionalism responsible to general governing bodies. Briefly, there are several reasons for this: (a) the mere presence of elected officials administering “welfare” and “sustaining” functions diffuses policy determination and places administration in the hands of individuals oriented to responsibility to the law instead of public policy as determined by local governing bodies; (b) the statutory fixing of terms of administrative officials of “welfare” and “sustaining” functions results periodically in unnecessary and unintended policy changes and frequently in unjustified personnel changes down the line; and (c) statutory salaries tend to place a relatively inflexible lid on the whole personnel compensation system and makes it difficult to recruit and retain qualified professional and technical personnel.

The restrictions developed around the administration of “liberty” functions may result in uneconomical and sometimes inadequate protection of property and persons, administration of justice, maintenance of ownership records, and elections administration. Nevertheless, the officials and practices associated with “liberty” and “equality” functions are deeply ingrained in our mores, and generally resistant to change. The Commission does not urge changing the laws relating to officials dominantly engaged in administering “liberty” and “equality” functions. At the same time, the overall number of elected officials could be reduced substantially, especially through reasonable area adjustments.

*2. The Commission recommends that States empower all classes of municipalities to appoint all city officers other than the mayor and council members.*



Nearly one-half of the municipalities over 5,000 population have one or more elected officials other than the mayor and council members. Such elected municipal officials are found in all but a few States. Municipal officials listed in the order of the number elected compared to the number appointed follow: treasurer, clerk, assessor, auditor, attorney, comptroller, police chief, and public works director.

Generally, these officials are engaged in the management and direction of city affairs and there seems to be little reason for electing any of them. Where the auditor is strictly a post-auditor and certified public accounting firms are not employed to make annual audits, a good case might be made for electing the auditor or having him appointed by the council.

As indicated earlier, the Commission is keenly aware of the dual nature of county government, as distinguished from city government, and strongly believes that county officials carrying out "welfare" and "sustaining" functions should be appointed by county governing boards. However, the Commission does not oppose the continuance of State limitations with regard to the selection, tenure, and compensation of county officials engaged in "liberty" and "equality" functions.

*3. The Commission recommends that State governments extend, upon request, technical assistance to local units of government with respect to personnel administration.*

Delegating responsibility for personnel management and salary determination to local governing bodies, by general law and subject to as few classifications and limitations as practicable, will increase local government responsibility generally. It also should result in better personnel management and free State legislatures for more important work.

States can help local government most in the solution of personnel service problems by example and by increasing their facilities to help localities follow a good example. Many local governments, however, are too small to operate effective personnel systems, training programs, and retirement and insurance plans, and thus are disadvantaged in recruiting and retaining competent personnel. Others need help or want to cooperate in broader programs.

The very real restrictions upon local government are not so much legislative failure to require standards and provide supervision as they are failure to offer help and encourage voluntary participation in State programs. State retirement and insurance programs should be available for participation by local government on an optional basis for employees and officials under certain standards. State government and State university training programs should be extended and personnel services, including testing and certifying applicants, should be available from the State on a fee basis to local government.<sup>93</sup> Larger units of local government should be encouraged to offer smaller jurisdictions cooperatively or contractually the opportunity to participate in their personnel programs.

The recent Office of Standards and Training for Police in California and the New York State Municipal Police Training Council are promising, while the less ambitious and older Kentucky program for training and examining candidates for county assessor has shown limited but positive results. Teacher certification and State public health supervision and assistance to local health officers have been reasonably successful and accepted. The comprehensive State programs of mandatory State standards, assistance, and supervision in New York and Massachusetts may have been effective in accomplishing better personnel administration but it relieves local officials of a kind of responsibility we believe they should shoulder.<sup>94</sup>

Certain federally subsidized programs require some degree of a professional approach to personnel problems. Some tend more than others to operate through State machinery and have had a wholesome influence upon State and local personnel practices. The Commission believes that Federal agencies should have a uniform policy, with some administrative flexibility, respecting personnel practices of local governments receiving aid.

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<sup>93</sup> *State-Local Relations, op. cit.*, pp. 38-40.

<sup>94</sup> Troy R. Westmeyer, "A Massachusetts Myth," *National Municipal Review*, Vol. 45, pp. 116-119.

## VIII. CONCLUDING OBSERVATIONS

Government and the power to make decisions binding upon the area are synonymous. Our inheritance and concept of local government cater to simple decisions. Simple decisions are becoming fewer. More complex decisions are encompassing larger areas.

As problems confronting government expand over greater areas, the vehicle for making decisions about the problems must expand comparably, else the decision will be made on a higher level that does contain the area. This logic explains a portion of the local government dilemma. There are at least two other horns to it. Activities considered private or local are constantly becoming vested with a larger public interest; they tend to be not confined to an area but to acquire State and even national characteristics. Also, local government is dedicated to diversity and its powers, by design and incapacity, frequently operate as a conservative influence in opposition to emerging social requirements.

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. The Commission believes that this is the system of government best inclined in our day to produce and maintain diversity—freedom, ingenuity, enterprise. We fear that by holding tenaciously, as we are inclined to do, to the old way, the necessity for greater discipline will cause the important powers of government to ascend to the State capital or to Washington and that our society will lose some of its capacity to be diverse. We would choose a new and broader discipline of local government to avoid its atrophy.

Political phenomena are subject to much more critical analysis, classification, and description, than has been accomplished. Guiding beacons are not bright. Remedies are often counter-

acting. For example, if a central city cooperates with fringe municipalities or a county provides contract services to its municipalities, protective incorporation may be encouraged and expansion of area defeated. On the other hand, it is possible that an *esprit de corps* might develop among independent units that would supplant the desirability of larger units. 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. This effort assuredly will evolve patterns more acceptable than we now know.





PUBLISHED REPORTS OF THE ADVISORY COMMISSION ON  
INTERGOVERNMENTAL RELATIONS

- Coordination of State and Federal Inheritance, Estate and Gift Taxes.*  
January 1961. (Report A-1; 134 p., printed.)
- Modification of Federal Grants-in-Aid for Public Health Services.*  
January 1961. (Report A-2; 46 p., offset.)
- Investment of Idle Cash Balances by State and Local Governments.*  
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- State and Local Taxation of Privately Owned Property Located on Federal Areas: Proposed Amendment of the Buck Act.* June 1961. (Report A-6; 34 p., offset.)
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- Intergovernmental Responsibilities for Water Supply and Sewage Disposal in Metropolitan Areas.* October 1962. (Report A-13; 135 p., offset.)
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- Tax Overlapping in the United States, 1961.* September 1961. (Report M-11; 136 p., printed.)\*
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\* This publication, priced at \$1.00, may be purchased from the Superintendent of Documents, Government Printing Office, Washington 25, D.C. Single copies of the other reports listed may be obtained from the Advisory Commission on Intergovernmental Relations, Washington 25, D.C.

