

The Central Place of States and Local Governments in American Federalism

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Writing in Federalist Number 45, James Madison predicted that the states would dominate the new federal union created by the Constitution. The powers of the federal government were “few and defined,” he pointed out, limited primarily to “external objects, as war, peace, negotiation, and foreign commerce.” By contrast, the states, he explained, would have authority over “all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State.” As a result of their greater role in governance and their closer ties to the people, the states would also enjoy stronger popular support than the distant national government. Madison assumed the principal problem of federalism would be protecting a fragile federal government from the states, not protecting the states from the federal government.

For more than a century, American federalism developed largely as Madison forecast, with the federal government exercising a limited role in peacetime domestic life, and most government power wielded at the state and local levels. On the eve of the Great Depression, federal spending accounted for barely one-sixth of total domestic government—federal, state, and local—spending. The federal government provided few services directly to the people and only a modest amount of financial assistance to state and local governments.¹

¹ J. Richard Aronson and John L. Hilley, *Financing State and Local Governments: Fourth Edition* (Washington, DC: Brookings Institute Press, 1986), p. 17.

Over the course of the twentieth century, this situation changed dramatically. The emergence of a national—and increasingly global—economy, two world wars, the rise of the United States to superpower status, and the ongoing cultural and technological transformations of our society have been accompanied by a tectonic shift in power to the federal government. The federal government now plays an enormous role in regulating the economy, promoting social welfare, enforcing political and civil rights, and protecting the environment.

Yet states and local governments remain central to American governance. As in Madison's day, "the ordinary course of affairs" is dominated by state and local governments. The rules that structure civil society—contract law, tort law, property and land use law, criminal law, family law, the incorporation of businesses, the regulation of the professions—are developed, implemented, and enforced primarily at the state and local levels. So, too, most public services that affect people in their homes and families—public schools, policing, incarceration of offenders, fire safety, clean water, removal of solid wastes and sewage, maintenance of roads and streets, public parks, public hospitals and emergency medical services—are provided by states and localities, not the federal government. The vast majority of the opportunities for participation in political life—such as running for office, campaigning for or against a ballot proposition, or appearing before such critical governing institutions as the school board, the planning and zoning commission or a town meeting—are at the state and local level, too.

The centrality of states and local governments to our federal system was dramatically underscored by three recent events: the 2000 Presidential election and the bitter postelection battle over Florida's 25 electoral votes; the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001; and Hurricane Katrina's devastation of New Orleans and the Gulf Coast in 2005.

The 2000 election reminded us that there is no national presidential election. Instead we undertake 50—actually, 51 including the District of Columbia—separate state elections. The winner is determined not by the national popular vote, but by the states' electoral votes, which are based in part on state population but also provide representation for the states as states. The collection, tabulation, and recounting of presidential votes is conducted by state officials, pursuant to state rules. Moreover, the states often delegate critical issues—selection of voting machinery, ballot design, whether to undertake a manual recount, whether to accept a technically flawed absentee ballot, whether dangling or dimpled chad is sufficient to mark the intent of a voter—to local officials. To be sure, as the Supreme Court's *Bush v. Gore*, 525 U.S. 98 (2000), decision indicates, the federal constitution constrains state and local decision making. And Congress

reacted to the events of 2000 with new legislation increasing the federal role in the mechanics of voting. But the 2000 election remains a stunning reminder of how even with respect to our most important national office, states and local governments play a vital role.

September 11, 2001—9/11—demonstrated the crucial role of the states and especially local governments in dealing with issues of public safety and security. Although the terrorist attacks were an assault on our nation, most of the domestic response involved local governments. New York City police, firefighters, and emergency medical personnel responded to the attacks on the World Trade Center. Local public health and safety workers from the District of Columbia and various Virginia and Maryland counties battled the consequences of the terrorist attack on our most important federal military installation, the Pentagon. The vast bulk of the subsequent public effort to increase the security of public buildings, public spaces, and vulnerable infrastructure facilities has involved state and local security officers, not the federal government. More generally, in detecting and pursuing terrorists and preventing future terrorist attacks, the 600,000 local police officers are likely to play at least as great a role as the FBI and its 11,000 agents. This is not simply a matter of numbers—although the enormous difference in the magnitude of the local versus federal police forces is surely relevant. Local police forces are likely to have far greater knowledge of local conditions and dangers, including access to informants and awareness of unusual or suspicious incidents.²

The central role of states and local governments was underscored again in the aftermath of Hurricane Katrina. Once again, states and local governments were called upon to make critical decisions concerning evacuations, public safety, emergency health and medical assistance, and the provision of basic services. State and local actions directly affected the lives and property of hundreds of thousands, if not millions, of people. State and local governments are also continuing to play a key role in aiding victims of the disaster, rebuilding stricken areas, and planning future development in light of the needs of disaster prevention and preparedness.

The centrality of the states and local government is not simply a lingering aftermath of an earlier era. In recent years, the federalizing trend that marked the middle decades of the twentieth century has flattened, and the federal system has witnessed a modest tilt away from the federal government and back to the states and localities. This can be seen in the enhanced state and local share of public employment and public spending; in the greater discretion accorded to states and local governments in the manage-

² See generally Richard Briffault, "Facing the Urban Future After September 11, 2001," *The Urban Lawyer* 34 (Summer 2002), pp. 563–582.

ment of federally funded programs; and in the many policy initiatives that have sprung from the states and localities.

In 2002, the federal government civilian workforce was 2,690,000—down 13% from nearly 3.1 million federal employees 15 years earlier, and 170,000 workers smaller than the federal civilian workforce of 1966. By contrast, the combined state and local workforce in 2002 was 15,602,000—or nearly six times the federal. And while the federal workforce has been stagnating, the state and local workforce has been growing. The number of state and local employees in 2002 was 11% higher than in 1990—and roughly double the state and local workforce of 1966.

The state and local share of total government spending is also on the rise. In 1980, federal spending was 87% greater than state and local spending. In 2003, federal spending was just 48% greater than state and local spending. If federal spending on defense and foreign affairs, interest on the national debt, and the two major social insurance programs—Medicare and Social Security—are subtracted from the federal total, so that the focus is on domestic regulation and public services, then state and local spending actually dominates federal spending—by roughly 2:1. Moreover, although the federal government provides significant financial assistance to local governments, the federal aid share of state and local funds has been dropping. Federal aid amounted to 23% of state and local spending in 1980, and was slightly less than that in 2003. States and localities have not only expanded their programs but have also become more successful at cultivating their own resources.

Moreover, in recent years the federal government has given the states greater flexibility in spending federal dollars. The most famous instance of this is the 1996 welfare reform law, which gave the states broad new authority over federally funded welfare programs. Other federal aid programs in such areas as transportation and pollution control have been revised to reduce federal regulatory controls. This trend, however, is not unmixed, as the federal role has also increased in some areas, like primary and secondary education, that have traditionally been reserved to the states and localities.

States and localities have also been more aggressive in addressing a wide range of domestic policy issues. This is reflected in the unprecedented leadership role assumed by the state attorneys general in shaping national policy on tobacco; the initiatives underway in nearly a dozen states to tackle the sprawling pattern of urban growth; the states' exploration of new forms of school finance, HMO regulation, income assistance, and health insurance for the uninsured; the combination of voter-initiated and legislatively adopted measures to promote campaign finance reform; and the state and local legislative and judicial decisions reexamining family and marriage relationships. These developments demonstrate that states and localities are important, independent policymakers within the federal system.

THE STATES

The 50 states are the basic components of the United States. Although not all American land or residents are found within the states—the District of Columbia, the Commonwealth of Puerto Rico, and territories such as American Samoa, Guam, the Northern Marianas Islands, and the Virgin Islands are also parts of the United States—the federal government is structurally constituted out of the United States. As the Supreme Court has observed, “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” (*Texas v. White*, 74 U.S. 700, 725 (1869)).

The U.S. Constitution and the States

The Constitution includes multiple protections of the autonomy and equality of the states. The Constitution guarantees the territorial integrity of the states. No state may be created out of the territory of another state without its consent. So, too, no state may be deprived of its equal suffrage in the Senate. Under the Guarantee Clause, the United States is committed to protecting the states from invasion and domestic violence.

The states are in no sense arms of the federal government. They are not like federal administrative agencies or regional offices; the federal government does not appoint state officers. The states can legislate without having to demonstrate any authorization from the federal Constitution or by the federal government. Under the Tenth Amendment, the states have residual power over all aspects of government not granted to the federal government or not constrained by the Constitution or by the federal government acting pursuant to the Constitution. To be sure, the federal Constitution does impose significant restrictions on the scope of state law-making authority, and Congress acting pursuant to the Constitution’s grant of power to the federal government can impose further limitations on the states. Nonetheless, the states continue to possess and exercise broad police power authority over their territory and their citizens.

Several recent Supreme Court decisions have underscored the protections that the Constitution provides for the autonomy of the states and their localities. Under *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997), Congress cannot “commandeer” states and localities to serve federal ends; that is, they cannot require the states to pass certain laws or enforce a federal regulatory program. Under the Court’s recent Eleventh Amendment cases, Congress lacks the power to subject nonconsenting states to private damages actions in either federal, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or state, *Alden*

v. Maine, 527 U.S. 706 (1999), courts. Principles of federalism also limit the ability of Congress to enact legislation intended to remedy state and local violations of constitutional rights; such measures must be “congruent” with and “proportional” to the scope of state violations (see *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Board of Trustees v. Garrett*, 531 U.S. 356 (2001)). Of course, Congress has broad powers under the Commerce Clause and other provisions of the Constitution to adopt economic and social legislation, preempt inconsistent state laws (see, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)), regulate state and local activity that affects commerce or constitutional rights (see e.g., *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003)), and use conditions attached to federal grants to influence state and local actions (see *South Dakota v. Dole*, 483 U.S. 203 (1987)).

The inherent law-making power of the states includes fiscal affairs. Although the Constitution prohibits certain specific forms of state taxation and imposes other more general rules, such as nondiscrimination against interstate commerce, the states have enormous autonomy with respect to taxation, borrowing, spending, and lending money. They may innovate new forms of revenue-raising and new types of debt instruments, they may adopt new taxes and raise tax rates, and they may incur debt to raise the funds they need to pay for the programs they prefer. To be sure, state resources may be limited in practice, and interstate competition may constrain state activities. But the states’ formal legal authority with respect to state fiscal matters is significant.

State Constitutions

Each state has its own constitution that establishes the basic structural framework for its state government. The federal constitution does not create the states or design their governments. Rather, a state’s constitution provides for the basic component parts of state government, allocates powers among these components, and determines how these parts interact. So, too, like the federal constitution, most state constitutions impose limits on the scope of governmental authority. Many state constitutions contain limits similar to those in the federal constitution like the due process and equal protection clauses and the Bill of Rights. But state constitutions also differ from the federal in significant ways.

As a matter of theory, the federal constitution provides a *grant of enumerated powers* to the federal government. In other words, the federal government enjoys only those powers actually granted to it by the federal constitution. To be sure, expansive judicial interpretations of such open-

ended constitutional provisions as the necessary and proper clause, the commerce clause, and the spending power have given the federal government broad authority; but still, in theory, all federal powers must be expressly or impliedly granted by the federal constitution. By contrast, state governments acting through their state legislatures are presumed to have broad, residual, plenary governmental powers. State constitutions are seen not as granting powers to state governments but, instead, as limiting the powers the states inherently possess.

A second major distinction between the federal and state constitutions is one of form. State constitutions tend to be longer and more detailed than the federal. This may be, in part, a reflection of the greater domestic responsibilities of state governments. Many state constitutions deal with the substantive responsibilities of state government, like public education. It may also reflect the relative frequency with which state constitutions have been revised or amended. The United States has operated under the same constitution since 1787. It has been amended 27 times. By contrast, the 50 states have had 147 constitutions, or nearly three per state. Nine states have had five or more constitutions. Only 19 states have operated under just one constitution. Moreover, not only do states frequently change their constitutions, but they even more frequently amend the ones they have. At the start of 2003, the states' current constitutions had been amended nearly 6,800 times, or approximately 136 amendments per state. As a result, many state constitutions include considerable statutory-like details.

To be sure, despite these differences most state constitutions produce state governments that look a lot like the federal government and the governments of their sister states. Thus, all 50 states have adopted the separation of powers, with three separate branches of government. All 50 states have an independently elected governor and an independently elected legislature; no state employs a parliamentary system in which the state legislature chooses the chief executive. In 49 states the legislature, like the federal Congress, is bicameral; and in most states the members of the upper house of the legislature serve for longer terms than members of the lower house. All 50 states also have an independent judiciary, and in all 50 states the courts engage in judicial review of state legislation. State bill of rights provisions frequently resemble those of the federal constitution, too.

Yet, in the areas of governmental structure and fundamental rights, many state constitutions include provisions that differ significantly from those in the federal constitution, or have no federal constitutional counterpart at all. Whereas federal judges are appointed by the executive, and, once confirmed by the Senate, enjoy life tenure, most state constitutions provide that most state judges are elected and serve for terms, rather than for life. Similarly, although the federal constitution places no limits on the number

of terms federal legislators may serve, 18 states limit the number of terms state legislators can serve. Moreover, while the federal constitution creates only two executive branch officers—the president and the vice president—most states provide for numerous independently elected state officials who may exercise executive functions independently of the governor. In all but seven states, for example, the voters elect the attorney general, and in two of the other states, the attorney general is selected by an institution other than the governor.³ The governor and attorney general may be of different parties and may clash over questions of legal policy. In addition to the independent attorney general, 38 states have an independently elected treasurer or comptroller, while in another four the official with these functions is elected by the legislature. Other officials who in some states are elected independently include the secretary of state, the commissioner of education, the commissioner of insurance, and the commissioner of agriculture.

Other structural innovations found in many state constitutions include the item veto and direct democracy. With respect to the former, the federal constitution enables the president to veto proposed legislation, but the president must veto an entire bill if he is to veto it at all. The constitutions of 43 states, however, allow the governor to veto “items” or “parts” of bills, although in every state but one that provides for this power the item veto is limited to appropriation bills.

The federal constitution makes no provision for direct democracy. The federal government is entirely representative: The people elect representatives to office who then do the governing. Apart from voting for candidates, citizens have no direct role in the ongoing processes of government. Most state constitutions, however, provide for some direct role for the people in governing. In every state but one, popular approval in a referendum is necessary to ratify changes to the constitution. Many state constitutions also condition the issuance of state or local debt on voter approval. Some state constitutions permit the voters to use referenda to block new legislation, while others authorize voter initiation of new legislation or amendments to the state constitution. In other words, in nearly half the states the voters can make or amend the constitution, without any action by the state legislature or the governor.

Direct democracy, particularly voter-initiated legislation and constitutional amendments, has had an enormous impact on the states that provide for it, particularly since California’s adoption of Proposition 13 in the late 1970s. Today, in states like California, Colorado, Washington, and Oregon it is a central part of the political process. The voter initiative played a critical role in the adoption and spread of legislative term limits and in the imposition of limits on state and local taxation and spending.

³ The attorney general is elected by the state legislature in Maine, and appointed by the judges of the state supreme court in Tennessee.

The State Fiscal Constitution

State constitutions pay considerable attention to state and local finances. The federal constitution says next to nothing about public finance, doing little more than authorizing federal taxation and borrowing,⁴ and setting out the basic procedures for raising and spending money.⁵ It places just a handful of substantive constraints on federal taxation,⁶ and no restrictions on federal borrowing at all. By contrast, state constitutions accord extensive consideration to state and local spending, borrowing, and taxing.

State constitutions limit the purposes for which states and localities can spend or lend their funds and expressly address specific spending techniques.⁷ These “public purpose” provisions narrow the range of government action and limit public sector support for private sector activities, although, in practice, judicial interpretations make these constraints far less binding than the constitutional texts might suggest.⁸

Nearly all state constitutions impose significant substantive or procedural restrictions on state and local borrowing. Some bar state debt outright or impose very low limits on the amount of debt a state may incur. Some cap state or local debt at a specified fraction of state or local taxable wealth or revenues. Many require a supermajority in the legislature, or of voters in a referendum, or of both before debt may be incurred.⁹

Many state constitutions also constrain state and local taxation. These provisions include prohibitions on certain types of taxes, such as the income

⁴ See U.S. Const., art. I, § 8, cl. 1 (authorizing Congress to “lay and collect Taxes, Imposts and Excises”); id. at Amend. XVI (authorizing imposition of income tax); id. at § 8, cl. 2 (authorizing Congress “[t]o borrow Money on the credit of the United States”).

⁵ See U.S. Const., art. I, § 7, cl. (providing that “[a]ll bills for raising revenue shall originate in the House of Representatives”); id. at § 9, cl. 7 (providing that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

⁶ See U.S. Const., art. I, § 8, cl. (providing that “[a]ll Duties, Imposts and Excises shall be uniform throughout the United States”); id. at § 9, cl. 4 (providing that “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken); id. at § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State”).

⁷ See, for example, Dale F. Rubin, “Constitutional Aid Limitation Provisions and the Public Purpose Doctrine,” *St. Louis University Public Law Review* 12, No. (1993), pp. 143–148. Rubin finds that 46 out of 50 state constitutions contain some limits on spending.

⁸ See, for example, Richard Briffault, “The Disfavored Constitution: State Fiscal Limits and State Constitutional Law,” *Rutgers Law Review* 34 (Summer 2003), pp. 907, 910–915.

⁹ Id., pp. 915–916.

tax; caps on the rates of certain taxes, such as the sales tax; and a variety of limits on the property tax, including the tax rate and annual increases in assessed valuation, as well as special procedural rules for new taxes or tax increases, including legislative supermajorities or voter approval requirements, some times with popular supermajorities.¹⁰

THE COMPLEX STRUCTURE OF AMERICAN LOCAL GOVERNMENT

Although American federalism can pose difficult questions concerning the allocation of governing authority between the federal government and the states, the position of the states in American government is reasonably familiar to most people. There are only 50 states, and many of us can name them all. The number of states is quite stable, as are state boundary lines. All but five states were admitted to the union before the start of the twentieth century, and the last two states, Alaska and Hawaii, were admitted in 1959, or nearly a half-century ago. The states are comparable to each other in powers, constitutional status, internal organization, and authority over their citizens even if they differ significantly in territorial size and population.

Local governments are quite a different story. There are nearly 90,000 of them and they differ dramatically in powers, status, organization, function, authority, and mode of creation across the country and, indeed, within a particular state. There is not even a consistent terminology for local governments; different states include such diverse local units as parishes, boroughs, townships, as well as the more common forms of local government such as county or city. Unlike the states, local governments may—and frequently do—overlap each other's territory. Unlike the states, local governments are frequently created, modified territorially, or abolished. Unlike the states, local governments lack inherent law-making authority. So, too, while the federal Constitution makes frequent reference to the states, the federal Constitution is entirely silent on the subject of local governments.

Local governments are crucial to American federalism. Approximately three-quarters of the aggregate total of state and local employees are actually employed by local governments. So, too, the overwhelming majority of state and local elected officials serve at the local level. The states may be formally responsible for the provision of most domestic public services, but local governments play the key role in actually delivering such basic services as education, policing, fire prevention, street and road maintenance, mass transit, and sewage and solid waste removal. Local governments are also the dominant actors in our intergovernmental system in regulating land use and in community development. A considerable portion of state spending is

¹⁰ *Id.*, pp. 927–929.

used not for the provision of state programs but consists, instead, of grants to local governments to help them finance local services and activities.

Part of the complexity of American local government derives from the fact that most localities are agents with two principals—their state government and their local constituents. On the one hand, local governments are creatures of their states, established by the states to discharge state functions locally. On the other hand, local governments are more than simply administrative arms of the state government. Local constituents play a critical role in directing local government activities and shaping their performance. This may involve local popular election of local government officials; appointment of some local officials by other, locally elected officials; or a requirement that the state appoint only local residents to the governance of the local unit. Local autonomy may also result from the powers and discretion accorded to the local government. Local governments, thus, have a bottom-up, that is, a local control aspect, as well as a top-down or state-control aspect.

Another part of the complexity of our local arrangements derives from the sheer variety of types of local governments. There are multiple forms of local government, and they often have overlapping territorial scopes and responsibilities. Most people in the United States live in at least two different local governments. Many are within the jurisdiction of multiple localities.

The County

One basic form of local government is the county. Descended from the old English shire, the county traditionally provided basic state services at the local level. Thus, the county was responsible for public prosecutions, recording deeds, keeping birth, death, and other public records, assessing property for tax purposes, registering voters, maintaining public roads, and providing poor relief and health care for the indigent. Most states are entirely divided up into counties. (Alaska uses the term *borough* for its counties; Louisiana uses the term *parish*.) There are exceptions: In Virginia, most of the cities are outside the jurisdiction of a county; in Connecticut and Rhode Island the county exists as a territorial unit but there are no county governments; and in a number of major cities—such as Boston, Denver, Honolulu, New York, Philadelphia, and San Francisco—city and county governments are combined. These and a few other exceptions aside, most of the land in most of the states lies within a county. A state's arrangement of counties is also usually quite stable, with counties only rarely created or destroyed, and county borders rarely changed. Indeed, in many states, the current county

structure dates back to the state's entry into the Union. In 2002, there were 3,034 counties, or virtually the same as the 3,052 a half century earlier.¹¹

Traditionally, the county was a regulatory and service-providing body, not a law- or policy-making one. Indeed, often there was neither a county executive nor a county legislature; instead the county government may have consisted of a group of independent officials, such as the Assessor, the Coroner or Medical Examiner, the Register of Deeds, the Board of Elections, the Sheriff, and the District Attorney. Although locally elected and thus to a considerable extent locally accountable, their function was to discharge state services locally. Counties were particularly important in providing basic services in rural and small town areas.

Beginning in the mid-twentieth century, however, counties, particularly those in urban areas, began to take on broader responsibilities and to assume a policy-making role. Frequently encompassing central cities, smaller outlying cities, and suburbs, counties are often well-situated to provide area-wide services in metropolitan regions. Many states have provided for stronger county governments, including elected executives and legislatures, and they have increased county functions to include such area-wide activities as housing, mass transit, airports, parks and recreation, water supply and sewage, planning, zoning, and regional governance.

Counties differ dramatically in population, ranging from under 100 people to nearly 10 million (Los Angeles County, California). At the start of the new millennium, the 671 counties that each had fewer than 10,000 inhabitants together had just 3.7 million people. But the 201 counties that each had more than 250,000 inhabitants together had 159 million people, or 56.5% of the total population in all the counties in the United States.¹² In 2001, county governments across the country raised and spent in the aggregate approximately \$250 billion.¹³

The City

The city—or the municipality or the municipal corporation—is another basic unit of local governance. Here, too, terminology varies from state to state, so that municipalities may include the borough in some states (but not the Alaskan “borough,” which is really a county), the town (but not the New England town), and the village. The city is closely associated with the idea of urbanness, that is, with greater population and greater population density, and the resulting need for more government regulation and public services. The city also relies on the concept of incorporation, that is, like a

¹¹ See U.S. Bureau of the Census, 1997 Census of Governments, p. 4.

¹² See U.S. Bureau of the Census, 2002 Census of Governments.

¹³ *Id.*

private business corporation or a not-for-profit corporation, a municipality is incorporated when local people seek a new local entity to provide the services and undertake the functions they believe are necessary to deal with the consequences of population growth and density. Typically, the municipal government includes an elected legislative or policy-making body and an elected executive or appointed manager.

The number of municipal corporations is far more fluid than the number of counties. There were 19,431 municipal corporations in 2002—a 2,624 (or 16%) increase over the 16,807 municipal corporations in 1952. This increase reflects both population growth and dramatic population movements over the last half century. Some municipal corporations are also able to change their boundaries and increase their population through the annexation of unincorporated land. Although municipal corporations account for only a tiny portion of the United States' total land area, in 2002, nearly 174 million Americans, or almost 62% of the population, lived in cities. Like counties, cities vary widely in their population. Slightly less than one-half of all municipalities have fewer than 1,000 inhabitants each. The total population of these 9,361 small municipalities came to only 3.7 million people, or just 2.2% of the total municipal population. Conversely, there were just 241 cities with populations of 100,000 or more, but the total population of these larger cities was 76 million. Most cities—with the exception of many of the cities in Virginia—are located territorially within counties and are subject to county jurisdiction. So too, as previously noted, for a number of major cities, the city and county have been effectively fused.

The Township

A third form of local governance is what the United States Census Bureau calls *town* or *township governments*. These entities are located in just 20 states, concentrated in New England, the Middle Atlantic region, and the Midwest. (The New England states, New York, and Wisconsin use the term *town* while the other states use the term *township*.) Typically in these states, all or most of the counties or the parts of counties outside of incorporated municipalities are subdivided into towns or townships, much as the state is divided into counties. In New England and in the Middle Atlantic states, they are frequently found in densely populated urban areas and perform many municipal-type regulatory and service functions. By contrast, in the Midwest, many township governments perform only a very limited range of services for predominantly rural areas. There they resemble old-fashioned counties. There were 16,504 town or township governments in 2002, and, like the number of counties, the number of towns and townships is relatively stable, dropping only modestly from the total of 17,202 in 1952. With an

aggregate population of 57 million, or around 20% of the total population of the United States, town and township governments play only a modest role in local governance in the United States as a whole. But they are significant in some states, including Connecticut, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and Wisconsin.

Special Districts

Although no local government has the full range of powers of a state, counties, cities and townships are all considered to be general purpose governments in that they have relatively broad responsibilities over a significant number of areas—public safety, public health, land use, streets, highways, and transportation. However, a significant number of local governments are given very narrowly defined authority and are authorized to undertake only one or a very limited number of functions. These are known as special purpose local governments, and they are actually the most common form of local government in the United States today. The most common form of special purpose government is the school district. In 2002, there were 13,522 school districts in the United States. The Census Bureau lumps all other forms of special purpose government into the category of *special district governments*. There were 35,356 special districts in 2002, or nearly as many as the total number of municipal governments and towns and townships combined—and far more than the total number of municipal governments and counties. The special district has also been the most rapidly growing form of local government in the United States over the last half-century. The number of special districts in 2002 was nearly triple the 12,340 counted in 1952.

The vast majority—nearly 32,000—of the special district governments in 2002 were single-function districts, with responsibilities ranging from fire protection (5,725 districts), water supply (3,405), housing and community development (3,399), drainage and flood control (3,247), soil and water conservation (2,506), sewerage (2,004), cemeteries (1,666), libraries (1,580), health and hospitals (1,464), parks and recreation (1,287), highways (743), air transportation (510), and solid waste management (455). Other districts provide parking facilities, public utility services, industrial development, and financial assistance to other local governments. The remaining roughly 3,000 districts are multifunction districts that engage in two or more activities, particularly involving sewerage, water supply, and natural resources. Special districts other than school districts raised and spent approximately \$90 billion in 1996–1997. That represented a 25% increase in special dis-

trict expenditures over 1991–1992, which was itself a 35% increase over special district expenditures in 1986–1987.¹⁴

Special districts may be created for a variety of reasons. These include giving them independence from general purpose cities or counties; tailoring the territorial scope of the government to the proper dimensions of its function or activity; avoiding certain state constitutional restrictions that apply to cities or counties; obtaining some of the infrastructure and service benefits of local government without having to incur the full costs of general purpose local government.

Like general purpose governments, special districts combine top-down and bottom-up elements. They may be created by the state, by local constituents pursuant to state enabling legislation, or by other local governments. Those with locally elected or appointed governing bodies have a stronger bottom-up aspect. Unlike general purpose local governments, some special purpose districts, particularly those that are regional in scope, may be governed by state-appointed boards of directors, which reinforces their top-down element. Moreover, unlike general purpose governments, many bottom-up special districts are designed to be accountable to and controlled not by the local population generally but by discrete local groups, such as local landowners or users of the service provided by the special district. In these districts, representation in district governance may be tied to land values or assessment payments.

FROM DILLON'S RULE TO HOME RULE

The source and scope of local government powers has long been controversial. As a matter of federal constitutional law, local governments are creatures of the states. The states enjoy broad powers to create, alter, or abolish their local governments, change their boundaries, and modify or eliminate their powers, largely unconstrained by the United States Constitution. (See *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).) Indeed, as a background legal principle in our system, a local government is a delegate or agent of its state, enjoying only the powers the state has delegated to it.¹⁵ The scope of a locality's state-granted powers was traditionally further constrained by *Dillon's Rule*. Named after Judge John F. Dillon of the Iowa Supreme Court,

¹⁴ See U.S. Census Bureau, 1997 Census of Government, Finances of Special District Governments 1 (September 2000). Because school districts are heavily funded by state aid and appropriations from general purpose local governments, school district expenditures may not be an appropriate measure of the importance of school districts in the state and local government system.

¹⁵ See Richard Briffault, "Our Localism: Part I: The Structure of Local Government Law," *Columbia Law Review* 90, no. 1 (January 1990), pp. 7–8.

who first authored the rule in his Commentaries on the Law of Municipal Corporations shortly after the Civil War, Dillon's Rule provides that local governments may exercise only those powers granted in express words, or *necessarily or fairly implied* in the expressly granted powers, or essential to the accomplishment of the objects and purposes of the locality.

Protecting Local Governments

Dillon's Rule's crabbed approach to local power has long been criticized, and many states have taken steps to empower their localities. Two older limits on state power in order to strengthen their localities are state constitutional prohibitions on special state commissions that perform municipal functions and on special or local legislation. The special commission bans, many of which date back to the nineteenth century, were intended to protect the integrity of local governments by curbing the ability of the states to take important local functions and vest them in special bodies unaccountable to the local electorate.¹⁶ The more widespread special legislation prohibitions were intended to limit the ability of state legislatures to target specific local governments.¹⁷ Both types of provisions have had mixed success. In the middle and late twentieth centuries, a number of states added a new type of provision to their constitutions with the goal of protecting local governments from state legislative imposition—restrictions on unfunded mandates. Some of these measures are procedural, requiring the disclosure of the costs that state mandates impose on localities, but others are substantive, prohibiting certain categories of cost-imposing requirements unless the state provides the funds to offset the new costs.¹⁸

Home Rule

Restrictions on special commissions, special laws, and unfunded mandates may limit the ability of state governments to disrupt or impose upon local governments, but they do not empower local governments to act on their own. That has been the role of "home rule." The first home rule amendments to state constitutions date back to the late nineteenth century. The initial home rule measures often empowered just a single large city—St. Louis in Missouri, San Francisco in California—or a small number of very big cities. Today, most states accord home rule to most municipalities, and some states even make home rule available to counties, or at least some counties, too.

¹⁶ See Richard Briffault and Laurie Reynolds, *Cases and Materials on State and Local Government Law: Sixth Edition* (St. Paul, MN: Thomson West, 2004), pp. 238–244.

¹⁷ *Id.*, pp. 244–259.

¹⁸ *Id.*, pp. 259–266.

Early versions of home rule sought to provide local governments with two powers—initiative and immunity.¹⁹ The initiative power would enable local governments to undertake actions over a range of important issues without having to go to the state for specific authorization. In other words, home rule as initiative would undo Dillon’s Rule and give local governments power to engage in policy-making concerning local matters. The immunity power would go further and protect local actions from displacement by state law. The combination of initiative and immunity powers would make a home rule city an “imperium in imperio,” *St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 468 (1893), that is, a state within a state.

In practice, however, so-called “imperio” home rule often did not work out well for the cities. In many state courts, the Dillon’s Rule philosophy lingered, leading to narrow interpretations of basic concepts such as “local” or “municipal.” State courts were particularly reluctant to recognize claims that home rule immunized local actions from state regulation. Yet, with the same language used to establish both local initiative and local immunity, narrow judicial interpretations in immunity cases often led to equally narrow readings in initiative cases. In 1953, the American Municipal Association (later the National League of Cities), sought to remedy the deficiencies of the traditional imperio model by proposing a new approach under which all legislative powers that could be delegated to a locality were deemed to have been delegated to the locality, subject to the legislature’s power to deny local authority by state statute. In other words, immunity was sacrificed to strengthen initiative. Later versions of the AMA/NLC model sought to provide a measure of immunity as well by requiring that state legislation limiting or denying local power do so expressly. This so-called “legislative” home rule approach influenced many home rule provisions in the second half of the twentieth century. In practice, however, many state home rule provisions blur these theoretically sharp distinctions and combine both imperio and “legislative” models. Moreover, the scope of home rule in any given state is inevitably influenced by both the constitutional or statutory text and the course of judicial interpretation. As a result, home rule powers and protections vary considerably from state to state, and from subject to subject.

FORMS OF LOCAL GOVERNMENT

There are three principal forms of local government in the United States: mayor-council, commission, and council-manager.

¹⁹ See Gordon L. Clark, *Judges and the Cities: Interpreting Local Autonomy* (Chicago, IL: University of Chicago Press, 1985), p. 7.

Mayor-Council

Most of the largest cities in the United States use the mayor-council form, which tracks the traditional separation of powers between executive and legislative functions. Many cities have embraced the “strong mayor” form of mayor-council, with the mayor authorized to appoint and remove most city commissioners, propose the budget, and enter into contracts on behalf of the city. Other large cities, concerned about the power of the mayor and the potential for corruption and abuse in the strong mayor system, embraced a “weak mayor” model, with municipal functions splintered among multiple independent boards and commissions. In recent years, there has been something of a turn back to the strong mayor model, in the belief that government accountability can be promoted when the voters have one person whom they can hold accountable for government performance. Thus, in a number of large cities, such as New York, Chicago, and Boston, already strong mayors have been given greater responsibility for the public schools, which were traditionally the domain of independent boards of education.

Commission

The commission form of city government vests both legislative and executive powers in a single body—the commission—usually composed of five members. The commission model emerged in Galveston, Texas in 1901 in response to a tidal wave that devastated the city. The Galveston commission, initially composed of local business leaders, helped the city get back on its feet and by 1915 about 500 communities had adopted the commission form. One of the commission members may be designated the mayor, but he has no more formal powers than his colleagues. Individual commission members may also be given administrative responsibilities for different city services. Although the commission system was popular in the early decades of the twentieth century, there have been virtually no new adoptions since 1930, and only about 5% of cities use this form today.

Council-Manager

The council-manager system also arose in the early twentieth century as an alternative to the mayoral system. Here the innovator was Dayton, Ohio, which hired a city manager in 1914 to help recover from bankruptcy. After World War II, the council-manager system spread widely, particularly in medium-sized cities and suburbs, although a few large cities rely on managers as well.

The council-manager form draws on the model of the business corporation. The council as the elected representative body hires the manager as

the chief administrative officer, who sits at the pleasure of the council. The manager has broad authority to hire and fire staff, administer the budget, and run day-to-day city operations. The council, which may be part time, sets overall policy. Although the manager works for the council, in many cities the city manager may actually take the initiative and emerge as the city's de facto leader.

Cutting across the issue of city form is the nature of city elections. Traditionally, most cities, including all but the largest, elected their councils or commissions in at-large elections, with all members of the body elected from the city as a whole. In the 1970s and 1980s, concerns grew that such electoral systems disadvantaged racial minorities, and especially following the 1982 amendments to the federal Voting Rights Act many at-large electoral systems in cities with large minority populations were challenged in court. In response to such suits as well as the greater political salience of minority representation, many local governments have shifted from at-large to district elections of their legislative bodies.

METROPOLITAN GOVERNANCE

Most Americans today live in large metropolitan areas, which may contain hundreds of thousands if not millions of people and sprawl across hundreds if not thousands of square miles, and include dozens if not hundreds of local governments. Some metropolitan areas cross state lines. Metropolitan area residents do not concentrate their activities within their home localities, but can live in one locality, work in a second, shop in a third, go to entertainment events in a fourth, and travel through multiple others in the course of these activities. So, too, metropolitan area businesses typically draw most of their workers or customers from outside their home localities. While the metropolitan area as an economic or social region has grown, only rarely is there a single local government with broad jurisdiction over such a region. Instead, most metropolitan areas are composed of large numbers of relatively small, some times overlapping, local governments.²⁰

At one time, scholars and policy analysts sought the creation of large metropolitan area governments that would provide a legal and political structure congruent with the economic and social region. Much as many large cities had expanded territorially by annexation and consolidation with smaller outlying localities in order to follow population growth in the nineteenth and early twentieth centuries, they hoped that central city boundaries could be extended regionally. Widespread opposition from people in the

²⁰ See generally Richard Briffault, "The Local Government Boundary Problem in Metropolitan Areas," *Stanford Law Review* 48, no. 5 (May 1996), pp. 1115-1171.

outlying areas often precluded such expansion. Moreover, many scholars also came to oppose centralized regional governments, claiming that there are benefits from the competition of large numbers of relatively small localities as well as costs to very large local units.

The large number of metropolitan area governments creates numerous possibilities for interlocal conflicts and raises issues concerning efficient service delivery, interlocal inequalities, and the financing and maintenance of regional infrastructure. Many states and localities have sought to address some of these problems by developing new modes of interlocal cooperation and interlocal agreements. These can include contracts for services, whereby one government pays another to provide a service; joint services agreements, in which two or more governments provide a service jointly; or regional collaborative efforts to create new governmental entities that can provide government services.²¹

Many states also create, or authorize local creation, of regional special service districts. These are particularly important for building and operating infrastructure services, such as transit, airports, water supply, or wastewater treatment. Such arrangements enable people to maintain small local governments for services such as policing or land use regulation that people like to keep close to home, while taking advantages of the economies of scale for certain kinds of high-cost physical infrastructure. These districts or authorities are typically governed by appointees and financed by user charges, tolls, or special taxes. In a few areas—Seattle, Washington; Portland, Oregon; the Twin Cities region—there are multiple-purpose regional governments that handle a number of functions together.²²

Only a handful of metropolitan areas have something that approaches a metropolitan area government. In smaller areas that fall entirely within a single county, the county may be given broader governing powers that make it effectively a regional government, or the central city and the county may be consolidated. Some prominent city-county consolidations, involving

larger areas, in the late twentieth century include Miami and Dade County, Florida; Nashville and Davidson County, Tennessee; Indianapolis and Marion County, Indiana; and Jacksonville and Duval County, Florida. Typically in these so-called “two tier” consolidations, only the central city is consolidated with the county. Smaller cities within the county may remain. These consolidations strengthen the county government but also maintain possibilities of conflict between local and regional units.²³

State governments have also been called upon to do more to address interlocal inequalities and the external consequences of local regulation.

²¹ See Briffault and Reynolds, *supra*, pp. 449–472.

²² See *id.*, pp. 472–495.

²³ See *id.*, pp. 496–507.

The school finance reform movement, which has led to often-protracted litigations in a majority of states, seeks to force the states to address the impact of interlocal tax base disparities on the funds available for the number one local expense, public education. In response, many states have determined to mitigate interlocal differences by supplementing locally generated revenues with more state aid, as well as by more actively overseeing locally provided education. A prime source of conflict over the external effects of local decisions is land use.

Zoning, subdivision controls, and other forms of land use regulation are important areas of local decision making. But with so many metropolitan area localities in close proximity to each other, local land use decisions will often affect neighboring communities. Local approvals of new development can create traffic, congestion, and pollution problems for nearby places. Conversely, local growth controls and zoning restrictions may either force unwanted development on other communities, or lead to the adoption of similar restrictions by adjacent localities, thereby contributing to the further movement of new development to outlying areas or the exclusion of certain land uses from a region. Some states have begun to take on a larger role in setting standards for and supervising local land use regulation to deal with these issues.

SUMMARY

State and local management of the problems of metropolitan development is an important example of the way American federalism works in practice. These issues of metropolitan organization, land use regulation, education finance, the cost and quality of local services, the construction and maintenance of basic infrastructure, and the like directly affect the economic well-being and quality of life of tens of millions of Americans, but they are addressed primarily by states and local governments. Different states and local governments come up with different approaches, with some taking these matters more seriously, or making greater progress, or engaging in more creative experiments, than others. The federal government almost certainly has the power to address many of these issues, and often provides some money or gets peripherally involved. But, much as Madison predicted in 1787, these and other key matters of domestic governance are the province of the states and local governments.

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