

LOCAL GOVERNMENT
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The U.S. Constitution neither prohibits nor requires states to establish local government units.

Provisions in state constitutions that address the question of local government vary greatly in form and substance. Drafting such “home rule” provisions raises questions at the state level that are as conceptually difficult as issues of vertical federalism in federal polities and of the subsidiarity principle¹ in the European Union.

Ten years ago, the United States Advisory Commission on Intergovernmental Relations, a federal agency composed of mayors, state and federal legislators, federal officials, and private citizens issued a comprehensive report discussing these issues. The rest of this document consists of excerpts from that report, *Local Government Autonomy*.²

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

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

¹See, Antonio Estella, *The EU Principle of Subsidiarity and its Critique* (2002); Council of European Charter of Local Self Government (1986); Michael E. Libonati, *Home Rule y Sociedad Civil* (2000) (tr. Pablo Riberi).

special attention.

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

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

A. FINDINGS

The States and Local Government Autonomy

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

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

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

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

Between 1978 and 1992, five states granted home rule authority to municipalities. On the

² United States Advisory Commission Local Government Autonomy 1-3 (October 1993).

county side, nine more states provide home rule authority now than in 1978.

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

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

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

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

In most states, the amount of discretionary authority differs for cities and counties and for

the four different types of power. Grants of structural and functional authority frequently exceed grants of financial and personnel powers. These imbalances can create difficulties for local governments.

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

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

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

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

6. As home rule has become a common feature of state constitutions and general state law, the relationship between the states and their local governments has become more complicated.

Increasingly, therefore, state courts are serving as arbiters of state-local relations.

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

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

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

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

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

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

B. RECOMMENDATIONS

Recommendation 1

Reaffirming the Need for Local Discretionary Authority While Preserving State Responsibilities

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

The Commission reaffirms, therefore, its previous recommendations to the states to increase and clarify local home rule by adopting constitutional and/or statutory provisions granting broad powers of structural, functional, fiscal, and personnel authority to local governments and to

authorize them to exercise their authority jointly with other governments as they deem best.

Recommendation 2

Strengthening Local Immunity from State Preemptions and Mandates

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

The Commission recommends, therefore, that the states review the local government articles in their constitutions and/or statutes governing the powers of local governments, and consider amending them as appropriate to clarify:

- (a) The extent of local power intended to initiate structural, functional, fiscal, and personnel matters without prior permission of the state, and to ensure a proper balance among these powers;
- (b) The degree of immunity from the reach of state statutes intended, including limitations on the right of the state to preempt local authority and to mandate functions without giving local governments the fiscal resources to carry out required functions;
- (c) Liberal rules of construction to be followed by the courts in interpreting these constitutional or statutory provisions in favor of local governments;
- (d) The status of local governments as juridical persons having the same capacity and rights to

assert legal claims against the state as natural persons and private corporations; and

(e) The extent to which autonomy and discretion are to be accorded to different types of local governments, including counties, municipalities, townships, school districts, and special districts.

Recommendation 3

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

The Commission finds that, in virtually all states, local government interests are represented in the state capital by local government associations or leagues. Their effectiveness in challenging state legislation that affects local governments adversely varies across states. Some statewide local government associations possess strong in-house counsel that monitors state legislative activities actively and represents local interests quickly and thoroughly in court. Others, however, rely on private ad hoc expert counsel, leaving the results very much to chance. Moreover, individual local governments rarely have the time and resources to match the state's legal resources in specific cases. Such an inconsistent arrangement for professional counsel is not conducive to sustained local government advocacy.

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

Recommendation 4

Recognizing an Alternative Theory of Local Government Autonomy

Although the United States Supreme Court has sanctioned the view that local

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

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

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