local government, the Indiana document enumerated several categories involving local government. The broadest of these prohibitions was aimed at local or special laws "regulating county and township business."[83] Prohibitions in this and many other state constitutions on special and local legislation were viewed as aiding "local self-government to this extent, that whatever rights of government or power of regulating its own affairs a community may have can be neither increased nor diminished without affecting in the same way the power or rights of all similar communities."[84]

Another state constitutional innovation affecting the sovereign prerogative of the legislature was the ripper clause, first developed by the 1872 Pennsylvania constitutional convention in response to the legislature's creation of the Philadelphia Building Commission, a state-appointed body that was charged with building City Hall, and vested with nearly unlimited authority to exact taxes to fund its operations. It read:

> The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or levy taxes or perform any municipal function whatsoever.[85]

Like the language of provisions concerning local or special legislation, the ripper clause is significant because these provisions reveal a conscious attempt to distinguish between purely local, internal, or municipal matters and those of statewide concern. The ripper clause soon found its way into the constitutions of seven other states, normally as part of a policy package that included restrictions on special or local legislation concerning the internal affairs of local governments.

State and local borrowing was another area in which the public restricted state-local action, particularly on behalf of private enterprise. The Ohio Constitution of 1851, for example, prohibited the General Assembly from authorizing any county, city, town, or township from either investing in, or borrowing on behalf of, private enterprise.[86] By 1880, 28 of the 38 states had incorporated similar restrictions in their constitutions.[87]

Developing Concepts of Home Rule and Local Government Autonomy

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

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

The Missouri Experiment

The shift from constitutional restraints on the state legislature to constitutional local empowerment began with the home rule provisions of the Missouri Constitution of 1875. Faced with legislative corruption and favoritism in managing the affairs of the city of St. Louis, constitutional convention delegates crafted a prohibition of local or special laws changing the charters of cities, towns, or villages, and a procedural provision requiring a three-month notice to the inhabitants of a county or city prior to the passage of any local laws.[88] These rules were designed to curb the legislature's propensity to make changes in the charter and organization of St. Louis that were not endorsed by the people of the city.[89] The convention's most striking innovation, however, was a provision delegating to the people of St. Louis a power previously possessed solely by the Legislature, namely, the power to make a charter.[90] These charter provisions had to be "in harmony with and subject to the Constitution and laws" of Missouri.[91] That is, whatever principle of local self-government was embodied in the constitutional text had neither the scope nor the dignity accorded other constitutional provisions. Local initiatives were subject to challenge and, thereby, judicial scrutiny not only on constitutional grounds but also on the ground that they were not in harmony with general laws. The charter clearly was subordinate, also, to any general law, including those laws that classified cities by population.

To remove any doubts about legislative supremacy, the convention adopted a second saving clause: "Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State."[92] Accordingly, the Missouri Supreme Court held that home rule cities constituted a class concerning which the legislature was free to enact legislation without violating constitutional prohibitions against local or special legislation.

The Missouri Constitution was the first to contain a separate article devoted to local government and its relationship to the state legislature. Although the constitution did not shield charter cities from state legislative intervention, it generally succeeded in providing charter cities with initiative, "the power to act without prior authorization by the state legislature," such that from its adoption until 1905 "the Missouri Supreme Court approved every exercise of municipal initiative . . . which was authorized by charter, did not conflict with a statute, and did not run afoul of a constitutional prohibition," including the power to tax.[93]

The Early Twentieth Century and Home Rule

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

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

Little by little, the importance of local government for its own and the state's sake began to be recognized. Thus, provisions in the California (1905), Colorado (1902), Oregon (1906), and Ohio (1912) constitutions, adopted during a period when the Progressive movement emphasized autonomy for urban communities, can be viewed as a major step forward in establishing local autonomy, however limited.[94] These provisions widened the scope of local initiative over municipal affairs, local and municipal matters, or all powers of local self-government and immunized local charter provisions within the protected sphere of local autonomy from State legislative intervention.

Local Bill of Rights: New York went one step further than Missouri and pursued in greater detail an effort to delineate the respective spheres of responsibility for the state government and its local governments. The state constitution combined a bill of rights for local governments with explicit definitions of the respective roles and duties of the legislature and local governments with regard to local government matters. The bill of rights, for example, guaranteed: (1) popular participation in the selection of local officials; (2) county option in regard to forms of county government; (3) allocations of local government functions as between counties and cities, towns, villages, districts, or other units of government; and (4) the right of people in an affected area to veto annexation by a neighboring local government by withholding majority approval in a referendum.[95] The bill of rights set limits, also, on the legislature's power to regulate

public utility operations conducted by local governments. Then, it conferred power on local governments to: (1) "adopt local laws as provided by this article" (Article IX); (2) enter into contracts with other local, state, and federal government agencies; (3) exercise eminent domain, subject to legislative regulations of its exercise outside the local government's boundaries; and (4) apportion the "cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature."[96]

The next section of the constitution required the legislature to provide for the creation and organization of local governments in such a manner as shall secure to them the rights, powers, privileges, and immunities granted to them by the constitution and, "subject to the bill of rights of local government," to enact legislation "granting to local government powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article."

Those powers, once granted, "may be repealed, diminished, impaired or suspended only by" a statute enacted twice in successive years. The constitution required that legislative action "in relation to the property, affairs, or government of any local government" must be by general law, subject to certain exceptions. Another part of that section gave 1ocal governments power to adopt and amend local laws not inconsistent with the provisions of the constitution or any general law relating to its property, affairs, or government. They also may legislate on any of the following subjects:

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

9. the wages or salaries, the hours of work or labor, and the protection, welfare, and safety of persons employed by any contractor or subcontractor performing work, labor, or services for it; and
10. the government, protection, order, conduct, safety, health, and well-being of persons or property therein.[97]

Disputes quickly arose over the scope of the powers that local governments had gained. Addressing the issue, Justice McFarland of the California Supreme Court said, "The section of the constitution in question uses the loose, indefinable wild words 'municipal affairs' and imposes upon the courts the almost impossible duty of saying what they mean."[98] Problems emerged even when the constitutional language spoke only to the empowerment question as, for example, the provision of the Washington Constitution conferring on "any county, city, town, or township" power to "make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws."[99] In a series of cases between 1901 and 1914, the Washington Supreme Court applied Dillon's Rule to this constitutional grant of powers. It announced that it would review charter provisions for their reasonableness; held that state regulation of a policy arena preempted local regulation; and refused to recognize that powers traditionally associated with sovereignty, such as eminent domain and taxation, were granted to localities.

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

> [I]f the legislature could be constantly prohibited from any interference with the so-called home rule charter adopted by the city so far as the same related to municipal affairs, this would substitute the interference of the judicial department of government for that of the legislative department, and every section of the charter and every ordinance must in time come before the courts in order to ascertain whether it related to a municipal affair only and if so whether subject to repeal or amendment by the state legislature.[100]

Simply put, charter cities would be freed from the tutelage of the state legislature only to find themselves subject to the guardianship of the state judiciary. In some instances, judicial home rule resulted, as in Ohio, where courts, on a case-by-case basis, exercised a legislative function of determining what was or was not a permissible power for local governments to exercise, leaving home rule cities in doubt as to the extent of their powers.[101] In others, such as New York, what resulted was a presumption of state responsibility that led to "a precipitous contraction of home rule powers."[102]

The Devolution-of-Powers Approach: The third approach to local home rule, setting out an area of devolved powers, seemed to avoid the difficulties inherent in delineating a constitutional division of powers between the state and local government. This devolved power provided local government with an area in which to operate freely, subject to the ultimate purview of the state legislature. Sometimes referred to as legislative home rule, the devolution of powers is most commonly associated with the model constitutional provision for home rule formulated in 1953 by Jefferson B. Fordham on behalf of the American Municipal Association's Committee on Home Rule.[103] The operative language of the provision states:

> A municipal corporation which adopts a home charter rule may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute. This devolution of power does not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent municipal power, nor does it include power to define and provide for the punishment of a felony.[104]

This home rule model represented a turning away from "the cross-checks and intersecting lines of divided responsibility" of the federal idea in favor of "a simple pyramid" of efficient, rationalized functional administration.[105]

The 1953 American Municipal Association formulation did not represent a complete abandonment of the search for a protected sphere of local autonomy. It did provide that "charter provisions with respect to municipal executive, legislative, and administrative structure, organization, personnel and procedure are of superior authority to statute."[106] Moreover, it squarely addressed the problem of state-mandated expenditures or programs by proposing that legislation requiring increased municipal expenditures would take effect, absent municipal consent, only on a two-thirds vote of the legislature or if the legislature funded the mandated increases.[107] These protective provisions are absent from the recommended local government article in the 1963 edition of the National Municipal League's Model State Constitution, indicating an even sharper retreat from a strong commitment to local immunity.[108]

The devolution-of-powers model has achieved considerable success. For example, both Missouri and Pennsylvania streamlined their constitutional home rule provisions (e.g., "a municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter, or by the General Assembly at, any time"[109]), and North Dakota's provision tracks the language of the Model State Constitution cited above.[110]

This home rule model makes clear that the state legislature has the authority to confer broad powers on local government units, thus precluding a challenge based on nineteenth century delegation-of-power doctrines. Language empowering home rule cities is drafted to leave "a charter municipality free to exercise any appropriate power or function except as expressly limited by charter or general statute." This eliminates the "strict constructionist presumption against the existence of municipal power" associated with Dillon's Rule.[111] It also strips state judges of the doctrine of implied preemption because a home rule entity's powers can be impeded only by express charter or statutory limits. The devolution-of-powers model seems designed almost exclusively with an eye to reducing the role that courts have played in mediating the division of power between state and local government.

New Jersey and Home Rule: The devolution-of-powers approach, however, has brought forth its own difficulties in state-local relations. Questions concerning administrative flexibility and entrenched rights in a state constitution are not fully developed. The New Jersey Constitution exemplifies one approach coping with some of these problems. That constitution has no local government article, with provisions pertaining to local government placed in the articles dealing with the legislative branch and taxation and finance. Three provisions illustrate the New Jersey approach.

First, the prohibition against local or special legislation regulating the internal affairs of individual municipalities and counties is qualified by an exception that allows such legislation to be enacted on petition by the affected governing body and by a two-thirds vote of the state legislature.[112] This provision relaxes the rigidity inherent in the distinction between internal affairs and matters of statewide concern. Flexibility, therefore, is permitted in the constitutionally prescribed division of powers by having both a concurrent majority of the local governing body and the state legislature participate in passing special acts of the legislature.

Second, the New Jersey Constitution provides guidance to policy makers on the reading of constitutional provisions empowering local governments. It states:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor: The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto and not inconsistent with or prohibited by this Constitution or by law.[113]

This "liberal construction" of local government powers counteracts the effect of Dillon's Rule and may produce a greater degree of functional autonomy than a more conventional constitutional grant of home rule. In 1973, for example, the New Jersey Supreme Court sustained a municipal rent control scheme under a statutory grant of authority to adopt such ordinances as the local governing body "may deem necessary and proper for the good government, order, and protection of persons and property, and for the preservation of the public health, safety, and welfare of the municipality and its in habitants."[114] The court thus upheld the municipal creation of a rent control board as a power necessary to carry out the regulatory purpose of a rent control ordinance, even where no statute existed authorizing municipalities to establish one. By contrast, a year earlier, the Florida Supreme Court strictly construed a home rule municipality's constitutional authority to "exercise any power for municipal purposes" when it overturned a similar ordinance.[115]

A third key constitutional provision, found in New Jersey's taxation and finance article, makes the delivery of certain services, notably a "thorough and efficient system of free public schools," a state responsibility.[116] This paragraph is read to mandate that the state create a funding scheme for public education that does not shift its financial burdens exclusively to local taxing jurisdictions.[117]

Local or Special Legislation: Prohibitions against local or special legislation, a mainstay of the state legislature's policy repertoire during the nineteenth century, received little attention during the twentieth century. Nonetheless, it may be time to review that neglect. For instance, although the recent elimination of local or special legislation from the South Carolina Constitution has been hailed as part of "the journey toward local self-government,"[118] others have viewed special legislation as "conducive to greater independence and expanded self-rule" and as an "essential means for ensuring flexibility and adaptability."[119] The framers of the Constitution of Virginia apparently thought so when they rejected the constitutional revision commission's recommendations to restrict the General Assembly's authority to devolve powers on local governments by special act.[120] The Virginia system apparently does deliver. In ACIR's index of city discretionary authority, Virginia cities ranked seventh overall. By comparison, such traditional bastions of home rule as Ohio and California placed eleventh and seventeenth, respectively.[121]

Interlocal Collaboration: Another significant response to emerging intergovernmental problems is represented by state constitutional rules governing interlocal collaboration. A 1987 ACIR report identified types of rules that enable local citizens may use to create and modify local governments. These enabling rules include:

1. rules of association that establish processes, such as municipal incorporation, that enable local citizens to create municipalities or other entities endowed with certain governmental powers);
2. boundary adjustment rules that enable local citizens and officials to alter the boundaries of existing units;
3. fiscal rules that determine local revenue raising authority; and
4. contracting rules that enable local units to enter into a variety of mutually agreeable relationships with one another and with private firms.[122]

The departure from conventional thinking called for by these rules casts new light on the significance of inserting into state constitutions such matters as dissolution and annexation, consolidation and separation, joint participation in common enterprises, interlocal cooperation, and intergovernmental relations, as is done in Missouri.[123] It also clarifies rules concerning the formation, operation, and dissolution of special districts, which are embedded in the local government article of the 1974 Louisiana Constitution.[124] Finally, this approach shifts the focus of attention from a preoccupation with conflict to a recognition of the pervasive collaboration through contractual arrangements that obtains in modern state and local government.[125]

Illinois and the Devolution-of-Powers Approach: The text of the local government article of the 1970 Illinois Constitution provides an interesting departure from the devolution-of-powers model. Article VII of the Illinois Constitution illustrates the complex kind of decision rules that must be supplied if the goal of entrenching the rights of local governments and local citizens is to be realized. These decision rules include:

1. the definition of entities eligible for home rule status;
2. the scope of powers afforded these home rule entities;
3. the interpretation of powers granted to them;
4. the basis for dealing with interlocal conflict and collaboration; and
5. the extent of state legislative control over the scope of home rule powers.

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

The complexity of these rules reflects not only the difficulty of coming to terms with the multifaceted roles that local governments play in the division of governmental responsibilities in a modern society but also the differentiated political culture that flourishes in Illinois. Counties, cities, villages, and incorporated towns in Illinois are eligible for home rule status. A self-executing grant of

home rule powers to certain counties and to municipalities with a population of more than 25,000 is subject to repeal by referendum. Otherwise, home rule status can be acquired only by referendum.[126]

In contrast to devolution-of-powers constitutions, the Illinois article distinguishes between several kinds of local autonomy: form of government and office holding, functional, and fiscal matters. A home rule unit can adopt, alter, or repeal its currently prescribed form of government subject to referendum approval. Home rule municipalities and home rule counties possess diverse powers with respect to the creation, manner of selection, and terms of office of local officials.[127] Under this article, " [a] home rule unit may exercise any power or perform any function pertaining to its government and affairs." What is pertinent to its government and affairs are defined expressly to include a copious grant of the police power "to regulate for the protection of the public health, safety, morals, and welfare" and "to license." This grant of power expressly includes the power to tax and to incur debt, attributes of fiscal autonomy without which home rule would be straitjacketed in practice.[128]

The Illinois Constitution also addresses and resolves the problem created by Dillon's Rule: How are decision makers to read the empowering text? The blunt answer is that "[p]owers and functions of home rule units shall be construed liberally." Counties and municipalities that are not home rule units "shall have only powers granted to them by law" plus expressly granted constitutional powers over form of government and office-holding, fiscal matters, and providing for local improvements and services. Limited purpose units of local government, such as townships, school districts, and special districts, "shall have only powers granted by law." In addition, the article prescribes rules for resolving conflicts between legislative enactments of home rule cities and home rule counties. It also is sprinkled with provisions aimed at facilitating interlocal cooperation by contract and power sharing.[129]

Finally, the article speaks to the neglected but pervasive question of state preemption of home rule powers. The Illinois home rule provision makes crystal clear that "home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the state's exercise to be exclusive."[130] There is no room for a doctrine of implied preemption in this language.

The express preemption question is dealt with generally as follows: "[T]he General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit." When the state chooses to assert a monopoly, a three-fifths supermajority is required to deny or limit a home rule entity's fiscal and other powers. Significantly, only two areas of home rule autonomy are protected against legislative limitation or denial; the power to add to the stock of local capital improvements by special assessment and the power to finance the provision of special services.[131]

Greater Fiscal Autonomy: A tilt toward local fiscal autonomy, proposed in the 1953 AMA proposal and highlighted in ACIR's studies, has come to fruition in recent amendments to several state constitutions concerning the proliferation of state mandates. The 1975 California provision requires the state to reimburse local governments if any new program or higher level of service cost is mandated.[132] Taken in the context of the taxpayer rebellion of the 1970s, the provision's primary objective is to guard against a potential "smoke and mirrors" device that would enable the state legislature to evade tax and spending limits by shifting costs to local governments. Nevertheless, an arguably unintended consequence of the reform creates a protected sphere of local fiscal autonomy. For example, the Missouri Constitution requires not only that the state fund "any new activity or service or any increase in the level of any activity or service beyond that required by existing law" but also that "the state cannot reduce the state financial proportion of the costs of any existing activity or service required of . . . political subdivisions."[133] The Missouri language thus substantially affects two common dogmas of state constitutional law; namely, that the state possesses virtually untrammeled power to impose duties and obligations on local governments; and that state funding of existing programs is a matter of legislative grace.

Conclusion

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

- the 1875 Missouri constitutional provision that broadly empowered one city, St. Louis, but created no meaningful barrier to state legislative interference with municipal matters;
- California's constitutional revision, on citizen initiative, to bar state legislative meddling with municipal affairs;
- New York's bill of rights on local governments;
- the American Municipal Association's model state constitution making the state legislature the ultimate arbiter of the scope of home rule;
- the Illinois Constitution marking the reemergence of complex rules for outlining the relationship between state and local government; and
- the New Jersey statutory home rule approach.