> Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

Analyzing Local Government Autonomy

The task of conferring "discretionary authority" on local governments requires a careful analysis of the components of local government authority. A report of the U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Measuring Local Discretionary Authority* (1981), will assist state constitution makers in addressing the range of issues involved. In this report, ACIR defined local discretionary authority as

> the power of a local government to conduct its own affairs—including specifically the power to determine its own organization, the functions it performs, its taxing and borrowing authority, and the numbers and employment conditions of its personnel.[12]

Examining these four dimensions of local government discretionary authority—structure, function, fiscal, and personnel—helps citizens and public officials get a clearer picture of local government autonomy and the trends affecting it. It enables the observer—whether trained in law, public administration, or political science-to organize and synthesize the otherwise unwieldy universe of state constitutional provisions, and court cases interpreting them, that bear on the question of local autonomy. The four categories of discretionary authority described in the ACIR report are reviewed in this section to determine their fruitfulness in serving as the basis for structuring the local government article of a state constitution.

Structural Autonomy

There are several elements that affect the degree of structural autonomy provided to local governments.

Barriers to the Enactment of Impermissible State Legislation

Autonomy in the sense of immunity from state legislative interference preceded affirmative grants of local initiative. Many early state constitutions, for example, made the filling of certain local offices the prerogative of local electors. The New Jersey legislature might define the contours of the office of County Sheriff, for instance, but the state constitution of 1776 required that the sheriff be elected by the inhabitants of the county.[13]

Many nineteenth- and early twentieth-century state constitutions sought to immunize local governments from state legislatures enacting local or special laws affecting local government structures and the duties of local officials. Pioneering provisions of the 1851 Indiana Constitution prohibited state regulation of the jurisdiction and duties of justices of the peace and of constables; the election of county and township officers and their compensation; and the opening and conducting of elections of . . . county or township officers and designating the places of voting.[14] Alabama's 1901 Constitution defined a local law as one "which applies to any political subdivision or subdivisions of the state less than the whole" in creating a similar enumeration of impermissible legislative enactments.[15]

It should be noted, however, that prohibitions against local or special legislation create only a permeable barrier to state legislative actions affecting local government decision-making structures. They reach only statutes that do not meet the constitutionally prescribed level of generality and uniformity. The legislature is ordinarily still free to classify local governments by population or some other general criterion. But in Rhode Island, the General Assembly has the power to enact general laws applicable to all cities and towns provided they do not affect "the form of government."[16]

Often, state constitutional provisions governing local or special legislation may provide for flexibility through local choice. For example, home rule governments in New York may opt out of the protection otherwise afforded by the constitutional ban on local or special laws on request of either a supermajority of its legislative body or its chief executive officer with a concurrent legislative majority.[17] The New Jersey Constitution permits private, local, or special laws affecting the internal affairs of a local government on petition of the governing body, with the approval of a supermajority of each house of the state legislature. The law becomes operative only if subsequently adopted by an ordinance of the governing body or a local referendum.[18]

Approval by the Local Electorate as a Check on the State Legislature

State constitutions are sprinkled with provisions that allow state legislative power over a variety of structural issues only with local electoral approval. In North Dakota, for example, the legislature must provide counties with optional forms of government, including the county manager plan, but no optional form may become operative without the approval of 55 percent of those

voting in a local election.[19] Local voters in Montana periodically must be offered an opportunity to review their existing local government structure.[20]

Several state constitutions contain rules requiring that fundamental changes in county government structure, such as consolidation, dissolution, and shifts in boundaries or county seats, must be approved by a majority of voters in each affected county.[21] And, in several states, the structural autonomy of the local decision-making process is protected by a provision forbidding the legislature from empowering "any special commission, private corporation or association" from performing "municipal functions."[22]

Local Voter Initiatives as a Counterweight to State Power

A more robust guarantee of voter choice is found in state constitutions that entrench not only the blocking power of the local referendum but also the power for citizens to initiate municipal or county legislation. The constitutions of Ohio, Oklahoma, and Oregon provide examples of this approach.[23]

Constitutional Restrictions on the Scope of Home Rule Authority

With regard to autonomy in the sense of initiative, no state constitutions limit the ambit of home rule power simply to matters of structure. The constitutions of sixteen states (California, Colorado, Florida, Georgia [cities only], Illinois, Iowa, Kansas, Louisiana, Maine, Michigan [counties only], Ohio, Oregon [counties only], Rhode Island, West Virginia, Wisconsin, and Wyoming) contain terms like "municipal affairs," "municipal matters," and "powers of local self-government," that would appear to convey discretion over the structure and methods of operation of local government.[24] This is confirmed in the case law of California, wherein matters concerning local elections, procedures for enacting and enforcing ordinances, forms of government (e.g., city manager, strong mayor, or weak mayor), and the establishment and operation of local, administrative bodies fall within the ambit of municipal affairs.[25]

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

Courts in several jurisdictions where a constitutional grant of home rule initiative is qualified by the adjective "local" or "municipal" have not been shy in holding that the subject matter in question is susceptible to redefinition as a matter of statewide concern when the state legislature has so spoken.[27]

The Louisiana Constitution guarantees structural autonomy by prohibiting the legislature from changing or affecting the structure and organization or the distribution of powers of a home rule entity.[28] The constitutions of Georgia (counties only), Michigan (cities only), New York, and Rhode Island have language that conveys power over matters concerning "property, affairs or government."[29] Maryland, Nebraska, Nevada, Oklahoma, Utah, and Washington each have constitutions that employ the term "its own government" to delineate the scope of local initiative.[30] As in the case of texts using the arguably broader terms of municipal affairs or local self-government, the scope of structural autonomy afforded will be subject to the vagaries of judicial interpretation as well as to the preemptive effect of general state statutes.

The Oregon and Texas constitutions grant eligible cities comprehensive power to formulate the contents of their home rule charters, limited only by the preemptive powers of the legislature.[31] Eleven states (Alaska, Connecticut, Massachusetts, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Pennsylvania, and South Dakota) embrace the devolution-of-powers model, making the extent of powers afforded local governments dependent on state enabling legislation, which may or may not confine the scope of structural autonomy.[32]

Four state constitutions speak unambiguously to the issue of structural initiative. The Colorado Constitution empowers home rule counties to provide for the organization and structure of county government consistent with state statutes.[33] Tennessee authorizes each home rule entity to provide for "the form, structure, personnel and organization of its government."[34] South Carolina grants the power to frame a charter "setting forth governmental structure and organization."[35] But that power is qualified by a provision expressly limiting the authority of South Carolina home rule entities to set aside "the structure and the administration of any government service or function, responsibility for which rests with State Government or which requires statewide uniformity."[36]

Finally, the South Dakota document achieves clarity on the issues of initiative and immunity by stipulating that "[T]he charter may provide for any form of executive, legislative and administrative structure which shall be of superior authority to statute, provided that the legislative body so established be chosen by popular election and that administrative proceedings be subject to judicial review."[37]

Geographic Reach of Local Government Powers

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

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

Functional Autonomy

Government is not simply a question of form and structure. Functional autonomy encompasses the power of local government to exercise the police powers. The police powers are broadly defined as providing for the safety; preserving the health; promoting the prosperity; and improving the morals, peace, good order, comfort, and convenience of the locality and its inhabitants.

Current Constitutional Approaches
A study of early constitutional home rule provisions indicates that the power to create a charter "for its government" was granted to local governments along with the power to regulate, and the power to provide services.[42] For example, the Michigan and Ohio constitutions resolved the debate over municipal ownership of public utilities by expressly permitting it.[43]

The Bill of Rights provision of the local government article of the New York Constitution includes a compendious grant of regulatory authority over "the government, protection, order, conduct, safety, health and well-being of persons or property," as well as an express power to acquire, own, and operate transit facilities.[44] Under the Florida Constitution, home rule municipalities "shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services."[45]

Local regulation of private conduct may, of course, be problematic in the sixteen states that employ a qualifying adjective like "local" or "municipal" in conveying discretion to local governments. Thus, a home rule city's power to enact a rent control ordinance was struck down in Florida but sustained in California.[46] In ten states adopting the devolution-of-powers model, the scope of regulatory authority is limited by the charter, state law, or the constitution itself.[47] Home rule regulatory powers are subject to the preemptive effect of state statute in these ten jurisdictions. In California and other states that provide concurrent powers of the state with their local governments, home rule regulatory powers are subject to preemption if the matter in conflict is of statewide concern.[48]

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

Authority to Provide Service

States have authorized specific functions as responsibilities that local governments may or must undertake. Oklahoma and Arizona empower municipal corporations to "engage in any business or enterprise" that may be engaged in by the private sector.[49] The Arizona Constitution vests special purpose service provision districts "with all the rights, privileges, benefits . . . immunities and exemptions" afforded Arizona municipalities and political subdivisions.[50] Home rule units in South Carolina can undertake to provide gas, water, sewer, electric, and transportation services if the local electorate consents.[51] The Illinois Constitution establishes only two unlimited powers of home rule cities: the power to make local improvements by special assessments and the power to impose taxes for the provision of special services.[52]

Intergovernmental Relations

A survey of the constitutions of California, Florida, Illinois, Missouri, New York, Ohio, Pennsylvania, and Texas reveals contemporary variations in state constitutional law on intergovernmental relations. The Ohio text, unrevised since 1912, is silent on this topic. A series of ad hoc amendments to the Texas Constitution permits specific collaborative projects between counties.[53] The California Constitution speaks only to the issue of whether a county may perform municipal functions.[54] But the California Supreme Court assured a broad competence to collaborate when it characterized a state statute providing for joint exercise of powers as dealing with matters of statewide concern that could, therefore, lawfully override conflicting charter provisions.[55]

The New York Local Government Bill of Rights confirms that local governments have the power, as authorized by the legislature, "to provide cooperatively, jointly or by contract any facility, service, activity or undertaking which each local government has the power to provide separately."[56] Other states have broadly phrased language permitting collaboration in the provision of public improvement, facilities, and services.[57] The Illinois provision is notable in that it extends local government units and school districts the power to "contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance."[58]

Thus, state constitution makers are faced with a number of options in considering the issue of interlocal collaboration. These choices range from silence, to specific and limited authorization, to general grants of authority to collaborate with other governmental entities, and, finally, to the permissive Illinois approach that includes collaboration with the private sector as well. The Illinois model is consistent with the broadest grant of home rule authority, but carries with it a policy judgment concerning the controversial question of privatization of governmental functions.

Fiscal Autonomy

Fiscal autonomy, whether in the sense of initiative or immunity, traditionally has not been considered a necessary component of home rule.[59] An ACIR study reveals that, for local government, financial management is a realm of constraint.[60] Forty-eight states, for example, impose debt limits on cities, forty on counties. Other detailed restrictions cover referendum requirements (forty states); maximum duration of bonds (forty-one states); and interest ceilings (twenty-four states). Thirty-eight states impose property tax limits on cities, and thirty-five impose them on counties. Forty-eight states establish the method of property tax assessment for local governments.

Only a handful of states have provisions that directly address the question of fiscal initiative. Nine state constitutions expressly provide autonomy with respect to borrowing and taxation.[61] Tennessee and Iowa expressly preclude additional taxing authority. Massachusetts and Rhode Island do so for both borrowing and taxation.[62]

Vaguer constitutional grants of power couched in terms like "municipal matters" or "local self-government" are unsparingly criticized in the legal literature.[63] Yet such provisions of the California, Missouri, Ohio, and Oregon constitutions have been interpreted by courts to empower home rule units to diversify their portfolio of revenue generating measures beyond the property tax.[64] Despite the success in these four states, courts did not approve municipal income taxes in two states with similar constitutional language, Missouri and Colorado.[65] Also, taxation, like other exercises of home rule powers in states giving substantial local autonomy, even if somewhat vaguely stated, may be preempted by statute on the grounds that the subject is of statewide concern.[66]

The only area of fiscal policy in which some state constitutions have recently constrained state government power over local government units concerns unfunded mandates. The operative definition of unfunded mandates varies from state to state. The New Hampshire Constitution provides a good example:

> The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the legislative body of the political subdivision.[67]

Michigan not only prohibits the state from requiring new or expanded activities without full state financing but also bars both reducing the proportion of state spending in the form of aid to local governments and shifting the tax burden to

local governments.[68] A less sweeping approach is found in Tennessee and Hawaii provisions that require sharing between the state and its political subdivisions.[69]

Antimandate policies entrenched in fifteen state constitutions aim at strengthening accountability for and transparency in state decision-making by linking program creation and expansion to state funding.[70] Opponents stress the loss of flexibility in dividing and funding programmatic responsibility.

Personnel Autonomy

ACIR also delineates the scope of personnel autonomy.[71] Personnel matters include:

1. the hiring, promotion, discipline, and termination of public employees;
2. civil service and the merit system;
3. levels of compensation and entitlement to fringe benefits, such as pensions;
4. collective bargaining; and
5. conflict-of-interest requirements, disclosure requirements, and restrictions on partisan political activity.

This area annually produces a flood of local controversies, few of which turn for their resolution on the home rule status of the public employer.

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

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

Pension and Benefits
Public employee pension and benefit rights also may be protected by an express provision of the state constitution or a judicial interpretation of a provision forbidding the impairment of contracts.[72] In Florida and New Jersey, public

employees are constitutionally guaranteed the right to organize.[73] In Illinois, financial disclosure by public employees and officials is mandated by the state constitution; in California, however, the extent of disclosure by public employees is limited by their state constitutional privacy rights.[74]

Merit Systems
New York became "the first state to constitutionalize a merit system of civil service employment" in 1894.[75] The New York provision, like that in Ohio's constitution, applies to both the state and its political subdivisions.[76]

Limited Immunity
The most recent state to entrench local autonomy over personnel matters in its constitution is Louisiana. Its 1974 constitution renders the appointment and functioning of city civil service commissions impervious to state legislative control.[77] The legislature is also forbidden from enacting laws mandating Aincreased expenditures for wages, hours, working conditions, pension, and retirement benefits, vacation or sick leave benefits of political subdivision employees" unless the governing body of the affected entity approves or the state legislature appropriates and provides the necessary funds.[78]

Implementing Local Government Autonomy

Organizing State and Local Government Relations: Dillon's Rule to Illinois Home Rule (1868–1968)

Dillon's Rule
The legal doctrine known as "Dillon's Rule" emphasizes the legal subordination of cities to state government. Although some observers believe this doctrine developed only after the Civil War,[79] much of what became Dillon's Rule apparently derives from a line of Massachusetts cases decided before 1820 that elaborated a theory concerning the juridical subordination of corporate entities to the sovereign that is rooted in medieval law.[80] The rule—named for its author, Chief Justice John Dillon of the Iowa Supreme Court—was firmly established in a landmark case in 1868 and ultimately adopted in nearly every state. Dillon wrote:

> In determining the question now made, it must be taken for settled law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable;

> fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.[81]

Dillon refined his views in subsequent editions of his treatise on the law of municipal corporations, writing:

> The extent of the power of municipalities, whether express, implied, or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable, as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or fair, reasonable, substantial doubt as to the extent of the power is to be determined in favor of the State or general public and against the State's grantee. The rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which grant franchises, or rights of that nature, or which may result in public burdens, or which, in their exercise, touch the rights to liberty or property, or, as it may be compendiously expressed, any common-law right of citizen or inhabitant. . . . The rule of strict construction does not apply to the mode adopted by the municipality to carry into effect powers expressly or plainly granted, where the mode is not limited or prescribed by the legislature, and is left to the discretion of the municipal authorities. In such a case the usual test of the validity of the act of a municipal body is, whether it is reasonable, and there is no presumption against the municipal action in such cases.[82]

It is difficult to overestimate the impact of Dillon's Rule on the shaping of state and local government relations. The rule has been applied to the interpretation of both statutory and constitutional grants of power to local governments. It is so deeply entrenched in American juridical culture that more than a dozen states have abolished or modified Dillon's rule by express provisions in the state constitution. Moreover, the initiative stifling consequences of Dillon's Rule provided a grievance that energized the early advocates of municipal home rule.

NINETEENTH-CENTURY STATE CONSTITUTIONAL RESTRICTIONS ON STATE SUPREMACY

The Indiana Constitution of 1851 apparently contained the first state constitutional provision prohibiting local or special legislation. Although the provision did not exclusively address the relationship between the legislature and

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