Defining Statewide vs. Local Concerns: Can It Be Done And Is It Necessary?

A Supplement to ACIR'S 1987 Report on
Home Rule in Connecticut: It's History, Status and Recommendations For Change

Connecticut Advisory Commission
on Intergovernmental Relations

May 1989

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

The Advisory Commission on Intergovernmental Relations (ACIR) is a 25-member legislative branch agency of the State of Connecticut, created in 1985 to study system issues between the state and its local governments, and to recommend solutions as appropriate. The membership is designed to represent the state legislative and executive branches, municipalities and other local interests, and the general public.

The role of ACIR, as contained in Section 2-79a of the General Statutes, requires that the commission shall: (1) serve as a forum for consultation between state and local officials; (2) conduct research on intergovernmental issues; (3) encourage and coordinate studies of intergovernmental issues by universities and others; and (4) initiate policy development and make recommendations to all levels of government.

The commission is served by a two person staff, including an executive director and a research analyst. The staff, which began in the Fall of 1986, is located at 80 Washington Street, Hartford.

COMMISSION MEMBERS

David B. Walker, Ph.D., Chairman
Rep. Geri W. Langlois, Vice-Chairman
Rep. Alice W. Meyer, Vice-Chairman

Hon. John B. Larson, Senate President Pro Tempore
Hon.Richard J. Balducci, Speaker of the House
Hon. Reginald J. Smith, Senate Minority Leader
Hon. Robert G. Jaekle, House Minority Leader
Hon. Anthony V. Milano, Secretary, Office of Policy and Management
Hon. Carrie S. Perry, Mayor of Hartford
Hon. Sebastian Garafalo, Mayor of Middletown
Hon. Frank J. Esposito, Mayor of Norwalk
Hon. George E. Hill, Mayor of Mansfield
Hon. Russell B. Stoddard, First Selectman of Woodbridge
Hugh I. Manke, Corporation Counsel of Hamden
Joel Cogen, Esq., Connecticut Conference of Municipalities
Edwin V. Selden, Office of Policy and Management
William M. Grover, Connecticut Association of Boards of Education
John C. Mulrain Ed.D., Connecticut Association of School Administrators
Regional Planning Association of Connecticut
Margaret W. Becker, Public Member
Marie T. Larson, Public Member
Lewis B. Rome, Esq., Public Member

Staff

David W. Russell, Executive Director
Brian E. West, Research Analyst

Table of Contents

INTRODUCTION

In January, 1987, the Connecticut Advisory Commission on Intergovernmental Relations (ACIR) submitted to the General Assembly a report entitled Home Rule in Connecticut: It's History, Status and Recommendations for Change. That report was undertaken to develop a better understanding of local governmental powers and responsibilities. The "Home Rule" report concentrated on the basic philosophies of home rule and a determination of the current status of state-local legal relations in Connecticut.

This study is to be a supplement to that earlier report, aimed at developing the issue of "statewide vs. local" concern as recommended in the "Home Rule" study. While the "Home Rule" report concentrated on Connecticut and its basis for local powers, this study will be focused on the other 49 states. We have attempted to determine if other states have a working definition of statewide vs. local concern, and the impact that court decisions have had on these powers. This report also examines the general treatment of local governments by their state constitutions. Aside from the individual State Constitutions, the works of experts in the field were also examined in order to add their perspectives on this issue. Since Connecticut does not have counties we did not examine any constitutional provisions for counties.

Method of Study

Eleven states, selected because they are generally considered to grant broad discretionary powers to their local governments, were studied in some depth. The constitutions of each of these states were examined in detail and compared to understand the relationship between the constitution and the level of discretion allowed to local governments. In addition to the constitutions themselves, it became necessary to review the major court interpretations of the relevant constitutional provisions in order to more fully understand the state-local legal relationship. Once the constitutions and relevant court cases were examined, synopses of each state's characteristics were prepared and sent to different public and private concerns in those states to verify that our assessments are accurate.

We also made a brief examination of the constitutional provisions of the remaining states to determine how they treat local governments.* Finally, we examined how this subject was treated in selected literature, the intent being that background from "experts" might give a valuable perspective on the issue.

One meaningful limitation on the scope of the study which should be noted is that we purposely avoided examining the state statutes on municipal corporations. We limited the scope of the study to examining constitutions and court decisions, consciously eliminating a systematic review of state statutes for two basic reasons. First, a meaningful examination of the statutes of forty-nine states would involve an enormous time commitment, and second, that commitment would be questionable given the opinions expressed to us in our research. Basically, we found that states have not geared their approaches to local government powers along the lines of "bright-line" definitions of statewide vs. local concerns. In addition, most practitioners and "experts" are of the opinion that such definitions are not particularly helpful, although, as we shall see, many have tried to do just that. It became clearer as the research continued that the statutes can have the greatest impact on the discretionary power of municipalities, but that impact is generally created on an issue by issue basis rather than any single sweeping definition. Statutes may be an appropriate focus of a future study.

---

* Mississippi has no section in its Constitution concerning local municipal governments.

SUMMARY

The overall objectives of this report are a stronger knowledge of local powers, the extent to which constitutional provisions affect those powers and the impacts of court interpretations on those powers. One thing that becomes clear from the court cases is that, for the most part, states are given the upper hand in court cases with local governments. Even in those states which call for a liberal construction of local powers, the courts have decided (in most cases) that state concerns override local concerns. With certain exceptions, there are three questions or tests that courts try to apply to these cases: a) the public vs. private test (powers of municipalities which are governmental or public are deemed to be matters of statewide concern, while it's proprietary or private powers are a local concern); b) the paramount interest test (those situations in which the interest of the state dominates); and c) the impact test (those situations which affect the local community only).[1]

Most states, including those with strong home rule, have provisions that stipulate that municipalities can have any power for their local self-government which does not go against state law or constitution. The main point, however, is that no state constitution sets up parameters for what are strictly state or local concerns. In the past, generally anything that would affect the state as a whole would have been interpreted as a statewide concern, while anything having to do with the governing of a municipal government would have been considered a local concern. But a bright-line distinction is not easily made in the context of recent court decisions. According to the various responses we received from our inquiries not only is this true, but surprisingly the differentiation between state and local issues is not a real concern with many government officials any longer. The respondents made it clear that responsibility, in relation to ability to pay and local government discretion are in fact the real concerns. All states authorize their Legislatures to pass legislation affecting municipalities, most often by general laws which affect all municipalities alike, but in some cases, by special act. It is the issue of local discretion for municipalities which is the focus of this study.

STATES OF STUDY

The Commission studied the annotated constitutions of eleven states (Alaska, Illinois, Maine, Maryland, Michigan, Missouri, Montana, New York, North Carolina, Pennsylvania and Texas), states which are generally considered to allow considerable local discretion. We were looking for a clear distinction between, or definition of, statewide vs. local concern. Neither the municipal powers section(s) of their constitutions, nor the relevant court cases delivered an effective definition of that issue. Six of these states (Maine, Michigan, Montana, New York, Pennsylvania and Texas) have implied powers for most of their local governments, which means that they are not dependent on enumerated powers to specifically define their roles. None of these states had a general definition for "statewide" vs. "local" concern, although all of the states had court cases which stated that the purpose of home rule is to give local governments some autonomy or self-government. This autonomy has been generally interpreted to mean that states could not pass legislation affecting any one community, that it had to be a general legislation that affected two or more communities or all local governments of the same classification. The following are analyses of the eleven states.

---

[1] Mary Howard research memorandum, Robinson and Cole, pp. 1-3.

Alaska Constitution[2]

Basic Grant of Power

Article X of the Alaska Constitution provides two layers of local government; boroughs and cities. All cities are incorporated, some in a manner limited by specific state law, while those designated as first class cities can adopt home rule charters in which they can exercise all legislative powers not prohibited by law. The constitution also specifies the governing bodies of non-charter local governments. Courts are mandated to give a broad construction to local government powers.

Court Interpretation

The local government section of the Alaska Constitution is a general and direct statement of local government powers. This has been beneficial to local government because the courts seem to have sided with them on questions of the use or exercise of local powers. In Lien City of Ketchikan Sup. Ct. Op. No. 146 the court found that "the meaning of this section is that, where a home rule city is concerned, the charter and not a legislative act is looked to in order to determine whether a particular power has been conferred upon the city. It would be incongruous to recognize the constitutional provision stating that a home rule city 'may exercise all legislative powers not prohibited by law or by charter', and then to say that the power of a home rule city is measured by a legislative act". From other court cases, notably Johnson v. City of Fairbanks(1978) , Jefferson v. State (1974) and Macauley v. Hildebrande (1971), the decisions turned on whether local governments were prohibited from exercising a certain power in that field, and whether it was a statewide or local concern. In all cases, however, the courts clearly appear to be giving local governments the benefit of broad latitude.

Illinois Constitution[3]

General Grant of Power

Through Article VII of the Illinois Constitution, all municipalities with a population of 25,000 or more are automatically considered home rule units, while all other municipalities can elect, by referendum, to become home rule units. Non-home rule counties, municipalities and other units of local government have only those express powers granted by the constitution and law, whereas home rule governments can exercise any power relating to their government and affairs with a minimum number of expressed powers. The courts have also been mandated to give a liberal construction to the powers and functions of home rule units.

The State recognizes many layers of government, including; counties, cities, villages, incorporated towns, townships, special districts and other units of local government, but only counties and municipalities (cities, villages and incorporated towns) can be home rule units. While most of Article VII is general in nature, Section 6, which is concerned with the powers of home rule units, is more involved. Home rule governments are given what seems to be broad powers and authority in all local areas, which include but are not limited to, public health, safety, morals and welfare.

---

[2] Alaska Const. art. X

[3] Illinois Const. art. VII.

Key Unique Feature

Section 6 further supports local authority by requiring a 3/5 vote by the General Assembly to change or deny a power or function of a home rule unit. It also stipulates that if the State is to move into an area previously belonging to the municipality it must explicitly state its degree of exclusive preemption or the local authority will remain in existence.

Court Interpretations

Although parts of Section 6 would seem to contradict the broad authority of home rule governments, this section hasn't confused the courts which have clearly stated the strong position of these governments. Quillici v. Village of Morton Grove (1982) stated that "this section establishes presumption in favor of municipal home rule"., Other major cases which would seem to support this position are People's Gas Light & Coke Co. v. City of Chicago (1984), Illinois Liquor Control Commission v. City of Joliet (1975), and City of Chicago v. State & Mun. Teamsters (1984). It would seem to be that, even with the potential for State intervention, home rule governments have a superior position in areas of local government and affairs.

Maine Constitution[4]

Basic Grant of Power

Much like Connecticut, the Municipal Home Rule section of the Maine Constitution is very short and is open to a broad range of interpretation. Article VIII states that municipalities can amend their charters in any way they choose, so long as the amendment is local and municipal in character and is not prohibited by the constitution or general law. Nowhere in the constitution, however, is there any mention of any general grant of municipal power to create a charter for local self-government. The only reference is in Section 14 of Article IV, which provides for the formation of municipal corporations by general laws.

Court Interpretations

Municipalities in Maine are given a constitutional grant of power to effect anything that is local or municipal in nature so long as it doesn't conflict with the Constitution or general law. This would seem to be supported by the 1981 case of Bird v. Town of Old Orchard Beach, where the courts ruled that when "no constitutional, statutory or charter provision explicitly prohibited the town council from re-passing a bond issue, substantially identical to one which had been rejected by the electorate at a referendum election, the council was vested with such power".

Other court cases have declared that more of an expressed power granted by the General Assembly is necessary for municipalities to act. The Schwanda v. Bonney decision in 1980 stated that "municipal corporations, as public bodies, may exercise only such powers as legislature has conferred upon them by law or which may have been granted to them directly by Constitution". This was supported by Spain v. City of Brewer in 1984 when the courts again ruled "municipal corporations have no inherent authority to interfere with, or to regulate use of, private property, but may, exercise only such powers as have been granted to them directly by State Constitution or which legislature has conferred on them by statute". It seems to us that despite the broad language used in Article VIII to describe the local discretionary powers available to municipalities, without a description or definition of what a municipal concern is,

---

[4] Maine Const. arts. IV and VIII.

the courts will continue to side with the General Assembly to the limitation of local governments.

Maryland Constitution[5]

Basic Grant of Power

The Maryland Constitution, as it regards local government, is broken down into three categories, one each regarding the City of Baltimore, counties and other municipal corporations. It would appear from a reading of the sections concerned with the City of Baltimore and counties that neither have much constitutional local discretion. Section 9 of Article 11 makes it very clear that Baltimore is under legislative control, while the express powers mentioned in Section 2, Article 11-A delineate the areas in which those counties which have adopted their own charters have the authority to enact local legislation. By contrast, however, this Article also prevents the legislature from enacting local laws for charter counties, but ensures that they must enact general laws which affect all counties in a similar manner.

Article 11-E is concerned with all other municipal corporations. Among other things, it provides for home rule, classifies municipal corporations by population, and prohibits the General Assembly from incorporating municipalities by special charters. This section allows municipalities to form their own charters concerning organization, government and local affairs. The constitution, however, reserves the right of the General Assembly to, by general legislation, enact laws affecting the affairs of local or municipal government when it deems it necessary.

Court Interpretations

It would seem that municipal corporations are the only one of the three categories that have some autonomy in local matters. There are certain court cases that would tend to support this. In Mayor of Baltimore v. Gorter 1901 the courts found that, except insofar as the Constitution forbids, the city, (Baltimore) like the counties, is subject to legislative control". Although earlier cases, like Hitchins v. Mayor of Baltimore 1955 and Mayor of Baltimore v. Sitnick 1969, tended to ensure the power of the General Assembly to interfere in local affairs, more recent cases seem to emphasize the municipalities' role in this process. Both the case of Birge v. Town of Easton 1975 and the case of Campbell v. Mayor of Annapolis 1980 ruled that the purpose of Article 11-E was to grant municipalities the power to run their own local affairs.

Michigan Constitution[6]

Basic Grant of Power

Michigan has one of the most detailed and complex constitutions of those which were examined for this study. Article VII has 34 sections covering everything from parks, boulevards and cemeteries to highways and public utilities. For our purposes, however, the most relevant sections are 17-22 and 32-34. There is an implication within Section 22, which authorizes cities and villages to adopt charters for their own self-government, that local governments have a general grant of power or authority to act on anything not restricted by the constitution or law in areas of local or municipal concern. As in other states, though, there does not seem to be a clear definition, or list, of what are local concerns as opposed to those of a more statewide concern.

---

[5] Maryland Const. art. XI.

[6] Michigan Const. art. VII.

Michigan has a multi-layered local government system with the constitution recognizing, with differing levels of autonomy, four distinct governments: counties, townships, cities and villages. By far the charter cities and villages have the larger amount of local discretion, with non-charter local governments having only those powers that are provided for by the legislature. One of the significant features of this Constitution is that it instructs the courts in Section 24 to give a broad or liberal reading to all statutes concerning local governments.

Court Interpretations

Even with the stipulation in Section 24, the courts do not seem to be giving a broad construction to local government powers. On the one hand, there are a number of cases that support local governments, including Marxer v. City of Saginaw, 270 Mich. 256; Veldman v. City of Grand Rapids, 275 Mich. 100; Dooley v. Detroit, 370 Mich. 194; and People v. Vickery, 69 Mich. App. 183. All of these cases rule that municipal authorities have the power to exercise their discretionary duties in matters of local municipal concern so long as their action was not contrary to law or sound public policy. There are, however, just as many that support a narrower construction by stating that home rule does not prohibit the Legislature from enacting laws on municipal matters. These include; Local Union #876, Int'l Brother Elec. Workers v. State Labor Mediation Bd., 294 Mich. 629, Bullinger v. Gremore, 343 Mich. 516, and Builders Ass'n v. Detroit, 295 Mich. 272. A reasonable conclusion is that, even with the instruction for a broader construction towards the local governments, the courts continue to side with the states in controversial areas dealing with state-local power relationships.

Missouri Constitution[7]

Basic Grant of Power

The local government Article of the Missouri Constitution is the longest (57 sections) and most detailed of all the constitutions we examined for this study. The Article covers all aspects of county and municipal powers, along with a separate section on the County and City of St. Louis. As in most home rule states, Missouri has two types of municipalities, those whose organization and powers are specifically defined by the General Assembly and those with home rule charters.

Missouri allows any city with a population of 5,000 or more, or any incorporated city, to adopt its own charter. Any charter city, in addition to these home rule powers, also has all local powers conferred by statute. Municipalities with charters have implied powers and can exercise any power not denied them by constitution or law. The constitution is very general on the subject of general local government powers but contains numerous specific financial limitations on municipalities.

Court Interpretations

It has been left to the courts to decide whether an issue is of statewide or local concern and there are many cases which have dealt with that issue. Examples of this are School District of Kansas City v. Kansas City (1964) which stated that charters must give way to state law on matters of statewide concern, and Grant v. Kansas City (1968) which decided that in matters of municipal concern, city charters would supersede statutes. The 1984 case, State ex inf. Hannah ex Rel. Christ v. City of St. Charles appears to be definitive in finding "Under this section for home rule charter cities, even in the absence of an expressed delegation by the people of a home rule

---

[7] Missouri Const. art. VI.

municipality in their charter, the municipality possesses all powers which are not limited or denied by the Constitution, by statute, or by the charter itself".

Montana Constitution[8]

General Grant of Power

Montana recognizes two types of incorporated municipalities; those with self-government powers and those without. For those cities and towns without self-government charters, powers are provided by express state law, while self-government municipalities are permitted to exercise any power not expressly prohibited by the constitution or law. In all cases of incorporated municipalities the courts have been directed (in Section 4 of Article 11) to give a broad and liberal construction to the powers of local governments.

The section of the constitution concerned with local governments is general in nature, but specific enough to differentiate forms of government and their powers. It recognizes two layers of local governments; counties, and cities & towns. One unique feature of the constitution is contained in Section 9, where it mandates a review, within four years of ratification of the constitution, by all local governmental units of their structures and the development of an alternative form of government to be voted upon by the electorate. It further mandates that each local government conduct a referendum vote every 10 years on whether the local government structure should be studied.

Court Interpretations

Although the language in the constitution does not address the issue of statewide v. local concern, the courts have touched on it in several major decisions. Both USMFG. & Distrib. Corp. v. Great Falls (1976) and Billings Firefighters Local 521 v. Billings (1985) were decided on the issue of the expanded powers of self governing municipalities and whether they overstepped their powers by acting in areas already covered by state law. In both cases the local ordinances were overturned, however, the courts did emphasize that these municipalities are only limited by the constitution, law or their own charter. This was confirmed in the 1982 case, Tipco Corp. v. Billings, where the courts found that a city possessing self governing powers may exercise any power not prohibited by the constitution or law.

New York Constitution[9]

Basic Grant of Power

The New York Constitution has two articles directly dealing with local governments. Article 8 is concerned with local finances and Article 9 is concerned with the powers of local governments. Article 8 is very specific on debt and taxation limits and clearly establishes the superiority of the Legislature over local governments in fiscal matters. Article 9, in contrast, is considerably more general in establishing the powers of local governments.

All local governments are allowed to form their own legislative bodies and adopt laws as part of a general bill of rights for local governments. These powers are extended in Section 2 of Article 9 which grants to all local governments home rule powers and exclusive rights in matters of property, affairs and government, as long as they don't conflict with the Constitution or law.

---

[8] Montana Const. art. XI.

[9] New York Const. arts. VIII and IX.

Local governments can act in areas not concerned with their property, affairs and government, but the state reserves the power to restrict any such act. The courts have also been instructed to give a broad interpretation to the powers of local governments.

Unique Features

There are two unique features in the Constitution. For one, no power granted to local governments (which consist of counties, cities, towns and villages) can be denied or diminished in any way without the passage of legislation in two consecutive regular sessions of the Legislature. Also, the Legislature is prohibited from acting by special law except by request of 2/3 of the legislative membership representing the specific local government or on request by its chief executive officer with concurrence by the legislative membership described above, and, except for New York City, an emergency act by the governor with the concurrence of 2/3 of the Legislature.

Court Interpretations

Despite the language of the constitution, a majority of the court cases have been decided in favor of the State on the basis that the issues were of statewide concern (Kelley v. McGee, 1982) or that municipal corporations, by nature, are subservient to the State (People v. Kearse, 1968 and Ames v. Smoot, 1983). There have been cases, however, where the courts have ruled in favor of the local governments based on a broad grant of power, notably Weber v. City of New York (1959) and Krolick v. Lowery, (1969). It is rare, though, even with a constitutional provision calling for a broad interpretation of local powers, that the courts base a favorable ruling for a municipality on the constitutional broad grant of powers for local governments. It is more normal for the courts to have decided, as in Carparco v. Kaplan,.(1963) based on one specific issue of local concern.

North Carolina Constitution[10]

Basic Grant of Power

Article VII of the North Carolina Constitution provides a very brief basis for local governmental powers. Basically, the state does not provide home rule for its municipalities. The General Assembly is authorized to provide for the organization, government and boundaries of all governmental subdivisions and can also grant them certain other powers and duties. It can only be assumed that the Legislature has adopted a very liberal grant of powers, which accounts for North Carolina municipalities being considered to have a large measure of local discretion.

Court Interpretations

The fact that municipalities have only those powers expressly granted to them by the General Assembly is supported by the court cases. In Town of Grimesland v. City of Washington (1951) the courts concluded that "Municipal corporations are instrumentalities of the state for the administration of local government. They are created by the General Assembly under the general authority conferred by this section. They have such powers as are expressly conferred by statute and those necessarily implied therefrom". There are other cases, including In Re Incorporation of Indian Hills and Rhodes v. City of Asheville which support that position. In the latter case, the court decided that the "authority of cities and towns as instrumentalities for the administration of local government may be enlarged, abridged, or withdrawn entirely at the will

---

[10] North Carolina Const. art. VII.

or pleasure of the legislature". It would seem from the constitution that municipalities are dependent on the General Assembly for all local authority.

Pennsylvania Constitution[11]

Basic Powers Authorization

Article IX of the Pennsylvania Constitution has divided its municipalities into two groups: non-charter and charter governments. The non-charter municipalities, as stated in Section 1 of this Article, have only those powers provided by the General Assembly, while the charter, or home rule, municipalities seemingly have implied powers. Home rule governments can exercise any power or function not denied them by the constitution, statute or home rule charter.The constitution also allows for the municipalities to adopt an optional form of government, as provided for by law. The language used in the constitution seemingly indicates that, at least for charter governments, municipalities have a large amount of discretion in the organization and operation of their governments.

Court Interpretations

Several court cases strengthen the role of the legislature, including both non-charter and home rule municipalities. For non-charter governments there is no question as to the controlling authority. The 1982 case of Mariott Corp. v. Board of Assessor Appeals of Montgomery County decided that "as a creature of the state, a municipal corp., absent home rule, has only those powers granted to it by the General Assembly". However, even for home rule municipalities the court has ruled in favor of the legislature. An example of this is Comm. v. Cabell(1962) where the courts found that "Limiting grant of power to city to extent that General Assembly could legislate in reference to cities of that class, and because of subordinate position of city, home rule city had no power in amending city charter beyond that possessed by Legislature to enact law dealing with the city". Any trend that exists among court decisions is in the direction of more legislative power and away from local government power.

Texas Constitution[12]

General Grant of Power

Texas has two classifications of charter cities and towns. Those municipalities with populations up to 5,000 are to be chartered according to general laws, while those municipalities with populations over 5,000 can adopt their own charters consistent with the Constitution and law. There are two main differences between the two classes, one being that the general law chartered towns are prohibited from adopting the commission form of government, but the more important difference is that while municipalities of 5,000 or less can only do what the general laws allow, home rule municipalities can do anything that they are not specifically prohibited from doing.

Although the general powers sections of the Constitution are not very detailed, the Constitution is specific on the subject of taxes. Among other financial restrictions, Article 11 forbids municipalities from levying or assessing taxes, unless authorized by law or their charters. There is no mention of statewide or local concern within the article, but it is implied by sections 7 and 8 concerning the construction of sea walls that, for those local governments,

---

[11] Pennsylvania Const. art. IX.

[12] Texas Const. art. XI.

public safety is a statewide concern. However, these are the only two issues (taxation and sea walls) that approach implying some type of distinction between statewide and local concern.

Court Interpretations

It would seem from the language of the Constitution that home rule communities in Texas would have a goodly amount of freedom from state legislative control, but that is not the reality. The fact that the Constitution allows the Legislature to use general laws in governing municipalities means that municipal ability to act will always be dependent on the limitations of general law. There are a few cases that have resulted in strengthening local governments, notably City of Brownsville v. Public Utility of Texas (1981), which stated that the Legislature has to be very clear with its limitations on municipalities, and City of Houston v. State ex rel. City of West University Place which concluded that the purpose of home rule is to give municipalities full power of self-government.

Most cases, however, favor the legislature. The most important of these include State ex rel. Wilkinson v. Self, City of Arlington v. Lillard, Green v. City of Amarillo and State ex rel. Burnet County v. Burnet County Hospital Authority. All of these can be interpreted to mean that the legislature can act by general laws on many matters of municipal concerns; a clear limitation of local authority.

Analysis of the Eleven States

One of the questions that we sought to answer was how the court decisions relate to the state constitutions' allowances for local powers or local discretionary authority. Of the eleven states that we examined only four, Alaska, Illinois, Missouri and Montana, have a general trend of court decisions supporting the home rule powers of local government. In the 1982 Illinois case Quillici v. Village of Morton Grove the court ruled that "this section (art. 7) establishes presumptions in favor of municipal home rule". In Missouri the courts found in State ex. inf Hannah ex. Rel. Christ v. City of St. Charles(1984) that "under this section for home rule charter cities, even in the absence of an expressed delegation by the people of a home rule municipality in their charter, the municipality possesses all powers which are not limited or denied by the constitution, by statute, or by the charter itself". The most surprising of these states is Montana because it is not considered one of those states that allows vast local discretion, yet Tipco Corp. v. Billings(1982) decided that home rule municipalities could exercise any power not prohibited to them. The one constant among three of these states, Missouri being the exception, is that their constitutions call for a broad interpretation of local powers by the courts.

More typical, however, are the other seven states (Maine, Maryland, Michigan, New York, North Carolina, Pennsylvania and Texas) wherein the courts vary in their determinations, with an overall leaning towards the state concern. Most courts have been satisfied to decide on a case by case basis, rather than make broad or sweeping judgements. Maine is representative of this position. While the 1981 case Bird v. Town of Old Orchard Beach said that towns were vested with powers not denied them by Constitution or law, two other cases in the 1980's, Schwanda v. Bonnery and Spain v. City of Brewer, found that municipalities only had expressed powers. The courts have also seemed to establish North Carolina as an expressed powers state, even though it is one of the highest rated states for allowing local discretion. Clearly, the discretionary powers must be found in the statutes.

Proof of the limitation on local governments is that six out of seven of these states (North Carolina being the exception) allow some form of local home rule and two of these, Michigan and New York, even include clauses directing that a broad construction of local powers

be given by the courts. In Michigan, cases such as Bullinger v. Gremore and Builders Ass'n v. Detroit support a narrower construction by finding that home rule does not prohibit the legislature from enacting legislation on local matters. In Texas, State ex Rel. Wilkinson v. Self,City of Arlington v. Lillard and Green v. City of Amarillo all found that the legislature could act in areas of municipal concerns, if only by general laws.

Responses From Officials of the Eleven States

The ACIR sent letters to both private and public officials concerned with municipal affairs in each of the above mentioned states requesting them to validate the accuracy of our assessments of the constitutional provisions and interpretations of their state court decisions regarding local governments. We received responses, ranging in length from one line to twelve pages, from ten of the eleven states, with Texas being the lone exception. Most of the responses concurred in our interpretation of how the constitution treated local governments and were very helpful in suggesting alternative directions for us to go in to complete our study. For instance, the executive director of the Alaska Municipal League suggested other sections of the constitution which address certain state responsibilities. Officials in the states of Maine, Maryland, Michigan, New York, North Carolina and Pennsylvania also suggested other sources for us to consider.

There are certain consistencies among all the responses that we received. One is that none of the states we contacted had a clear, consistent definition of statewide and local concerns, nor found a need to have one. An attorney in the Attorney General's office in Maryland wrote "the legislation of the State of Maryland does not differentiate between statewide and local concerns or attempt to define these differences when regulating or invoking power to municipal corporations". The Governor's Office in Michigan also reported no definition and stated that they "examine each problem and/or concern and attempt to remedy the situation at the appropriate level of government". The General Counsel of the Michigan Municipal League believed that the issue was not particularly helpful in analyzing the distribution of powers between state and local governments because in most areas there is a role for both. In actuality, he stated, the question is really "over the degree of balance and authority for the final decision". The director of the Illinois Department of Commerce and Community Affairs says that there is no working definition in Illinois because "areas of concern which are attended to by local and governmental units often overlap and continue to shift with changes in demographics, technology, methods of governments, etc., the courts will probably continue to make issue-by-issue determinations".

The Local Government Assistance Division in Montana also acknowledged that there is no consistent definition of statewide/local concern, but did give examples of activities such as strip mining of coal, and construction of major electrical generating facilities which the legislature has found enough of a statewide impact to necessitate state regulation. The executive director of the Pennsylvania Intergovernmental Council believes that "we are really beyond the question of local vs. statewide powers and responsibilities because 'government' is really the exercise of shared functions and concerns. Instead... the critical issues today are revenue capacities and assistance within the context of intergovernmental cooperation and management". In other words, he believes the major issue today is responsibility vs. ability to pay.

COMMON LAW ANALYSIS

The court cases we have discussed to this point have referred to challenges to the constitutional provisions of our eleven selected states. We have also reviewed common law decisions based on cases from all the states. The main sources we used were McQuillin's The Law of Municipal Corporations and Sands & Libonati's Local Government Law. This common law research ultimately endorses the information which has previously been gathered.

According to McQuillin, court cases have not recognized or defined exclusive areas of activity wherein controlling interest is specifically defined. Courts for the most part seem to refuse to articulate an overall definition of what is a statewide concern or what is a local concern so that each case can be decided on its own merits. In Dairy Belle Farms v. Brock, 97 Cal App.2d 146 (1950), the court ruled that "What is strictly municipal affair is not always easy of determination, and no exact definition of term "municipal affairs" can be formulated and courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case."

Generally speaking, the powers and functions of municipalities are divided into two classes: a) public and governmental; and b) private or local. Those powers and functions in the former are those used in administering the affairs of the state and promoting the public welfare and those in the latter are used for the specific benefit of the affected municipality. Once again, however, there appear to be no accepted rules that can both distinguish between the two and carry over between states. It appears that functions which may be considered governmental powers or functions in one state may not be considered governmental in another. The same thing holds true with private powers or functions. There are two court cases that seem to sum this up. First, in Farrow v. City Council of Charleston,169 SC 373 (1932), the court found that "In South Carolina, however, the distinction between private and governmental functions of municipalities is not recognized." In the second case, Daly v. Stokell (Fla), 63 So2d 644 (1953), the court decided that "There is no precise dividing line between the two functions, and they may sometimes be difficult of distinction and overlap."

The doctrines of implied powers, inherent powers and "custom or usage" of powers often are used as a basis for determining statewide versus local concerns. The latter issue, "custom or usage" (defined as exercising powers over a long period of time for which no legal basis exists) normally cannot be the basis on which to confer power on a municipality and consequently is seldom, if ever, accepted by the courts. Municipalities, according to McQuillin, do have certain implied powers but there is no clearly articulated definition that is universally accepted. It can be generally stated that there can be no implied power which is in conflict with an express power or which is in an area where there is no general grant of power. A supporting court case for this theorem is Buffalo v. Stevenson, 207 NY 258 (1913), where the court decided that "Powers are implied only when they are necessarily incidental to the full exercise of those expressly granted, to the end that the objects declared by the municipal charter may be accomplished."

This doctrine has also been enumerated in several Connecticut cases. As stated in the ACIR report: Home Rule in Connecticut: It's History, Status, and Recommendations for Change, municipalities may exercise those powers which are necessarily implied, however, what is considered "necessary" has been very narrowly construed. Connecticut courts, in cases such as City Council v. Hall, 180 Conn 243 (1980), Buonocore v. Branford, 192 Conn 399 (1984), and Simons v. Canty, 195 Conn 524 (1985) have defined implied powers as being limited to those which are essential to carry out delegated powers, similar to the New York court's decision in Buffalo v. Stevenson.

On the question of inherent powers, it is generally recognized that local governments have no inherent right of self-government which would allow them to be independent of the state. Local governments are creatures of the state and receive all their powers from it. There is evidence that at one time a certain, limited number of states (Indiana, Kentucky, Michigan and Montana) claimed an inherent right of local powers but this no longer seems to be the situation in any of the states as exemplified by the case South Bend v. Krovitch, 149 Ind App. 438 (1971), which found that "There was a time when local autonomy was the rule of law in Indiana, but the bulk of decisions has eroded the local autonomy theory into a state of practical nonexistence."

Although court cases are filled with statements like "municipal affairs are the internal business affairs of a municipality", there seemingly are no rules or principles with which to determine, in specific instances, a statewide versus a local concern. One example of this void is Van Gilder v. Madison, 222 Wis 58 (1936), where the court concluded "When is an enactment of the Legislature of state-wide concern? We find no answer to this question in any decision of any court in this country." McQuillin states that ultimately there are two determinants as to what is a statewide concern and what is a local concern: 1) what the legislature decides; and 2) how the courts, which must make the final decision in case of conflict, rule.

Case Notations

The diversity of powers granted to municipalities by the various states can be seen in the following quotes from additional state court decisions relating to the common law interpretations of state-local legal relationships. While these cases show a diversity of powers, they also generally underscore the basic concept of the complete sovereignty of the state over local governments, modified only by constitutional and statutory grants of power.

Munro v. Albuquerque, 48 NM 306 (1943)
"Municipalities are creatures of the laws of the state of which they are a part and their powers are derived solely therefrom."

Admiral Development Corp. v. Maitland (Fla App), 267 So2d 860 (1972)
"The paramount law of a municipality is its charter, which gives the municipality all those powers it possesses unless other statutes are applicable."

Greene v. Winston-Salem, 287 NC 66 (1975)
"Towns and cities are parcels of the state and their corporate powers are emanations from the state for purposes of convenience and as such cannot be allowed to contravene state policy or exercise powers not conferred much less such as are either expressly or impliedly prohibited."

San Antonio v. Whitten, 161 Tex 150 (1960)
"Power of municipal council is plenary except as controlled by higher legislative authority."

Lark v. Whitehead, 28 Utah 2d 343 (1972)
"Cities have none of the elements of sovereignty and any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the city and the power is denied."

Brackman's Inc. v. Huntington, 126 W. Va 21 (1943)
"Municipalities have no inherent power to exercise any function of government whatsoever."

Cambridge v. Commissioner of Public Welfare, 357 Mass 183 (1970)
"Powers conferred by necessary implication from undoubted prerogatives vested in municipalities."

Green v. Mayor & Aldermen of city of Milledgeville, 112 Ga App 130 (1965)
"Necessary implication of municipal power must be so clear and strong as to render highly improbable that legislature could have entertained intention contrary to implication."

Shaffer v. Allt, 25 Ariz App 565 (1976)
"In Arizona a home rule city derives its powers from the constitution and is independent of the state legislature as to all subjects of strictly local municipal concern."

Clute v. Linscomb (Tex Civ App), 446 Sw2d 377 (1969)
"Home rule cities look to the constitution and general laws, not for specific grants of power, but to ascertain whether or not a specific power is denied them."

Janus Films, Inc v. Fort Worth (Tex Civ App), 354 Sw2d 597 (1962)
"Charter powers of home rule city are plenary, subject of course to limitation that its charter and ordinances shall contain nothing inconsistent with state and federal constitutions or general laws enacted by Legislature."

Bayless v. Limber, 26 Cal App 3d 463 (1972)
"Subject only to constitutional limitations and preemptive state law, the charter of the city of Whittier is the supreme law of the state with respect to its municipal affairs."

Bazell v. Cincinnati, 13 Ohio St. 2d 63 (1968)
"A charter city has all the powers of local self-government, except to the extent that those powers are taken from it or limited by other provisions of the constitution or by statutory limitations on the powers of municipality which the constitution has authorized the general assembly to impose."

Mayor of Americus v. Perry, 114 Ga 871 (1902)
"There being nothing in the constitution of Georgia which guarantees to the people within the limits of a municipal corporation the absolute right of local self-government, the inhabitants thereof may participate in the choice of officers to administer the affairs of the local government only in so far as they are given the right by the General Assembly, which matter is discretionary with such body."

These cases generally deal with the issue of the relative powers of state and local governments. As such, they often touch upon the somewhat more limited issue of statewide vs. local concerns. Given the understanding that states virtually always have ultimate sovereignty, the diversity in the outcomes of these cases indicates the variety of doctrines used by states in allocating power to local governments, and also the degrees of responsibilities given to local governments through constitutions and statutes.

STATE CONSTITUTIONAL SUMMARIES

Alabama

The Alabama Constitution prohibits the use of special legislation to incorporate municipalities, but does allow the state legislature to incorporate by general laws. The Constitution does not mention anything about powers and functions for municipalities. There are a few expressed limitations of municipalities mentioned, including issuance of bonds, indebtedness and use of public utilities.

Arizona

The Arizona Constitution instructs the legislature to provide for the incorporation, organization and classification of municipalities. Cities with a population over 3,500 are authorized to frame their own charters in accordance with the constitution and laws of the state. Special Districts and the granting of franchises are also provided for in this section of the constitution. The only other distinguishing local characteristics of this constitution are the provisions for recall of public officials, and initiative and referendum.

Arkansas

The Arkansas Constitution does provide for the organization of cities and incorporated towns. There are restrictions on financial powers for municipalities, including the levying of taxes and the issuing of bonds. The General Assembly, except for certain charitable, educational or penal purposes, is prohibited from creating municipal corporations by special act. This constitution also prohibits the state from assuming the debt of municipalities. There is no mention of municipalities being able to form their own chartered governments.

California

California constitutional provisions state that the legislature is to provide for the organization of cities and must also provide a method for cities to draft their own charters. These charters are to provide all ordinances and regulations in respect to municipal affairs subject only to their own limitations, and on other matters to be subject to the general laws of the state. Municipal affairs, however, are not defined in the constitution and thus are left to the courts to interpret. A minimum number of enumerated powers are listed. Other sections of the constitution allow consolidation between counties and cities, allow counties to assume municipal functions under certain circumstances and prohibit the use of special acts by the legislature when a general law is currently in place.

Colorado

The Colorado Constitution provides cities and towns with populations of 2,000 or more the power to form home rule charters, extending to all local and municipal matters. There is no definition of what these "municipal matters" are. These charters would supersede any state law to the extent that the law affects local matters. There are implied powers of local government with minimum enumerated powers, and the constitution allows statutes applying to municipalities to be superseded by local ordinances. This document also authorizes recall of public officials. It is the stated intention of this section of the constitution to give municipalities the full right of self-government and local governments do seem to have a broad grant of powers on local matters. The distinguishing characteristic of this document is the clause making charter municipalities' ordinances superior to state statutes in areas of local concern.

Delaware

The only local government provision of the Delaware Constitution is to allow municipalities to be incorporated by either general or special law, by 2/3 vote of the legislature.

Florida

The Florida Constitution allows for the establishment of municipalities by general or special law. The one distinguishable characteristic is that the constitution allows municipalities to exercise any power for municipal purposes except as provided by law. This document also allows for consolidation and/or the transfer of powers with any other county or municipality.

Georgia

The Georgia Constitution is a very detailed document which mandates that the General Assembly is to provide for local self-government for municipalities. All municipalities have power to act in fourteen enumerated areas where the state cannot act unless it is done by contract with an individual municipality or by general law. There is a limited prohibition on special legislation for the fourteen enumerated powers. The constitution also provides for the powers of taxation for municipalities and has sections limiting local debt and the issuance of revenue bonds.

Hawaii

The Hawaiian Constitution grants the legislature the power to create and provide for political subdivisions of the state. It also allows political subdivisions to adopt charters for their own self-government, making charter provisions concerning the executive, legislative and administrative structure and organization superior to statutory provisions. This superiority is not to imply that the legislature could not enact laws of statewide concern, of which there is no definition.

Idaho

The Idaho Constitution states that the Legislature is to provide for the incorporation, organization and classification of municipalities by general laws. It also prohibits municipal debt from being assumed by the state. Municipalities are only provided for by general laws and there is no mention of home rule.

Indiana

The Indiana Constitution has no provisions for the organization of municipal governments, but there are provisions for residency requirements, allowing impeachment of local officials and limiting municipal indebtedness. Municipalities can only be formed by general laws, not special.

Iowa

The Iowa Constitution provides municipalities with home rule powers for their local affairs and government, except that they must receive authorization from the legislature to levy any tax. There is not a definition of what "local affairs and government" are. The constitution also puts a limitation on municipal indebtedness, and prohibits the legislature from incorporating municipalities by special act. There is no other distinguishing characteristic about local governments in this constitution. Municipalities are not limited by express powers.

Kansas

The Kansas Constitution mandates that the legislature can grant powers of local legislation to municipalities and is to provide for necessary township officers, including their removal from office for cause. The legislature is prohibited from incorporating municipalities by special act. Cities have been authorized to adopt local self-government, including the levying of taxes, fees, etc. The Legislature can only act by general law on matters of statewide concern toward all cities, or those cities in a particular class. If the Legislature enacts legislation not of statewide concern, a city can elect by a 2/3 vote not to have it apply to that city. This document also allows for initiative and referendum. The one really notable clause declares that the powers of local governments are to be liberally construed. There is no definition of statewide concern or local affairs.

Kentucky

The Kentucky Constitution divides municipalities into six classes, with the organization and powers of each class provided for by general laws. The constitution also sets the ceiling level of tax rates for municipalities, with certain restrictions, along with certain debt limitations and the methods for how municipalities are to pay these off. Municipal officers, their election and terms of office are set by either the constitution or law.

Louisiana

The Louisiana Constitution directs the legislature to provide for the incorporation, organization, etc., of municipalities by general law only. It also allows the legislature to classify municipalities, and to legislate solely to each class. Municipalities are allowed to draft home rule charters which provide the structure, organization, powers, etc. necessary for the management of their affairs not denied by general law or the constitution. The legislature is prohibited from passing laws affecting structure, organization, powers, etc., of home rule municipalities. Non-home rule municipalities can exercise all powers necessary for their affairs, so long as voters agree to it. The governing bodies of municipalities are to be chosen by the voters also, and their compensation is to be set by law. Laws requiring expenditures by municipalities, with certain exceptions, are prohibited unless approved by local ordinance or the legislature distributes money to affected municipalities for that purpose. There are also sections involved with local government agencies, special districts, zoning and land use, and limited assistance to local industry. Municipalities can tax to raise revenue, but the constitution places a limit on the amount the city can tax. The Constitution allows a local sales tax and other special taxes, and also has sections concerning bonds and port commissions.

Massachusetts

The Massachusetts Constitution gives municipalities the right of self-government in local matters subject to the constitution and laws of the state. The constitution also allows cities and towns to adopt and amend their own charters, except towns under 12,000 may not adopt a city form of government and towns under 6,000 population may not adopt the Representative Town Meeting form of government. The Constitution also provides the methods for adopting and amending charters. Municipalities can exercise any power not denied them either expressly or by clear implication. The constitution has a minimum number of limitations on local powers, which include the levying of taxes and the borrowing of money. The state may use special acts only under certain circumstances, one of which is incorporation of municipalities.

Minnesota

The Minnesota Constitution authorizes the legislature to provide for the organization, administration, etc., of local governments. The constitution prohibits special acts on certain specific subjects, and in all cases when there is a general law covering it. One notable clause allows the legislature to pass special acts relating to local governments provided, however, they

must be approved by the voters of the affected unit. Local governments are also authorized by the constitution to adopt home rule charters.

Nebraska

The Nebraska Constitution allows cities over 5,000 in population to adopt charters for their own self-government, in a prescribed manner, and subject to the laws of the state. The constitution also allows those home rule municipalities to issue bonds for certain purposes.

Nevada

The Nevada Constitution allows municipalities to be formed by either general or special act of the legislature. When providing for the organization of municipalities by general law, the legislature must restrict their power of taxation, borrowing, indebtedness, etc., provided that the legislature allows municipalities to adopt charters for their own government.

New Jersey

The New Jersey Constitution specifically provides for implied powers necessary to carry out the powers enumerated by statute. It also establishes limited methods by which the legislature may pass special or local laws. The constitution is a brief document but it does have one distinguishing characteristic; it requires a liberal construction of constitutional and statutory provisions regarding municipal corporations.

New Hampshire

The New Hampshire Constitution allows the legislature to authorize municipalities to adopt or amend charters in any way not inconsistent with general law, and these charters must be approved by the voters of the municipality. The constitution also allows the legislature to act by special legislation with a positive vote by the municipality.

New Mexico

The New Mexico Constitution allows a municipality to adopt, amend, etc., a home rule charter as provided by law, which can then exercise all legislative powers and perform all functions not expressly denied by general law or charter. It also has the Legislature provide by general law for the formation of combined city and county municipal corporations, which are able to adopt charters for its self-government, subject to the constitution and general laws. The constitution also denies the municipality from enacting any tax provisions that are not authorized by general law without approval by a majority vote of that municipality and there are certain restrictions on municipal debt. The Legislature is prohibited from passing special laws in numerous areas, including all areas where a general law can be applied. This constitution mandates that a liberal interpretation be given to municipal powers.

North Dakota

The North Dakota Constitution defines its purpose toward municipalities as providing for maximum local self-government. The constitution assigns the legislature with the task of providing for both the establishment and government of all political subdivisions and the establishment and exercise of home rule in cities. Municipalities have statutorily enumerated powers. It also allows political subdivisions to agree to joint administration of any functions, or to transfer any of its functions to the county in which it is located. the legislature is prohibited from denying cities the ability to franchise the construction and operation of any public utility.

Ohio

The Ohio Constitution grants municipalities authority to exercise all powers of local self-government, while having their incorporation and government provided for by general laws. Municipalities are also allowed to adopt their own charters. The legislature can pass laws limiting the taxing and debt ability of municipalities, but any other law, if it is not a general law, must be approved by the voters in that municipality. The constitution also allows initiative and referendum, and grants municipalities the right to own, operate, etc., any public utility.

Oklahoma

The Oklahoma Constitution states that the legislature is to provide for the incorporation, organization and classification of municipalities by general laws, and not by special act. The constitution also allows any city with a population over 2,000 to frame its own charter, so long as it is consistent with the constitution and laws of the state. The residents of all municipalities have the powers of initiative and referendum.

Oregon

The Oregon constitution allows the legislature to incorporate municipalities by general law only, and prohibits the legislature from enacting, amending or repealing any municipal charter. Those municipalities which are incorporated by general law have restrictions on their power to tax, borrow money, contract debt, etc. Municipalities can also adopt their own charters, subject to the constitution and law. The constitution authorizes certain township and city officers as may be necessary to be elected or appointed in a manner prescribed by law. It also authorizes mergers between municipalities and county-city consolidations.

Rhode Island

The Rhode Island Constitution seems to grant municipalities right of self-government in all local matters. Municipalities can adopt, alter, etc., charters not in conflict with state law. The constitution provides the method for adopting and amending charters. It also prohibits the general assembly from enacting special laws unless approved by voters in the affected municipalities. On the other hand, municipalities are prohibited from imposing taxes or borrowing money without state permission.

South Carolina

The South Carolina Constitution delegates to the general assembly the responsibility of providing for the incorporation, powers, duties, etc., of new municipalities, but it is to do so by general laws, not special. The general assembly is also to provide methods for municipalities to develop their own charters. The constitution also allows for consolidation of counties with municipalities and for joint administration of functions if so desired. The two most notable clauses in the constitution require the consent of municipalities in certain areas before the general assembly may act and that the powers granted to municipalities are to be liberally construed in their favor.

South Dakota

The South Dakota Constitution grants authority to the legislature to organize and classify local governments. It also allows any city to adopt its own charter, which would let it perform any function not denied by any law and its form of government structure would supersede state statute. Local governments are also allowed to jointly perform any function with other local governments. Notably, the powers of local governments are to be liberally construed.

Tennessee

The Tennessee Constitution has no individual section or article devoted to municipal corporations or local governments, however, there are sections in different articles concerned with local government. The constitution does give the general assembly power to authorize incorporated towns to impose taxes while prohibiting it from enacting special laws on certain topics. In cases when a special act is used it needs to be approved by either the legislative body or voters of the municipality that is affected. In home rule municipalities the legislature can only act by general law. Any municipality can become a home rule government with the approval of the voters of that municipality. These home rule municipalities cannot supersede state law, nor can they enlarge their power of taxation. The general assembly is also to provide for the consolidation of services and functions among governmental units.

Utah

Under the Utah Constitution the legislature provides for the incorporation, organization and classification of local governments. The Constitution also allows municipalities to adopt their own charters within a prescribed manner. These charter municipalities are granted full powers relating to municipal affairs, which does not however, prohibit the legislature from passing general laws regarding issues of statewide concern. The legislature is prohibited from the use of special legislation to create municipalities. The state has developed a minimum of enumerated powers for the municipalities which are not to be construed as to limit the general grant of power already given them. Neither the term municipal affairs nor statewide concern are defined in this constitution.

Vermont

The Vermont Constitution is very brief on the subject of municipalities, but basically it allows the general assembly to incorporate municipalities by special act and provide, by general law for the organization of all corporations. Municipal corporations are under the control of the state. There is no other distinguishing characteristic in this constitution.

Virginia

The Virginia Constitution stipulates that the general assembly is to provide for the organization and government of municipal governments including, within certain restrictions, by special act. The constitution also provides the method for electing local governing bodies and certain officers thereof, and also involves itself with budgetary matters (debt, franchising and use of public property). The general assembly can provide by general or special law, for the municipalities to exercise any of their powers. The general assembly is prohibited from using a special law when a general law already covers the subject. There is no mention of home rule nor any other distinguishing characteristic.

Washington

The Washington Constitution directs the legislature to provide by general laws only for the incorporation, organization and classification of municipalities, which are subject to and controlled by general laws. Cities with a population of 10,000 or more may frame their own charters within a prescribed manner. The legislature is prohibited from taxing municipalities for the purposes of those municipalities, but it can give local governments that power for such purposes.

West Virginia

The West Virginia Constitution, like many of the states, has the legislature provide for the incorporation, organization and classification of municipalities, but this cannot be done by special act. These municipalities are restricted in their ability to borrow money and as to their

rate of tax levy. Any municipality with a population over 2,000 can adopt, amend, etc., its own charter and pass laws relating to its municipal affairs, so long as it is not inconsistent with the constitution or law. Municipal affairs are not defined in the constitution.

Wisconsin

The Wisconsin Constitution allows municipalities to be formed by either general or special act. Cities and villages can determine their own local affairs and government, but the legislature can still enact general laws of statewide concern. The constitution also allows for the establishment of one system of town government and it sets the debt limit for all municipalities. The constitution does not define the terms "local affairs" or "statewide concern".

Wyoming

The Wyoming Legislature instructs the legislature to provide for the incorporation, organization and classification of municipalities by general law. Municipalities are empowered to determine their local affairs, subject to the general laws of the state. One notable clause states that municipalities can challenge the applicability of any special act statute, other than those concerned with local debt, and may get an exemption from that statute by 2/3 vote of the legislative body involved. The legislature is empowered to restrict the municipalities' ability to levy taxes and contract debt while also determining the salaries for public officers. Of major importance also is that the powers and authority granted to municipalities are to be liberally construed.

NOTABLE CHARACTERISTICS OF STATE CONSTITUTIONS

- 34 states explicitly allow municipalities to exercise any power of self-government not denied them or contrary to constitution or law

- 19 states prohibit the use of special legislation

- 15 states direct courts to give a liberal interpretation to local government powers

- Certain notable characteristics of features of the state constitutions:

  * Article VII, Section 6 of the Illinois Constitution requires a 3/5 vote by the General Assembly to change or deny a power or function of a home rule unit of local government

  * The Maryland Constitution reserves the right of the General Assembly to enact laws affecting the affairs of local or municipal government when it deems necessary

  * The Montana Constitution required a review, within four years of its ratification (1972), by all local government units of their structures and the development of an alternative form of government to be voted upon by the electorate

  * In New York, no power granted to local governments can be denied or diminished in any way without the passage in two consecutive regular sessions of the Legislature. Also, the Legislature is prohibited from acting by special law except by request of 2/3 of the legislative membership of the specific government or by request of it's CEO with concurrence of the membership and also, except for New York City, an emergency act by the governor with the concurrence of 2/3 of the Legislature

  * There is a clause in the Colorado Constitution making ordinances in charter municipalities superior to state statutes in matters of local concern

  * The Delaware Constitution requires a 2/3 vote of the legislature to incorporate municipalities, whether by general or special laws

  * The Kansas Constitution states that if the legislature enacts legislation not of a statewide concern, a city can elect by a 2/3 vote not to have it apply to that city

  * The Louisiana Constitution prohibits state laws requiring expenditures by municipalities, with certain exceptions, unless they are approved by local ordinance, or the legislature distributes to the affected municipalities

  * Six states (Minnesota, New Hampshire, Ohio, Rhode Island, Tennessee and Wyoming[13]) have constitutional provisions which allow their legislatures to pass special acts affecting municipal governments only when approved by the voters of the affected unit

  * The South Carolina Constitution requires the consent of municipalities in order for the state to act in certain areas

---

[13] Wyoming needs 2/3 vote.

* The Vermont Constitution specifically states that municipal corporations are under control of the state

* The Virginia Constitution prohibits the legislature from using a special act when a general law already covers the subject

ANALYSIS OF RESEARCH ON STATEWIDE V. LOCAL CONCERN

The subject of statewide vs. local concern in America has been an issue of debate between state and local officials from the early days of the colonies. The Massachusetts Bay Colony exercised tight control over towns, including their establishment.[14] In 1636 the colony granted what is considered to be the first law or charter for towns, to Dorchester, whose charter gave them powers over local business so long as they did not conflict with the colony.[15] Through time there has been a conflict between those factions which believe that states should maintain strict control of municipalities, and those factions which believe that municipalities should have exclusive control over their own concerns. With that in mind, and in order that we might best be able to determine how our analysis of state constitutional provisions relate to what the theoreticians or experts in the field believe to be the situation, selected literature has been examined.

In what is generally accepted as the test case on the issue of statewide v. local concern, City of Clinton v. Cedar Rapids and Missouri Railroad Co., (1868), Judge John F. Dillon ruled that "the true view is this: Municipal corporations owe their origin to, and derive their power from, the legislature. It breaths into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act...sweep from existence all municipal corporations of the state, and the corporations could not prevent it. We know of no limitation on this right as the corporations themselves as concerned. They are, so to phrase it, the mere tenants at will of the legislature".[16] This case was upheld by the U.S. Supreme Court in 1903 in Atkins v. Kansas.[17] There was a Michigan case in 1871, People v. Hurlburt, where the judge, Thomas M. Cooley, challenged what had become known as Dillon's Rule by finding that local self-government was an inherent right of municipalities. Four states, Indiana, Iowa, Kentucky and Texas, followed this theory for a while, but by 1946 any support for that opinion had collapsed and, according to the U.S. ACIR, this position continues to this day.[18]

One thing that becomes noticeable from the readings is that students of political science have been searching for years to find a definition or understanding of what "municipal affairs" or "statewide concerns" are or should be. Many people or groups have attempted to delineate a sphere of influence for local governments of which state governments could not interfere. One drawback has always been the knowledge that as time does not stand still neither do the responsibilities for government services. Areas of service that at one time would have been considered to be of local concern, like education and solid waste, have become, if not a strictly state concern, then most assuredly a shared function between the state and its local government units.

Sho Sato, professor of law at the University of California-Berkley, was concerned with the lack of clear judicial guidelines on the issue of home rule and local government autonomy in California and is one of those who tried to develop a reasonable method for apportioning functions between state and local governments. Sato noted that there were no clearly articulated

---

[14] Zimmerman, Joseph F., Evolving State-Local Relations in New England: Selected Aspects, Chicago, 1975, p. 4.

[15] IBID, p. 8.

[16] U.S. ACIR Report M-131, Measuring Local Discretionary Authority, Washington D.C. 1981, p.17.

[17] IBID.

[18] IBID.

definitions of municipal concerns, especially as interpreted by the courts, thus he set up possible criteria for deciding whether a chartered city should have complete independence with respect to certain activities or regulations. The criteria included:

1) if the activity or regulation of a city has a substantial external spillover effect state regulation should control;

2) if the state regulation operates primarily to promote the welfare of the people and has no rational basis for difference in application to the private and public sectors, state regulation should control; and

3) if the state regulation operates upon public entities in their nonconsensual relationships with residents and non-residents of the city alike the state regulation should control.[19]

What Sato was attempting to do was develop a plan to divide activities into statewide and non-statewide concern in order that the state could act act in the former, but not in the latter. He realized that these criteria were not the answer in all instances, but that they were a sound basis on which to start.

Another author who similarly attempted to develop criteria for what should be a statewide concern was Everett Kimball, who wrote that there are certain municipal functions that are of interest to the state. Kimball believed that the state had a rightful interest in municipal affairs because municipal corporations are created by the state and perform certain functions that are of interest to the state at large, including: the financial conditions of municipalities; elections; police; health; education; and charities (state institutions, relief of the poor, etc.)[21]

The Council of State Governments (CSG), in its 1946 study State-Local Relations, expressed two major concerns about these relations. First, CSG was concerned about the excessive use of special legislation as it affected local governments. It felt that this practice was injurious to both the state and their local governments for many reasons, including: the practice makes undue demands on the time of members of the legislature; it accentuates the feeling of localism in the legislature by bringing local affairs into the state-wide political arena; and it removes the control of local affairs from the hands of local citizens.[22] This is one of the reasons that 18 states have written into their constitutions a prohibition against the use of special legislation.

CSG was also concerned because home rule and local self-government seemed to have lost their meaning, due in a great degree to court decisions which consistently gave narrow definitions to local authority. This situation still seems to exist as two recent court cases help illustrate. In City of Fresno v. Pinedale County Water District, (Ca. 1986) the court recognized that "what constitutes a strictly municipal affair is often a difficult question...no exact definition can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each contraverted case... Furthermore, what is a municipal affair changes with conditions. What may at one time have a matter of local concern may at a later time become a matter of state concern". The other case, Jacobberger v. Terry (Neb. 1982) answered the question of why courts give such a narrow definition to local powers when it found that "there is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The courts

---

19 Scott, Stanley ed., Local Government in a Changing World, Berkley Ca., 1967, pp. 25-26.

21 Kimball, Everett, State and Municipal Government in the United States, Boston, 1922, pp. 388-390.

22 Council of State Governments, State-Local Relations, 1946, pp. 146-47.

must consider each case as it arises and draw the line of demarcation. While some jurisdictions have attempted to define one or the other category, the circuitous nature of these attempted definitions lead us to conclude that the better course remains one of a case by case analysis of the issues as it arises".[23] CSG made a number of recommendations which were intended to help make more efficient the operation of municipal authority, which included:

1) Acknowledging that it is difficult to clearly separate state from local functions, they called for an enumeration of some specified powers for localities ;

2) Prohibitions on the powers of the legislature must be balanced by a positive grant of authority to localities; and

3) Reduce the need for the judicial system to play a role in this as much as possible.[24]

The U.S. ACIR has been concerned with local powers/authority since its inception and has,for years recommended a broad grant of powers for local governments. It has produced many reports on the subject over the years, two of the most important being State Mandating of Local Expenditures in 1978 and Measuring Local Discretionary Authority in 1981. In the earlier report ACIR recognized that there were few issues, or areas of government, that were all state or all local in interest. The report was concerned with the financial burdens on municipalities due to state mandates, which has consequences for the issue of statewide concern It recognized five general types of state mandates:

1) "rules of the game mandates", which relate to the organization and procedures of local governments;

2) "spillover mandates", which deal with new programs or enrichment of existing local government programs;

3) "interlocal equity mandates", which require localities to act or refrain from acting to avoid injury to, or conflict with, neighboring jurisdictions;

4) "loss of local tax base mandates", where the state removes property or selected items from the local tax base; and

5) "personnel benefit mandates", where the state sets salary, wage levels, working conditions or retirement benefits.[25]

One recommendation of the report was that an interest of statewide concern must be proven before a mandate could be imposed on localities, possibly by the use of a mandate review process determine if a mandate served an area of statewide concern.[26]

In Measuring Local Discretionary Authority the ACIR prepared criteria on which to measure states in terms of the powers allowed to municipalities with which they then ranked those states. (see appendix) It is interesting to note that a state's position on this chart does not always directly relate to that state's constitutional provisions for local governments. For instance, the South Dakota Constitution seemingly indicates that it authorizes much local discretion, yet it ranks 43rd on the ACIR chart. Conversely, both Florida and Colorado ranked

---

[23] Howard, Mary, Op Cit., pp. 3-4.

[24] Council of State Governments, Op Cit., pp. 171-74.

[25] U.S. ACIR Report A-67, State Mandating of Local Expenditures, Washington D.C. 1978, p.16.

[26] IBID, p.5.

higher than their constitutional provisions would indicate. This suggests that the state statutes have a tremendous impact on a local government's ability to govern itself, and that some states grant a higher level of authority, while others may be more restrictive, and in neither case may be reflective of their constitutions. For example, North Carolina is an expressed powers state where the statutes grant a considerable amount of local authority, a fact which would not be realized by reading the constitutional provisions. The ACIR, while acknowledging state authority over local governments, has urged that all general purpose local governments be given a broad grant of local powers and that this grant contain structural and fiscal, as well as functional, powers. In furtherance of this goal, ACIR has recommended that any constitutional amendment include:

1) a self-executing provision;

2) a stipulation that the grant of local discretionary authority be interpreted liberally by the courts;

3) a limitation on the use of special legislation by requiring that the state legislatures examine carefully requests by local governments for the enactment of special laws, and reject requests if the concerned local government possess sufficient discretionary authority to achieve the objective(s) of the special laws by enactment of local by-laws, laws or ordinances;

4) require that the state legislature establish a "code of restriction" specifying those powers expressly reserved to or preempted by the state legislature; and

5) require that the state legislature adopt and maintain a local government code consolidating all statutes applicable to local governments.[27]

The U.S. ACIR believed that all general purpose local governments should be granted all functional, structural and fiscal powers not expressly reserved, preempted or restricted by constitution or law. It also believed that this general policy was the most beneficial and logical for both the states and their municipalities.

---

[27] U.S. ACIR Report M-131, Op Cit., p.9.

CONCLUSION

There are three significant findings that develop from the readings and responses from the various officials who responded to our inquiries. First, there seems to be no generally accepted definitions for statewide and local concerns nor does that seem to be a major concern any longer. Most people recognize that it would be disadvantageous to "put things in stone" because as time changes so do the roles of the players. In areas that would have, at one time, been seen as strictly a municipal concern, (i.e. education, solid waste disposal and transportation) a state role is now often seen. Even those who tried to develop a definition for statewide and local concerns could only do so in general terms and by setting up parameters for the state, i.e., the state cannot act here unless... thus laying the groundwork for "reasonable" intervention by state legislatures into local affairs when it is a matter of statewide concern. The more important issue today seems to be unfunded state mandates, which have the effect of requiring municipalities to perform functions which they cannot afford. That is why, according to Joseph Zimmerman, what municipalities really need is financial home rule which would forbid legislatures from mandating state programs on local governments without providing funding for them. [28]

Secondly, courts for the most part, have avoided making any broad readings on local governments' authority, preferring to rule on the narrower issue before them. In seven of the eleven states for which we examined court cases (Maine, Maryland, Michigan, New York, North Carolina, Pennsylvania and Texas) the courts have been consistently inconsistent. Courts have generally decided that, home rule aside, if the states can introduce a greater concern of a statewide nature, it will answer the question on that basis alone. Two New York cases seem to reflect this reasoning: Wambat Realty Corp. v. New York(1977) where it was decided "that a proper concern of the State may also touch upon local concerns does not mean that the State may not freely legislate with respect to such concerns" and Matter of Kelley v. McGee(1982) which stated that "it is well established that the home rule provision of Article IX does not operate to restrict the Legislature in acting upon matters of State concern". As with the constitutional provisions there is no single definition of what a statewide concern is other than saying it is any issue that affects more than a single municipality.

Thirdly,perhaps the most salient point which our research has demonstrated is that it would seem that state statutes play as big a role, if not bigger, than state constitutions in determining the freedom or discretionary authority within which a municipality has to act. This is best illustrated by the following:

> "to put the matter even more accurately, the best guarantee of home rule in New York is not the Constitution. It exists in State Legislator's seasoned judgement and conscientious representation of constituents deeply concerned about local control".[29]

---

[28] Zimmerman, Joseph F., Op Cit., p. 48.

[29] New York State Legislative Commission on State-Local Relations, New York's State-Local Service Delivery System, New York 1987, p. 41.

Table 20

STATES RANKED BY DEGREE OF LOCAL DISCRETIONARY AUTHORITY, 1980

	A. Composite (all types of local units)	B. Cities Only	C. Counties Only	Degree of State Dominance of Fiscal Partnership*
1	Oregon	Texas	Oregon	2
2	Maine	Maine	Alaska	2
3	North Carolina	Michigan	North Carolina	1
4	Connecticut	Connecticut	Pennsylvania	2
5	Alaska	North Carolina	Delaware	1
6	Maryland	Oregon	Arkansas	2
7	Pennsylvania	Maryland	South Carolina	2
8	Virginia	Missouri	Louisiana	2
9	Delaware	Virginia	Maryland	1
10	Louisiana	Illinois	Utah	1
11	Texas	Ohio	Kansas	2
12	Illinois	Oklahoma	Minnesota	2
13	Oklahoma	Alaska	Virginia	1
14	Kansas	Arizona	Florida	2
15	South Carolina	Kansas	Wisconsin	1
16	Michigan	Louisiana	Kentucky	2
17	Minnesota	California	California	2
18	California	Georgia	Montana	3
19	Missouri	Minnesota	Illinois	2
20	Utah	Pennsylvania	Maine	2
21	Arkansas	South Carolina	North Dakota	1
22	New Hampshire	Wisconsin	Hawaii	3
23	Wisconsin	Alabama	New Mexico	2
24	North Dakota	Nebraska	Indiana	2
25	Arizona	North Dakota	New York	2
26	Florida	Delaware	Wyoming	2
27	Ohio	New Hampshire	Oklahoma	3
28	Alabama	Utah	Michigan	1
29	Kentucky	Wyoming	Washington	1
30	Georgia	Florida	Iowa	2
31	Montana	Mississippi	New Jersey	3
32	Washington	Tennessee	Georgia	2
33	Wyoming	Washington	Nevada	2
34	Tennessee	Arkansas	Tennessee	2
35	New York	New Jersey	Mississippi	3
36	New Jersey	Kentucky	New Hampshire	3
37	Indiana	Colorado	Alabama	2
38	Rhode Island	Montana	Arizona	2
39	Vermont	Iowa	South Dakota	2
40	Hawaii	Indiana	West Virginia	1
41	Nebraska	Massachusetts	Nebraska	3
42	Colorado	Rhode Island	Ohio	2
43	Massachusetts	South Dakota	Texas	3
44	Iowa	New York	Idaho	2
45	Mississippi	Nevada	Colorado	1
46	Nevada	West Virginia	Vermont	2
47	South Dakota	Idaho	Missouri	3
48	New Mexico	Vermont	Massachusetts	1
49	West Virginia	New Mexico	—	1
50	Idaho	—	—	2

*Key:
1—State dominant fiscal partner.
2—State strong fiscal partner.
3—State junior fiscal partner.
Applies to states in column A.

SOURCE: ACIR survey and staff calculation.

Bibliography

Agger, Robert E., Goldrich, Daniel, & Swanson, Bert E., The Rulers and the Ruled: Political Power and Impotence in American Communities, New York: John Wiley & Sons, Inc. 1964.

Alabama Legislative Reference Service, Report on a Survey of the Problem of Curtailing Excessive Local Legislation, Montgomery, Alabama, 1953.

Cole, James, Constitutional Home Rule in New York: "The Ghost of Home Rule", 59 St. John's Law. Rev. 713 ,1985.

Commission to Investigate the Relationship Between the State and its Subdivisions, State and Local Governmental Relationship in Connecticut, Hartford, 1955.

Connecticut Commission to Study the Necessity and Feasibility of Metropolitan Government, The State's Biggest Business - Local and Regional Problems, Hartford, 1967.

Council of State Governments, State-Local Relations, Lexington, KY., 1946.

Key, V.O., The Problem of Local Legislation in Maryland, Baltimore: Maryland State Planning Commission and Legislative Council, 1940.

Kimball, Everett, State and Municipal Government in the United States, Boston: Ginn and Co., 1922.

Howard, Mary P., Esq., Robinson and Cole P.C., "Judicial Definitions of 'Matters of State-Wide Concern'", unpublished memorandum to Connecticut ACIR, December 9, 1986.

McQuillin, Eugene, The Law of Municipal Corporations 3rd Edition, 1979 Revised Volume Wilmette, Ill: Callaghan & Co., 1979.

National Governors' Conference, States' Responsibilities to Local Governments: An Action Agenda, Washington D.C., 1975.

National Governors' Conference, States' Responsibilities to Local Governments: Model Legislation From the Advisory Commission on Intergovernmental Relations, Washington D.C., 1975.

New York State Legislative Commission on State-Local Relations, New York's State-Local Service Delivery System: Legal Framework and Services Provided, New York, 1987.

Pontius, Dale, State Supervision of Local Government: Its Development in Massachusetts, Washington D.C.: American Council on Public Affairs, 1942.

Report of National Conference, States' Role in Strengthening Local Government Capabilities, Harrisburg, Pa., 1975.

Rhyne, Charles, The Law of Local Government Operations, National Institute of Municipal Law Officers.

Sands, C. Dallas & Libonati, Michael E., Local Government Law, Vol. 1, Wilmette, Ill: Callaghan & Co. 1981.

Scott, Stanley, ed., Local Government in a Changing World, Berkley, Ca.: Institute of Governmental Studies, 1967.

U.S. Advisory Commission on Intergovernmental Relations, Measuring Local Discretionary Authority, Washington D.C., 1981.

U.S. Advisory Commission on Intergovernmental Relations, State Mandating of Local Expenditures, Washington D.C., 1979.

Wickmar, W. Hardy, The Political Theory of Local Government, Columbia, S.C. : University of South Carolina Press, 1970.

Zimmermann, Joseph F., Evolving State-Local Relations in New England: Selected Aspects, Chicago, 1975.

OTHER PUBLICATIONS BY THE

CONNECTICUT ACIR

Home Rule in Connecticut: Its History, Status and Recommendations for Change (January 1987)

The Impact of the Timing of State Aid Decisions on Local Budgetmaking (December 1987)

Independent Special Taxing Districts in Connecticut (December 1988)

The State of State-Local Relations in Connecticut (March 1989)