Chapter 1

State Governments and Their Political Subdivisions

Local governments are the most common form of government in the United States, provide most public services on a daily basis to their respective citizens, and are major regulators of business firms and individuals. The 2007 census of governments reveals that there were 89,476 local governments: 3,033 counties; 19,492 municipalities; 16,519 towns and townships; 37,381 special districts; and 13,051 independent school districts. These units were governed by approximately 500,000 elected officers supported by approximately 12.1 million full-time equivalent employees, a 5.5 percent increase since 2002. These governmental units vary from Lilliputian ones with a population under fifty to New York City with a population of approximately 9 million.

Public opinion polls consistently reveal that interviewees are convinced local governments provide the most benefits for taxpayers' money and spend it wisely. Public confidence in local governments has been increasing in sharp contrast to citizens' exceptionally low confidence in the federal government. Citizen confidence in local governments dates to the New England open town-meeting where voters assemble and make all decisions. This meeting originated in the Massachusetts Bay Colony in 1630, and is the only example of pure or direct assembled democracy in the United States.[1] Romanticized views suggest that the early town meetings possessed unrestricted discretionary authority over town affairs during a golden age of unfettered local self-government. Chapter 2 contains a brief examination of Massachusetts historical records that is most revealing with respect to the suggested grassroots tradition of local self-governance.

The replacement of the British rule by state governments did not change dramatically the discretionary authority of local governments as the new governments continued to employ the English common law and its Ultra Vires Rule positing that a local government may exercise only the powers devolved on it by the state legislature. Tight legislative control of local governments, including "ripper laws" tearing apart a local government, generated a debate over whether state dominance should be replaced by constitutionally protected local autonomy. The so-called home rule movement in the latter decades of the nineteenth century achieved some of its goals of broadening the discretionary authority of general-purpose local governments in a number of states, and other home-rule gains were made in some but not all of the states in the twentieth century.

Two competing theories with respect to the most desirable degree of concentration of political power influenced the legal nature of state-local relations in the United States. One paradigm stresses the integration of political authority and the other supports the fragmentation of such authority. Some observers view the clash as one between elitist theory and democratic theory. A brief examination of key provisions of the U.S. Constitution will facilitate an understanding of the powers a state legislature may exercise relative to local governments.

Formal Power Distribution

The drafters of the U.S. Constitution in 1787 decided against devolving specific powers to each of the three planes of government (national, state, and local) by including in the fundamental law provisions delegating specific enumerated powers to only the national government and reserving all other nonprohibited powers to the states and the people. In consequence, the Constitution contains no references to local government, which were considered to be creatures of their respective state.

The delegated or expressed powers include exclusive ones—coinage of money, declaration of war, foreign affairs, and post offices—states are forbidden to exercise.[2] Congress and the states are denied other powers—enactment of a bill of attainder or an ex post facto law, and grant titles of nobility—by the Constitution.[3]

The fundamental law authorized two types of concurrent powers exercisable by Congress and the states. The first type includes the power to

tax, which is not subject to formal preemption.[4] The second type includes powers granted to Congress and not prohibited to the states. Should there be a direct conflict between a congressional statute and a state statute, the supremacy of the law clause of the U.S. Constitution facially provides for the prevalence of the congressional statute by nullifying the state statute.[5] In consequence, the exercise of this type of concurrent regulatory power by a state is subject to congressional complete, partial, or contingent preemption.[6]

The fundamental law contains a list of powers states may exercise only with the consent of Congress. Examples include the levying of import and tonnage duties, keeping troops in time of peace, and entrance into compacts with other states.[7] It should be noted that the U.S. Supreme Court has not always interpreted these powers to mean that in all cases they may be exercised only with the consent of Congress, In 1893, for example, the Court in *Virginia v. Tennessee* opined that such consent is required only if states desire to entered into a political compact encroaching on the powers of Congress.[8] Similarly, in 1975, the Court ruled that the prohibition of levying duties on imports without the consent of Congress does not prohibit levying a property tax on imported products.[9]

Although Publius in *The Federalist Papers* assured readers that federal powers would be limited under the proposed constitution, opponents of a strong centralized national government persuaded proponents of the document to agree that the first action of Congress under the new fundamental law would be the proposal of a series of constitutional amendments incorporating a bill of rights.[10] The Tenth Amendment in particular stipulates that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This division of powers approach to government—an *imperium in imperio*—has been labeled "dual" or "layer cake" federalism. Chapters 5 and 6 clarify that there is a sharing of many powers by the federal, state, and local governments rather than the complete separation of national and state government powers suggested by the term *dual federalism*.[11]

The sphere of federal power has been broadened appreciably since 1789, as explained in more detail in chapter 6, by accretion of power from constitutional amendments, statutory elaboration of delegated powers, and judicial interpretation. A continuing debate over the proper role of the national government has arisen as the result of Congress initiating actions in functional areas long considered to be state and local

government responsibilities. In particular, conditional national grants-in-aid and congressional preemption statutes removing regulatory authority from subnational governments are responsible for the erosion of local government discretionary authority since the middle of the nineteenth century.

The discretionary authority of general-purpose local governments since 1900 has been broadened in many states by constitutional amendments, statutes, or both. These units have not always been able to take advantage of their broadened authority as the result of expensive congressional mandates and restraints, as explained in chapter 6.

State-Local Power Division

Local governments obtain all of their exercisable powers from their respective state constitution and statutes. The early constitutions contained no or few references to general-purpose local governments and their officers, and references generally were to counties that historically in every state were quasi-municipal corporations performing relatively few functions as administrative arms of their respective state and possessing no legislative powers. Lacking constitutional status, local governments were at the mercy of the state legislature, which continued to impose the common-law Ultra Vires Rule on local governments, positing that a political subdivision may exercise only the powers specifically granted to it, and these powers are to be interpreted narrowly by the courts.

On the one hand, state legislatures in the nineteenth century enacted numerous special laws affecting individual local governments, with some properly recognizing that political subdivisions differ in many respects, including climate, industry, population, topography, and transportation systems. On the other hand, so-called ripper laws represented an abuse of legislative power and were employed as a means of arbitrarily controlling political subdivisions.

Nineteenth-century abuses of the legislature's plenary power to enact special laws for individual local governments persuaded voters in several states to ratify proposed constitutional amendments or a new constitution prohibiting the legislature from enacting special laws pertaining to specified topics.[12] This prohibition was followed in several states by the ratification of a constitutional provision stipulating that all "special city" acts were subject to a suspensory veto by the concerned cities.[13] If a city council

vetoed an act, it was returned to the state legislature, which could override the veto by a majority vote.

The next power granted to cities, and later to other units in some states, by constitutional amendments or statutes is authority to draft, adopt, and amend a charter, and to supersede special laws and certain general laws. Chapter 2 explains and analyzes the two constitutional approaches utilized by certain states in granting discretionary authority to their political subdivisions.

The distribution of political power within a state may be placed in three broad spheres: a local controlling sphere, a state controlling sphere, and a shared state-local sphere. Many political subdivisions possess complete responsibility for a number of functions, the state similarly possesses complete responsibility for other functions, and the remaining functions are the shared responsibility of the state and certain local governments. However, the state legislature possesses the ultimate power, should the solons decide to exercise it, to assume complete responsibility for all subnational functions, as explained in chapter 2.

The discretionary authority of general-purpose local governments may be placed in four distinctive categories—structure of government, functional, personnel, and fiscal. The broadest discretionary powers typically relate to the structure of local governments and the narrowest to finance.[14] The amount of discretionary authority varies considerably from function to function. These discretionary powers may be repealed by the state legislature by the enactment of general laws. Furthermore, Congress possesses the authority to preempt the regulatory authority of state and local governments.

Local Discretionary Authority Determinants

The amount of discretionary authority possessed by local governments within a given state is determined by eight principal overlapping factors:

1. Traditional beliefs relative to the distribution of political power, if strongly held, guarantee that attempts to change power relationships will not succeed. Political culture, which varies from one state to another and within sections of certain states, influences the distribution of political powers and the

exercise of political powers granted to general-purpose local governments.[15]

2. The ease or difficulty of amending the state constitution affects the extent to which the fundamental law or legislation is employed to restrict or grant powers to local governments. The short Vermont Constitution is exceptionally difficult to amend because it stipulates that in every fourth year the senate by a two-thirds vote may propose amendments to the constitution, provided a majority of the representatives concur.[16] If the necessary approvals are received, the proposed amendment is referred to the next biennial session of the general assembly. Only if this session approves the proposed amendment is it referred to the voters in a statewide referendum. This process can consume up to eight years and, as a result, Vermont relies heavily on statutes for distributing discretionary authority to its cities and towns.

3. The constitutionally permitted length of the legislative session ranges from a sixty-day session every two years in Kentucky, to states such as New York, which has no restriction on session length. It is apparent the Kentucky General Assembly has a crowded calendar that does not permit the devotion of a large amount of time to the question of the amount of discretion exercisable by its political subdivisions.

4. The number of units in a state affects the degree of legislative control of the units. Hawaii has only four local governments, and southern states also tend to have a small number of units.

5. The political strength of local government officers associations and public service unions affect the amount of discretionary authority exercised by local governments. Hawaii lacks a municipal association; and there is no association of counties in Connecticut and Rhode Island that lack organized county governments, as well as in Massachusetts, where several counties have been eliminated and their functions transferred to the state. Police officers and firefighters, through their

respective associations and unions, have been successful in persuading the legislature in a number of states to enact mandates benefiting members of their associations and unions.

6. The exercise of local discretionary authority is influenced by the administrative resources the state dedicates to monitoring local governments. If a state has limited supervisory resources, local governments may ignore certain state mandates in the belief they will not be enforced. Local governments, however, may be reluctant to exercise their discretionary powers fully if the state devotes ample resources to scrutinizing them and state officers are aggressive in carrying out their responsibilities.

7. The state judiciary plays a major role in determining the discretionary authority of political subdivisions, and, as explained in chapter 2, traditionally interpreted narrowly the powers of local governments.

8. Rapid population growth in a state may pressure local government officers to exercise their authority to the fullest extent to cope with problems generated by growth.

Each state constitution contains provisions pertaining to local governments, yet ten constitutions—Alabama, Arkansas, Delaware, Indiana, Kentucky, Mississippi, New Jersey, South Carolina, Vermont, and Virginia—do not grant discretionary authority to their respective political subdivisions. The New Jersey Constitution, however, contains an important section: "[T]he provisions of any law concerning municipal corporations formed for local government or concerning counties, shall be liberally construed in their favor."[17] New Jersey local governments have been granted relatively broad discretionary powers by statute.

Ample revenues are the key determinant of the ability of a local government to take full advantage of its discretionary authority. The state legislature in granting powers to its political subdivisions typically retains stringent control over finances, thereby restricting the ability of the subdivisions to exercise their powers fully.

Complicated Governance System

Relations between a state and its local governments vary within each of the fifty states, and the differences tend to be greater when states are compared. The number of local governments varies from 4 in Hawaii to 6,903 in Illinois. The state government in Hawaii is responsible for corrections, education, hospitals, and welfare, and performs approximately 80 percent of all state-local functions.

Understanding state-local relations is difficult in states with special constitutional or statutory provisions. For example, a "reverse option" Texas law applies to a city until its council approves an ordinance excluding the city from the statute's coverage. Illinois city voters by referendum may vote to exclude their respective city from the constitutional grant of discretionary authority. An acceptance or permissive statute enacted by the Massachusetts General Court is not applicable within a city or town unless the city council or town meeting, respectively, votes to accept the statute.

The local governance system also is complicated by numerous political subdivisions requesting the state legislature to enact special laws rather than exercising their own discretionary powers. Instead of drafting and adopting a charter, a city in several states, such as Massachusetts and Washington, may adopt an optional charter enacted by the state legislature.

Forty-one states have a constitutional provision forbidding the state legislature to enact a special law unless it is requested by the concerned local government. Nevertheless, this prohibition has not been completely successful, as illustrated by the Pennsylvania General Assembly placing Allegheny County, Philadelphia, and Scranton each in a separate class in spite of the constitutional prohibition.

In California, general law cities currently possess approximately the same powers as home rule cities, and consequently the constitutional grant of local discretionary authority is of little significance.

New Mexico cities and counties have been granted certain powers by the state constitution, but nevertheless still must submit their budgets for approval by the state's local government division. A North Carolina correspondent made an interesting comment about a similar requirement in his state: "In some States the Local Government Commission's responsibilities and regulation would be looked upon as highly restrictive, as would state responsibility and funding for schools, highways, and prisons. It is looked on here as providing freedom from responsibilities, rather than restrictive."

In 1979, the West Virginia Supreme Court invalidated most of the statutory grant of local discretionary authority and in effect limited cities to selecting one of four statutory forms of government and to determining the dates of local elections.[18] Cities and towns in Vermont did not use the statutory home-rule provision because bond counsels advise that the provision violates the state constitution.

Citizen understanding of the amount and the type of discretionary authority possessed by political subdivisions has been inhibited by the failure of the state constitution to define terms such as local affairs and municipal affairs. In consequence, courts resolve state-local governmental conflicts on a case-by-case basis. Poorly drafted provisions—the use of not inconsistent or denied in the Massachusetts Constitution—cause problems, because a proposed city or town action that is not denied by the constitution or statutes is inconsistent if the action does not follow the existing statutes.

State-Local Tensions and Problems

The existence of tensions in the relations between a state and its political subdivisions is not surprising in view of the fact the state possesses plenary legal authority to control local governments, which naturally desire to operate independently of the state government. While local government officers typically seek additional discretionary authority—and the failure of the legislature to grant it may heighten state-local tensions—the major source of poor relations between the two planes of government is direct legislative action to solve local problems, particularly state mandates directing local governments to provide a service or undertake an activity.

While municipal leagues and county associations often decry what they labeled state interference in local affairs, these organizations request additional state financial assistance and prefer it in the form of "condition-free" revenue sharing, a subject examined in chapter 3. They also seek state reimbursement of costs attributable to state mandates and enactment of a procedural requirement that all bills affecting local governments must carry a fiscal note indicating the costs being imposed on political subdivisions.

Not surprisingly, local government officers representing a single jurisdiction lobby continually during a session of the state legislature in favor of certain bills and in opposition to other bills, and solicit the support of their respective associations. Where possible, local officers form coalitions

with other interest groups to amass sufficient political power to gain their legislative goals, but often encounter strong opposition from public employee unions. The latter not only oppose certain goals of the local officers, but also seek legislative approval for expensive state mandates on political subdivisions. Unions and associations representing firefighters and police officers tend to have the most political strength among public employee unions lobbying the legislature.

To improve state-local relations, many state legislatures created an advisory commission on intergovernmental relations.

State-Local Issues

The issue of state mandates is the root cause of poor state-local relations in many states. Interest groups unable to achieve their goals on the local government level often turn their attention to the state legislature in the knowledge the legislators possess the constitutional authority by general law to order political subdivisions to initiate or stop a specific action, and in the hope that the legislators will be more sympathetic to the groups' goals than local government legislators. Chapter 3 contains a typology of and rationale for state mandates.

The second most important issue in state-local government relations is state financial assistance for education and general-purpose local governments whose capacity to raise funds by taxation is limited.

The key question in state-local government relations is the extent to which states can permit local government self-determination without the danger that actions taken by one political subdivision will cause problems for other subdivisions. The second key question involves the state's role in local government problem-solving. The state as the superior government can play, as described in chapter 6, one or more of the following roles: inhibitor, facilitator, and initiator. States traditionally inhibited the solution of substate problems by failing to devolve to political subdivisions sufficient authority to cope successfully with certain problems. As a facilitator, a state can grant additional discretionary authority to local governments, including authorization to enter into intergovernmental service agreements and transfer functions or functional components to other local governments. The most controversial role tends to be that of an initiator of solutions for local problems, because such actions often are perceived by many local

government officers and many citizens as a violation of home rule, a subject analyzed in chapter 2. In 1974, Governor Calvin Rampton of Utah, admitted states have not responded adequately to local problems: "The past several years have seen a tendency arise for local governments, both city and county, to circumvent state government and take their problems directly to Washington. In all candor, I must say that a large share of the blame for this disenchantment on the part of local officers with state government lies with the States themselves. We as States have failed fully to meet our responsibilities to units of local government, and they have turned to the federal government in desperation."[19]

Congress, since the late 1940s, increasingly responded in a positive manner to numerous requests by local governments for assistance in solving problems. Chapter 6 describes and analyzes the impact of national government actions, including those associated with the war on terrorism, on local governments and state-local relations.

A detailed examination of state-local relations commences in chapter 2. The changing legal relationships between a state and its political subdivisions are analyzed, and information is presented on the amount of discretionary authority possessed by each type of general-purpose local government.