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President's Letter

We here tender an article describing the relative importance of different forms of local government as they existed some time ago. There has been little change since, except in the added and unappreciated increase in residential community associations, almost all of which have been created since 1960.

George W. Liebmann

Dropping Off Or Picking Up?

Monday, I drove our youngest son to his “final” final exam and picked him up several hours later when he had finished. Barring some unforeseen event, it will be the last time I assume the parental “drop off” or “pick-up” duty, first undertaken over a quarter of a century ago. Although I am the possessor of a rather dreadful memory, when it comes to the kids, well… it’s pretty good.

It was the first day of kindergarten for our oldest, and he was not thrilled about any part of it. When the children came together to walk through the doors for the first time, he tried to push his sister, a year younger than he was, into the line. He must have thought no one would notice and after all, wasn’t one Bennett pretty much the same as the next? When they came marching out several hours later (Catholic schools are great for marching), my wife and I nervously asked his teacher how the morning went. She responded, with a big smile on her face “Fine, were you worried?”

Most of the mornings that followed were easier, but I have never been one who enjoyed saying goodbye to his children. For me, the “pick-up” part of the equation was what I enjoyed the most. I always felt a bit of a rush when I would see them headed toward the car, and I have to admit that Monday, after a quarter of a century, I could still feel it. For all of you participating in the process, my best. Don’t take it for granted because it goes so very fast.

Now, something that I have never taken for granted is the Library Company of the Baltimore Bar and the Library it founded back in 1840. The Library has, for the last 184 years, not taken its members or users for granted. It has striven not to be good enough, but to be better: what can be added, what can be improved. Are all groups from the sole practitioner to the member of the large firm being adequately served? I think that we have done a pretty good job of it. I look forward to seeing you soon.

Joe Bennett

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George W. Liebmann

Member, Liebmann & Shively, P.A., Baltimore, Maryland;

J.D., University of Chicago, 1963;

A.B., Dartmouth College, 1960.

THE NEW AMERICAN LOCAL GOVERNMENT

I. Local Government Independence

A book was published in Britain in 1935 entitled,*A Century of Municipal Progress*.[1] Half a century later, a corporal's guard of Britain's few surviving local government scholars was assembled to prepare a sequel, fittingly entitled, *Half a Century of Municipal Decline*.[2] A similar sequence might be possible in the United States, except that the first title could not have been issued. A century ago, Lord Bryce noted that municipal government was the "one conspicuous failure of the United States."[3]

The ensuing period has seen little if any real improvement. While it would have been possible in 1950 to celebrate a century of development of the American small town,[4] there would have been only limited cause to celebrate that of large cities. Except for the twenty years ending with American entry into World War I, local government has attracted little interest from business and social leaders.

The explanation for this is found in its extreme dependence; its vulnerability before World War II to incursions by the state legislature and governor. "Franchises for utility services were bought and sold, and financial burdens imposed without reference to the inhabitants ... interference and corruption were constant."[5] Since World War II, municipal powers have been impaired by federal officials enforcing conditional spending and civil rights mandates. The nation's numerous but diminishing number of school districts likewise fail to inspire much confidence. Consolidation resulted in a dilution of the curriculum rather than its improvement; the insulation from politics provided by independent part-time boards has left the system naked in the face of the powerful closed shop operated by the nation's teachers unions. Even superintendents are required by state law to be selected from the ranks of the thoroughly indoctrinated and tend to be disloyal to any reformist purposes sought to be imposed upon them. These conditions give rise to civic apathy; persons with great talent are unwilling to involve themselves in disorderly political arenas where it is clear that they will not have the last word on any subject. As Gerald Frug has observed, "Power and participation are inextricably linked; a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so."[6]

The erosion of local tax bases has further diminished the vitality and significance of local government, which increasingly relies on conditional grants in aid from states for the discharge of essential functions. A study of the share of national governments in total taxation in the late 1970s revealed that the United States can no longer pride itself on the decentralization of its government, being surpassed in this respect by three of the six leading federal systems. National government shares of total revenues were 42% in Switzerland, 50% in Canada, 52% in Germany, 57% in the United States, 70% in Austria, and 80% in Australia.[7]

The conventional wisdom about the powers of local government was set forth thirty years ago by the British political observer Louis Heren: "The cities and other local governmental systems are not mentioned in the Constitution and the states have constitutional responsibility."[8] "Cities and counties do not have a constitutional existence."[9] "Political subdivisions in states such as counties and cities had never been considered as sovereign entities."[10] In a nation as legalistic as the United States, this view has affected both elite and public perceptions and behavior. It is significant that the most important developments in local administration since the war have come about through

private covenants perceived as enjoying constitutional protection.

One need not be an enthusiast for judicial activism to believe that the revitalization of local government requires some sense on the part of the public that there are legal limits on its destructibility. There are, in fact, a number of potential sources of such limits which apply in different measure and with respect to different types of local government. These limitations will be reviewed in turn.

A. *Limitation to Granted Powers*

It is undisputed that the national government is a government of limited powers. Even the *Garcia* case,[11] the high water mark of federal power vis-à-vis the states, recognized that some internal functions of state government, such as the choice of a state capital involved in the *Coyle* case[12] in 1911, are beyond federal control. The *Coyle* case itself may be regarded as direct authority against the validity of any federal effort to destroy or disadvantage a particular municipality. The ensuing *Printz* case,[13] decided since *Garcia*, invalidates any federal effort to conscript state officers for federal purposes, and nothing in it suggests that efforts to assume direct control over local officers are not equally condemned. Finally, the *Lopez* case[14] makes clear that the commerce power may not be extended to invade core state functions, and the existence, powers, and boundaries of local governments may be viewed as such core functions. The *Boerne* case[15] further indicates that the Fourteenth Amendment does not confer unlimited legislative competence on the national government.

B. *The Tenth Amendment*

The Supreme Court has repudiated its momentary effort in*Community Communications Co. v. Boulder*,[16] which suggested that monopolies granted by local government did not constitute "state action" for purposes of the doctrine o f *Parker v. Brown*,[17] insulating state action from antitrust liability.[18] As Professor Laurence Tribe has noted: "Certainly the text of the Tenth Amendment itself provides no basis for the distinction between state and local government made in *Boulder*: that provision reserves the same sphere of residual powers to the States respectively, or to the people." [19] Although Judge Cooley's early effort to find a Tenth Amendment inherent right of local self-government has been repudiated,[20] the case law still suggests that the proprietary functions of municipalities enjoy some Tenth Amendment immunity from interference.[21] In addition, the 1936 decision of the Supreme Court invalidating a municipal bankruptcy law on Tenth Amendment grounds has not been overruled although it has been qualified by conditioning validity of the federal statute on state involvement in the bankruptcy decision.[22]

C. *Property Rights*

Although the covenant regimes of residential community associations may be modified by the states acting under the police power,[23] the "state action" doctrine limits their enforcement only with respect to racial discrimination.[24] The ability of higher units of government to alter residential community association regimes without compensation is thus qualified. It is also not unheard of for municipalities to gain a derivative immunity by assuming enforcement of such private covenants.[25] In addition, to the extent that such regimes, or other local or sub-local regimes, have been given tax exemptions, higher units of

government may be held to be perpetually bound by the grant of exemption, a form of property right.[26]

However, a state can, without compensation, take the property of one of its constituent local governments without offending the federal Due Process Clause,[27] and municipalities do not possess the state's Eleventh Amendment immunity from suit.[28]

D. *The Contract Clause*

The Contract Clause of the Constitution may operate to immunize grants of power, subsidies, or of immunities to local levels of government from later state impairment when the rights of third persons, such as bondholders, have intervened,[29] but not otherwise.[30]

E. *Rights of Association*

Although it is unclear from where in the Constitution rights of association, like those professedly recognized in the questionable plurality opinion in *Moore v. City of East Cleveland*,[31] may be derived, it has been suggested that such rights extend at least to certain types of private clubs.[32] Professor Laurence Tribe has noted that *Village of Belle Terre v. Boraas*,[33] which upholds certain municipal zoning regulations, refers to "associational rights of the villagers themselves" and refers to a "sanctuary for people," leading him to suggest that:

if it can be demonstrated that a community's efforts to preserve its character do not operate to freeze out alternatives indefinitely or to exclude them from an area wider than a few square miles, such efforts should be regarded as entitled to at least some constitutional protection from the imposed uniformity of state or federal law.[34]

This comes close to a revival of the "inherent rights" theory. While the state may be able to destroy municipalities, while they subsist, their existence provides immunities against equal protection claims that would succeed if all the territory involved was under the jurisdiction of a single local government, as is illustrated in *Milliken v. Bradley*[85] and *San Antonio Independent School Dist. v. Rodriguez*.[36]

F. *The Guaranty Clause*

Although since *Luther v. Borden*,[37] it has been understood that enforcement of the clause empowering Congress to guarantee every state a republican form of government is a matter for Congress and not the judiciary, that case arose in the context of a private action.[38] Professor Tribe has suggested that it may provide the states or their subdivisions some protection against federal legislative or executive encroachment: "It need not follow from the unavailability of the Guaranty Clause as a textual protection for individuals that the clause confers no judicially enforcible rights upon states as states."[39] However, there is no case law supporting this proposition.

G. *Restrictions on Direct Taxes*

The Constitution's prohibition of unapportioned direct taxes is in effect a crude form of constitutionally rooted revenue sharing, because its practical effect is to reserve property taxes to state and local government.[40] State property taxes are, in fact, rare and are probably dependent for their validity on a uniform

statewide assessment mechanism.

H. *Home Rule Amendments*

State Home Rule Amendments operate, at least theoretically, to immunize municipalities and other subordinate governments from interference by state legislatures, at least where the legislation is not of statewide applicability.[41] However, even home rule grants are frequently subjected to strict construction under Dillon's Rule to limit entrepreneurial activities by municipalities, a tendency recently criticized by Professor Gerald Frug.[42]

I. *Constitutional Restrictions on Special Laws*

Nearly all state constitutions contain provisions limiting local and special laws, which immunize subordinate governments from some forms of legislative interference.[43]

While these immunities together make up a quilted patchwork, their conscious assertion and expansion is in the interest of a revitalized local government. Even in their neglected state, they are sufficient to dispel the frequently iterated notion that thirty-one states possess complete legislative power over municipalities.[44]

We proceed to an examination of the structures, public and private, making up contemporary local government.

II. Counties

A. *Incidence and Derivation*

The entire land area of the United States is substantially divided into counties or parishes in Louisiana or boroughs in Alaska that are their analogues; Baltimore City, St. Louis, Philadelphia, Denver, Baton Rouge, New Orleans, San Francisco, Honolulu, and forty-one independent cities in Virginia are counties in all but name. Yellowstone National Park and the District of Columbia are not included in any county, and there are eleven unorganized areas bearing county names in Rhode Island and South Dakota. There are about 3,000 counties in all that have little recent history of either creation or consolidation.[45]

B. *Franchise*

The franchise for elections of county officers is universally that of manhood suffrage, although this development came after manhood suffrage for legislative elections.[46] Because of the wider geographic scope of county elections, the extension of the franchise to renters does not cause the moral hazard that is present in elections in cities with higher percentages of nonproperty owners. Although some towns and municipalities in resort areas still enfranchise nonresident property owners, the practice has been upheld subsequent to the reapportionment decisions.[47] This practice seems no longer present at the county level.

C. *Legislative Election System*

The typical county government in the United States centers on three county commissioners, who are generally elected at-large and who serve general

governmental functions.[48] They are supplemented by an at-large election of courthouse officers, such as the sheriff, state's attorney, clerk of court, and registrar of wills.[49] The United States Supreme Court has upheld the validity of at-large and multi-member district elections, except where racial discrimination is present.[50] This pattern for the selection of general government officers is observed in half the counties;[51] moreover, elections of at-large courthouse officers are almost universal, save where an appointment mechanism has been provided.[52] A common variants on the three-commissioners scheme includes county boards made up of town representatives, which were obtained in about 10 percent of the counties— notably those in New York, Michigan, and Wisconsin.[53] This model is no longer valid where town-elected officials serve *ex officio* as members of county boards, because the United States Supreme Court's reapportionment decisions required equality in districting.[54] Town-appointed members of county boards, however, are not subject to reapportionment doctrine.[55] The Court has upheld at-large elections of council members who are required to reside in districts of unequal size.[56] The total effect of these decisions has been to quench the movement away from at-large elections. In four New England states and South Carolina, powers elsewhere exercised by county commissioners are exercised by the county's legislative delegation.[57] In about 10 percent of counties, including those in Oregon, Vermont, and some southern states, judicial officers serve as the county board.[58] In California and some populous counties in other states, they are given their own charters provided that boards are elected by district.[59] The relatively small number of charter counties also frequently have elected or indirectly elected county executives, which introduced a separation of powers between legislature and executive not present in most counties.

In virtually all jurisdictions, county boards or councils are quite small.[60] Small boards in sub-districted counties and at-large elections in most counties create a substantial democratic deficit and lack of neighborhood representation in American county government. In addition, in some areas, prevalence of the southern county system greatly impairs interjurisdictional competition in tax rates and school quality. Professor William Fischel, analogizing to doctrines in antitrust merger cases, has calculated suburban concentration ratios for the twenty-five leading metropolitan areas showing the share of the four most populous subdivisions in the total suburban “market,” with the following results: New York, 12%; Los Angeles, 10%; Chicago, 70%; Philadelphia, 13%; Detroit, 19%; San Francisco, 21%; Boston, 12%; Washington, 89%; Cleveland, 17%; St. Louis, 13%; Pittsburgh, 14%; Minneapolis, 23%; Houston, 72%; Baltimore, 100%; Dallas, 48%; Milwaukee, 38%; Seattle, 69%; Miami, 90%; San Diego, 74%; Atlanta, 74%; Cincinnati, 19%; Kansas City, 86%; Buffalo, 35%; Denver, 31%; and San Jose, 47%.[61]

Charter governments have grown very slowly. As of 1952, only twelve counties —ten in California, one in Maryland, and one in Missouri—had chosen to have a charter government,[62] although by 1955 about ten states had provided this or other options to at least some of their counties.[63] By 1989, there were 118 charter counties, including all the counties in Hawaii and at least five counties each in Alaska, California, Florida, Louisiana, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, and Washington.[64]

D. *Executive Functions*

As of 1955, only about fifteen counties had appointed managers deemed

equivalent to city managers, though there were elective chief executives in some important counties, including Cook County, Illinois.[65] By 1989, 383 counties had elected executives, including all counties in Arkansas, Kentucky, and Tennessee, and at least five each in Alaska, Louisiana, Maryland, Minnesota, New Jersey, New York, South Carolina, and Wisconsin.[66] Approximately 786 counties had appointive managers, including all the counties without charters or elected executives in Alaska, Arizona, California, Delaware, Maryland, New Jersey, New Mexico, New York, North Carolina, South Carolina, and Virginia.[67] Lastly, appointive managers also exist in 40 percent or more of counties in Colorado, Florida, Georgia, Michigan, Minnesota, Nevada, New Hampshire, Washington, and West Virginia.[68] The only states without a significant number of county chief executives were Idaho, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Vermont, and Wyoming.[69] Only the State of New York had legislation requiring counties to have a merit system in 1955,[70] thus, these counties served as the last bastions of political patronage.

E. *Territoriality*

County boundaries in most states were generally laid out during the pre-automobile age with a view to allowing reasonably convenient access to the courthouse, which was the focal point of county government.[71] As a consequence, with the outward spread of population from cities, a number of suburban counties now have populations exceeding those of some American states. Notwithstanding this, no movement has been made toward division of these counties. Unfortunately, in Maryland and the south, there is only a limited amount of municipal and town incorporation, and there is a substantial democratic deficit in local government. As a result, there is little interjurisdictional competition and few checks on local extravagance and educational deterioration.

F. *Revenues*

In 1953, 45% of all county revenues were derived from property taxes, 38% from grants in aid by higher levels of government, 11% from charges and miscellaneous sources, and only 6% from other exactions.[72] In 1976-77, 44.3% of county revenues were from grants in aid; 30.4% were from property taxes; 7.0%, or about $3 billion from other taxes; and 18.3% from charges and miscellaneous sources.[73] By 1992, a major shift had occurred. Roughly 35.7% of county revenues were from grants in aid; 27.4% from property taxes; 9.3% from other taxes; and 24.8% from charges and miscellaneous sources.[74]

In 1953, New York State allowed its counties to levy a tax on retail sales, restaurants, utility services, alcoholic beverage amusement, hotel rooms, business gross receipts, and passenger motor vehicle taxes within specified limits.[75] New York's procedure was highly unusual whereas seven Southern and Western states allowed local motor fuel taxes, the greatest use being in Alabama.[76] In 1976-77, this picture had not greatly changed, except that other taxes had somewhat increased in importance in Ohio, and a local income tax had been introduced in Maryland.[77]

By 1992, property tax limitation initiatives, such as in California, limited property tax yields.[78] No less than thirty-one states had local sales taxes, and Indiana and Kentucky, in addition to Maryland, had county income taxes.[79] Increased energy costs boosted charge revenues, as did increased parking, highway use,

and development charges.[80] Florida counties accounted for 59% of the total yield of county fuel taxes; counties in Arkansas, Georgia, Illinois, and Tennessee accounted for 95% of county alcoholic beverage taxes; and Illinois counties for 65% of county tobacco taxes.[81] Counties spent $1.5 billion in 1942, $9 billion in 1962, $42 billion in 1977, and $144 billion in 1991.[82]

G. *Auditing*

At mid-century, most American counties provided for elective comptrollers to perform audits.[83] The comptrollers were subject to the same political influences as the officials whose accounts they were auditing. In some states, county audits were performed by the staff of a state administrative agency.[84] The Single Audit Act of 1984 required single audits of recipients of federal funds of $100,000 per year or more, and regulations under the Act specified procedural requirements for audits, but do not require the use of external auditors.[85]

III. Townships

A. *Incidence and Derivation*

Townships, areas generally but not always six miles square, exist in sixteen states. These include the states of the Northwest Territory, Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin; the plains states of Kansas, Missouri, Nebraska, and North and South Dakota; and the Middle Atlantic states of New Jersey, New York, and Pennsylvania. [86] South Carolina and Washington also have a few townships.[87]

Over time, the number of townships has decreased. Iowa townships, of which there were 1,608 in 1942, were assimilated into county governments.[88] The same result took place in Oklahoma in 1935.[89] Legislation in Illinois, Minnesota, Missouri, and Nebraska allowed de-organization of townships.[90] In Maine and Vermont, nearly 500 former townships are now deemed wild lands governed by a state-designated supervisor.[91] In 1952, 17,202 townships existed, including 1,429 New England towns.[92] By 1975, there were still 16,822 townships including 1,425 New England towns.[93] The number in the Middle Atlantic states declined from 2,729 to 2,171.[94] By 1992, townships and New England towns numbered 16,666.[95] In 1975, nearly three-fifths of township governments had fewer than 1,000 people, and approximately 48 million people lived under township jurisdiction.[96] Although studies in Illinois, Indiana, Michigan, New York, and Pennsylvania have alleged that townships are wasteful and duplicative of county governments,[97] resistance to their abolition is strong.[98]

B. *Franchise*

As with counties, manhood suffrage now prevails, without votes for nonresident property owners.

C. *Legislative-Election System*

With respect to the New England town, “the nucleus of town government was the town meeting, an annual event.”[99] At these meetings, select men were chosen by the body of small freeholders or later, by all inhabitants. Various other officers with specialized functions were also chosen, including constables, clerks, surveyors, and overseers of the poor. Town meetings

continue to take place in New England rural areas, particularly in Vermont; townships in some Midwestern states, notably Michigan, Illinois, Wisconsin, Minnesota, Nebraska, and the Dakotas; and in New York and New Jersey. [100] The system has been required in communities closely knit in ideas, compact in area, and homogeneous in population. Meetings outside New England are sparsely attended. The southern tier of states with townships, Pennsylvania, Ohio, Indiana, Kansas, and Missouri, do not have meetings but regular elections. This is said to be due to the large areas of townships, in the Midwest and the fact that most of the settlers were southern or immigrants, rather than New England stock.[101] Unlike the typical county, Midwestern and Middle Atlantic townships usually have a head officer or supervisor; in Pennsylvania and Kansas there are three-member township boards; larger Pennsylvania townships may elect board members by districts rather than at large as is usually the practice.[102]

D. *Executive*

As noted, most townships outside New England have supervisors or trustees, rather than three-member boards.[103]

E. *Territoriality*

Most townships outside New England were laid out in six-mile square units and subsequently had towns and municipalities subtracted from them.[104] In consequence, with a few exceptions in the Middle Atlantic states and Indiana, (where townships cover the whole territory of the state), most townships are rural entities with relatively small populations.[105] In 1975, less than 2 percent of the nation's townships had more than 25,000 people, and these accounted for about a third of the 48 million residents of townships.[106] None of the 1,500-odd townships in Nebraska and South Dakota had more than 5,000 people.[107]

F. *Revenues*

In 1953, 60% of township revenues were derived from the property tax, 25% from intergovernmental revenues, and 15% from miscellaneous sources.[108] By 1992, 74.1% of non-intergovernmental township revenues were from the property tax, or about 55.6% of all revenues, 5.7% of nongovernmental revenues, or 4.3% of all revenues were from other taxes, mostly license taxes, and 20.5% of non-intergovernmental revenues, or 15.3% of all revenues from user charges and other sources, township revenues displaying great constancy over time.[109] Township expenditures amounted to about $1 billion in 1953[110] and 1962. Their general revenues in 1991, apart from intergovernmental transfers and utility revenues, amounted to approximately $15 billion.[111]

G. *Auditing*

In most states, townships are audited by their own auditors, and smaller townships are below the threshold at which federal regulations relating to forms of audit apply.

IV. Municipalities

A. *Incidence and Derivation*

In 1952, there were 16,778 municipalities in the United States, an increase of 558 over a ten year period.[112] By 1977 there were 18,862 municipalities, and by

1992, there were 19,296, only 6,623 of which had populations of 2,500 or more.[113] The smaller municipalities, however, account for only about 3% of the municipally served population.[114] In 1977, the population of all municipalities was about 136 million.[115] Municipalities are commonly defined as separately incorporated areas based on a concentration of population; they enjoy charters conferred pursuant to special or general law. Most states have legislated minimum population requirements for municipal incorporation. Except in Pennsylvania, which requires a minimum population of 10,000, the required population numbers are usually in the low hundreds. Only twenty-three municipal charters were granted during the colonial period.[116]

B. *Franchise*

In early Annapolis, Norfolk, and Philadelphia, boards were self-perpetuating.[117] Elsewhere there was a property qualification for voting that originally qualified only about 10 percent of the male population.[118] These restrictions began to break down during the Jacksonian period, but they lasted much longer with respect to municipalities than they did for legislatures. Manhood suffrage in municipalities was sharply criticized by commentators like James Bryce[119] and Frank Goodnow[120] at the turn of the century for its provision of representation without taxation and the moral hazard presented thereby in jurisdictions with high percentages of renters; some such jurisdiction, notably New York, Washington, and some of the London boroughs became notorious for overspending, leading to the superimposition of appointed “control boards” in the United States and “rate capping” in England.

C. *Legislation*

Municipalities, unlike counties and townships, customarily selected their legislatures on a district or ward basis. Initially, municipalities were more business enterprises than political units and had limited or no powers of taxation. Many cities particularly in the East had bicameral councils, as late as 1903 such councils survived in about one-third of cities with populations in excess of 25,000. Bicameral councils were abolished in New Orleans in 1870, in Milwaukee in 1874, in Cincinnati in 1890, in Detroit in 1887, and in New York in 1873.[121] Interference by the state legislature in the affairs of particular cities was common. Home rule amendments limiting legislative interference except by general law began to be adopted beginning with Missouri in 1875, followed by Washington in 1889, California in 1896, and Minnesota in 1898.[122] By 1930, nineteen states had such provisions; by 1954 the number had grown to twenty-five.[123]

D. *Executive*

Early cities were governed by councils and council committees on the English pattern, mayors having few functions beyond the ceremonial. Beginning with the Jacksonian period, elective mayors with veto power and no right to sit with the council became more common, with emphasis on the separation of powers.[124] After the Civil War, there was a tendency toward longer mayoral terms, fewer elected department heads or department heads chosen by the council.[125]

Following the inept performance of the Galveston municipal government after the flood of 1900, a new plan providing for municipal government by a board of

elected commissioners, each of whom was a department head came into vogue until the First World War. [126] In 1954, 356 cities operated under this plan; of the 6,623 municipalities with a population over 2,500 in 1995, 156 had the commission plan, 364 were governed by town meetings, all with populations of less than 50,000; 3,294 had a mayor and council system; and 2,738 had managers selected by the council.[127] Staunton, Virginia, in 1908 was the first municipality to hire a manager.[128] By 1955, there were 1,260 cities with managers, double the number in 1940.[129] Managers are less common on the Eastern seaboard.

The sixty-four cities with more than 250,000 people included two cities that used the commission plan, thirty-six utilizing the mayor and council system, and twenty-six with councils and managers.[130] The council-manager system was used in a majority of cities with populations under 100,000; cities with more than 500,000 included twenty with mayor and council systems and only five with council-manager systems.[131]

Municipal charters, unlike private corporate charters over which the state legislature has not reserved jurisdiction like that in the *Dartmouth College* case,[132] are treated as revocable or amendable by the state legislature; Justice Story's concurring opinion in the case distinguished between private and public corporations.[133] Perhaps more importantly, while the activities of private corporations are generally restricted only by the business judgment of their directors, municipal charters, including home rule charters, are generally subject to the principle of Dillon's rule requiring that the powers granted by them be narrowly construed. This limits some forms of “municipal socialism.”[134]

In most states, annexation to a municipality can take place only upon a majority vote of the annexing city and the area to be annexed.[135] In Virginia and Texas, and with respect to second-class townships in Virginia, annexation may be judicially decreed on petition without a referendum, greatly reducing the number of separately incorporated suburban areas.[136] Annexations are most common in less densely populated areas of the country; once suburbs have become incorporated, local loyalties make annexation difficult. Some states, including Alabama, accord municipalities extraterritorial powers in fringe areas, allowing them to preclude incorporation, exercise some police powers, and collect taxes at lower rates.[137] A partial federation of Atlanta and its suburbs, carried out by allocating some functions to the city and some to the counties, was carried out in 1952.[138] A merger of Nashville and its suburbs took place in 1962, as did similar extensions of Jacksonville and Baton Rouge. Miami and Dade County established a two-tiered government in 1957, as did Indianapolis in 1969.[139] The states of Colorado, Kentucky, Michigan, Minnesota, Ohio, Texas, and Virginia have enacted legislation authorizing local governments to share revenues by mutual agreement.[140]

E. *Revenues*

Municipal revenues in 1953 were derived 38% from property taxes, 13% from intergovernmental transfers, 9% from other taxes, and 40% from utilities, charges, license fees, and other sources.[141] In Philadelphia, the authorization of a local income tax caused the yield of other taxes to exceed that of the property tax; elsewhere, nonproperty taxes were of major import only in New York and in tourist cities like Atlantic City and New Orleans.[142] By 1977, intergovernmental transfers accounted for 38.0% of city revenues, 14.6% of

which were federal transfers, an increase from 4.4% ten years earlier.[143] Property taxes accounted for 25.7% of revenues, nonproperty taxes for 16 to 17%, and utility charges and miscellaneous sources for 17.5%.[144] About $3.5 billion was derived from sales taxes, $2.3 billion from excises, particularly those on tourists, and $4.6 billion from licenses, income taxes, and other taxes.[145] In Philadelphia, nonproperty taxes were more than double property taxes in yield; in New York City they were about equal in yield. [146] By 1992, intergovernmental transfers accounted for about 33% of municipal revenues, property taxes for about 21.2%, sales and gross receipts taxes for 10.8%, income taxes for 5.4%, other taxes for 3.0%, and utility charges and miscellaneous revenue for about 26.0%.[147] Local sales taxes existed in thirty-one states[148]; property tax limitation measures had been applied in California and some other states,[149] local income taxes were authorized in sixteen states and were important in Maryland, New York, Ohio, and Pennsylvania. [150] Total expenditure of municipalities amounted to $9 billion in 1953,[151] $56 billion in 1977,[152] and $232 billion in 1991.[153]

V. Special Districts

A. *Incidence and Derivation*

There were 12,339 special districts in the United States in 1952;[154] their number increasing to 18,332 by 1962, 25,962 in 1977, and 31,555 in 1992.[155] In 1952, six states—California, Illinois, Kansas, Missouri, New York, and Washington—had two-thirds of all special districts.[156] In 1977, these six states, together with Pennsylvania, Texas, Nebraska, Colorado, and Indiana, had 61% of all special districts.[157] By 1992, five Western states—California, Nevada, New Mexico, Oregon, and Washington—appointed state commissions to retard the further growth in numbers of special districts.[158] States continue to vary widely in their use of special districts. In 1977, eight states had special districts that had more than 5% of all state and local government full-time equivalent employees in the state: Alabama, California, Florida, Georgia, Illinois, Nebraska, Oregon, and Washington, the percentage reaching over 13% in Georgia.[159] Thirteen states, including New York and Wisconsin, had less than 1% of state and local full-time-equivalent workers employed in special districts.[160]

The motivations for formation of such districts are several. They allow evasion of local debt limits; allow independent governments to cooperate in rendering the few functions, such as water and sewer, that have significant economies of scale; allow revenue bond financing, and provide insulation from politics, the benefit of “expert” or market-oriented administration, and the ability to function as pure provision units and compete for municipal custom.[161] As special-purpose agencies, they provide a way to avoid the force of the Supreme Court's reapportionment decisions. Former Justice Tom Clark observed in 1968 that the extension of reapportionment decisions to local government “[w]ill cause a proliferation of established local government into special purpose agencies that will be removed from the electoral process.”[162] Their drawbacks are said to be inadequate political control, the higher costs of revenue bond financing, fragmentation of government, and the creation of categorical nails, linking them with specific federal programs without regard for normal budgeting priorities.[163]

The 30,331 districts in 1992 (with 1977 numbers in parentheses) were made

up of 6,948 (4,200) sewer, water, and other utility districts; 5,923 (6,301) drainage, flood control, irrigation, and soil conservation districts; 5,260 (4,181) fire protection districts; 3,470 (2,408) housing and community development districts; and about a thousand districts each concerned with health, highways, hospitals, libraries, parks, and school buildings.[164] Housing and community development districts were the most rapidly burgeoning non-utility category; this increase reflects not only federally connected housing authorities but increased use of such entities as tax increment financing districts and historic preservation districts. It should be noted that some districts, such as school building districts designed to foster construction of consolidated schools and tax increment financing districts, are self-liquidating and will disappear when project bonds are paid off.

B. *Franchise*

Most special districts have appointive boards or boards designated by participating local governments, though some important districts, the Cook County, Illinois, sanitary district, for example, have elected boards.[165] Many of the drainage, irrigation, flood control, and soil conservation districts in the Western states have property franchises for elections, which have been repeatedly upheld by the Supreme Court in the *Salyer*,[166] *Toltec*,[167] and *Ball*[168] cases.

C. *Legislative Election System*

It is impossible to generalize about the election systems of special districts, where boards are elected, because of geographic and functional variations.

D. *Executive*

A majority of the special districts have a single manager, designated by the board, which in turn consists of representatives of the parent governments.

E. *Territoriality*

The typical utility district generally encompasses more than one township or county. The same is true of hospital districts, which have more employees than any other category. Library and school building districts characteristically exist in states without county government to allow townships or small school districts to cooperate. Some of the newer districts in the housing and community development category are sub-municipal historic preservation, business improvement, and tax increment financing districts; some are metropolitan-area housing authorities. However, in 1977, "[o]ne-fourth of all special districts serve[d] an area with the same boundaries as those of some other local government—county, city or township government." These entities are "categorical nails," and their independent existence is particularly difficult to justify, particularly when they are empowered to directly impose taxes, and because their elections rarely arouse much interest and are subject to only limited political or budgetary checks. In 1977, almost all states gave large numbers of special districts property-taxation powers, the exceptions being Alabama, Alaska, Arkansas, Pennsylvania, and Virginia.[169] Georgia, Maryland, Oklahoma, and Tennessee accorded property-taxation power to only a few districts.[170]

F. *Revenues*

In 1953, revenues of special districts were derived 40% from utility receipts, 35% from other user charges, 18% from district-imposed property taxes, and 7% from intergovernmental transfers.[171] This picture has changed significantly. In 1990-91, special districts had total revenue of $64.6 billion,[172] of which 41% was from charges, 21% from intergovernmental transfers, and only 12% from district-imposed property taxes.[173] "[S]pecial districts accounted for only 3.5 percent of local government general taxes in the United States, and in no state did special districts raise as much as 13 percent of local taxes."[174]

District proliferation has been criticized by the Committee on Economic Development, which in 1966 recommended that the number of districts be decreased by 80%,[175] and by the Advisory Commission on Intergovernmental Relations,[176] which urged that they dilute citizen control and are inefficient. However,

[b]ecause many sewage treatment districts operate with economies of scale, smaller communities that desire sewage treatment services often construct their own collection systems and contract with a sewage district for treatment ... Special districts can also be conducive to efficient consumption, by providing a mechanism through which diverse collective demands for local public goods can be met.[177]

An Advisory Commission on Intergovernmental Relations study in 1970 found "significant diseconomies of scale" in cities of over 250,000,[178] a result concurred in by Professor Robert Dahl.[179] Various studies associate curtailment of special districts with higher governmental costs.[180]

VI. School Districts

A. *Incidence and Derivation*

When a public school system began to be created in the mid-nineteenth century, different patterns of organization emerged. In eleven Southern states —Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, New Mexico, North Carolina, Tennessee, Virginia, and West Virginia—and in Utah, countywide school systems were organized.[181] In nine states, the six New England states and Indiana, New Jersey and Pennsylvania, township boundaries were also those of the school district, except where there were incorporated towns.[182] The remaining twenty-seven states (other than Alaska and Hawaii) had independently defined school districts.[183]

The number of school districts has fallen sharply in recent years. Several study groups, including the National Commission on School Reorganization (1948) and a study of the American high school by James Conant ten years later,[184] urged consolidation of school districts in the interest of providing a broader curriculum, a development also fostered by teachers' unions for their own purposes, and carried out through various devices, including changes in state funding formulas penalizing small districts and legislatively and administratively coerced mergers, including mandatory county unit systems in Florida and West Virginia.[185] The 1948 commission recommended that each district have 1,200 pupils, and if possible as many as 10,000; that each elementary school have a minimum of 175 students and seven teachers and each secondary school a minimum of 300 pupils with twelve teachers, and that busing be limited to forty-five minutes each way for elementary students and an hour each way for high

school students[186]—distances clearly sufficient to destroy any neighborhood basis of education. One consequence of consolidation has been a drastic fall in the number of persons with experience of service on school boards; there were 234,000 school board members as recently as 1955.[187]

The number of school systems declined from 127,244 in 1933, to 108,579 (or one for every 1,250 people) in 1942; to 67,442 in 1952; to 59,631 in 1954[188]; to 15,781 in 1972; to 15,174 in 1977; to 14,851 in 1982; and to 14,556 in 1992. [189] In addition to these districts, there are additional systems (2,409 in 1952; 1,374 in 1977) operated as part of state, county, municipal, or township governments. This is the preponderant practice in Alaska, Connecticut, Hawaii (which has a single state system), Maine, Maryland, Massachusetts, North Carolina, Rhode Island, Tennessee, and Virginia, and in several New York cities, including Albany, Buffalo, New York City, and Yonkers. [190] Integration of school districts and local government has been urged in a number of studies on the ground that "[t]he observations made ... do not indicate that the schools are subjected to greater political pressure in those areas in which school and municipal services are administered cooperatively than in the situations in which the school authorities administer the same functions independently." [191] It is further urged that this fixes political responsibility and prevents the schools from being administered as a private preserve of teachers' unions. Against this, it is pointed out that county governments are highly politicized and that city governments have on occasion used school systems as sources of political patronage. The separation of teachers' aides from the school personnel system, which existed until recently in Baltimore provides an example of this.[192]

Much of the earlier reduction was due to the elimination of one-teacher elementary schools, of which there were more than 75,000 in 1948.[193] The school consolidation movement is attributed by its more sympathetic commentators to the higher cost of one-room schools, and to the need for "kindergartens, competitive athletics, adult education, education for handicapped children, vocational education, and guidance counseling,"[194] as well as high schools with more than 300 students. In addition, "the hard road and the motor vehicle have made possible the establishment of larger districts through the agency of the school bus. Thus has social community been enlarged."[195] It is to be noted that the French government to this day keeps open one-room village schools with a minimum enrollment of 23 (there being 10,778 such one-room schools in 1982), the required number being reduced from 26 in 1976.[196]

A study by the U.S. Office of Education in 1949 reported on the fruits of this consolidation, "changes are in the direction of more functional education. They represent efforts to meet life needs of increasingly diverse bodies of pupils."

Many general courses such as general science and general mathematics had increased their enrollments at the expense of specific subjects such as physics, algebra and geometry. The outstanding percentage of increases between 1934 and 1949 were in physical education, typewriting and general mathematics. Subjects taught in 1949 but not in 1934 in fifteen or more states were conservation, consumer buying, safety education, driver education, home management, fundamentals of electricity, radio speaking and aeronautics.[197]

Only recently have there been efforts to restore greater civic participation in school governance through the creation of boards for individual schools in

Chicago and the creation of a very small number of charter schools in a number of American jurisdictions. By contrast, recent reform legislation in Britain, Australia, and New Zealand has provided each school with its own governing board.[198]

B. *Franchise*

Although the school district franchise, like that for municipal governments generally, was once limited to property owners who were thus property taxpayers, these restrictions were generally eliminated in the late nineteenth century, though they survived in some jurisdictions. The coup de grace to the remaining limitations was administered by the Supreme Court in *Kramer v. Union Free School District*.[199]

Efforts to place elected parent representatives on boards of individual schools in Illinois were contested by the teacher unions. The resulting *Fumarolo* decision[200] invalidating the efforts was much criticized and has been overcome by later legislation that limited the authority of the local board to selection of a principal and allocation of funds within a budget and denied it assessment powers, the new legislation being upheld.[201] No American state has thus far emulated Britain, Australia, and New Zealand in providing for election of boards of individual schools by parents, teachers, and local government representatives and for co-optation of additional board members.

School district boards throughout the country are of varying size, though five is the most common number. Most boards are popularly elected, but a number of large city boards, including those of New York, Chicago, and Baltimore are appointed. In Georgia, county boards are appointed by the grand jury; in Maryland, most boards are appointed by the governor, though some are elected; and the Baltimore City board is appointed jointly by the mayor and governor; in North Carolina county boards are appointed by the legislature; in Virginia by a board appointed by judges; in South Carolina by the State Board of Education in New Mexico jointly by the state superintendent, the county judge, and the chair of the county commissioners; and in Tennessee by the county courts.[202]

C. *Legislative Election System*

As previously noted, most American school boards are of five members, elected at large, though some large districts, such as the large county districts in Montgomery and Prince George's Counties in Maryland, are now elected from single-member districts.[203]

D. *Executive*

Virtually nowhere are schools, as distinct from counties, directly administered by their boards. Essentially all school systems have superintendents appointed by the boards, whose qualifications, defined by state law, usually include extended graduate work in education, thus assuring that leadership of the public schools is vested in a limited number of persons with graduate education degrees indoctrinated in schools of education.[204]

E. *Territoriality*

As previously noted, involuntary consolidations of districts are possible in

some states, while in others incentives are provided in the form of aid for new buildings and penalties for single-room schools, which survive in large numbers only in Nebraska, where they are under pressure from the state. Districts organized on a county or township basis have undergone less consolidation than have schools in states with separately defined districts.

F. *Revenues*

In 1953, 51% of school district revenue was derived from property taxes, 43% from intergovernmental grants, and 6% from miscellaneous sources.[205] In 1992, leaving aside intergovernmental grants, 83.5% of school district revenues were provided by taxes and 16.5% by charges and miscellaneous revenues.[206] The property tax accounted for 81.4% of own-source revenues, sales and income taxes for only .7% each, and license and other taxes only .8%.[207] Expenditures of school districts amounted to about $6 billion in 1953.[208] Their general revenues exclusive of intergovernmental transfers amounted to about $92 billion in 1992 and total revenues to about $202 billion.[209]

VII. Residential Community Associations

A. *Incidence and Derivation*

The first American residential community association established by deed covenants may have been that for Louisburg Square in Boston in the early nineteenth century. The availability in American as distinct from English law of positive covenants that could be imposed on land and carried with them the obligation to pay recurring charges made possible the later development in the United States. In the early 1960s, the Federal Housing Administration distributed model covenants and required developers as a condition federal mortgage insurance to deed infrastructure to a community association with the means to maintain it, in order to obviate the imposition upon municipalities of the costs of failing systems. Since that time, residential community associations and condominium associations have been provided for by statute in every state.

In 1999, according to the Community Associations Institute, there were 205,000 community associations, with a total population of 42 million, constituting about 15 percent of the housing in the United States.[210] The resale market value of RCAs was said to be $1.8 trillion; their reserves $18 billion.[211]

B. *Franchise*

The franchise of RCAs is characteristically a property franchise, with each unit either having a single vote or a vote apportioned to its initial value or square footage.[212] Recent amendments to the Uniform Common Interest Act permit variants to this model by allowing tenants to vote on matters other than assessments.[213] Because the voting regime is imposed by private covenant, it raises no problems under the Supreme Court's reapportionment decisions.[214] Even if it were subject to them, the property franchise would be supportable in view of the cases upholding property-based western special districts, including the multi-functional Salt River District in Arizona described in Joel Garreau's *Edge City*.[215] RCAs do not run schools or enact or enforce criminal laws; these characteristics, along with a lack of significant nexus with the state suffice to protect the voting regime. A number of RCAs, desirous of obtaining the benefit of public funds or tax deductibility, have reinforced their position by obtaining

incorporation of parallel special districts with a one-man/one-vote voting regime; this has happened in Oronque Village, Connecticut; Pennsbury, Pennsylvania; and with respect to several dozen RCAs in Anne Arundel County, Maryland, where a local law expressly permits such incorporations.[216]

C. *Legislative Election System*

RCAs, almost without exception, are the last bastions of a town meeting system. Officers are elected and budgets approved at an annual meeting of all owners. Additional safeguards are provided for owners by requirements for majority or supermajority votes of all owners, not merely majorities of a quorum, with respect to such matters as amendments to the covenants and special assessments beyond certain minimums. Only limited rulemaking functions are allowed to RCAs by their covenants, although amendments to the Uniform Common Interest Act, not duplicated in the American Law Institute's *Restatement of Property: Servitudes* would permit associations, with the approval of 80 percent of all their members, to impose new restrictions so long as grandfather rights are accorded present owners.[217]

D. *Executive*

RCA members elect a governing board. This board either self-manages, elects a chair to carry out management functions, hires an employee to do so, or hires an outside management company to do so. According to the Community Associations Institute, 27% of boards self-manage, 26% hire an employee, 42% hire an outside management company, and 5% use a combination of these approaches.[218]

E. *Territoriality*

The boundaries of RCAs are generally fixed by covenant, although developers may create separate associations for contiguous districts to limit the size of associations or to provide different associations for areas with differing interests.

F. *Revenues*

Revenues of RCAs derive in overwhelming proportion from assessments on property provided for in the deed covenants, which generally are related to the original sale price. Some covenants also allow per capita assessments, which are seldom used. User charges for such facilities as parking, laundry, swimming pool, and clubroom use can be important, as can rentals to outside groups. Payments by public bodies in consideration of road maintenance or trash collection are increasingly common, as are small public grants to foster volunteer security patrols. Their annual revenues in 1999 approximate $20 billion.[219]

VIII. Business Improvement Districts and Merchants' Associations

A. *Incidence and Derivation*

It is said that the first American Business Improvement District (BID) was the Downtown Development District of New Orleans, established in 1975, which followed the creation of such a district in Toronto in 1970.[220] It followed at a distance of about twenty years the creation, under initial single ownership, of large suburban shopping malls with merchants, associations, and ultimately

surrounding office space, developments described by Spencer Heath MacCallum in *The Art of Community*[221] and in *Edge City*, by the journalist Joel Garreau.[222] Approximately forty states and the District of Columbia have authorized such urban entities, which now number between 1,000 and 2,000.[223] There are said to be "forty BIDs in New York City, fifty-four in Wisconsin, thirty-five in New Jersey, sixteen in San Diego."[224]

B. *Franchise*

The franchise in BIDs is characteristically restricted to property owners, and sometimes to commercial property owners.[225] In some cases, votes are weighted to assessments; while in others, the city government or particular institutions may appoint to the board. The board, at least theoretically, is a management committee that acts for the city government. It is this feature, that, in the view of one commentator, saves the arrangement from being constitutionally vulnerable,[226] though the property-related nature of district functions and the example of the Salt River District case would appear to immunize it even apart from city supervision. The leading case upholding the validity of BID voting arrangements gives only limited emphasis to city control.[227] One state, Colorado, provides for one-man/one-vote voting, but only where a majority of landowners approve.[228]

C. *Legislative Election System*

As noted, election systems widely vary. Characteristically, boards are quite large, and owners of residential property and even tenants may be given some representation, as may designees of institutions or of the local government.[229]

D. *Executive*

The managing board of the BID generally either employs or contracts with a manager, who is removable by the board, or, under some circumstances, by the city government.

E. *Territoriality*

The area of BIDs is customarily defined either by local legislation or by a petition for their creation. Typically, the area is a business district, but not necessarily a downtown business district. Substantial support by property owners and approval (except in Mississippi) by the municipal government is requisite to creation.[230]

F. *Revenues*

Revenues of BIDs customarily are drawn from an assessment either on all property or on commercial property in a maximum amount that is a percentage of property taxes, and such assessments are usually in addition to property taxes.[231] In addition, BIDs usually have bond-issuing authority, and frequently derive revenue from BID-operated facilities, such as parking garages, and from fees paid by the city for BID management of city-owned facilities, from appropriations to the BID from the city.[232] It has been estimated that less than 10% of all BID revenues are derived from general fund appropriations.[233] A survey of twenty-three BIDs undertaken by the Pittsburgh downtown partnership indicated that assessments accounted for more than 80% of BID revenues in sixteen BIDs and from 50% to 79% in three other cases.[234] The

largest single BID, New York's Grand Central Partnership, had assessment income of $14.3 million in 1996.[235] Total BID assessments in New York City in 1997 amounted to less than $50 million, as against a municipal budget of $34 billion; this suggests that total revenues of all BIDS are considerably less than $1 billion nationally.[236] Their functions include development of needed infrastructure, chiefly parking garages, small parks, street furniture, and shuttle transit; improved enforcement of public nuisance regulations; better rendition of maintenance services; and cooperative advertising in the interest of local businesses.[237]

The population of BIDS in central business districts is usually quite limited. Recently, there have been a number of instances of organization of similar instrumentalities in established residential neighborhoods, including the Marquette Park neighborhood in Chicago, residential policing districts in New Orleans, and the Charles Village district in Baltimore. These districts have a property owners' franchise. The improvements in these districts have fewer spillover effects than downtown improvements, but aid cities in retaining and attracting taxpayers. With respect to both BIDS and NIDS there may also be in time a tendency for cities to contract with neighborhood organizations for the delivery of ordinary, as well as supplemental services, or to grant tax abatements to organizations performing such services. Quasi-public neighborhood organizations are better equipped than cities to contract out services like street repair and trash removal and to function as pure provision units without conflicts of interest with their own bureaucracies; they are also better equipped to engage in co-production through the use of volunteers in connection with such services as tree planting, trash removal, and security patrols. The zoning commentator, Richard Babcock, has suggested that neighborhood groups be given the power to determine the intensity of housing code enforcement.[238]

Whether the new NIDS, which ordinarily encompass several tens of thousands of persons, are of optimum size may be open to question. To question them on the basis that they will create or aggravate inequalities of provision, however, is clearly retrograde.[239] The ability of small neighborhoods to tax themselves results in greater aggregate spending on public goods. If economic leveling is to be accomplished, this should be done by higher levels of government through the tax and benefit systems. Preventing local self-government and the volunteer effort, co-production of services and additional investment that it generates is a self-defeating policy.

This survey suggests that many of the traditional proposals for rationalizing American local government are misconceived.

One traditional proposal would fold townships into counties in rural areas. But as populations grow, county government becomes more remote, and as usually practiced, with at-large elections, it suffers from a democratic deficit. Even where suburban counties sub-district their councils, the result tends to be a form of councilmanic courtesy—a system of one-man rule in which constituencies of 50,000 to 100,000 have their zoning reclassification and infrastructure development decisions made by a single legislator, with all the opportunities that affords for regulatory capture and corruption.

A second favored and highly fashionable scheme is metropolitan government. This panacea is driven by a purpose to use richer suburban tax bases for the benefit of the inner city; talk of superior efficiency and coordination is really so

much window-dressing and is refuted by most studies of government costs.[240] Because the purpose is well understood, the proposals have in recent years found little favor. Forced mergers of tax bases rarely work as means of equalization; this has not only been the experience in California in the wake of *Serrano v. Priest*; but also, in Paris and its suburbs, in the wake of changes attempted by the Mitterand government in the interest of the poorer suburbs; and, in Germany, where a mild system of taxing provincial revenues for the benefit of poorer provinces broke down in the wake of German reunification.[241] If higher levels of government wish to foster greater leveling, they must do it themselves, with their own tax and benefit systems, and not through shotgun marriages of local units at the expense of local self-government. The nationalization of business property taxes in Britain, France, and Germany, supplies one example of a more appropriate approach, and one which the auctioning to large business of municipal and county tax bases may make necessary in American states. Metropolitan government is a recipe for tax revolts. It is also significant that even suburban counties that are most intransigently opposed to metropolitan government have usually been willing to enter cooperative arrangements in connection with water, sewer, and solid waste disposal facilities as to which there are true economies of scale. Baltimore County, Maryland, thus shares a water and sewer system with Baltimore City and ten years after rejecting a joint housing authority and constitutional changes perceived as fostering metropolitan government joined in establishing a solid waste authority.[242] It should also be noted that the Supreme Court's local government reapportionment decisions made voluntary establishment of metropolitan government more difficult; as Justice Harlan noted in his dissenting opinion in *Avery v. Midland County*, “the suburbanites often will be reluctant to join the metropolitan government unless they receive a share in the government proportional to the benefits they bring with them and not to their numbers.”[243]

A third set of proposals, those which would enfold independent school districts in their related municipal, township, or county governments, has much more to be said for it. In many places, by reason of the largely misbegotten consolidation movement, school districts are no longer more localized than general local government. Where this is the case, absorption into general government would accord the schools political leadership with which to resist the capture by teachers unions, by which they are now afflicted. Part-time boards, employing super-intendents who are part of a closed shop, do not have the public support, resources, or political clout to legislate significant reform or drive hard bargains with the teacher unions, nor is the absence of budgetary competition and scrutiny useful to the system.

A fourth set of proposals would drastically reduce the number of special districts. Where these districts have boundaries coextensive with general purpose governments (as a quarter of them do) and enjoy property taxing power, the case for merger seems incontrovertible: it will eliminate duplicating bureaucracies and foster competitive budgeting as well as improved accountability to taxpayers. There is no good reason for separate library or fire taxes within budgets when service areas are no larger or smaller than those of general purpose government. But many community development districts, soil conservation districts, and irrigation, drainage, and flood control districts are sub-local districts, which deserve to be preserved. The same is true of utility districts, serving multiple jurisdictions and enjoying real economies of scale and freedom from municipal bureaucracies. Some special districts with the

same territory as general purpose governments also deserve to survive; their purpose is revenue-bond financing and separation of the delivery of services from the pressures of unionized municipal employees.

Consequently, only small parts of the conventional agenda can reasonably be embraced. Major problems with the present state of American local government as disclosed by the preceding outline require two different reforms:

First, even the strongest political leadership is insufficient to successfully run a large bureaucratized school system. This is so because the closed shop imposed by “professional” education and certification requirements has grown so rigid as to ensure that competent managers for a large system cannot be found. The power of union bureaucracies cannot be counterweighed; it can only be disintegrated. The current voucher proposals are one means of disintegration, but a milder means can be found in the system created by the 1988 British Education Act, which has variants in other countries, including Australia, New Zealand, Denmark, Germany, Ireland, and Switzerland. Under this scheme, each school is provided with its own board, partly appointed, partly elected by parents and teachers, and partly co-opted. The board is empowered to hire and fire the principal; the principal is empowered to hire and, with board assent, to fire teachers and, with board approval, to allocate the school budget among teaching, library, and maintenance needs, including pay increments for valued or needed teachers; and at the high school level, some power is given to select pupils. Because this system begins with existing schools in place, it can be carried into operation at once, unlike the almost farcical schemes for charter schools, which are calculated to maximize union and bureaucratic resistance at every point, and which after twenty years of discussion affect only a miniscule proportion of the nation's public school students.

Second, there is a need in both suburban areas and large cities for far more localized mechanisms of civic cooperation than now exist.

There is an extraordinary democratic deficit in many of the nation's fast-growing suburban counties. In some of them, Baltimore County, Maryland, for example, with a population of 600,000, there are no township or municipal governments of any kind. The only elected officers are a county executive and courthouse officers, seven county councilmen, each with a constituency larger than a constituency for the British parliament, and state legislators, nearly all of whom represent three-member districts no smaller than the councilmanic districts. The resulting democratic deficit, is partly filled for those residents fortunate enough to live in developments constructed since 1960 with private residential community associations: about 15 percent of the nation's population, and perhaps a third of its suburban population. But for other residents, including those in rapidly deteriorating inner suburbs, new local institutions are needed.

What form should these take? This author and others have speculated elsewhere on this subject, discussing urban street associations for traffic calming purposes and block dissociations for land readjustment, zoning relaxation, and urban renewal purposes.[244] But these are unfamiliar and varying instrumentalities, and in any case are not readily adaptable to suburban conditions. On further consideration, an existing political structure, the election precinct or district, is well adapted to all these approaches, and to both the inner city and suburbs. The typical election district has several

features: (1) its population is modest, usually not more than 2,500, and is roughly comparable to that of British parish councils and French and Swiss communes, which have long persisted as political entities; (2) it invariably has a centrally located meeting place, a church, school, or other public building, and indeed is designed with that in view; (3) its meeting place is familiar to the electorate; (4) over time, there is a tendency in most places to provide sizeable RCAs with their own election districts; and, (5) existing records classify each home and voting resident by election district. There is at least some history of use of voting precincts for purposes other than elections. In Arkansas, Idaho, Illinois, Indiana, Kansas, Kentucky, Minnesota, and Texas, precinct electorates are given at least limited authority to regulate liquor sales within election districts[245]; in Illinois, there are precinct referenda on inclusion in neighborhood security patrol districts, and a home equity assurance program, and three fence viewers in each precinct allocate fence repair costs[246]; in Kansas, precinct residents may petition for sidewalks[247]; in Massachusetts, they may petition to revoke occupational licenses[248]; in Nebraska, they may authorize precinct bond issues and the levy of property taxes[249]; in New Hampshire, they may appoint managers and create fire and zoning districts.[250]

Recently, private RCAs have begun to assume various quasi-public functions: the repair of local streets, and collection of trash in exchange for tax abatements or payments by municipal governments; receipt of notice of and comment on nearby zoning applications. A leading community association attorney, Wayne Hyatt, has proposed amendment of characteristic association documents to include new paragraphs authorizing "Provision of Services, Facilities and Programs" in exchange for user fees; "Specific Assessments" for lot owners electing optional services; "Provision of Services," including landscaping, pest control, cable television, and caretaker services on an elective basis; "Relations with Other Entities," authorizing cooperation in maintaining recreational facilities, educational, cultural, and recycling programs, and voluntary social services and charities; "Volunteer Clearinghouses," including the maintenance of databanks; and "Chartered Clubs," listed and allowed to utilize facilities for the benefit of residents.[251] This listing suggests that similar authority might be made available to public entities organized on an election district level.

What is envisaged is a scheme under which all registered voters are advised of the right of any twenty-five or more of them to petition for a district association. If such an organization is petitioned for and approved by a majority of those voting at the next election and a requisite percentage of the total electorate in the district, it would receive a modest local government appropriation, perhaps $1,000 per year, to defer mailing expenses or receive the use of county or municipal facilities for this purpose. Thereafter, the association would have the right to initiate traffic-calming and land readjustment schemes with the approval of an appropriate percentage of affected property owners and would have the right, subject to an affirmative vote of a majority of property owners, or a large supermajority of all registered voters, to impose limited property assessments for such purposes as demand response transportation, engagement of persons to call on the elderly, organization of user-fee financed old age clubs, playgroups, and addiction treatment organizations, erection of street furniture and bus shelters, maintenance of watchmen or volunteer security patrols, or any other service of general benefit, or of special benefit for which user fees are paid. Associations would be subject to annual outside audits supervised by municipal or county government. The association would

also be empowered to contract with the county or municipality to render municipal services, and to waive zoning restrictions against such things as accessory apartments in owner occupied homes, very small one-room shops, and social services. If self-governing schools were established, it would be entitled, as are parish councils in Britain, to a representative on the board of the elementary school serving it; it would also be entitled to notice of, and standing to intervene in, nearby significant zoning applications. To avoid the reapportionment decisions, the representative on school boards would need to be appointed by each district's officers rather than elected by its residents.[252] Terms of some board members would expire each year. The rights of residents would be protected by supermajority requirements for assessments, frequent elections, audits, and rights of voice and exit.

While RCAs would not need such a scheme and no area would be required to take part in it, it is believed that a device of this sort would fill a considerable social vacuum and would also improve the recruitment of candidates for higher levels of government.

Footnotes

1 Harold J. Laski et al., A Century of Municipal Progress, 1835-1935 (1935).

2 Martin Loughlin et al., Half a Century of Municipal Decline (1985).

3 James Bryce, The American Commonwealth 637 (1896).

4 *See* Page Smith, As a City Upon a Hill: The Town in American History (1966).

5 Louis Heren, The New American Commonwealth 245 (1968).

6 Gerald E. Frug, *The City as a Legal Concept, 93 Harv. L. Rev. 1059, 1070 (1980).*

7 Arend Lijphart, Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries (1984).

8 Louis Heren, The New American Commonwealth 245 (1968).

9 *Id.* at 239.

10 *Id.* at 99.

11 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)

12 Coyle v. Smith, 221 U.S. 559 (1911).

13 Printz v. United States, 521 U.S. 898 (1997)

14 United States v. Lopez, 514 U.S. 549 (1995)

15 City of Boerne v. Flores, 521 U.S. 507 (1997).

16 455 U.S. 40 (1982).

17 317 U.S. 341 (1943).

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28 Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274, 279 (1977)

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30 Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Pawhuska v. Pawhuska Oil, 250 U.S. 394 (1919) (withdrawal of regulatory power); Williamson v. New Jersey, 130 U.S. 189 (1889) (withdrawal of taxing power); Covington v. Kentucky, 173 U.S. 231 (1899) ; Merriwether v. Garrett, 102 U.S. 472 (1880) (withdrawal of tax exemption).

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