Local Government: Old Problems and a New Constitution

James D. Moore
LOCAL GOVERNMENT: OLD PROBLEMS AND A NEW CONSTITUTION

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INTRODUCTION

In 1970 it was noted that the Illinois Constitution of 1870, since repealed, was laden with provisions pertaining to local government which together read like a poorly drafted statute.\footnote{M. W. Mumford & J. T. Otis, Prospectus for Change: A Proposed Local Governments Article for Illinois, 50-51 CHICAGO BAR RECORD 243, 244 (1970).} The Montana Constitution, in its present form, would appear to epitomize any "poorly-drafted-statute" classification.\footnote{I.e., "the legislative assembly shall not pass local or special laws regulating county and township affairs or creating offices or prescribing the powers or duties of officers in counties, cities or townships." MONT. CONST. art. V, § 26. The legislative assembly may pass such laws for counties, counties and cities, or cities and townships." MONT. CONST. art XVI, § 7. "In addition, they may provide for the election or appointment of county, township, precinct, and municipal officers as public convenience may require." MONT. CONST. art XVI, § 6. "And, in the case of municipal government for counties and cities or cities and town, may prescribe the number, designation, terms, qualifications, method of appointment, election or removal of officers, and define their duties." MONT. CONST. art XVI, § 5. "The legislative assembly shall not delegate to any special commission any power to perform any municipal functions whatever." MONT. CONST. art V, § 36. This writer readily admits that illusions inhere in such an example as that created above.} It is unnecessarily steeped in detail,\footnote{MONT. CONST. art. XVI, § 4, which creates and provides for the board of county commissioners, stands as a fairly classic example of constitutional hyper-detailism. It contains roughly 2,500 words, 2,400 of which could have been left to the legislature. I.e., MONT. CONST. art XIII, §§ 5 and 6, with other revenue and indebtedness provisions. See also MONT. CONST. art XVI, § 4. See generally, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, (1967), and REPORT TO THE LOCAL GOVERNMENT SUBCOMMITTEE TO THE MONTANA CONSTITUTION REVISION COMMITTEE, 4, 5, (1969).} highly restrictive,\footnote{Perhaps water and air pollution are the most potent examples, since they know no jurisdictional boundaries and cannot be solved on a local level without a substantial drain of already overburdened local revenues. Kennedy, "The Legal Aspects of Air Pollution Control," MUNICIPALITIES AND THE LAW IN ACTION, 42 (1947).} and peppered with provisions which effect indirect prohibitions on necessary change.\footnote{See generally, Macchiarola, Local Government Home Rule and the Judiciary, 48 JOURNAL OF URBAN LAW 335 (1971). See also cases, infra note 15.}

Perhaps no one has felt the stifling inflexibility of our 1889 Constitution as poignantly as our local governments. Beseiged by population implosion\footnote{See generally, Macchiarola, Local Government Home Rule and the Judiciary, 48 JOURNAL OF URBAN LAW 335 (1971). See also cases, infra note 15.} and a plethora of unforeseen problems,\footnote{Perhaps water and air pollution are the most patent examples, since they know no jurisdictional boundaries and cannot be solved on a local level without a substantial drain of already overburdened local revenues. Kennedy, "The Legal Aspects of Air Pollution Control," MUNICIPALITIES AND THE LAW IN ACTION, 42 (1947).} local governments have found themselves crippled by the restrictive provisions of the Constitution and by seemingly hostile courts.\footnote{See generally, Macchiarola, Local Government Home Rule and the Judiciary, 48 JOURNAL OF URBAN LAW 335 (1971). See also cases, infra note 15.} As a consequence, perhaps few have more acutely felt the need for a new Constitution than local governmental officials.

The purpose of this comment is to present an overview of the dilemma of local governments, of possible approaches to metropolitan and area-wide problems, recent constitutional attempts to free local
governments from traditional obstacles, and to offer a proposal for consideration by Montana's Constitutional Convention.

THE FRAMEWORK

Two theories of state-local power distribution traditionally dominate any discussion of local-governmental authority over local problems. The first is generally referred to as the "creature concept," and may be encapsulated in the statement that state supremacy will be considered to exist absent specific constitutional provisions to the contrary. This plenary power of the state over municipal corporations was described by John F. Dillon, Iowa Supreme Court Justice:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.

In 1872 Justice Dillon articulated his and other judicial interpretations of local governmental power into what has since been termed "Dillon's Rule." It provides:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied. (Emphasis in original)

"Dillon's rule" received early approval by the Supreme Court of the United States and has since been accepted by virtually all state courts as the proper statement of the natural state-local relationship.

Winters, State Constitutional Limitations On Solutions Of Metropolitan Area Problems, 3-7 (1961); see also 1 McQuillan, Municipal Corporations, § 1.91 (3rd ed. 1949) and 2 McQuillan, Municipal Corporations, § 10.01 et. seq. (3rd ed. revised, 1966).

A city is generally considered to be a public corporation existing within certain boundaries, having a more or less urbanized population, and endowed with certain governmental powers. 1 McQuillan, supra note 9 at § 207. A county, on the other hand, is often referred to as a quasi-municipal corporation which aids in the administration of governmental affairs and exercises the delegated sovereign powers of the state. 1 McQuillan, supra note 9 at § 1.88.


See Littlefield, Metropolitan Area Problems And Municipal Home Rule, 7 (1962).


Local powers are limited to powers explicitly granted or indispensably or impliedly necessary. Mason City v. Zerble, 250 Iowa 102, 93 N.W.2d 94 (1958); Higgen v. City of Gainesburg, 401 Ill. 87, 81 N.E.2d 520 (1948). Grants of power are to be construed against the city, Garden City v. Miller, 181 Kan. 360, 311 P.2d 306 (1957); City of Chicago Heights v. Western Union, 406 Ill. 428, 94 N.E.2d 306 (1950), and any reasonable doubt is to be resolved against the city.

In Montana see Plath v. Hi-Ball Contractors, Inc., 139 M. 263, 362 P.2d 1021 (1961);
Somewhat antithetical to the creature-concept, the second theory of state-local power distribution finds its more “American” roots in the principle that local affairs can best be managed by local officials. The colonists of this country were perhaps unconscious proponents of this theory, constantly manifesting a determination to enjoy self-government in internal affairs. They had adopted the English local and municipal systems, however, rather than creating them.

As might be perceived through analysis of the “creature concept”, although local autonomy antedated the establishment of central or state authority, the latter has clearly dominated the former, to the point where the right to local self-government, if desired, needed to be stated as an express limitation upon the creature theory of centralized government. Thus, while home rule exists today as both a political symbol and as a legal doctrine, and while it may seem only logical that matters of local concern should belong to local government, when no constitutional provision alters the state-local balance of power the municipal corporation will be expected to operate within the restrictive framework of “Dillon’s Rule”.

Montana may provide an excellent example of this abdication to the creature concept. Although home rule provisions have been adopted by over half the states and by at least eleven since 1950, it is probable that Montana does not operate under the home-rule theory. While two leading authorities suggest that we may recognize the right to local self-government, we are generally omitted from compiled lists of home rule jurisdictions. Any extra constitutional right to local power is confusing in this respect. This is generally accomplished through the insertion of a “home rule” provision in the state constitution.

Missouri was the first state to adopt a constitutional home rule provision in 1875. California followed suit in 1879. Missouri Const. art. IX, § 20-26. Missouri Const. art. XI, § 8.

Montana Const. art. V, § 26, which prohibits the legislature from enacting special laws regulating county and township affairs, Montana Const. art. V, § 36, which prohibits legislation delegating power to perform or interfere with municipal functions, and Montana Const. art. XVI, § 7, which apparently grants the legislature plenary power in dealing the form of local governments, are confusing in this respect.

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self-government in Montana, whether based upon an inherent right to local self-government, or upon the distinction between the "governmental" and "proprietary" functions of municipal corporations, would appear to have been severely limited by those cases making specific reference to the creature concept and those limiting the interpretation given to "proprietary" functions.

Thus if home rule, or some hybrid between home rule and absolute state domination, is indeed a key to stronger, more responsive local government, the constitutional convention may provide the best, and perhaps the only forum for the necessary reallocation of governmental powers.

THE URBAN CONDITION

The problem-plethoric urban condition finds its genesis in population growth and redistribution. Between the years of 1860 and 1960 the population in the United States increased from 31.4 to 179.3 million, and the enormous impact of this increase in population was felt in urban, rather than rural areas. The most recent trend has been an exodus from the central city to the periphery and beyond, as manifested by the encirclement of the city by sprawling suburbs or by satellite municipalities. The result of this migration has been the formation of essentially local but legally extrajurisdictional suburban never-never lands, or of unitary metropolitan areas which in fact are composed of myriads of individual local governments. For instance, it was noted by Illinois constitutional convention delegates that Illinois had more governments per thousand (1/1,600) than dentists (1/1,800), that "what the layman or sociologist would refer to as 'Chicago' comprises over a thousand such units of government, including counties, cities, towns, special service districts, school districts, unincorporated areas, and parts of two states."

While Montana may not exhibit a population comparable to that of Illinois, we are nevertheless beset by many of the same problems.

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1. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915 (1940).
3. Littlefield, supra note 13 at 2.
8. Id. at 3.
10. Littlefield, supra note 13 at 3.
11. This writer suggests that it may be folly to ignore the urban ills endured by our more populous sister states, simply because of disparity in population. Montana's population is almost certainly going to increase, and our Constitution must be farsighted enough to anticipate and provide for a more populous urban state. In addition, most metropolitan area difficulties are common to even smaller local units, and differ only in magnitude or degree from those of highly populated areas. This is particularly true of fragmentation and overlap.
By 1960 Montana was classified as an urban state with over half of its population living in or around twenty-six municipal corporations. As in other states, our major cities have experienced an exodus of higher income groups to beyond their artificial boundaries, while simultaneously suffering an influx of lower income groups into the city-cores. The result is a concurrent difficulty in achieving coordination of financial resources and an increased cost to the city in such areas as housing and welfare. It culminates in a structure wherein those areas experiencing the greatest need for revenue are also those areas ranking lowest in taxable resources and bonding capabilities.

Lack of coordination leads to such inequities as double taxation of citizens by overlapping layers of government and 'freeloading' by suburban (or rural) citizens out of reach of the core city tax collector.

These phenomena, known respectively as "pancaking" and "spillover", often make it impossible to relate services and benefits to taxes. Perhaps more unfortunate, they work a deterrent on the under-revenued local government with regard to embarking on projects affecting more than itself. Since most state constitutions limit the taxing and debt incurring powers of the local government, while prohibiting the state from taxing for or extending credit to the same, it becomes incumbent on state legislatures to attack the problem through the creation of special improvement districts.

Montana, in this respect, offers no exception to the general rule. Our constitution limits both the taxing and

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[42] Under Article XVI, § 7 of the Montana Constitution the legislative assembly appears to be able, "by general or special law" to fix or define the boundaries of municipal corporations to embrace unincorporated areas surrounding them, subject to a majority vote of those affected by the change. The requirement that no annexation occur without first obtaining the assent of a majority of electors in the contiguous area to be annexed is the rule rather than the exception, e.g., see Cal. Const. art. II, § 1(a).

[43] While this procedure is undeniably democratic, it has low political feasibility. Consequently, if such a provision is to be included in the local government article of a new constitution, delegates would do well to examine alternatives, e.g., Iowa altered their code to provide two means by which annexation could be consummated: the first is by application of the inhabitants of the adjacent area; the second is through action of the municipal corporation itself. Iowa Code §§ 362.20, 362.66 (1966).


[46] Id. at 765.

[47] J. Bolens and H. Schmandt, The Metropolis, 367 (1965). These terms speak to such core-city activities as mass-transit, traffic control, and pollution control, which benefit the non-resident as well as the paying resident, and the necessity to create special units of government, vested with taxing power, to provide essentially local services.


[50] Id.

debt incurring powers\textsuperscript{52} of the local government while expressly prohibiting the state from taxing for \textsuperscript{53} or assuming the debt\textsuperscript{54} of the local unit. It has been held that a Montana city cannot be compelled to extend a service beyond its boundaries to meet area-wide needs.\textsuperscript{55} The result, as elsewhere, has been the creation of special districts, and as of 1967, 209 such districts had been authorized by state law.\textsuperscript{56}

While the special district has been successful in subverting fiscal limitations imposed upon local governments, it has caused the substitution of other problems among which are the creation of overlapping, highly fragmented governmental units and of a piecemeal approach to comprehensive planning.\textsuperscript{57} Because of the resulting difficulty in discerning with whom the responsibility for local action or inaction lies, a diminution of popular control has been effected.\textsuperscript{58} And because different units of government supply similar services to different populations, there exists inequality in the level of services available to the individual local units.\textsuperscript{59}

Clearly, the limitations placed upon local governments\textsuperscript{60} by state constitutions have gone far toward crippling any coherent efforts directed at solving municipal and metropolitan area problems. The states, although empowered to act under "Dillon's rule" and the creature concept, have been slow to respond,\textsuperscript{51} and have generally failed to provide authorization for even the mildest reforms directed at such an effort.\textsuperscript{62} Counties, originally established as decentralized agents of state government, are presently not equipped to handle the problems raised by the metropolitan areas within their boundaries.\textsuperscript{63} Change is necessary. As to what type of change, it will behoove us to digress slightly and examine those approaches being tested by local governments today.\textsuperscript{64}

\textsuperscript{52}Mont. Const. art. XIII, §§ 5, 6.
\textsuperscript{53}Mont. Const. art. XII, § 4.
\textsuperscript{54}Mont. Const. art. XIII, § 4.
\textsuperscript{55}Crawford v. City of Billings, 130 Mont. 158, 297 P.2d 292 (1956).
\textsuperscript{56}Mont. Rep. on Local Govt., supra note 41 at 6.
\textsuperscript{58}Minn. Experiment, supra note 48 at 129.
\textsuperscript{59}Grant, Trends In Urban Government and Administration, 30 Law and Contemp. Prob. 38, 46 (1960).
\textsuperscript{60}It should be noted that what may appear to be a limitation upon the state may work an indirect limitation upon local government's ability to meet the challenges which face it. The constitutional prohibition against special legislation may work such a result. See Mont. Const. art. V, § 26.
\textsuperscript{61}Bollens, supra note 46 at 529; Mont. Rep. on Local Govt., supra note 41 at 6.
\textsuperscript{64}The purpose of this digression is not to single out approaches which might be incorporated into a new constitution. Such a maneuver would serve to freeze local government into an inflexible stature, to lay the seeds for future problems. Rather this writer would employ this device as an aid in understanding the problems of local governments, to point out what should not be precluded by a new article on local government.
PRESENT APPROACHES TO THE METROPOLITAN PROBLEM

As briefly outlined above, local governments are presently beset by extremely difficult and multifarious problems. The key problem is one of jurisdiction. Local governments are hamstrung, both by their inability to act without prior legislative authorization, and by the fact that demands for services often refuse to respect artificial political boundary lines. This latter problem—that of confronting the local, yet area-wide problem, of coordinating area resources to meet area needs, of eliminating duplicity of effort through integration of governmental units—has been the motivating force behind recent attempts of local governments to mold themselves into more functional units.

ANNEXATION

Annexation is the absorption of territory by a municipality. Theoretically, it is difficult to perceive of a more obvious means for the municipal corporation to solve the problem which physically transcends its boundaries than by extending that boundary to encompass the area in question. It would certainly permit the recapture and reincorporation of revenues escaping to suburban areas.

As a practical matter, however, annexation has not been a panacea. The procedure is viewed as a purely political matter and consequently one over which the state exercises plenary power. Seven methods of annexation predominate those prescribed by the several states: 1) legislative action; 2) popular vote of the annexing city; 3) popular vote of the annexed area; 4) popular vote of both; 5) unilateral action of the municipality; 6) judicial fiat upon petition; 7) determination by a board or commission.

As a political device for solving area-wide problems, annexation has two serious drawbacks. The first is that the territory to be annexed must be unincorporated. Thus the more prosperous suburban area may avoid the burden of financial coordination with the city by simply incorporating itself. Second, since compulsory incorporation of governmental areas is not favored in this country, a majority vote of the electorate within the territory to be annexed is generally required. This latter requirement has severely limited the political feasibility of annexation.

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*Comus, supra note 57 at 812.
*For a thorough discussion of annexation see 2 McQuillin, supra note 9 at § 7.01 et seq.
*See notes 43 through 45, supra, and accompanying textual discussion.
*2 McQuillin, supra note 9 at § 7.10.
*A.C.I.R., Alternative Approaches, supra note 66 at 58.
*Comus, supra note 57 at 822.
*Id.
*See material, infra note 87.
CONSOLIDATION

Consolidation, like annexation, is aimed at enlarging the physical area over which the local government may exercise its jurisdiction. Unlike annexation, which involves the incorporation of additional territory under the same government, consolidation entails the incorporation of two or more incorporated bodies into a single new governmental unit.\footnote{McQuillin, \textit{supra} note 9 at § 8.23.}

Consolidation provides several advantages as a problem alleviating device for local governments. Since it may occur between contiguous municipalities, or between a municipality and the county embracing it, consolidation offers an area-wide approach to metropolitan problems.\footnote{F. Sengstock, \textit{Consolidation: Building a Bridge Between City and Suburb} (1964).} It possesses the virtue of enlarging territorial jurisdiction while reducing governmental duplication, overlap, and fragmentation.\footnote{Grant, \textit{A Comparison Of Predictions And Experience With The Nashville \textquoteleft\textquoteleft Metro\textquoteright\textquoteright}, 1 \textit{Urban Affairs Q.}, 34-54 (1965); see also D. Booth, \textit{Metropolitics: The Nashville Council} (1963); R. Martin, \textit{Consolidation: Jacksonville and Duval County} (1968).} Unfortunately, as the number of individual units which must be consolidated increases, the feasibility of consolidation decreases.\footnote{Comus, \textit{supra} note 57 at 822,23.} This, and our nemesis, voter approval,\footnote{The requirement of voter approval often proves fatal to governmental reorganization on a local level. See A.C.I.R., \textit{Factors Affecting Voter Reaction To Govt'\textquoteright Reorganization In Metro Areas} (1963).} have rendered consolidation less than perfect.

EXTRATERRITORIAL POWERS

In certain instances the legislature has empowered the local governmental unit to act on a specific problem beyond its boundaries.\footnote{A.C.I.R., Alternative Approaches, \textit{supra} note 66 at 20.} Although this device has limited usefulness as a comprehensive cure of metropolitan ills, it has nevertheless been successfully employed in certain areas, i.e., zoning.\footnote{For more complete treatment of this subject see Sengstock, \textit{Extraterritorial Powers In The Metropolitan Area} (1962); R. Maddox, \textit{Extraterritorial Powers Of Municipalities In The United States} (1955).}

INTERGOVERNMENTAL AGREEMENTS AND TRANSFER OF FUNCTIONS

Both the formation of intergovernmental agreements and the transfer of functions between governmental units attack the problem of duplication and deter the creation of special districts.\footnote{Comus, \textit{supra} note 57 at 819.}

Intergovernmental agreements take the form of contracts between municipalities, or between municipalities and the county, for the performance of services.\footnote{The classic example appears to be Lakewood, California, which contracted virtually all of its governmental services from the city of Los Angeles. S. Gove, \textit{The Lakewood Plan} (1961); Will, \textit{Another Look at Lakewood}, \textit{Readings In State And Local Government} 328 (1964).} These agreements, while generally requiring
statutory authorization, do not require voter approval and therefore exhibit high political feasibility. By their nature, however, these agreements are restricted to just certain local units or to certain unfurnished services. Consequently, the intergovernmental agreement may have a somnambulistic result, causing procrastination of comprehensive regional planning, and exhibiting a prophylactic effect on necessary change.

**SPECIAL DISTRICTS**

The special district contemplates a form of government which is independent of other governments. It is granted power to initiate and complete projects, to provide services, is usually financed by service charges and behaves as much like an independent government as is necessary to accomplish its purposes.

The propensity of state legislative assemblies to subvert the constitutional limitations placed upon local governments by creating special districts was touched upon earlier. While the necessity of this device as a stop-gap measure cannot be questioned, the special district has serious drawbacks. It constitutes another hidden layer of government, increasing the fragmentation of the local unit, and causing further diminution of popular control. It atomizes local government and thereby renders planning difficult. Finally, while its proponents argue that the special district removes a local service from politics, it actually tends to replace the general politics of the city with the more narrow, less public politics of the special interest clientele.

**FEDERATION**

The federation approach to local government generally involves the creation of two levels, or tiers of government. One tier has area-wide jurisdiction, and devotes itself to providing area-wide services. The other tier is composed of the individual constituent municipalities and devotes itself to the performance of local functions.

As a device for accomplishing area-wide or metropolitan government without requiring the composite units to relinquish control over purely local matters, the federated form of government stands alone.

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58Comus, supra note 57 at 818, 819.
59See supra, notes 50-60 and accompanying textual discussion.
61Bollen, Special District Governments in the United States (1957).
63R. Martin, supra note 62 at 179.
65The classic example of metropolitan federation is Toronto, created under The Municipality of Metropolitan Toronto Act (1953), R.S. Ont. 260 (1960). There, thirteen (13) local units were united for purposes of dealing with area-wide problems under a representative Metropolitan council which was given the status of a municipal government.
It has shown itself to be politically feasible, yet strong enough to meet complex metropolitan needs. In addition, this devise is clearly amenable to such governmental innovations as preemption through action and abdicating authority, thus prompting action as a response to growing problems. In short, federation provides strength over area government without stifling experimentation and creativity of approach by individual local governments.

The Metropolitan Council

The Council of Governments (C.O.G.) offers a voluntary approach to metropolitan problems. Whether prompted by fears of being excluded from regional planning or by other factors, the metropolitan council has become an established means of effecting area-wide planning and coordination. It is generally composed of appointed representatives from the participating local units and serves exclusively as a recommending body to the legislature, as a forum for discussion of metropolitan problems, as a planning agency, and as a research body.

This is largely because the individual municipal units remain intact, retaining jurisdiction over problems which affect only their affairs, and also have representation in the metropolitan council.

This is not to say that the council of government cannot, in fact, be given a legal status. See, e.g., Calif. Govt. Code §§ 6500-6513 as amended (1963).

The availability of federal funds is probably an important incentive behind most C.O.G.'s, since eligibility to the locality of these funds depends upon such factors as citizen participation and area-wide planning. See, e.g., The Housing and Urban Development Act of 1965, 40 U.S.C. § 461(g) (Supp. 1967) and The Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. §§ 3301 through 3374 (Supp. 1967).

Questionnaires involving the East-West Gateway Coordinating Council of St. Louis indicated that 24% of the individual units had joined the council to remain eligible for federal funds. See Hoadley, Metropolitan Council; The St. Louis Experience, 60 NAT. CIV. REV., 79 (Feb. 71).

"It has been suggested that the council might better be "constitutionalized" through elections, thus giving the citizen a direct voter relation to council officials. Dixon, New Constitutional Forms for the Metropolis: Reapportioned County Boards; Local Councils of Government, 30 LAW AND CONTEMP. PROB. 57, 64 (1965). This suggestion is countered by the argument that qualified individuals are more apt to accept appointment than to seek election, that ballots are already overburdened, and that the recommendational nature of these bodies leaves voter recourse at the legislative level, where final decisions will be made. Minn. Experiment, supra note 48 at 147, 148.

A potential flaw in the C.O.G. approach appears here. Since participation is generally voluntary, it is possible that regional planning might be thwarted by the nonparticipation of sporadic units within the area.

The Minnesota Council of Governments is of this type. See, Minn. Experiment, supra note 48.

This is accomplished through regular meetings and sponsored seminars. If nothing else could be said, the councils have been effective in reducing interlocal suspicions and hostilities. See, e.g., discussion of eligibility for federal funds, supra note 94.
center for the preparation of special studies. The C.O.G. is generally not considered as threatening to local governments, and does not interfere in local politics. It is consequently a politically feasible unit, despite having indirect enforcement powers over participating municipalities. In short, while the metropolitan council may constitute another "hidden layer of government," it has realized noteworthy success as an approach to area-wide planning.

The Planning Agency

The state or regional metropolitan planning agency generally contemplates a more permanent body, administered by public officials and staffed by professionals. Such an agency would clearly be useful in guiding the metropolitan development of local governments, and could also serve as an active conduit through which federal funds might be obtained. In addition, the agency approach, like the federation approach, offers a sound mechanism for administering a system of local abdication of authority, should such a system be desired.

The goals sought through the employment of these devices are important in understanding the weaknesses built into present local governmental structure. While it is true that many of these approaches were required to meet the problems of natural growth, many were made necessary by, and were adopted for the purpose of evading those constitutional provisions which have straight-jacketed the local governmental unit.

The Council of Governments has been highly effective in this area. In Minnesota, the metropolitan council has completed studies on subdivision control, land use, water use, financial coordination, population, street and highway standards, shopping centers, and the availability of parks and other recreational facilities. In St. Louis an air pollution study resulted in the drafting of a model air pollution control ordinance for the area. In Oregon has incorporated this system into their zoning law. Ore. Laws 324.1 (1969) provides that the failure of city and county governments to prepare comprehensive land use and zoning plans within two years thereafter would result in abdication of their authority over such plans. Such power would then vest in the governor.

These goals are listed in A.C.I.R., Alternative Approaches, supra note 66 at 11-17, as follows:

1) The jurisdiction of the local government must be broad enough to cope adequately with metropolitan problems.
2) The base of government must be broad enough to ensure that adequate revenues can be obtained by equitable means.
3) There must be flexibility to alter boundaries to adjust to future growth.
4) Local government should be general purpose rather than single purpose to ensure efficiency and a balance between needs and resources.
5) The local jurisdiction should be large enough so that the demand for services is not out of proportion to the size of the governmental unit.
6) The government should be accessible to and controllable by the people.
7) The local government should be such as to foster active citizen participation.
8) The local government should be politically feasible.
The point which emerges from the present situation is this: Stop-gap measures have succeeded somewhat in alleviating local difficulties, but they are nonetheless stop-gap measures. What is needed is a new constitutional foundation from which the local government may proceed.10

**DRAFTING THE LOCAL GOVERNMENT PROVISION**

A new constitutional article on local government must accomplish two basic changes. First, it must encourage greater flexibility over area-wide, or metropolitan problems by insuring that all creative inter-governmental approaches to such problems shall be available to the various political subdivisions of the state. Second, it must work a change on the creature concept by reallocating power between the state and the local governmental units. These changes will permit power to unite over area problems and to act upon local problems. In short, they will permit efficiency and responsibility in local government.

**ENCOURAGING INTERGOVERNMENTAL AGREEMENT**

As noted earlier, there exist diversified approaches to the metropolitan problem.110 Consequently, any constitutional provision should be drafted such that no workable approach is precluded, and moreover, should encourage intergovernmental and regional cooperation.111

This can be accomplished by several constitutional methods. Alaska's constitution,112 for example, contains sections of "purpose and construction" which preface each article. Such a section, while expressing the general intent of the framers, constitutes a possible repository for the encouragement of intergovernmental cooperation.113

Alaska's constitution also contains a provision which specifically grants local governments the power to transfer functions between units and to consummate intergovernmental agreements.114 Similar provisions have been incorporated into the Illinois constitution,115 and, to a limited degree, into the California constitution.116

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10 See Mont. Rep. on Local Govt., supra note 41 at 6.
11 See notes 65-107, supra, and the accompanying textual discussion.
112 This is not to urge that all regional devises are in fact sound; i.e., it has been suggested that even fragmentation is preferable to complete consolidation of local units. BANFIELD AND GRODZINS, LIMITATIONS OF METROPOLITAN REORGANIZATION, DEMOCRACY IN URBAN AMERICA, 176 (1961). It is simply to suggest that the Constitution is no place for such value judgments.
11 This Appendix B, infra, for full text of Alaskan Local Government Provision.
113 ALASKA CONST. art. X, § 1, in fact does provide encouragement to local governments to cooperate over area-wide problems, and also admonishes against such approaches as the special district, which has caused as many problems as it has solved. It states: "The purpose of this article is to provide for maximum self-government with a minimum of local governmental units, and to prevent duplication of tax levying jurisdictions. A liberal construction shall be given to the powers of local government units."
115 ILL. CONST. art. VII, § 10.
116 CAL. CONST. art. II, § 6 and § 8.
Such a provision is probably advisable, particularly in light of the disinclination of state legislatures to authorize equivalent powers to local units, and of courts to strictly construe their powers.\footnote{Mont. Rep. on Local Govt., supra note 41 at 8.} As noted earlier, however, a provision of this type must be drafted as a broad grant or certain innovative approaches to the metropolitan problem may be precluded. Legislative supremacy may still be maintained, as it was in both Alaska and Illinois, through the simple insertion of an “unless prohibited by law or charter” clause within the provision.

The final method of encouraging cooperation between local governments is perhaps the most tempting and the least desirable.\footnote{FELLMAN, STATE CONSTITUTIONAL REVISION (1960).} It is the adoption of provisions which authorize a particular approach to area-wide problems. Thus the Illinois Constitution provides for a county executive officer,\footnote{ILL. CONST. art. VII, § 4.} and the Alaska constitution creates a local affairs agency.\footnote{ALASKA CONST. art. X, § 14.} While both approaches are attractive, their inclusion into the constitution has a freezing effect on future flexibility and tends to deter alternative devices which may be equally, if not more, effective.\footnote{When legislation is permitted to infiltrate a constitution, it shackles the hands of the men and women elected by the people to exercise public authority.” 1 J. Bryce, THE AMERICAN COMMONWEALTH, 444 (1913).} Thus the adoption of particular methods of metropolitan problem fighting should be left to the legislature, or to the local communities themselves.\footnote{The greatest contribution which the revised Constitution could make in this regard would be to refrain from limiting legislative solutions.” Mumford & Otis, supra note 1 at 247.}

Reallocating Power—The Home Rule Grant

It is not difficult to perceive why “well-nigh unanimous cries for home rule”\footnote{J. C. Parkhurst, supra note 35 at 94.} have been raised by political scientists and governmental officials. Under the present domination of the “creature concept” it has been necessary for the local unit to seek legislative authorization for even the mildest exercise of governmental power.\footnote{J. E. Westbrook, supra note 25 at 47.} Consequently, unduly large amounts of legislative time have been devoted to requests for legislation directed towards the special problems of special cities.\footnote{Id. at 72, 73.} The constant need for the local governments to seek authority has severely limited local bargaining power in that forum, and legislative systems of political barter have required the compromise of city needs.\footnote{Id.} Not only is the legislature less likely than municipal officials to be familiar with the ramifications of urban problems, but responsibility to the local electorates is often lost in the shuffle.\footnote{Sandalow, Limits of Municipal Power Under Home Rule: A Role For The Courts, 49 MINN. L. REV. 643, 655 (1964).} Since the situation is the same

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\footnote{Mont. Rep. on Local Govt., supra note 41 at 8.}
\footnote{FELLMAN, STATE CONSTITUTIONAL REVISION (1960).}
\footnote{ILL. CONST. art. VII, § 4.}
\footnote{ALASKA CONST. art. X, § 14.}
\footnote{When legislation is permitted to infiltrate a constitution, it shackles the hands of the men and women elected by the people to exercise public authority.” 1 J. Bryce, THE AMERICAN COMMONWEALTH, 444 (1913).}
\footnote{The greatest contribution which the revised Constitution could make in this regard would be to refrain from limiting legislative solutions.” Mumford & Otis, supra note 1 at 247.}
\footnote{J. C. Parkhurst, supra note 35 at 94.}
\footnote{J. E. Westbrook, supra note 25 at 47.}
\footnote{Id. at 72, 73.}
\footnote{Id.}
\footnote{Sandalow, Limits of Municipal Power Under Home Rule: A Role For The Courts, 49 MINN. L. REV. 643, 655 (1964).}
in Montana the question is not whether a home rule grant is necessary, but how it should be drafted.

The predominant criticisms of home rule are amenable to elimination through the proper construction of the home rule provision. The fear that ultimate state control over local units might be lost, for instance, has been reckoned with in nearly all recent constitutions. Hawaii leaves it to the legislature to prescribe the limits of local self-government. Alaska grants boroughs and cities all powers “not prohibited by law or charter,” and thereby insures legislative supremacy. South Dakota’s constitution combines these measures. Illinois, in a more detailed approach, spells out the relationship between the local and central governments and requires a 3/5 vote by the state legislature if any local power is to be denied. Through these means the local unit can be granted broad powers of self-government without the feared loss of state supremacy.

Likewise, the criticism that home rule retards the ability of governments to act over area-wide problems may be substantially alleviated through proper drafting. The provision discussed in the previous section, on intergovernmental agreements and local flexibility, will do much in this regard. The ideal approach, in addition, would be to make home rule available to all political subdivisions. Alaska’s constitution provides that boroughs and cities of the first class may adopt a home rule charter and that the legislature may extend home rule to other boroughs and cities. Illinois’ constitution simply grants the home rule classification outright to counties of more than 25,000, provided they elect an executive officer. These provisions are directed toward the area-wide problem, but greater strength can be obtained through an open-ended home rule section which speaks to political subdivisions generally.

In the realm of the domain and extent of the power granted, the traditional home rule approach spoke to matters of local or statewide concern. This distinction, while logically sound, raises pragmatic difficulties, particularly when one recalls that urban and rural interests both complement and rely upon each other. Innumerable grey areas are

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129HAWAII CONST. art. VII, §§ 2, 3.
130ALASKA CONST. art. X, § 11.
131S.D. CONST. art. X, §§ 4, 5.
132For the full text of this provision, see Appendix D, infra.
133ILL. CONST. art. VII, § 6(g) as limited by § 6(1).
134J. M. Winters, supra note 9 at 16.
135ALASKA CONST. art. X, § 9.
136ALASKA CONST. art. X, § 10.
137ILL. CONST. art. VII, § 6(a).
138Mumford and Otis, supra note 1 at 248. The local government provision suggested by these scholars omitted all reference to “counties” and “municipal corporations” and instead spoke of “political subdivisions” and “governmental units.”
139This distinction was suggested by the National Municipal League in their Model Constitution, NAT. MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION, 97 (6th ed., 1963).
inevitable. The result is an uncertainty in the law which impedes local officials and which renders the public uncertain as to who is accountable.

The preferable approach does not attempt to carve areas of local autonomy, but rather reverses the old strict-constructionist presumption against the existence of the municipal power. As noted, state supremacy may still be maintained, but unless the legislature has denied the power, local exercises thereof are presumed to be proper. This approach has been adopted by the American Municipal Association, the Advisory Commission on Intergovernmental Relations, and now by the National Municipal League. It has been embodied in the constitutions of Alaska, South Dakota, and Massachusetts. While Illinois opted for a more detailed allocation of power between the state and local governments, this writer suggests the avoidance of all detail that is not absolutely necessary to the provision. Alaska's provision, when read with their section on purpose and construction, is both simpler and more organic.

Simplicity

"The most obvious, and in many ways the crucial fault of state constitutions is that they are too detailed." Local government is a subject which state constitutions have traditionally devoted to excessive "detailization", whether because of special interest groups wanting their particular views nailed down, or because of unfounded fears that future legislators will not possess the wisdom of constitutional convention delegates. The wordy constitution leads to inflexibility, the need for amendment, and constitutes an invitation to future litigation. The very fact that a new constitution is deemed more desirable than amendment attests to this fact.

The new constitutional provision on local government, if it is to be more successful than the present provision, should be short, and couched

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148 J. E. Westbrook, supra note 25 at 74.
149 ALASKA CONST. art. X, § 11.
150 S.D. CONST. art. X, §§ 4 and 5.
152 ILL. CONST. art. VII, § 10.
153 D. Fellman, *supra* note 118 at 142.
154 E.g., the Louisiana Constitution, in Article XIV, §§ 20-31.1, devoted 28 pages to the government of New Orleans. The old California Constitution, in Article XI devoted one-sixth of their constitutional verbosity to details of city and county government. In their new Constitutional provision, Article II, local government is still subjected to excessive detail.
155 D. Fellman, *supra* note 118 at 145.
156 *DeGrazia, State Constitutions—Are They Growing Longer?*, 27 STATE GOVT. 82-83 (1954).
in simple, organic language. Detailed provisions on the structure and procedure of the local governmental units should be left to the legislature or to the local units themselves. Reference to specific types of local units, a device which tends to freeze those units into existence, should be avoided. Limitations upon taxation and indebtedness should be left to the legislature. In short:

A constitution, to contain accurate detail of all subdivisions of which its great powers will admit, and of all means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

CONCLUSION

In light of the purpose of this comment, this writer has prepared what he considers a sound provision on local government.

Section 1 is simply a restatement of Alaska's section on purpose and construction, and will serve to offer our courts insight into the tenor of the entire provision. Section 2 lays groundwork for the remainder of the provision by establishing, without traditional restrictiveness, the local units of government. It is open-ended as to types of local units, yet adopts the Hawaii approach of vesting any such unit with governmental power. Section 3 requires that the legislature classify political subdivisions, but leaves the assembly free to chose the means of classification, and to change that classification as may be required from time to time. Taken with Section 4, which grants home rule outright to political subdivisions of the first class, and Section 5, which permits the legislature to grant home rule to governmental units not of the first class, a healthy balance is created. The legislative assembly is given both power and room for initiative. The local subdivisions, through Section 6, are given broad home rule powers subject only to a power of prohibition in the legislature.

Section 7 of the provision would accomplish the goal of providing local flexibility over area-wide problems. It is broader than the simple cooperation provisions in the Illinois and Alaska constitutions, in that it permits changes in the form of governments over local units. Thus the ambit of solutions, from cooperation to federation, remain available. The reference to a state local affairs agency is probably unnecessary, but is couched in permissive terms and is therefore innocuous if not desired.

154 This writer's unavoidable infatuation with the Alaska Constitution is based on both of these factors, particularly on the uncomplicated language employed therein.
156 Mumford and Otis, supra note 1 at 247, 248. As noted, the terms "political subdivision" or "governmental unit" provide greater flexibility.
158 See Appendix A, infra.
Section 8 transfers the local tax and indebtedness provisions to the local government article, incorporates them into a single section, removes the rigid, constitutional limitations, and grants the power to set such limitations in the legislative assembly.

Finally, Section 9 removes the absolute prohibition against special or local legislation, but safeguards against abuses by requiring voter approval in the area affected.

Admittedly, this provision is progressive. The need for change, however, is clear. The need for courage is clear. This provision is a problem oriented approach to the urban ills which the present constitution has unwittingly helped to create. While a provision such as this will not effect an immediate cure to all local conditions, it removes the plethoric restrictions imposed upon both state and local governments, and thereby increases flexibility and popular control.

A society in constant change demands governments responsive to change. Consequently, this provision seeks not to solve today's problems, but to enhance our ability to respond to the problems of tomorrow.

\[^{166} Mont. Rep. on Local Govt., supra note 41 at 1.\]
\[^{167} Id. at 8.\]
APPENDIX A

CONSTITUTIONAL PROVISION ON LOCAL GOVERNMENT—A PROPOSAL

ARTICLE: LOCAL GOVERNMENT

Section 1: Purpose and Construction. The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Section 2: All local government powers shall be vested in the political subdivisions of the state. These shall include, but shall not be limited to, cities and counties. Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be prescribed by law.

Section 3: The legislative assembly shall classify the political subdivisions of the state. Such political subdivisions shall have those powers and functions provided by charter or law, allowing for maximum local participation and responsibility.

Section 4: The qualified voters in any political subdivision of the first class may adopt, amend, or repeal a home rule charter in a manner provided by law.

Section 5: The legislative assembly may extend home rule to other political subdivisions.

Section 6: A home rule unit may exercise all legislative powers not prohibited by law or charter.

Section 7: (A) Regardless of home rule classification, agreements, including those for cooperation and joint administration, and for transfer of functions, between local subdivisions, local subdivisions and the state, or local subdivisions and the United States, may be consummated except where prohibited by law or charter. (B) The State shall encourage intergovernmental cooperation, and shall provide for methods by which its political subdivisions may annex, consolidate, or change their form of government. A state agency on local affairs may be created by the legislative assembly to coordinate, advise and assist the various political subdivisions.

Section 8: The political subdivisions of the state shall have the power to tax, improve through special assessments, and to incur indebtedness, as provided by law.

Section 9: Special acts of the legislature shall not be effective upon any particular subdivision of the state unless approved by a majority of the qualified electorate voting therein.

APPENDIX B

ALASKA CONSTITUTION

ARTICLE X—LOCAL GOVERNMENT

Section 1: Purpose and Construction. The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Section 2: All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

Section 3: The entire State shall be divided into boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. The standards shall include population, geography, economy, transportation, and other factors. Each borough shall embrace an area and population with common interests to the maximum degree possible. The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.

Section 4: Assembly: The governing body of the organized borough shall be the Assembly, and its composition shall be established by law or charter. Each city
of the first class, and each city of any other class designated by law, shall be repre-
presented on the assembly by one or more members of its council. The other members
of the assembly shall be elected from and by the qualified voters resident outside
such cities.

Section 5: Service areas to provide special services within an organized borough
may be established, altered, or abolished by the assembly, subject to the provisions of
law or charter. A new service area shall not be established if, consistent with the
purposes of this article, the new service can be provided by an existing service area,
by incorporation as a city, or by annexation to a city. The assembly may authorize
the levying of taxes, charges, or assessments within a service area to finance the
special services.

Section 6: Unorganized Boroughs: The legislature shall provide for the per-
formance of services it deems necessary or advisable in unorganized boroughs,
allowing for maximum local participation and responsibility. It may exercise any
power or function in an organized borough which the assembly may exercise in an
organized borough.

Section 7: Cities. Cities shall be incorporated in a manner prescribed by law,
and shall be a part of the borough in which they are located. Cities shall have the
powers and functions conferred by law or charter. They may be merged, consolidated,
classified, reclassified, or dissolved in the manner provided by law.

Section 8: The governing body of a city shall be the council.

Section 9: Charters: The qualified voters of any borough of the first class or
city of the first class may adopt, amend or repeal a home rule charter in a manner
provided by law. In the absence of such legislation, the governing body of a borough
or city of the first class shall provide the procedure for the preparation and adoption
or rejection of the charter. All charters, or parts or amendments of charters, shall be
submitted to the qualified voters of the borough or city, and shall become effective
if approved by a majority of those who vote on the specific question.

Section 10: The legislature may extend home rule to other boroughs and cities.

Section 11: A home rule borough or city may exercise all legislative powers
not prohibited by law or charter.

Section 12: A local boundary commission or board shall be established by law
in the executive branch of the state government. The commission or board may con-
sider any proposed local government boundary change. It may present proposed
changes to the legislature during the first 10 days of any regular session. The
change shall become effective forty-five days after presentation or at the end of the
session, whichever is earlier, unless disapproved by a resolution concurred in by a
majority of the members of each house. The commission or board, subject to law,
may establish procedures whereby boundaries may be adjusted by local action.

Section 13: Agreements, including those for cooperative or joint administration
of any function or powers, may be made by any local government with any other
local government, with the State, or with the United States, unless otherwise provided
by law or charter. A city may transfer to the borough in which it is located any of its
powers or functions unless prohibited by law or charter, and may in like manner
revoke the transfer.

Section 14: An agency shall be established by law in the executive branch of
the state government to advise and assist local governments. It shall review their
activities, collect and publish local government information, and perform other duties
prescribed by law.

Section 15: Special service districts existing at the time a borough is organized
shall be integrated with the government of the borough as provided by law.

APPENDIX C

HAWAII CONSTITUTION

ARTICLE VIII—LOCAL GOVERNMENT

Section 1: The legislature shall create counties, and may create other political
subdivisions within the State, and provide for the government thereof. Each political
subdivision shall have and exercise such powers as shall be conferred under general
laws.
Section 2: Each political subdivision shall have power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be prescribed by law.

Section 3: The taxing power shall be reserved to the State except so much thereof as may be delegated by the legislature to the political subdivisions, and the legislature shall have the power to apportion state revenues among the political subdivisions.

Section 4: No law shall be passed mandating any political subdivision to pay any previously accrued claim.

Section 5: This article shall not limit the power of the legislature to enact laws of statewide concern.

APPENDIX D

ILLINOIS CONSTITUTION

ARTICLE VII—LOCAL GOVERNMENT

Section 6: Powers of Home Rule Units

(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

(b) A home rule unit by referendum may elect not to be a home rule unit.

(c) If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction.

(d) A home rule unit does not have the power (1) to incur debt payable from ad valorem property tax receipts maturing more than 40 years from the time it is incurred or (2) to define and provide for the punishment of a felony.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law. A home rule county shall have the power to provide for its officers, their manner of selection and terms of office in the manner set forth in Section 4 of this Article.

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a taxing power or a power or function specified in subsection (1) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

(j) The General Assembly may limit by law the amount of debt which home rule counties may incur and may limit by law approved by three-fifths of the members elected to each house the amount of debt, other than debt payable from ad valorem property tax receipts, which home rule municipalities may incur.
(k) The General Assembly may limit by law the amount and require referendum approval of debt to be incurred by home rule municipalities, payable from ad valorem property tax receipts, only in excess of the following percentages of the assessed value of its taxable property: (1) if its population is 500,000 or more, an aggregate of three percent; (2) if its population is more than 25,000 and less than 500,000, an aggregate of one percent; and (3) if its population is 25,000 or less, an aggregate of one-half percent. Indebtedness which is outstanding on the effective date of this Constitution or which is thereafter approved by referendum or assumed from another unit of local government shall not be included in the foregoing percentage amounts.

(l) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

(m) Powers and functions of home rule units shall be construed liberally.