METROPOLITAN REGIONALISM: LEGAL AND CONSTITUTIONAL PROBLEMS

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The legal requirements of effective metropolitan government are simply stated to provide the means of formation of common policy for common problems, to enable the adoption of over-all plans to meet the total needs of the metropolitan area and to organize the resources of the entire area to implement those policies and plans. It is the purpose of this paper to explore the more significant legal problems which are suggested by these objectives.

The one hundred seventy-four metropolitan "agglomerations," as they have been called, are found in forty-two states, meaning at least that many potentially different systems of jurisprudence. Furthermore, the problem of the metropolis for conventional governmental units is appreciated more when it is seen that the area covered frequently is not only larger than a city, but may be inter-county. Thirty metropolitan areas are now inter-county. They are not within the jurisdiction of any of the traditional units of state government. Another twenty-four metropolitan units are not even within the territory of one state. Effective government in these areas requires cooperation between a minimum of two state governments, and at times, the consent of Congress. An additional twenty-nine metropolitan areas border state lines. Several are international.[1] Nevertheless, they all have the common ancestor—the outward growth from a central city without comparable change in the political boundaries of the city. With reference to this growth, it has been said that:

> ". . . Suburbanization, in essence, is a manifestation that the city-as-a-community is expanding more rapidly than the city-as-a-political entity. The fact is that our legal and political precepts have not kept pace with the changes in urban living.
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> ". . . In too many areas the problems have become so acute as to threaten major disruption of services. Particularly has this been true in:

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1. These data may be found in COUNCIL OF STATE GOVERNMENTS, THE STATES AND THE METROPOLITAN PROBLEM 3-17 (1956).

(1) Organizing public transportation and the movement of people

(2) Developing adequate school facilities

(3) Policing, notably in fighting organized crime

(4) Providing public utilities, especially water and sewerage facilities

And were the horrible eventuality of war to become a reality, a fifth and most urgent problem—that of civilian defense—would quickly be added to this list." [2]

The question remains—is it law or politics that "lag"?

Units of Metropolitan Government

The realization that metropolitan problems were integrated produced a realization that they could not be met by non-integrated governmental units acting independently. Various devices have been utilized to create adequate metropolitan government. Several of these involve considerable re-arrangement of boundary lines, the displacement of office holders and the reconciliation of state constitutional limitations which reflect needs of the past. For these reasons they are increasingly difficult to implement. Annexation, for example, results in the complete incorporation of a contiguous area into the central city. Used substantially in the last century, the device now has potentiality only for the integration of fringe areas of low population density which are unincorporated—and has been very actively used for this purpose over the past ten years. City-county consolidation affects the boundary line of the city and may cause the displacement of office holders in each unit. Once created, these governments have difficulty coping with practical metropolitan problems, which frequently extend beyond county borders. City-county separation cuts the jurisdiction of the county short of the richest sources of revenue. It is now rarely used except in Virginia. Federation is an ambitious plan which would make the municipal governments subordinate "legislative" units in an area-wide government. It would provide one of the most complete answers to the need for over-all metropolitan control as well as for local control over distinctively municipal problems. The device has never been utilized in the United States. The federation of the Toronto, Canada area in 1953 represents the only recent example on this continent.

2. Merriam, The Federal Government and Metropolitan Areas 2 (address by the Assistant Director, United States Bureau of the Budget before Regional Plan Association, Oct. 22, 1956).

Other devices require no boundary changes and only slight displacement of office holders. The legal problems, furthermore, are not as difficult for this group as for those mentioned above. Frequently, these devices center around the management of a single function such as transportation, bridge operation or sewerage. A common method is the creation by mutual agreement of a joint authority. Each municipality usually must give its consent to unforeseen action. The transfer of functions to already existing governmental units, as from city to county, is a closely related device. Another method which is used to a great extent for a limited number of functions, frequently as a last resort, is the creation of special metropolitan districts.

MAY A LEGISLATURE CREATE A "METROPOLITAN GOVERNMENT"?

If by the creation of a metropolitan government we mean the adaptation of the area of the political subdivision to the area of central influence, it is almost ancient learning that a legislature has common-law power to go all the way—to wipe out all old boundaries and create new. The Pittsburgh annexation proves the point. There Allegheny County sought to prevent annexation on the ground that Pittsburgh was greatly in debt and lacked the improvements that Allegheny had already installed; that as a consequence of annexation the tax burden in Allegheny would be considerably heavier, without any corresponding benefit to the Allegheny taxpayer. It was held that the annexation was valid under state and federal constitutions. The Supreme Court stated the rule broadly:

> "Neither their charter, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, confirming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States." [3]

3. Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907); *accord,* Toney v. Macon, 119 Ga. 83, 46 S.E. 80 (1903), *appeal dismissed,* 195 U.S. 625 (1904).

There is no doubt that the legislature, in the absence of constitutional restriction, may divide counties and towns at its pleasure, and apportion the common property and the common burdens in such manner as may seem reasonable and equitable to the legislature.[4] The power to transfer the property of a municipal corporation is necessarily incident to the power to divide its territory and to create new corporations.[5]

While the fundamental law is thus well settled, the successful efforts at metropolitan adaptation have been few and far between; a few city-county consolidations such as Denver and Los Angeles, the nineteenth-century creations of greater New York City, and more recently Richmond[6] and Baton Rouge[7] annexations and consolidations are among the few examples.

The reasons for this slow progress are as much practical or political as they may be legal. In a few states, however, an unhappy array of older cases may impose special constitutional barriers to the creation of any general purpose unit of metropolitan government which does not follow the conventional pattern of county, township, village or city. A line of cases in New York illustrate this problem. In the earliest, decided in 1857, the legislature created a metropolitan police district comprising four counties and vested the general police power of the district in a special board of police commissioners. The conventional units of government within the district determined the number of police necessary in their respective areas and paid a proportionate share of the operational cost. It was held that this type of district did not

4. Laramie County v. Albany County, 92 U.S. 307 (1875); Johnson v. San Diego, 109 Cal. 468, 42 Pac. 249 (1895); Township of Bloomfield v. Borough of Glen Ridge, 54 N.J. Eq. 276, 33 Atl. 925 (Ch. 1896); Montpelier v. East Montpelier, 29 Vt. 12 (1856). For state limitations upon power of the legislature to change boundaries of municipality subject to outstanding obligations, see Board of Education v. Board of Education, 245 Mich. 411, 222 N.W. 763 (1929); *cf.* Kies v. Lowrey, 199 U.S. 233 (1905). See also Loving County v. Reeves County, 126 S.W.2d 87 (Tex. Civ. App. 1939). In the face of constitutional provisions against incurring obligations without a vote of the electors an independent school district to which another district is annexed does not become liable for the bonded indebtedness of the annexed district. The property of the annexed district remains liable for the debts of its original district and becomes liable after annexation for the obligations of the enlarged district. Missouri-K.T.R.R. v. Excise Bd., 181 Okl. 229, 73 P.2d 173 (1937).

5. Trenton v. New Jersey, 262 U.S. 182 (1923); Clinton v. Cedar Rapids & Mo. R.R., 24 Iowa 455, 475 (1868); Layton v. New Orleans, 12 La. Ann. 515 (1857); Bristol v. New Charter, 3 N.H. 524 (1826); Darlington v. City of New York, 31 N.Y. 163, 195 (1865). The power to divide a governmental area is in its nature purely legislative. City of Olney v. Harvey, 50 Ill. 453 (1869); Shelby County Judge v. Shelby R.R., 5 Bush (Ky.) 225, 228 (1868); Powers v. Commissioners, 8 Ohio St. 285, 290 (1858).

6. Henrico County v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941).

7. State *ex rel.* Kemp v. Baton Rouge, 215 La. 315, 40 So. 2d 477 (1949); Kean, *Consolidation That Works,* 45 NAT'L MUNIC. REV. 478 (1956).

bypass the political subdivisions recognized by the constitution and accordingly its constitutionality was upheld.[8] Subsequently, about a decade later, the authority of the legislature to create a regional board of health embracing several counties was also upheld.[9] In the third case in this line, however, the court invalidated a statute creating a "territory of Sylvan Beach" with local police power, on the ground that the provisions of the state constitution enumerating the four standard classifications of local government implicitly excluded legislative power to create any other division of local government for general purposes.[10] It may be significant that the New York courts leave unimpaired the authority of the legislature to create regional agencies of government, provided they are not delegated any general legislative power. A major element of difficulty which is widely prevalent, however, may be found in the various limitations upon financial powers that may be delegated to a unit of metropolitan government under the various state constitutions. These questions of finance are separately considered at a later point.

Home Rule and Metropolitan Rule: A Conflict?

Does the principle of home rule conflict with the principle of metropolitan rule? This question cannot be answered without looking to the origins of the principle of home rule. The concept goes hand-in-hand with the requirement of general laws. Both represent a reaction against legislative interference in municipal affairs. The principle of general legislation, the more venerable notion, was intended to prevent a legislature from discriminating between two municipalities of the same classification [11] but added nothing to the powers of the municipality. Home rule was meant to supply the municipalities with the power to establish and amend their own charters within constitutional limitations, and to legislate on local matters. The gap allegedly left by the prohibition of special laws was filled by the home rule concept. It invoked the notion of local action for local problems as opposed to state action for state problems. When problems expanded significantly beyond the boundaries of a municipality, however, the principle of home

8. People *ex rel.* Wood v. Draper, 15 N.Y. 532 (1857).

9. Heister v. Metropolitan Bd. of Health, 37 N.Y. 661 (1868).

10. People *ex rel.* Hon Yost v. Becker, 203 N.Y. 201, 96 N.E. 381 (1911).

11. The common state constitutional requirement that the legislature act by general laws in relation to local government permits differential treatment by classification on a basis which is generous to the legislative purpose. See Commission on Public Local and Private Legislation, *Report,* Popular Government, Feb.-Mar. 1949.

rule was not meant to apply. This has been recognized from the outset of the movement in Missouri in 1875 to the present day.[12]

Taking "metropolitan" in its current usage, *i.e.*, a central city and its environs, it is seen that its problems could hardly be contained within one of the conventional units of municipal government. If the home rule concept is applied to a metropolitan area it must become metropolitan home rule. Within the present legal framework, this is possible through a single avenue: the creation of a general purpose metropolitan government which would acquire its own home rule entitlement. To drive the argument full circle, home rule for a single municipality in a metropolitan area may result in the negation of the home rule principle for the entire area. As was said in the recent report of the Commission on Intergovernmental Relations, "Self determination in one isolated local unit of a large community restricts the opportunity for genuine home rule in the whole community." [13] It is this interrelationship which converts the matter to a state affair, free of the usual home rule restrictions on states action.[14]

Popular Consent

The existant legal requirements for voter consent is related to home rule, but is a distinct matter. The fact that the principle of metropolitan rule is consistent with the principle of home rule does not bypass the statutory requirements for the consent of local municipalities to many metropolitan plans. This may take the form of a veto in the hands of the governing bodies, or the necessity for a majority vote of the electorates in every individual municipality covered by the proposed metropolitan government.[15]

It is possible in certain states, therefore, for a majority of the voters in a single municipality to defeat a proposal for a metropolitan authority favored by an absolute majority of the voters in the entire area. Authorities requiring such majorities usually fall within the

12. See City of Dearborn v. Michigan Turnpike Authority, 344 Mich. 37, 73 N.W.2d 544 (1955) (state highway construction through a city); Robertson v. Zimmerman, 268 N.Y. 52, 196 N.E. 740 (1935) (Buffalo Sewer Authority upheld); McGoldrick, Law and Practice of Municipal Home Rule 1916-1930, at 299 (1933).

13. U.S. Commission on Intergovernmental Relations, Report 44-55 (1955).

14. See citations at note 12 *supra;* Committee on State-Local Relations of the Council of State Governments, State-Local Relations 172 (1946). *Compare* Mott, Home Rule for American Cities (1949), *with* Fordham, Model Constitutional Provisions for Municipal Home Rule (1953).

15. The notion of a popular referendum in these matters is widespread and stems from the voluntary origin of local governments, although not a requirement of common law. Berlin v. Gorham, 34 N.H. 266 (1856); see, *e.g.*, Faust, *Voters Turn Thumbs Down on Pittsburgh's Metropolitan Charter,* 18 Nat'l Munic. Rev. 529 (1929).

first classification mentioned above calling for a radical displacement of boundary lines and office holders. Annexation, city-county consolidation and federation fit into this category. In many states, a constitutional amendment and legislative authorization or both must precede the vote in the affected municipalities.

The dual requirement of express prior legislative authorization and concurrent popular majorities has made the use of the devices of consolidation and federation extremely difficult, or politically impossible.[16] City-county consolidation was effected in this century only in Baton Rouge, Louisiana, where but two majorities—in the city and in the remaining area considered as a whole—were required. Large scale annexations, infrequent in recent years, are implemented where the vote of the electorate in the area to be annexed is not controlling. In Virginia, which has a successful record of recent annexations, determination of the "necessity and expediency" of annexation is completely in the hands of a special annexation court. This procedure has been upheld by the appellate courts in Virginia and works smoothly there.[17] The question of the constitutionality of this delegation of legislative power to the judiciary was raised in a recent study.[18] Of greater significance is a 1953 decision of the Iowa Supreme Court: a statute conferring on the courts a power similar to that in the Virginia grant—to determine when annexations are "necessary" and "desirable"—was held to be an unconstitutional delegation of legislative power.[19] On principle, the values in consolidation or annexation are political, not legal, and any effort to enshroud them in judicial forms cannot alter their character.

The obstacles to effective re-adjustment of the areas of political subdivision have underscored the importance of less radical means of integrating authority. These include the Toronto plan of federation, co-operative formation of *ad hoc* service districts, re-allocation of service responsibilities by legislative mandate, and intermunicipal contracts for the rendering of governmental services by the more able unit. While the basic problem in these arrangements is financial—that is, in public

16. It should not be inferred from this that the many legal requirements for local majorities have, in practice, been the major stumbling block for consolidation proposals. Out of almost a score of rejected consolidation proposals in this century, only five got to the stage of a local vote and rejection. The others were refused either legislative authorization or a constitutional amendment by the entire state electorate. COUNCIL OF STATE GOVERNMENTS, THE STATES AND THE METROPOLITAN PROBLEM 71-74 (1956).

17. Henrico County v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941).

18. FRYER, ANALYSIS OF ANNEXATION IN MICHIGAN TOGETHER WITH A COMPARISON OF ANNEXATION IN OTHER STATES 47 (1951).

19. State *ex rel.* Klise v. Town of Riverdale, 244 Iowa 423, 57 N.W.2d 63 (1953).

borrowing and taxation which are separately considered below—a variety of special state constitutional problems beset the architect of the order in this field.

The formation of the Municipality of Metropolitan Toronto [20] is a unique illustration of the simplicity of common-law background. The motivation for this effort was an urgent need for schools, water supply and rapid transit facilities throughout the region of the City of Toronto and twelve adjoining municipalities. The history and development of the municipality is ably set forth in a separate paper in this symposium.[21] While the constituent municipalities remain as independent governmental entities, the metropolitan government is vested with responsibility for schools, sewerage disposal, water supply, major roads, transportation, regional parks and certain social welfare services. It is contemplated that a metropolitan police force and metropolitan fire force will be added before long.

Two essential powers of the metropolitan government are delegated to the metropolitan council, that is, the power to assess unified area-wide taxes and the power to control land use planning throughout the district. The administration of transportation functions is delegated to a separate commission known as the Toronto Transit Commission, appointed by the Metropolitan Council but functioning independently thereof except that the credit of the metropolitan corporation is used to support transit operations. For school purposes, a separate metropolitan school board was also established by the act, consisting of the respective chairmen of the boards of education of the constituent municipalities. The credit and taxing power of the metropolitan corporation is also made available to the school board. Despite these major responsibilities and far-reaching powers, affecting 1,300,000 persons residing in thirteen municipalities comprising 240 square miles, the legislation was enacted without any popular referendum, and has produced remarkably little litigation.[22]

Among the American states, by contrast, a variety of constitutional provisions reflecting the fears of bygone days, together with a pervasive reliance upon the popular referendum as an assurance of merit to the most technical proposals, have presented some real obstacles to effective co-operation. One of these is the maxim that a city may not be a giver of gifts. It was this maxim that presented substantial difficulty, even though it was overcome, to one of our state courts in

20. 2 ELIZ. 2, c. 73 (Canada 1953).

21. See Milner, *The Metropolitan Toronto Plan,* 105 U. PA. L. REV. 570 (1957).

22. One of the few cases involved the question of jurisdiction, municipal or metropolitan, over fluidation of the public potable water supply. Village of Forest Hill v. Metropolitan Toronto, [1955] Ont. 889.

dealing with a co-operative airport venture undertaken by a county and two cities within the county. Appropriate state legislation created an airport authority with a governing body consisting of five members, one each to be appointed by the city council in each of the two cities, and three to be appointed by the county commissioners. It was contended, with the support of a vigorous minority of the court, that the legislature could not authorize two cities to contribute to the airport authority for the reason that such a contribution would not be for a public purpose of the respective cities. While this arrangement was upheld, the court's opinion intimates that a different result might have prevailed had the record shown that there was any lending of municipal credit or pledge of the municipal taxing power in violation of the state constitution.[23] In the less conservative cases, however, our courts have upheld extensive arrangements for intermunicipal cooperation. For example, a municipal housing authority has been granted a writ of mandamus to compel a city to perform a cooperation contract which contained an undertaking by the city to vacate certain streets and to zone and re-zone a certain area in connection with a public housing project.[24]

Delegation of Powers of Taxation and Borrowing

The two main tools of metropolitan integration—recognized in the Toronto federation plan—the central power to plan for services and improvements, and the central power to integrate the public credit of the area, may present legal doubts in some states depending upon the form of administrative organization of the metropolitan government. By its nature as an integrating agency, the governing body of a metropolitan government is not particularly well suited to popular election. Thus it is that the boards and commissions at the head of the largest public authorities are appointive, and the council of the metropolitan government of Toronto was made to consist of *ex officio* representatives from the constituent municipalities.

Where the governing body is not directly elected by the people, and the power of taxation is conferred upon the metropolitan government, the plan may encounter the old slogan of "no taxation without representation" which has become fixed as a rule of law in most jurisdictions. This was the problem created by an old New Jersey

23. Airport Authority v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946); *cf.* Board of Education v. City of Corbin, 301 Ky. 686, 192 S.W.2d 951 (1946) (constitutional provision forbidding appropriation of money by a municipality to any other corporation, held to deny a city the power to appropriate to an independent coterminous school district for the supplementation of teachers' salaries.)

24. State *ex rel.* Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915 (1940), 50 Yale L.J. 525 (1941).

statute establishing a regional sewerage district. Under that statute, the governing body of the district was appointed by the Governor, and delegated discretion to determine the amount required to be raised by taxation upon all persons and property within an area which extended beyond the service area of the district. The act was held unconstitutional on two grounds; first that the district could not be vested with power to tax persons and property beyond its own limits, and second that the taxing power could not be delegated to non-elective representatives.[25] The scope of the doctrine and the authorities has been reviewed in comprehensive opinions rendered in Pennsylvania[26] and Illinois.[27] In a subsequent opinion upholding the constitutionality of a regional airport authority act, which in effect authorized the creation of a special purpose municipal corporation and included the delegation of power to levy taxes, the Illinois court reasoned from the parliamentary power of the legislature over local government that there was no constitutional infirmity in the act creating "a municipal corporation with power to operate an agency of public safety or welfare, and to tax for it. . . ."[28]

From these cases, it is clear that the power of taxation may not be delegated to an administrative agency in the more common sense of the term. While some states will permit the delegation of such power to appointive officers provided that the creation and organization of the regional agency is authorized by popular vote, other states will limit the power to levy taxes to popularly elected governing bodies. Whatever the legal refinements may be in a given state, it is more likely that the decision will turn on the political acceptability of the form and extent of taxing power to be delegated.[29]

A metropolitan unit which confines itself to the planning, construction and administration of revenue producing enterprises which are self-liquidating in character, may avoid the problems and implications of a delegation of the taxing power. The best example of this characteristic may be found in the Port of New York Authority, a

25. Van Cleve v. Passaic Valley Sewerage Comm'rs, 71 N.J.L. 574 (1905).

26. Wilson v. Philadelphia School Dist., 328 Pa. 225, 195 Atl. 90 (1937).

27. People *ex rel.* Greening v. Bartholf, 388 Ill. 445, 58 N.E.2d 172 (1944).

28. People *ex rel.* Curren v. Wood, 391 Ill. 237, 62 N.E.2d 809 (1945), citing Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923).

29. See DEEM, THE PROBLEM OF BOSTON'S METROPOLITAN TRANSIT AUTHORITY 42-60 (Harvard University Bureau of Research in Municipal Government No. 20, 1953); URBAN LAND INSTITUTE, URBAN LAND USE AND PROPERTY TAXATION (Technical Bulletin No. 18, 1952); *Round Table: Taxes and User Charges in Government Finance,* in NATIONAL TAX ASSOCIATION, 1955 PROCEEDINGS 139-93 (1956); Tobin, *Transportation in the New York Metropolitan Region During the Next Twenty-five Years,* in METROPOLIS IN THE MAKING 27 (Regional Plan Association 1955).

bi-state agency of the states of New York and New Jersey which has no power to tax and therefore carefully follows the policy of undertaking no facility or service which cannot ultimately be made self-sustaining.[30] This element of self-sufficiency has been a dominant characteristic of public authority development in America, with such notable exceptions as the Metropolitan Water District of Southern California and the Buffalo Sewer Authority, the former being vested with the power to levy property taxes and the latter having the power to impose sewer rentals which have the lien and effect of taxes on a property owner. As metropolitan units undertake to perform non-revenue producing services, such as fire and police services, public schools or services which have not demonstrated a self-liquidating character, such as rapid transit by rail, the legal problems of organizing metropolitan taxing power to support such services become more pressing. For those metropolitan regional units that cannot have direct taxing power for one reason or another, access to the taxing power of their constituent municipalities might possibly be afforded through the authority to certify the operating need of the metropolitan unit to the constituent municipality with provision that the amount so certified shall be a mandatory charge upon the budget of the constituent municipality.[31]

The delegation of power to incur debt is dependent upon the self-liquidating character of the operations of a metropolitan unit. If revenue financing is possible, both the limitations on the delegation of taxing power and those of constitutional and statutory debt limitations are avoided.[32] If the power of taxation is delegated, the effect of state constitutional tax and debt limitations would depend upon whether they are stated in broad enough terms to encompass the use of public credit by an unconventional unit of government.[33]

Special Considerations in Interstate Metropolitan Areas

Interstate metropolitan areas present the special problem of reconciling two different systems of public law,[34] as well as the potential

30. Bird, A Study of the Port of New York Authority *passim* (1949).

31. McAneny v. Board of Estimate and Apportionment, 232 N.Y. 377, 134 N.E. 187 (the power of the transit commission in New York City to require the levy of taxes was upheld on the theory of the state's plenary power over taxation and municipal corporations). *Contra,* State v. Mayor, 103 Iowa 76, 72 N.W. 639 (1897).

32. See Williams & Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations,* 37 Colum. L. Rev. 177 (1937).

33. Department of Water & Power v. Vroman, 218 Cal. 206, 22 P.2d 698 (1933); New York City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936); Tranter v. Allegheny County Authority, 316 Pa. 65, 173 Atl. 289 (1934). For an economic justification, see Hansen & Perloff, State and Local Finances in the National Economy 85 (1944).

34. For example, in the North Jersey-New York metropolitan area, the constitution of New Jersey has no specific provision which might affect the delegation

advantage of exercising substantive powers derived from the compact clause of the Federal Constitution. In brief, the question is suggested whether two states may by compact with the approval of the Congress, achieve metropolitan governmental purposes through machinery which would not be available to either of them alone.

The law on the subject is scanty. In recent years the courts have approved the exercise of the police power by the interstate compact between the states of New Jersey and New York which established the bi-state Waterfront Commission.[35]

For purposes of analysis, there are two potential grounds upon which states might rely in order to exercise, by means of a compact, powers beyond their own constitutional restrictions. These are: (1) that whenever by the agreement of states and the consent of Congress an interstate compact comes into operation it has the same effect as a treaty between sovereign powers; and (2) if a compact becomes a federal law by reason of congressional consent, the states may proceed without regard to local constitutional limitations.[36] These may be somewhat mutually distinguishable reasons.

It has been stated that the "compact . . . adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations." [37] In this light the compact clause is viewed as a reiteration of the power of sovereign states to enter into agreements, with the exception, however, that they be consented to by Congress.[38] The common view seems to be to conceive of compacts as contracts between sovereign states, which compacts are superior to subsequent legislation of either state, and are not unilaterally abrogable but are

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of powers to a metropolitan unit of government, whereas the constitution of New York contains some fifteen separate provisions relating to local taxation and indebtedness and public corporations, to be resolved.

35. Staten Island Loaders, Inc. v. Waterfront Comm'n, 117 F. Supp. 308 (S.D.N.Y. 1953) (upholding compact's prohibition of business of "public loading" on piers within the port district), *aff'd sub nom.* Linehan v. Waterfront Comm'n, 347 U.S. 439 (1954); Linehan v. Waterfront Comm'n, 116 F. Supp. 401 (S.D.N.Y. 1953) (refusing to enjoin enforcement of compact prohibition against collection of union dues if any official of the union has been convicted of a felony).

36. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 25 (8th ed. 1927).

37. Hinderlider v. La Plata County, 304 U.S. 92, 104 (1938).

38. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Poole v. Fleeger, 36 U.S. (11 Pet.) 185 (1837); Marlatt v. Silk, 36 U.S. (11 Pet.) 1 (1837). Compacts are then considered as contracts of quasi-international status. Notes, 23 IOWA L. REV. 618, 631 (1938); 45 YALE L.J. 324, 328 (1935). Under the doctrine of Missouri v. Holland, 252 U.S. 416 (1920) and United States v. Curtiss-Wright, 299 U.S. 304 (1936), "inherent" power in states might provide support for treaties beyond constitutional powers, but it is doubtful if these doctrines, applicable to the federal government, are equally viable to the states. There are, in fact, several cases which hold that "states" cannot adopt treaties violative of their own organic law. Asakura v. Seattle, 265 U.S. 332, 341 (1924); Geoffroy v. Riggs, 133 U.S. 258 (1896).

subordinate to the Constitution and to judicial review.[39] Cases in respect to the question have been few. The power of one state to agree with another that the latter shall possess jurisdiction over a common river, close to the shore of the first state, has been sustained.[40] A compact between New Mexico and Colorado provided for "equitable apportionment" of the waters of the Colorado. The constitutions of both states incorporated the rule of "prior appropriation." The Supreme Court denied a claim that the compact was thus invalid, stating:

> "Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." [41]

Here private rights were altered by the terms of a compact, and the authority of the Colorado legislature to enter into a compact so resulting was upheld. The efficacy of this decision is questionable, however, since there was really not a clash between the state constitutions and the compact. The latter determined the apportionment, as between states, of the waters of an interstate stream, the former governed the apportionment within each state of such waters.[42]

Dyer v. Sims,[43] involving a potential clash, avoided the issue by declaring that no conflict existed. There the West Virginia Supreme Court had determined that a West Virginia act approving that state's adherence to the Ohio River Valley Water Sanitation Compact was invalid, in that (1) the compact was deemed to delegate West Virginia's police power to other states and to the federal government, and (2) it was deemed to bind future legislatures to make appropriations for the continued activities of the Commission and thus to violate the West Virginia Constitution. Taking the case on certiorari, the Court held that it had final power to pass upon the meaning and validity of compacts, and to examine determinations of state law by state courts in the limited field where a compact brings in issue the rights of other states and the United States. Thus setting the stage, the Court determined that there was no conflict.

39. See Notes, 23 IOWA L. REV. 573, 578 (1938); 45 YALE L.J. 324, 329 (1935). This is particularly true under the fifth and fourteenth amendments.

40. People v. Central R.R., 79 U.S. (12 Wall.) 455 (1870).

41. Hinderlider v. La Plata County, 304 U.S. 92, 106 (1938).

42. See ZIMMERMAN & WENDELL, THE INTERSTATE COMPACT SINCE 1925, at 95-96 (1951).

43. 341 U.S. 22 (1951).

Of interest, however, is the concurring opinion of Justice Reed.[44] Asserting that under the compact clause federal questions are present for determination by the court, he stated that the interpretation of the meaning of a compact controls over a state's application of its own law through the supremacy clause, and not by any implied federal power to construe state law. Resting on the second of the grounds initially stated herein, Justice Reed gave federal scope to compacts and stated, "Since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action." [45] He rested his conclusion on *Hinderlider v. La Plata County,*[46] although that decision was premised more on the "sovereign-treaty" concept.

Justice Jackson in his concurring opinion [47] stressed the "sovereign-treaty" aspect and concluded that West Virginia was estopped from subsequently denying her power to enter into the compact.

The "federal acts" aspect is another approach. The Supreme Court has held that compacts, consented to by Congress, are laws of the Union.[48] Although this has been doubted, except perhaps for purposes of federal jurisdiction,[49] this theory was apparently approved by Justice Reed in *Dyer v. Sims,* and thus credence is lent to the concept that local constitutional limitations need not restrict states in adopting federally approved compacts.[50]

Under either theory, therefore, it is possible to argue that states are not bound by local constitutional restrictions when executing compacts. As yet the cases do not go quite that far.

CONCLUSION

This limited review of the authorities may well justify the conclusion it is not the law that has lagged, but rather the political art which has been unequal to the task of overcoming the inertia of the metropolitan mass of the body politic. The well established device of

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44. *Id.* at 33.

45. *Id.* at 34.

46. 304 U.S. 92 (1938).

47. 341 U.S. at 35.

48. Missouri v. Illinois, 200 U.S. 496, 519 (1906); Wedding v. Meyer, 192 U.S. 573, 582 (1904); Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1855); Pennsylvania v. Wheeling and Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1851).

49. See Notes, 23 IOWA L. REV. 618, 627 (1938); 45 YALE L.J. 324, 328 (1935); Comment, 37 MICH. L. REV. 129, 130 (1938).

50. See 34 COLUM. L. REV. 169 (1934).

the public authority for self-liquidating projects, the metropolitan district for tax-supported functions, and various combinations of these for revenue-producing projects requiring tax subsidy are within legal reach if they can achieve political acceptability. The choice of specific applications under the defined conditions of a given metropolitan region or project cannot be easy, but this is not so much because of a law which lags as it is because of the practical need to find the solution which is "constitutionally sound, financially practicable and politically feasible." [51]

51. This is a specification in the Memorandum of Understanding between the Port of New York Authority and the Metropolitan Rapid Transit Commission, regarding the North Jersey-New York rapid transit survey. See METROPOLITAN RAPID TRANSIT COMMISSION, INTERIM REPORT app. C, at 43 (1955).