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The Delegation of Police Power to Counties

HERMAN WALKER, JR.*

The past few years, notable for their noisy expansion of federal activity, have evidenced also a less remarked trend toward the accretion of governmental functions at the local level. Witness, for example, the growth of housing and electrification authorities, the wide enactment of soil conservation district laws, and the spread of county zoning enabling statutes.1 Presumably, this development will continue. Certainly it will be pressed by those unreconstructed democrats who feel that strong and viable local self-governing institutions are vitally necessary to a healthy democratic order, as well as by all others who see in local governments expedient instruments for carrying out social policies which they advocate.

Given the desire for, or impulse toward, a fuller measure of local self-direction, there yet remains the question as to how it can be acquired legally. A local government (especially a county), cannot spontaneously generate power, for it is axiomatic that local governments are mere creatures of the state, utterly dependent upon a state legislature for their leave to do or not to do. The extent of the power which a political subdivision may possess is thus normally determined by legislative enactment. But legislators are not free agents; they must operate within constitutional limits. Consequently it is necessary to make some estimate of the power of legislature, acting within the framework of a constitution, to make grants of local authority. Although certain aspects of this subject have been adequately treated elsewhere,2 it appears that problems related to the delegation of police powers to counties have so far escaped comprehensive treatment.

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2. The subject of grants of police powers to cities has already been fully treated by McBain, Delegation of Legislative Power to Cities (1917) Pol. Sci. Q. 276, 391.
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The rule is well known and well established that legislatures are constitutionally unable to delegate legislative power. It is equally a truism that a state-wide police power is one of the categories of legislative power which cannot be delegated. Does it follow from these premises that a legislature cannot authorize a county to exercise police powers for local, as distinguished from state-wide, purposes? Let it be emphasized that the sort of powers in question are applicable only within the county boundaries and even then only for county purposes, and are comparable to those which may be granted to municipalities for exercise within their corporate limits.

The trail to an answer should begin with an examination of the several legal arguments that support the delegation doctrine. It is important to determine whether all or any of these traditional arguments are appropriate to the particular kind of delegation here being considered. The idea that a delegation of legislative power is unconstitutional has been supported along three different lines: (1) that such delegation is inconsistent with a republican form of government; (2) that it violates the doctrine of separation of powers; or (3) that it contravenes the principle expressed by the maxim delegatus non potest delegare.3

The first of the above arguments is that the republican state governments contemplated by the federal constitution must be governments directly by representative state assemblies; and that, consequently, all attempts to vest in local agencies any authority of a legislative character are invalid as being unrepublican. This reasoning once intrigued several courts, which made reference to it in determining the validity of local option statutes.4 The idea was soon abandoned, however. It appeared again in a series of cases arising in Colorado, in which home rule provisions for the City and County of Denver were considered; but, again, it was later discarded.5 These decisions virtually exhaust the catalogue of cases in point. It would be profitless to pursue further the republican-form-of-government argument as an approach that has any plausible claim to support by authority. In any event, as is

3. Often given as potestas delegata non potest delegari: "Delegated power cannot be redelegated."
5. People v. Johnson, 34 Colo. 143, 86 Pac. 233 (1905); People v. Curtice, 50 Colo. 503, 117 Pac. 357 (1911); Denver v. Mountain States Telegraph Co., 67 Colo. 225, 184 Pac. 604 (1919).
illustrated by all the above-mentioned cases, this argument is relevant only when the issue is a transfer of what is conceived to be general (as contrasted with local) legislative power. Finally, it is hardly necessary to dilate upon the absurdity of arguing that local self-government is per se unrepublican. The following statement by Cooley clearly represents the current legislative attitude, which is quite contrary to any such notion:

"... the legislature assumes this division of the State [into counties and other subdivisions] to be essential in republican government, and ... imposed as a part of the necessary and proper burden which citizens must bear in maintaining and perpetuating constitutional liberty.

When we turn to the separation-of-powers argument we find that it is hardly persuasive in the situation now being considered. Two reasons as to why it does not deserve intensive treatment may be pointed out. First, as an axiom of American political theory the doctrine of separation of powers has reference only to the partition of jurisdictions on a single level of government. Hence it becomes pertinent only when an alleged delegation flows from one department to another coordinate department, on the same level (as, from the state legislature to the state executive). It cannot be regarded as applicable when the alleged delegation is from a legislative agency at one level to a legislative agency at another level (as, from the state legislature to the county board). Of course, the separation-of-power argument would be relevant, and strongly so, if counties were alleged to be on the same "level" with state organs; and it were accordingly deduced that the legislature, in dealing with counties, would be dealing with a coordinate branch of the state government. But so to hold would require a major revision of traditional and deeply-entrenched concepts of government in this country. The second point is that the separation of powers doctrine does not hold for local governments.

6. I Cooley, Constitutional Limitations (8 ed. 1927) 508. See also Carson v. Board of Directors of St. Francis Levee District, 59 Ark. 513, 27 S.W. 590 (1894); Cotten v. County Com'rs of Leon County, 6 Fla. 610 (1856); White v. Board of Com'rs, 129 Ind. 396, 28 N.E. 846 (1891); Ocean Springs v. Green, 77 Miss. 472, 27 So. 743 (1900); State v. Noyes, 30 N.H. 279 (1855); McBain, Right of Local Self-Government (1916) 16 Col. L. Rev. 299; Note (1918) 3 Corn. L. Q. 277, 280.

7. At various places below, there will be discussion bearing on this point.

8. A discussion of this point, with authorities and a list of cases, may be found in United States Department of Agriculture, A Standard State Soil Conservation Districts Law (1936) 59-51. Additional cases include Fox v. McDonald, 101 Ala. 51, 13 So. 418 (1883); State v. Duval County, 76 Fla. 180, 79
Regularly there occur comminglings of judicial, administrative and legislative powers in local governing agencies. The validity of this practice is not open to doubt. Local governing agencies do not belong to any of the three traditional departments that the separation-of-powers doctrine requires be kept distinct from one another.

The discussion from this point on will accordingly be directed toward the last, the most forceful and telling, of the three arguments, namely, that the granting of local legislative power to counties would violate the maxim *delegatus non potest delegare.* This thesis runs as follows: Since the state legislature receives its own legislative power by virtue of delegation (from the state constitution), it cannot re-delegate to any other body the exercise of any part thereof; local police powers form a part of such non-delegable legislative power; and, therefore, the legislature is constitutionally incapable of authorizing the exercise of local police powers by counties.

The highly doubtful link in this chain of reasoning is the assumed proposition that local police powers form a part of the general, non-delegable legislative power; or, stated alternatively, that when the legislature grants local police powers to a local government it is actually delegating its own legislative power. It should be emphasized that this is merely an assumption and is not self-demonstrative.  

By its very nature, a legislature is a duty-assigning body. One of its most frequently exercised functions is that of prescribing for various persons, bodies, and departments the particular powers and duties within their respective spheres of competence: administrative duties are assigned to administrative bodies, judicial duties to the judiciary, and so on. When it so functions, the legislature is not at all “delegating” in any unconstitutional sense.
The particular competence of a local government lies in its capacity and equipment to manage and regulate local affairs. Accordingly, when a legislature grants local legislative powers to subordinate units of government—the distinction being between "what is properly legislation and what is properly or necessarily a local by-law"—it is merely parcelling out to them quanta of governmental authority appropriate to their status and purpose. "... in distributing local powers," as one court put it, "the Legislature acts in strict conformity to the fundamental principles of our system of government." This—which, to avoid semantic confusion, may be called "devolution"—far from involving invalid "delegation," is rather a proper expression of the ordinary legislative process. One of the elements of the state's legislative power is the right to devolve local regulatory authority upon units of local government, whether these units be cities or counties.


The same point is made as well in other connections, such as local option and territorial cases. McCormick v. Western Union Tel. Co., 79 Fed. 449 (C.C.A. 8th, 1897); In re Opinion of the Justices No. 36, 232 Ala. 56, 166 So. 706 (1938); Rice v. Foster, 4 Harr. 479 (Dela. 1846); Powers v. The Inferior Court of Dougherty County, 23 Ga. 65 (1857). I McQuillin, Municipal Corporations (2 ed. 1928) 400. See especially State v. Circuit Court of Gloucester County, 50 N.J. Law 585, 15 Atl. 272 (1888); and for illustrative purposes, the striking supplementary opinion of Blair, Chief Justice of the Missouri Supreme Court, in State ex rel. Lashly v. Becker, 290 Mo. 560, 235 S.W. 1017 (1921).

The decision in the last-named case had invalidated, as entailing a delegation of legislative power, a statute vesting in a committee of state executive officials the contingent duty of redistricting the state. A dissenting opinion had expressed the fear that the majority's language was so broad as to preclude the granting of "local legislative powers" to municipalities; and it was to allay this fear that the Chief Justice wrote a sort of explanatory addendum to the main opinion. In it he emphasized in some detail that when the legislature devolved "local legislative powers" on municipalities, it was by no means "delegating" its own exclusive "legislative power"—but was, on the contrary, simply exercising that power. "The power to invest municipalities with authority to enact ordinances is a part of the legislative power in the constitutional sense. That power the Legislature cannot delegate. The power which municipalities exercise under legislative authority is not a part of the 'general legislative power'..." (290 Mo. at 636, 235 S.W. at 1027.)

15. The same result has been reached by reasoning that "local legislative powers" are among those which may be classified as "not strictly legislative"—powers, that is, which the legislature may either exercise itself or vest in appropriate agencies, as it sees fit. Stanton v. Board of Sup'rs, 191 N.Y. 428,
Only when the legislature attempts to vest in local units authority outside their competence—that is, "non-local," or "general" powers—is it venturing into forbidden territory. Just where lies the line that separates local from general, is, of course, a topic demanding a detailed study beyond the bounds of the present paper. There must be first established the antecedent

84 N.E. 380 (1908); Cleveland v. City of Watertown, 222 N.Y. 159, 118 N.E. 500 (1917). "... the power conferred on such [municipal] corporations to pass by-laws and ordinances, subject to the laws of the state... is not a part of the general legislative power which is committed to the general assembly, to be exercised only by that body." State v. Field, 17 Mo. 529, 533 (1853).

Often the courts and writers, in cases involving municipalities, have taken another tack. They have justified the devolution on the grounds that it may be considered a valid exception to the rule that legislative power cannot be delegated. For example, 3 Willoughby, Constitutional Law (2 ed. 1929) 1836. Such an approach is not only unnecessary but theoretically fuzzy and unsatisfying. It represents a make-shift attempt to rationalize a desired result only superficially prohibited by the non-delegation doctrine; and it thus destroys the logical symmetry of that doctrine in an uncalled-for way. Moreover, it is a source of confusion—first, in that it suggests an arbitrary and unverified distinction between cities and other units in this regard; and second, in that it gives no hint or explanation of the legislature's acknowledged incapacity to "delegate general legislative power" under any circumstances.


17. The following illustrate where various courts have drawn the line, and at the same time suggest some of the difficulties encountered. In State v. Hardwick, 144 Kan. 3, 57 P. (2d) 1231 (1936), wind-produced soil erosion was held to be beyond county control, inasmuch as winds blow far and wide; but at the same time it was suggested that rain-produced erosion could probably be validly subjected to local control. In Bradshaw v. Lankford, 73 Md. 428, 21 Atl. 66 (1891), it was ruled that the regulation of oystering was too much a matter of state-wide concern to be entrusted to local regulation, although a contrary result was reached in Smith v. Levinus, 8 N.Y. 472 (1853), and Barataria Canning Co. v. Ott, 84 Miss. 737, 37 So. 121 (1904).

Examples of matters the control of which has been variously deemed entrusted exclusively to the state legislature, and hence incapable of commitment to unchanneled county discretion: altering rules of civil liability, Slinger v. Henneman, 38 Wis. 504 (1875); creation of a state offense, State v. Baum, 33 La. Ann. 981 (1881) [as construed by State v. Westmoreland, 133 La. 1015, 63 So. 502 (1913)]; disposition of public property belonging to the people of the whole state, State v. O'Quinn, 114 Fla. 222, 154 So. 166 (1934); system of registering voters, Richter v. Chatham County, 146 Ga. 218, 91 S.E. 35 (1918); salary of district attorney or county judge, Doherty v. Ransom Co., 5 N.D. 1, 63 N.W. 148 (1895); Moseley v. Garrett, 182 Ga. 810, 187 S.E. 20 (1936); Delmar v. Bergen County, 117 N.J. Law 377, 189 Atl. 75 (1937). On the other hand, however, counties have been permitted to regulate the salaries of sheriff, tax-collector and clerk of municipal court, Abbott v. Commissioners of Fulton Co., 160 Ga. 657, 129 S.E. 38 (1925); Truesdel v. Freeney, 186 Ga. 288, 197 S.E. 783 (1938), on the ground that they are essentially "local" rather than "state" officers. Numerous examples of matters which might constitutionally be entrusted to county control will occur from time to time below, as: gambling, liquor sales, location of cemeteries, etc.

It should be noted that the loose term "general" here used includes that
principle that those powers which properly fall into the "local" category can be constitutionally vested in counties. In determining the validity of a proposed grant to a county, the power under consideration is tested by the question, "Is it local?" just as the validity of a grant to ordinary administrative agencies is worked out by the courts in terms of "adequate standards and guides."[18]

II

Having briefly stated the theoretical background, the next step is to probe into various pertinent questions, cases, analogies and arguments, in order to ascertain whether counties, in particular, fall within the stated rule. Of foremost importance is the question how far a persuasive analogy can be made between cities and counties in regard to their power-receiving capacities.

It is no longer open to dispute that legislatures may constitutionally authorize cities to exercise police powers for local purposes. This principle is justified on the ground that grants of power to a city—provided always that the power is local—do not violate the non-delegation doctrine, for precisely the reasons set forth in the foregoing section. By a parity of rea-

which is so because of principle, and also that which is so because of having been allocated expressly by the constitution to a specified agency. Thus, if the constitution particularly requires the legislature to set the salary of the county clerk, the function of fixing that salary becomes "general," although in the absence of such a constitutional requirement it might be considered "local."

18. There is a "distinction in principle between the delegated exercise of . . . power by counties and cities, and the delegated exercise of that power through a statutory administrative board." Whitney v. Hillsborough County, 99 Fla. 628, 127 So. 486 (1930).

19. Examples of matters variously held to be "non-local," and hence not constitutionally susceptible of being entrusted to unchanneled municipal control: altering rules of civil liability, Green v. Amarillo, 244 S.W. 241 (Tex. Civ. App. 1922), affirmed 267 S.W. 702 (Tex. Comm. App. 1924); modifying the state's criminal law, Montross v. State, 61 Miss. 429 (1883); conduct of elections, Mauff v. People, 52 Colo. 562, 123 Pac. 101 (1912); creation of new municipal courts, State v. Barker, 50 Utah 189, 167 Pac. 262 (1917); modification of the city's own powers and jurisdiction, Pursley v. Fort Myers, 87 Fla. 428, 100 So. 366 (1924); number of justices of the peace, State v. Adams, 90 Tenn. 722, 18 S.W. 393 (1891) (But see Thrush v. People, 53 Colo. 514, 127 Pac. 937 (1912)); system of electing county judges, Dixon v. People, 53 Colo. 527, 127 Pac. 930 (1912). For two series of cases, illustrating the judicial difficulties encountered, see the various stages of Cleveland v. City of Watertown, 99 Misc. 66, 165 N.Y. Supp. 305 (Sup. Ct. 1917); 179 App. Div. 954, 166 N.Y. Supp. 298 (1917); 222 N.Y. 159, 118 N.E. 500 (1917); and People v. Sours, 31 Colo. 369, 74 Pac. 167 (1903); People v. Johnson, 34 Colo. 143, 86 Pac. 233 (1905); People v. Curtice, 50 Colo. 503, 117 Pac. 357 (1911); Hilts v. Markey, 52 Colo. 382, 122 Pac. 394 (1912); Mauff v. People, Dixon v. People, and Thrush v. People, supra.

soning, would not the same hold true for counties? Cities and counties are alike units of local government, a fact which is only superficially obscured by the circumstance that the one is primarily urban whereas the other is mainly rural.

In upholding devolutions of local legislative powers to cities, the courts are strongly influenced by what they feel to be the value and desirability of local self-government. There is no reason why self-government is not equally valuable and desirable for counties. Any “cardinal principle of our system of government that local affairs shall be managed by local authorities” should be applicable quite as fully to rural, as to urban, areas. Counties, too, “are created to give effect to and enable citizens to exercise the right of local self-government.” The paeons of praise so often sung on the virtues of local self-government and its political desirability in a republic have proved quite susceptible of particularization to counties. Moreover, if devolutions to cities are wise and good because of the practical impossibility of a legislature’s adopting necessary regulations to the varying conditions of different localities, if municipalities should have powers of local self-government because it is sensible to allow local people to work out for themselves those regulations that are of local concern, then the same ought to be true for counties.

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21. Morris v. Board of Com’rs of Switzerland County, 131 Ind. 285, 31 N.E. 77 (1892).
22. I Cooley, op. cit. supra note 6, at 385-388; I McQuillin, op. cit. supra note 14, at 251-260. Early County v. Baker County, 137 Ga. 126, 72 S.E. 905 (1911); White v. Board of Com’rs of Sullivan County, 129 Ind. 396, 28 N.E. 846 (1891); White v. Commissioners, 90 N.C. 437 (1883); The Redistricting Cases, 111 Tenn. 234, 80 S.W. 750 (1904); and note 6, supra.
23. Bordelon v. Lewis, 8 La. Ann. 472 (1852); Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769 (1914); State v. Copeland, 66 Minn. 315, 69 N.W. 27 (1896). "The Constitution grants the power to legislate, but it does not confer knowledge..."
25. As seen, for instance, in Hunsicker v. Briscoe, 12 La. Ann. 169 (1857);
The validity of the analogy has been indicated also in other ways. There are, for example, numerous dicta which refer to counties and cities interchangeably in the matter of local legislative capacity. Authority for the regularity of devolutions of taxing power upon counties has been found in urban practice; local option statutes have been upheld for counties and cities in equal terms; and more aptly yet, some of the few cases which have decided specifically upon a grant of police power to counties have employed the urban analogy.

So, on grounds both of rational constitutional theory and of traditional public policy, the sorts of devolutions which are permissible for cities should be permissible for counties. The analogy appears even stronger in light of the doctrine that state constitutions contain merely limitations on the legislature, rather than grants of power to it; and that, accordingly, the legislature

Stanfill v. Court of County Revenue, 80 Ala. 287 (1885); Dunn v. Wilcox County, 85 Ala. 144, 4 So. 661 (1888); Territory v. Supervisors of Mohave County, 2 Ariz. 248, 12 Pac. 730 (1887); Ex parte Lewis, 101 Fla. 624, 135 So. 147 (1931); Caldwell v. Barrett, 73 Ga. 604 (1884); Cooke v. Iverson, 108 Minn. 388, 122 N.W. 251 (1909); Alcorn v. Hamer, 38 Miss. 652 (1859) (levee district, however); People v. McIntyre, 154 N.Y. 628, 49 N.E. 70 (1898); State v. Messenger, 63 Ohio St. 388, 59 N.E. 105 (1900); Livesay v. De Armond, 131 Ore. 563, 284 Pac. 166 (1930); Johnson v. Martin, 75 Tex. 33, 12 S.W. 321 (1889).

26. New Orleans v. Turpin, 13 La. Ann. 56 (1858); In re Opinions of the Justices, 232 Ala. 56, 166 So. 706 (1936); Maricopa County Municipal Water Conservation District No. 1 v. La Prade, 45 Ariz. 61, 40 P. (2d) 94 (1935); Gill v. Wilder, 95 Fla. 901, 116 So. 870 (1928); Mayor v. Hussey, 21 Ga. 80 (1856); State v. Hay, 126 N.C. 999, 35 S.E. 439 (1900); Davis v. Mayor of Knoxville, 90 Tenn. 399, 18 S.W. 254 (1891). See also Shaver v. Martin, 166 Ga. 424, 148 S.E. 402 (1928); Mayor and Council of Pocomoke v. Standard Oil Co., 162 Md. 368, 159 Atl. 902 (1932); Fylken v. Minot, 66 N.D. 251, 264 N.W. 728 (1936); Schubel v. Olcott, 60 Ore. 503, 120 Pac. 375 (1912); Hilt v. Roberts, 142 Tenn. 215, 217 S.W. 826 (1920).

27. Stoppenbach v. Multnomah County, 71 Ore. 493, 142 Pac. 832 (1914). In Bordelon v. Lewis, 8 La. Ann. 472 (1852), the analogy of cities and counties was used to sustain a grant of taxing power to a school district.

28. Haney v. Board of Com'rs of Roads and Revenue, 91 Ga. 770, 18 S.E. 28 (1893); Bradshaw v. Lankford, 73 Md. 428, 21 Atl. 66 (1891); Opinion of the Justices, 160 Mass. 596, 36 N.E. 488 (1894); State v. Wilcox, 45 Mo. 458 (1870); Clarke v. Rochester, 28 N.Y. 605 (1864); Locke's Appeal, 72 Pa. 491 (1873). See also Mayor v. Finney, 54 Ga. 317 (1875); State v. Ure, 91 Neb. 31, 135 N.W. 224 (1912). I Cooley, op. cit. supra note 6, at 243 et seq. McBain, supra note 2, at 393-394.

The aptness of the analogy is underscored by the comment on Dunn v. Wilcox County, 85 Ala. 144, 4 So. 661 (1888) in 16 L.R.A. 161: "In this case it will be seen that a larger freedom in delegating legislative power was allowed to counties than to municipal corporations."

29. State v. Westmoreland, 133 La. 1015, 63 So. 502 (1913); Territory v. Whitney, 17 Hawaii 174, 7 Ann. Cas. 737 (1905). Note Professor Willis' statement: "The delegation of authorities to counties, townships, and school districts is also sometimes upheld for the same reason that a delegation of power to municipalities is upheld." Willis, Constitutional Law of the United States (1938) 137-138.
may do anything which is not prohibited. No state constitution expressly prohibits the granting of police powers to counties.

III

In reply to what has been said above, it might be contended that cities and towns have certain unique characteristics, not yet mentioned, which make them peculiarly appropriate subjects for a devolution of local legislative powers.

For instance, cities are usually termed "municipal corporations proper" (endowed with charters), whereas counties are said to be only "quasi" municipal corporations (without charters). It is, however, difficult to understand how this distinction could matter, despite intimations to the contrary. The picture might be otherwise had the courts adhered to an early theory that the local legislation of municipalities is similar to corporation by-laws of a private corporation and valid for the same reason. But this theory has long since been abandoned. Corporateyness of itself has been found an insubstantial basis for an acceptable theory.

Moreover, a formal parchment called a "charter" is non-es-

30. "In political and governmental matters, counties are the representatives of the sovereignty of the state, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of private corporations. Hence while counties are sometimes called quasi corporations, because not in terms declared by statute to be corporations, and have a corporate capacity only for particular specified ends, still so long as they are invested with corporate attributes, even if it be sub modo, the distinction is without a substantial difference within the limits of the corporate powers conferred." (Italics supplied.) 7 R.C.L. 924-925. This quotation is apparently taken from People v. Ingersoll, 59 N.Y. 1 (1874).

31. People v. Sours, 31 Colo. 369, 386, 74 Pac. 167, 172 (1903); Hanson v. City of Cresco, 132 Iowa 533, 109 N.W. 1109 (1906); Burnett v. Maloney, 97 Tenn. 697, 37 S.W. 689 (1896).


33. See, for example, State v. Circuit Court of Gloucester County, 50 N.J. Law 585, 15 Atl. 272 (1888) and 11 Am. Jur. 935-936: "The view generally adopted is that a grant of power to a municipal corporation to legislate by ordinance on enumerated subjects connected with its municipal affairs is in addition to the power of making by laws, which is incidental to the creation of a corporation."

The by-law theory supposed that an ordinance was "no more than a species of contract between the individual members of the corporation" [Perdue v. Ellis, 18 Ga. 586, 595 (1855)] or between the inhabitants and the governing authority of the city [McBain, supra note 2, at 298]. But, of course, an ordinance is no more a contract than any other public law. Some of the difficulties inherent in the by-law theory are illustrated in the opinion of McDonald, J., in Mayor and Aldermen of Savannah v. Hussey, 21 Ga. 80 (1866).
sential.\textsuperscript{34} The territories, for example, have never been endowed with charters. This incident, however, has not diminished their ability to exercise local legislative powers pursuant to congressional authorization. The same may be said of the municipality of the District of Columbia, which, although charterless,\textsuperscript{35} has been able to exercise whatever municipal powers Congress has seen fit to confer upon it.\textsuperscript{36}

The reason is that the essential power-receiving and power-exercising attributes may be given by statutes which are not labeled “charters,” but which yet perform all the functions commonly associated with formal charters. These acts create a legal personality, establish that personality’s territorial jurisdiction, powers and obligations, and provide for its operating machinery. There is no magic in the form.\textsuperscript{37} What for the sake of convenience and tradition is called a “charter” is itself nothing more than a statute, which, like any other, is simply an act of a legislative body.\textsuperscript{38} Not infrequently it is an aggregate term used to designate several coordinate statutes.\textsuperscript{39} A county is endowed with the necessary attributes given by a charter: corporate personality, defined territorial jurisdiction, and an organized machinery. No more is needed than enabling legislation setting forth the

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\item It would seem that the most notable effect of a charter is to create a corporate personality with a certain autonomous distinctiveness, giving it “private” characteristics. These in turn imply that legal rules regarding such matters as tort liability apply to it in a different way from the way they apply to political subdivisions lacking “charters.”
\item At the same time it is true that charters do in fact almost invariably confer on cities ordinance making powers, for “a city deprived of this time-exercised power of local legislation would be very nearly inconceivable as an operating unit of government. . . .” McBain, supra note 2, at 285-286. But of course the bare assertion that charters have always contained such grants is quite different from saying that such powers can be given only in charters or to units holding charters.
\item District of Columbia v. Tyrrell, 41 App. D.C. 463, 471-472 (1914). Also illustrating the fact that municipalities can exist and function without “charters” are Speer v. Board of Kearney County, 88 Fed. 749, 764-767 (C.C.A. 8th, 1898); Jameson v. People, 16 Ill. 257 (1855); Bow v. Allenstown, 34 N.H. 351 (1857). “In England boroughs, even before the earliest incorporation of 1439, exercised powers of local self-government.” Baesler, supra note 13, at 520.
\item “A municipal charter requires for its validity no particular form of words, but is valid and effective if the language employed manifests legislative intention thereby to erect a municipality.” Cooley, Municipal Corporations (1914) 121.
\item State v. Ermentraut, 63 Minn. 104, 65 N.W. 251 (1895).
\end{enumerate}
powers which the legislature desires to confer, and perhaps the manner in which they are to be exercised. 40

Another allegedly significant difference between cities and counties is expressed by the cliché that the former are created at the solicitation or at least with the consent of their inhabitants, whereas counties are mere involuntary divisions of the state, created quite regardless of the wishes of their inhabitants. 41 Although this possibly may be accepted as descriptive of the respective way in which most counties and cities have come into being, it nevertheless remains worthless as a statement which entails any legal consequence. On the one hand, counties may properly be formed under a procedure whereby the consent of the people affected is requisite. 42 It is equally true that cities may

40. "The statute is to them [i.e., counties] their fundamental law." Fales v. Multnomah County, 119 Ore. 127, 133, 248 Pac. 151, 152 (1926). The fact that cities may in some states, by virtue of constitutional amendment, have home-rule charter-making authority, giving them wide powers of self-determination, should not be allowed to obscure the equally pertinent fact that the legislature retains the right to confer by statute upon counties such particular local powers as it may deem expedient. An uncritical reading of such a case as Carriker v. Lake County, 89 Ore. 240, 171 Pac. 407, 173 Pac. 573 (1918) may thus lead to confusion. Here an attempt by Lake County, completely on its own motion, to levy a tax in order to pay a jack-rabbit bounty was invalidated. By contrast, the court conceded that a similar action by a city would have been valid, as a "charter" right. But the city had its right of self-determination by virtue of the Oregon Constitution, Art. XI, § 2. Since the county did not enjoy a similar constitutional prerogative, it needed a specific enabling act from the legislature—which it subsequently got (§ 20-2604, Code of 1919). The county's infirmity was altogether remediable by an act of the legislature.

It may be thought desirable in particular states to go through the ritual of enacting that the county have general ordinance making capacity, before proceeding to authorize the exercise of a particular police power. This was done by the Pennsylvania General Assembly in passing the county zoning enabling act of 1937 (Act 435).

State v. Circuit Court of Gloucester County, 50 N.J. Law 585, 602, 15 Atl. 272, 280 (1888). "... it is said that counties are not in a condition to receive such powers. Why not?

"What condition is necessary, in this case, except the legislative will, to give the power and the machinery necessary to the execution of it by the county?"

41. "The real distinction between the municipal corporation, properly so called, and the local organizations, such as unincorporated townships, school districts, and counties, consists in the fact that the municipal corporation is a voluntary one, originating in personal agreement, while the so-called quasi corporations are the mere creatures of the legislature." Hanson v. Cresco, 132 Iowa 533, 538, 109 N.W. 1109, 1111 (1906).

42. People v. McFadden, 81 Cal. 469, 22 Pac. 851 (1889); Hines v. Etheridge, 173 Ga. 870, 162 S.E. 113 (1931); Board of Com'rs of Jasper County v. Spitler, 19 Ind. 235 (1859); State v. Wilcox, 45 Mo. 458, 463 (1870). The constitutions of some states (as South Dakota and South Carolina) require popular consent as a condition precedent to the formation of a new county. Cooley, op. cit. supra note 37, at 509-510. It is now very general for statutes covering the formation, territorial change, and dissolution of counties to provide for referenda.
be legitimately formed without the slightest regard for the desires of the inhabitants to be included within their boundaries. The creation, lease on life, territorial extent and powers of cities are all subject to the complete control of the legislature, which may, if it chooses, act without paying the slightest respect to the wishes of the city's inhabitants.43

IV

A more pertinent distinction which is claimed to exist between counties and cities is that counties are mere administrative divisions for the convenience of state policy, whereas cities are created to carry out local policies and purposes, and for this reason they are given more of the autonomous attributes of private corporations than are counties.44 Juridically, however, this distinction must be viewed in the light of the object for which it is drawn. It was designed to aid in distinguishing the "proprietary" characteristics peculiar to cities from the "governmental" character possessed by all political subdivisions of the state. A typical example of its employment is found in the tort cases, wherein the city is subjected to liability in some instances in which the county is deemed immune.45 But when a city enacts police power regulations it is functioning in its governmental rather than its private or proprietary capacity. Accordingly, a distinction created in order to aid in differentiating the private from the governmental aspects of municipal corporate life, does not necessarily have any place as between these facets of city and county administration which are alike governmental.


44. As a matter of fact, counties are habitually so tarred with the "administrative" stick that they are sometimes assimilated in loose thinking to state administrative agencies, nothing more or less; and their peculiar, vitally important character as local governments in consequence mistakenly obscured. As Ronchetto, Supplemental Memorandum on Rural Zoning (December 1936) Oregon State Pl. Bo., mimeo. But see Ray, supra note 9, at 502. Further, see p. 554 et seq., infra.

45. State v. Board of Com'rs, 170 Ind. 595, 85 N.E. 513 (1908); State v. Holmes, 100 Mont. 256, 47 P. (2d) 624 (1935) (applicability of state insurance requirements to public buildings); State v. Arnold, 100 Mont. 346, 49 P. (2d) 976 (1935); O'Berry v. Mecklenburg County, 198 N.C. 357, 151 S.E. 880 (1930) (applicability of the gasoline tax).
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The necessity of restricting such a distinction as the above to its own setting is readily illustrated. For example, as will later be pointed out, a number of state constitutions contain provisions expressly recognizing the county's capacity to exercise local legislative powers; but the courts of these states quite often allude to counties in the customary "mere administrative division" terms, when there is in issue some question other than of local legislative capacity. Furthermore, on occasion cities have in their turn been spoken of as "mere instruments of the state"; and counties are often termed units designed to serve local purposes and functions (just as municipalities) for the convenience of the people of the locality. "A county is a public corporation, classed with cities, towns, and villages, and invested with subordinate legislative powers to be exercised for local purposes connected with the public good. . . ."

Another cause for distinction, so it is said, lies in the circumstance that cities have historically exercised a considerable range

46. For example: County of Los Angeles v. Riley, 6 Cal. (2d) 625, 59 P. (2d) 139 (1936); State v. Vantage Bridge Co., 134 Wash. 568, 236 Pac. 280 (1925); Frederick v. Douglas County, 96 Wis. 411, 71 N.W. 798 (1897); VII Cal. Jur. (1922) 387-389.
48. Early County v. Baker County, 137 Ga. 126, 72 S.E. 905 (1911). McQuillin, op. cit. supra note 14, at 244-245. See also notes 21, 22, 25, 26, supra.
49. Schubel v. Olcott, 60 Ore. 503, 511, 120 Pac. 375, 378 (1912). Accord: Aurora v. West, 9 Ind. 74 (1857); Durach's Appeal, 62 Pa. 491 (1869); Maury County v. Lewis County, 31 Tenn. 236 (1851).
50. An interesting illustration of the fact that a county is more than a mere administrative division of the state is afforded by Ex parte Selma & Gulf R.R., 45 Ala. 696 (1871). Here it was held that counties could be authorized to "engage in works of internal improvement," despite a constitutional provision prohibiting the "state" from so doing. The court reached its conclusion ("the state is different from a county") against the opposition of a dissenting justice who argued that, if counties were really mere administrative divisions as he felt they were, the constitutional proviso would necessarily inhibit them as well as the state government. (Id. at 736.) To those familiar with text-book doctrine, the assertions of Truesdel v. Freeney, 186 Ga. 288, 197 S.E. 783 (1938), regarding the status of sheriffs and tax collectors, will again illustrate the point.
of police powers, whereas counties have not.\textsuperscript{50} This argument might be entitled to serious consideration if we could justify devolutions to cities only by reference to historical usage—if it were true that the granting of police power to municipalities over a long period of time entitles us to regard the practice as a historical exception to a general rule that legislative power is non-delegable. This argument, which may be termed “historical exceptionalism,” fails, however, if, as is here believed, the only persuasive reason that justifies legislature in handing over power to any local unit is embraced in the idea of “devolution,” which we have already discussed. Nevertheless, it cannot be denied that the courts—if their language affords a true guide—have been influenced by historical considerations in cases involving cities; and for that reason, the matter deserves further examination.

First it should be recalled that the courts sometimes find historical precedents for municipal exercises of local legislative power in the practice of rural units of government roughly analogous to counties.\textsuperscript{51} An examination of the language of the courts and the writers, moreover, will show that the historical exceptionalism argument is frequently put in terms of local self-government in general, in order to make the point that municipalities in particular have the capacity to exercise local legislative power.\textsuperscript{52} The same could be particularized to counties, as indeed it has.\textsuperscript{53} Moreover, historically counties in this country have not been completely without authority to exercise some (or even considerable) police power.\textsuperscript{54} The power to impose quarantines, to grant ferry franchises, to regulate peddlers, and to restrict the sale of liquor, for example, have traditionally been exercised by counties on frequent occasions; and of course counties have always had the right to exercise the local legislative power of taxation, as will be pointed out further on. That counties

\textsuperscript{50} For a discussion of one state (Ohio) see Reed, Constitutional Changes Necessary to Accomplish Local Government Reform (1936) 2 Legal Notes on Local Government 139, 143.

\textsuperscript{51} New England “towns.”

\textsuperscript{52} Holyoke v. Smith, 75 Colo. 236, 226 Pac. 158 (1924); Mayor v. Finney, 54 Ga. 317 (1875). See also State v. Hayes, 61 N.H. 264 (1881).

\textsuperscript{53} Territory v. Whitney, 17 Hawali 174, 7 Ann. Cas. 737 (1905); Marion County v. Jewett, 184 Ind. 63, 110 N.E. 553 (1915); Beck v. Puckett, 2 Shann. Cas. 490 (Tenn. 1877). I Cooley, op. cit. supra note 6, at 388-389; McQuillin, op. cit. supra note 14, at 251-260. See note 22, supra.

\textsuperscript{54} Beck v. Puckett, 2 Shann. Cas. 490 (Tenn. 1877) will be found of particular interest in this connection.
have historically exercised a material bundle of police and other local legislative powers is indeed sometimes emphasized and even detailed in the cases.\textsuperscript{55}

These powers are the same in kind as the powers that have been exercised by municipal corporations. The difference lies only in point of quantity or degree.\textsuperscript{56} The heterogeneous, crowded, artificial conditions of urban life have merely, as a matter of exigence, demanded more extensive and repeated exercises of power than have the more homogeneous, scattered and natural conditions of rural life.\textsuperscript{57} Counties and municipalities are both arms of the state, alike governmental agencies. Upon each the legislature confers such powers and functions as may seem appropriate to its well being and needs.\textsuperscript{58} If it should be found

\begin{itemize}
\item\textsuperscript{55} Ex parte Fritz, 86 Miss. 210, 38 So. 722 (1905); Halgh v. Bell, 41 W. Va. 19, 23 S.E. 666 (1895). See also State v. Baum, 33 La. Ann. 981 (1881); Stanfill v. Court of County Revenue, 80 Ala. 237 (1885); Wright v. Cunningham, 115 Tenn. 445, 91 S.W. 293 (1906).
\item\textsuperscript{56} See, for example, St. Paul & S.C. R.R. v. Robinson, 40 Minn. 360, 42 N.W. 79 (1889).
\item\textsuperscript{57} When the point is made that municipalities have customarily exercised police powers more extensively and intensively than have counties, because of the crowded conditions of urban life [State v. Board of Com'rs of Marion County, 170 Ind. 595, 85 N.E. 513 (1908); State v. Lee, 29 Minn. 445, 13 N.W. 913 (1882). Cooley, op. cit. supra note 37, at 524; 12 C.J. 911], the observer is dealing in the realm of fact rather than of legal principle. This fact in itself, then, cannot as a matter of law bar the legislature from authorizing the exercise by counties of whatever new or increased local powers the changing conditions of modern life may make necessary or desirable within county territory. That counties are now being given new functions, hitherto associated only with municipalities, has been noted by a number of observers. See, for example, Fuchs, Regional Agencies for Metropolitan Areas (1936) 22 Wash. U.L.Q. 64; Kneler, The Legal Nature and Status of the American County (1930) 14 Minn. L. Rev. 141; Tooke, Construction and Operation of Municipal Powers (1933) 7 Temp. L. Q. 267. “These developments indicate that the county, in fact as well as in law, is approaching more nearly the position of a municipal corporation.” Kneler, supra, at 156. “This power of local legislation, to enact ordinances having the force of law within their boundaries, is what differentiates the municipal corporation, as we conceive it, from other local governmental agencies, such as counties, towns and parishes from which this power was formerly completely withheld. Today, this distinction has largely disappeared; the functions of counties and towns have been greatly extended and local legislative power has been conferred upon them, so that in the majority of the states it is difficult to find any part of the territory that is not a part of some self-governing unit, exercising some of the powers which used to be classified as peculiarly those of municipal corporations.” (Italics supplied.) Tooke, supra, at 271.
\item\textsuperscript{58} That the courts will oppose such developments on some “delegation of powers” theory is not to be expected, as is exemplified by Park v. Greenwood County, 174 S.C. 35, 176 S.E. 870 (1934). It is well to remember, by way of comparison, that the United States Supreme Court has found ample constitutional room for growing federal activities which formerly the federal government did not assume.
\end{itemize}
desirable, because of changing conditions and changing social concepts, to grant increased local powers to counties, no departure from precedent would be involved, but only an enlargement on what has already been accepted as proper. The same process that has been at work for a long time in cities would merely be expanded to the county scale. When cities, under the impulse of growing needs, first undertook to play a more active role in public affairs, the same "unconstitutional-delegation-of-power" attacks were made; but the courts experienced no great difficulty in disposing of them. There is no new reason why the historical argument should raise any additional judicial difficulties for counties.

The conclusion, then, is that the various distinctions which have been attempted between counties and municipalities have no bearing on the present problem of capacity to be vested with authority to exercise police powers.

"We must look for the origin of the right to delegate these legislative powers, not in the name of the political district, nor in the condition of the people to which they were committed. That might have created a necessity for the delegation, but could not have conferred upon the law-maker the right to make it. . . .

"There is no more right inherent in a city than in a county to have these powers bestowed upon it. If there is, then the legislature, having absolute power to create a city co-extensive with county lines, can, by its own act, enlarge its powers under the constitution.

"The mistake is in assuming that the legislative capacity is dependent upon, and inseparable from, the character of the political subdivision of territory, which it can, at will, create or extinguish. The power of the legislature springs

59. Gordon v. Commissioners of Montgomery County, 164 Md. 210, 164 Atl. 676 (1933), specifically makes this point.
60. Professor Cooley remarks that the authority of the legislature to devolve local legislative powers on municipalities has been "challenged often and in nearly all the states," but, of course, "has been uniformly upheld." Cooley, op. cit. supra note 37, at 164-165. For a recent case, in which a list of early cases for one state is given, see Henderson v. City of Greenwood, 172 S.C. 26, 24, 172 S.E. 689, 692 (1933).
61. An abstract disposition of the historical argument is found in State v. Circuit Court of Gloucester County, 50 N.J. Law 585, 15 Atl. 272 (1888), a case upholding a county liquor option statute. Several decisions which have upheld grants of police powers to counties have not even bothered to consider the historical arguments as: State v. Westmoreland, 133 La. 1015, 63 So. 502 (1913); Haupt v. Maricopa County, 8 Ariz. 102, 68 Pac. 525 (1902); Territory v. Whitney, 17 Hawaii 174, 7 Ann. Cas. 737 (1905).
solely from the character of the grant [whether "local" or not, and not from the character of the political subdivision of the state to which the grant is made].”

There is every reason to believe that the suggested analogy, based as it is upon firm theoretical and pragmatic grounds, is a valid one.

V

There are other analogies in addition to those already discussed which point in the same direction. Among these are Congressional grants of authority to the territories, state grants to political subdivisions other than cities or counties, and local option legislation. It is well established that Congress can authorize the territories to exercise powers appropriate to their area and purpose—powers very similar in nature to those exercised by the states. In so doing, Congress is not regarded as delegating its exclusive general legislative power, although the powers thus granted could at its discretion be exercised directly by Congress itself. The practical justification is the


63. At least one other writer has examined the devolution of powers to counties and made comparisons between the position of cities and counties in that regard (for one state alone, however). He concludes that the courts of the state investigated (Texas) "have been as liberal in regard to delegations to county agencies as with those to municipalities." Ray, supra note 9, at 494, 504-505.

64. The analogy was, indeed, made in what may be considered the leading county case, Territory v. Whitney, 17 Hawaii 174, 7 Ann. Cas. 737 (1905).


This implies, of course, that congress may not delegate its general powers of legislation on subjects affecting the whole people [in the same way that a state cannot devolve upon its local subdivisions its own general powers of exclusive legislation]. But it has never been doubted that Congress may, in respect to any designated district outside of all the states, create a local legislative body. ...” McCormick v. Western Union Tel. Co., 79 Fed. 449, 451 (C.C.A. 8th, 1897).

67. First Nat. Bank of Brunswick v. County of Yankton, 101 U.S. 129, 25 L.Ed. 1046 (1880); Binns v. United States, 194 U.S. 486, 24 S.Ct. 816, 48 L.Ed. 1087 (1904). The area within which Congress may devolve “local legislative power” is of course only that within its plenary direct jurisdiction. Thus Congress cannot devolve powers to states (Willis, op. cit. supra note 29, 138n; 11 Am. Jur. 929); for in relation to the states, Congress has only powers of “general” legislation, the “local” powers being constitutionally reserved exclusively to the states.
same as for devolutions to political subdivisions within states, namely, the propriety of permitting and encouraging local self-government. The Supreme Court has remarked, in this connection, that territories bear the same relationship to the United States that counties bear to the states; and the same general arguments of policy, practicality and constitutional theory currently employed with respect to cities and towns may be found here.

It is well known, moreover, that the New England legislatures can constitutionally devolve local legislative powers on "towns"—units of government which may be regarded as intermediate between municipalities and counties. It is known, too, that local legislative power has been constitutionally granted to various miscellaneous political subdivisions, such as townships, special authorities, and improvement districts. It is also noteworthy that in each instance the character of the granted authority is commensurate with the local ends designed to be served by the particular unit. Here again judicial reasoning has followed the same lines of argument indicated above.


Professor Burdick conceives that the authority of Congress to devolve legislative powers is to be justified on the same basis as state legislative devolutions of local government powers to municipalities. Burdick, Law of the American Constitution (1922) 151.

69. In this case territories were described as "political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States. . . ." First Nat. Bank of Brunswick v. County of Yankton, 101 U.S. 129, 133, 25 L.Ed. 1046, 1047 (1880).


73. See Fuchs, supra note 57, at 64, 70.

74. Maricopa County Municipal Water Conservation District No. 1 v. La Prade, 45 Ariz. 61, 40 P. (2d) 94 (1935).

75. Thus, the Arizona Supreme Court disposed of an unconstitutional-delegation-of-legislative-power attack on particular devolutions to a water conservancy district, by observing that they were "only of such a nature as is reasonably necessary to carry out the purposes of the district authorized by law," and that they "unquestionably refer to matters affecting the district alone." (45 Ariz. at 76, 40 P. (2d) at 100.) Conversely, in Arkansas local improvement districts, considered not to be "political subdivisions" properly so-called, have been declared incapable of levying taxes for general revenue purposes; but are limited to assessing the property benefited, in pursuance of their exclusive purpose of constructing and maintaining local improvements. Davies v. Gaines, 48 Ark. 370, 3
Especially strong support is afforded by the line of reasoning adopted by the courts in the local option cases. This is particularly so when it is recalled that the exercise of the option may be as legitimately vested in a local governing board as in the local electorate. One court has even adopted the extreme position that the source of the legislature's authority to grant ordinance-making prerogatives to municipalities is to be found in the "local option legislative power." The Wisconsin Supreme Court was more conservative in stating that in principle the legislature's authority to vest municipal corporations with ordinance-making power is the same as that of providing local option. It is "indistinguishable from the immemorial grant of local powers of government." The analogy is further pointed by the similarity of the limitations by which local option and local legislation are each bound. The subject-matter of the option must be one of local concern; and thus when it is something of general statewide concern, deemed to be within the exclusive province of the

S.W. 184 (1887); Whaley v. Northern Road Imp. Dist. of Arkansas County, 152 Ark. 573, 240 S.W. 1 (1922). And it was unconstitutional for the New Hampshire legislature to enable a "town" to raise money for a non-local purpose. Bowles v. Landaff, 59 N.H. 164 (1879).

So, again, local legislative power is not delegable to mere divisions lacking a sufficient organization to exercise such power. See Neale v. County Court, 43 W. Va. 90, 27 S.E. 370 (1897).

76. Dunn v. Court of County Revenues, 85 Ala. 144, 4 So. 661 (1887); Haney v. Board of Com'rs of Roads and Revenues of Bartow County, 91 Ga. 770, 18 S.E. 28 (1893); State v. Smiley, 304 Mo. 549, 263 S.W. 825 (1924); Noonan v. Freeholders of Hudson, 51 N.J. Law 494, 18 Atl. 117 (1889); Picton v. Cass County, 13 N.D. 242, 100 N.W. 711 (1904); State v. Armeno, 29 R.I. 431, 72 Atl. 216 (1909); Johnson v. Martin, Wise and Fitzhugh, 73 Tex. 33, 12 S.W. 221 (1889); Halgh v. Bell, 41 W. Va. 19, 23 S.E. 666 (1895). But see Anderson, Special Legislation in Minnesota (1922) 11 Minn. L. Rev. 187, 199. The reasoning in Thornton v. Territory, 3 Wash. Terr. 482, 17 Pac. 896 (1888), is unusual but instructive. There a statute conferring on the electors of "precincts" local option liquor powers, was declared invalid, as involving unwarranted delegation of legislative power. The court reached this result by reasoning that the electors of a mere precinct could not properly be invested with local option powers, because a precinct is not a unit of local government possessing a governmental organization with authority to enact and enforce local legislation. Despite its irregular result (irregular because the courts elsewhere have found no objection to the use of "precincts"—or any other sort of unorganized districts—as a local option unit. For example: George v. Chickasaw Land Co., 209 Ala. 648, 96 So. 781 (1923); Locke's Appeal, 72 Pa. 491 (1873)), this decision does serve to spotlight the worth of the analogy.

77. "It is under this power ("the local option legislative power") that matters of local government, including even the adoption, as well as the enforcement, of police regulations are universally held to be validly delegated by statute to the local authorities of municipalities." (Italics supplied.) Bowman v. State Entomologist, 128 Va. 351, 377, 105 S.E. 141, 150 (1920).

78. Slinger v. Henneman, 38 Wis. 504, 610 (1875).

79. Freund, Police Power (1904) 205.
legislature, the local option statute will be found unconstitutional, as involving a delegation of legislative power.\textsuperscript{80}

The cases in which the ideas of local option were developed reveal an initial uncertainty as to how far the prohibition against delegating legislative power should be regarded as applicable. There was a great deal of searching into basic principles to find an acceptable guide for judgment.\textsuperscript{81} Some courts on first impression declared that local option statutes (whether applicable to cities, counties, or other subdivisions) fatally violated the non-delegability rule,\textsuperscript{82} and there are apparently a few jurisdictions which still adhere to this position.\textsuperscript{83} However, it soon became generally established that local option statutes are constitutional; and over a long period of time such statutes have been almost uniformly upheld. At the same time there also came to be established the idea that statutes dependent upon state-wide referenda are invalid.\textsuperscript{84} The presently prevailing idea is that state-wide option involves a prohibited delegation of legislative power, while local option does not.\textsuperscript{85} An interesting question for present purposes is why should the one be valid and the other invalid, when in both cases a statute's operation is made dependent upon an approval dehors the legislature?

Attempts at explanation have in the main followed two lines. The first reasons that statutes may generally be made to depend for their effectiveness on a defined contingency, of which a vote of the people may be one. This reasoning, however, is faulty, because the vote of a locality is in point of definition no more a "contingency" than would be the vote of the entire state.\textsuperscript{86} The

\textsuperscript{80.} Bradshaw v. Lankford, 73 Md. 428, 21 Atl. 66 (1891); Opinion of the Justices, 160 Mass. 586, 36 N.E. 488 (1894); Slinger v. Henneman, 38 Wis. 504 (1875). And see State v. Circuit Court of Gloucester County, 50 N.J. Law 585, 15 Atl. 272 (1888).

\textsuperscript{81.} Good examples would be Rice v. Foster, 4 Harr. 479 (Del. 1847); Alcorn v. Hamer, 38 Miss. 652 (1859).

\textsuperscript{82.} I Cooley, op. cit. supra note 6, at 244-245; and annotations in 1 Ann. Cas. 378-379 (1906); 23 L.R.A. 113 (1894).

\textsuperscript{83.} I Cooley, op. cit. supra note 6, at 244-245. An interesting example of graceful retreat may be observed by comparing Wright v. Cunningham, 115 Tenn. 445, 91 S.W. 293 (1905) with Clark v. State, 172 Tenn. 429, 113 S.W. (2d) 374 (1938).

\textsuperscript{84.} There has, however, been a small minority view favorable to the state wide referendum; and there seems to be at present some tendency toward a wider acceptance of this view. See (1931) 41 Yale L.J. 132-134 and In re Opinion of the Justices, 232 Ala. 60, 166 So. 710 (1936). The cases are collected and discussed in 76 A.L.R. 1053 (1931).


\textsuperscript{86.} This point has been remarked elsewhere, as Note (1932) 32 Col. L. Rev. 80. It is brought out forcefully in State v. Hayes, 61 N.H. 264, 314 (1881).
character of the contingency is the important factor. Accordingly, when the explanation is modified by saying that a local vote is a unique contingency because it is defined by ideas of local self-government,\(^7\) a better rationale is afforded. This leads to the second line of reasoning, namely, that a local option statute is constitutional because it amounts to a grant of local self-governing privileges, of local legislative power, to subdivisions of the state.\(^8\) Thus, when the subdivision is exercising a local option it is in fact exercising a local legislative power, the power of establishing the rule by which it shall be governed in its local affairs. The upshot of this contention is that the devolutions both of local option and of local legislative power are justifiable on the same ground.\(^9\)

A last analogy is found in local taxation. The proposition that counties may be granted taxing powers for local purposes is one which has been long accepted. They have exercised such powers from early days. The grant of taxing powers to counties has at times been criticized on the asserted basis that it involves an unconstitutional delegation of legislative power. An attack, based on similar reasoning, has been made on the grant of taxing powers to cities.\(^9^0\) But these powers have been regularly

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87. Locke’s Appeal, 72 Pa. 491 (1873). One annotator, however, has suggested that the reason for the distinction between local option and state referendum has been pragmatic. That is, the courts have sustained the former “chiefly through attempts” to modify “their earlier stand against the referendum.” Note (1931) 41 Yale L.J. 132.


The grounds set forth by Cooley are thus: “They [i.e., local option statutes] relate to subjects which, like the retailing of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground that the subject, though not embraced with the ordinary power of the municipality to make by-laws and ordinances, is nevertheless within the class of police regulations in regard to which it is proper that the local judgment should control.” I Cooley, op. cit. supra note 6, at 245.

89. Conversely, an attempt to make a general statute dependent for its validity on the result of a state-wide referendum will be invalid for the same reason that any genuine “delegation” of general legislative power is invalid.

90. Canova v. Williams, 41 Fla. 509, 27 So. 30 (1899); Mayor of Brunswick v. Finney, 54 Ga. 317 (1875); Butler’s Appeal, 73 Pa. 448 (1873); Hope v. Deaderick, 27 Tenn. 1 (1847).
sustained by the courts, quite irrespective of whether there were constitutional provisions expressly allowing them. A grant of taxing power to a county will be upheld if it was made in appropriate terms and for proper purposes. This affords a strong argument favoring the legal propriety of vesting police powers in counties. The taxing power is, like the police power, a power which is legislative in nature. Indeed the taxing power has often been declared to be "one of the highest, if not the highest" aspect of legislative power. Certainly when the courts recognize the legal propriety of granting to a local unit the power to tax, they admit by this token that local legislative power can be

91. In Cooley on Taxation we find the following statement: "But it is not true, as might well be concluded from some statements, that that power can be delegated only to municipalities proper as distinguished from other public corporations (such as counties) created by the state for the purpose of exercising defined and limited governmental functions in certain designated portions of the state's territory." I Cooley, Law of Taxation (4 ed. 1924) 187-189.


An early case, Marr v. Enloe, 9 Tenn. 452 (1830), has sometimes been viewed as declaring against the constitutionality of granting tax powers to counties. But it can likewise be viewed as laying down the same restriction for cities [See Nichol v. Nashville, 28 Tenn. 171 (1843) and Tenn. Const., Art. II, Section 29]. A reading of the case, however, shows that the decision was largely influenced by the intrinsic unfairness of the particular tax, and by its repellant "taxation without representation" features (the levying authority was not responsible to the local electorate). On this last, see Hope v. Deaderick, 27 Tenn. 1 (1847).

93. Hill v. Moody, 207 Ala. 325, 93 So. 422 (1922); Whitney v. Hillsborough County, 99 Fla. 628, 127 So. 486 (1930); State v. Board of Com'r's, 170 Ind. 595, 85 N.E. 513 (1908); Kinney v. Zimpleman, 36 Tex. 554 (1871). Cooley, op. cit. supra note 6, at § 64; Cooley, op. cit. supra note 37, at 560-561, 566.

So, a statute vesting in school districts the authority to tax was within the terms of a constitutional provision allowing the legislature to delegate to school districts local legislative powers in regard to school affairs. Kinney v. Zimpleman, supra.


Students of the history of political theory will recall in this connection Esmein's story that Louis XIV imposed the "dixième" only after a mighty battle with his conscience, and after being assured by the legal philosophers of the day as to its propriety. The King had feared that the measure would constitute a taking of the property of his subjects, forbidden by the natural law.
vested in local units.\textsuperscript{95} The power to tax has not been granted to counties for any generic reason, but only because such investment is necessary or desirable in order to promote the ends of local government.\textsuperscript{96} By the same token, the power to adopt local police regulations should be blessed with constitutionality if, when and insofar as, necessary or desirable to promote the same ends.

VI

In the foregoing pages we have sought to present what appears to be a plausible and valid theory which amply sustains the legal propriety of granting local police powers to counties, and we have probed several lines of analogy which appear to support our thesis. Consideration of one final objection has been postponed to this point since it demands a slightly different approach from the others heretofore dealt with. Some state constitutions expressly recognize the capacity of counties to exercise police powers, while others, decidedly in the majority, do not. How does this situation affect the contention that such powers are delegable to counties as a matter of course on general principles of constitutional law? Should we conclude that such delegation can be recognized only through some express provision of the state constitution since express recognition has been accorded in some but is lacking in others? Although an inference to this effect appears in at least one decision,\textsuperscript{97} such a deduction appears to be a non sequitur.\textsuperscript{98} The assertion of one state constitution does not at all mean that the silence of another is necessarily fatal;

\textsuperscript{95} It seems fair to say that the only normal circumstance in which the courts are under any necessity of spinning the distinction between "taxation" and "police power" is when they are faced with the problem of determining what rules must guide the specific application of a particular legislative measure, notably in the improvement assessment cases.

An example of a specific paralleling of the "police" and the "taxation" powers is the following statement by the Oregon Supreme Court: "The authority to tax, \textit{like an exercise of a measure of the police power}, can be delegated only to a municipal or a quasi municipal corporation. Every county ... is a quasi municipal corporation, and as such the power to determine the amount of tax to be levied on all property within its limits may be delegated to and exercised by such political entity." (Italics supplied.) Stoppenback v. Multnomah County, 71 Ore. 493, 505-506, 142 Pac. 832, 836 (1914).

\textsuperscript{96} See, for example, Durrach's Appeal, 62 Pa. 491 (1869).

\textsuperscript{97} Brookings County v. Murphy, 23 S.D. 311, 315-316, 121 N.W. 793, 795 (1909).

\textsuperscript{98} Recall that states have "reserved" powers; and that state legislatures may exercise all powers not denied them. The argument, therefore, that a legislature cannot exercise a given power because there is nothing in the state constitution saying that it can is a mistaken application of an exegesis peculiar to the federal constitution.
and there are specific considerations which demonstrate the present applicability of this constitutional axiom.

Constitutional provisions of the kind under consideration may either state that there is reserved to the counties the right to prescribe police and other necessary local regulations, or they may provide simply that the legislature may, as it chooses, grant counties local legislative authority. More often than not, such provisions treat cities on the same footing with counties. It has already been pointed out that the legislature can unquestionably grant local legislative powers to cities, and has regularly done so, quite in the absence of any specific constitutional provision. In this connection, it is worth noting that in New York the county provision has been in the state constitution since 1846, but the city provision only since 1923. Nevertheless the courts of that state have from the earliest times regularly allowed such legislative grants to cities. If the courts are uniformly willing to uphold a devolution of police powers upon municipalities without making reference to the varying treatment accorded the matter by the several state constitutions, there is no sound reason why they should adopt a different view with respect to county powers.

Again, state constitutions often contain provisions which expressly authorize the legislature to grant taxing powers to counties and yet fail to make similar provision with respect to county police powers. The same, however, is true regarding cities, and it has never been seriously contended that this deprives legislature of the capacity to devolve police powers upon them. In fact, the legislature has never been regarded as precluded from granting taxing powers to any local unit merely because no express authority can be found in the constitution.

103. Ibid. It is pertinent to note, in the case of Nebraska, that the county taxation provision (Neb. Const., Art. VIII, § 5) is couched in terms of a limitation (thus implying the pre-existing right of the legislature to make the grant), whereas the city provision (Neb. Const., Art. VIII, § 6) is couched in terms of a grant (with, however, subsequent limitations).
104. See cases cited supra note 92.
The obvious inference to be drawn from the above is that express constitutional provisions are not in themselves essential prerequisites to the legislature's authority to devolve appropriate powers upon either city or county. It is preferable to regard them as affirmations of existing powers or as limitations on such powers. For example, the California constitutional provision of the type we are considering has been construed to mean that the authority of the legislature to confer local legislative power is limited to the units named therein (counties, cities, towns, and townships), with the result that the legislature is not allowed to vest police powers in a specially created unit (such as a port authority). This conclusion is supported by the rule *expressio unius est exclusio alterius.* Likewise, a provision relative to the vesting of taxing powers in cities and counties has been interpreted to mean that such powers can be vested only in such units, and not in an unnamed unit such as a drainage district.

*levied in years preceding the adoption (in 1846) of the following provision of the Tennessee Constitution: "The General Assembly shall have power to authorize the several counties and incorporated towns in the state to impose taxes for county and corporation purposes respectively."*

105. The cases are discussed by La Farge, *Delegability of Police Powers to Non-Municipal Public Corporations in Home Rule States* (1937) 5 Geo. Wash. L. Rev. 880.

106. *Reelfoot Lake Levee District v. Dawson, 97 Tenn. 151, 36 S.W. 1041, 34 L.R.A. 725 (1896); Smith v. Carter, 131 Tenn. 1, 173 S.W. 430 (1915).* This, despite the fact that the Tennessee provision was originally deemed to have been placed in the constitution of that state for other reasons. See *Nichol v. Nashville, 28 Tenn. 171 (1848).* "The delegation of this power to these corporations had grown to be such a matter of course, and withal was such a conceded right of all government, that the expression in the section was a mere recital of the pre-existing right made in order to give a more noticeable meaning to the restrictions that close the section—the tax limitation." *Keel v. Board of Directors, 59 Ark. 513, 27 S.W. 590 (1894).*

*Parks v. Board of Com'rs, 61 Fed. 436 (C.C. Kan. 1894); Schultz v. Eberly, 82 Ala. 242, 2 So. 345 (1887); Atchison v. Barthlow, 4 Kan. 124 (1866); Jackson v. Breeland, 103 S.C. 184, 88 S.E. 128 (1916); Briggs v. Greenville County, 137 S.C. 285, 135 S.E. 153 (1926); Evans v. Beattie, 137 S.C. 496, 135 S.E. 538 (1926); Ferguson v. Tyler, 134 Tenn. 28, 183 S.W. 162 (1916), indicate another way of interpreting such provisions as limitations rather than as grants.*

The application of the *expressio unius, exclusio alterius* rule of construction is in a state of confusion. Compare, for example, the reasoning in *Stooky v. Board of Com'rs, 6 Idaho 542, 57 Pac. 312 (1899)* with that of the concurring judges in *In re Opinions of the Justices, 232 Ala. 56, 166 So. 706 (1938).* It may, however, be suggested that a conceded right, solidly grounded in theory and practicality, needs no mention in the constitution. A discussion of the conflict of opinion as to whether an enumeration of the units to which tax power can be given is deemed to prohibit the grant of that power to others not named is to be found in *I Cooley, Taxation (4 ed. 1924) 191-192.* Some courts solve the difficulty so far as special local agencies (such as improvement districts and school boards) are concerned, by giving a much broader meaning to the generic terms of constitutional provisions (such as "municipal corporations") than other courts are willing to accept. Examples:
It is pertinent to observe, too, that the nature and functions of counties are discussed in the same language by courts both in those states whose constitutions expressly sanction a grant of police power to counties and in those whose constitutions are silent on the matter. 107

In short, it appears that the propriety of granting police powers to counties should not be dependent on the existence or non-existence of any express constitutional authorization.

VII

The validity of the proposition herein advanced has been recognized by the courts in a number of ways. There are numerous dicta, for example, in which county governing bodies have been referred to as "local legislatures," "miniature legislatures, bearing a relation to the people of the county analogous to that borne by the General Assembly to the people of the state," et cetera. Sometimes we find the broad statement in opinions that counties may exercise local legislative powers duly authorized by statute, or the remark that counties may adopt police regulations. 108 Definitions of the county as a unit similar in this regard to a municipality proper have already been noted. 109

Milheim v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 Pac. 649 (1922); Smith v. Bohler, 72 Ga. 546 (1884).


108. Clarke & Daviney v. Jack, 60 Ala. 271 (1877); Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576, 17 So. 112 (1895); State v. Rogers, 107 Ala. 444, 19 So. 909 (1895); White v. Board of Com'rs, 129 Ind. 396, 23 N.E. 846 (1891); State v. Simons, 82 Minn. 540, 21 N.W. 750 (1884); McGee v. Board of Com'rs, 84 Minn. 472, 88 N.W. 6 (1901); Stoppenback v. Multnomah County, 71 Ore. 493, 142 Pac. 832 (1914); Wood v. Tipton County, 66 Tenn. 112 (1874); Nashville & K. R. R. v. Wilson County, 89 Tenn. 597, 15 S.W. 446 (1891); State v. Justices of Wayne County, 108 Tenn. 259, 67 S.W. 72 (1902); Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N.W. 460 (1902).

109. General indicatives are afforded also in divers other ways. For example, a comparison of the halting reasoning of Whitney v. Hillsborough County, 99 Fla. 628, 127 So. 436 (1930) with the decision in Merriman v. Hutchinson, 95 Fla. 600, 116 So. 271 (1928) apparently indicates a realization in the minds of the court that counties are something more than mere administrative divisions, that they are indeed local governments with capacity to exercise powers of local legislation granted by statute.

Again, when the Virginia Supreme Court was presented with what it deemed a devolution of police powers upon a county, it upheld the action without any reference to Section 65 of the Virginia Constitution which specifically authorizes devolutions of local legislative powers upon counties. It merely declared the proposition to be "plain that the Legislature has the right to grant to any county any functions looking to the advancement of the public welfare not prohibited by the state Constitution," since a county
DELEGATION OF POLICE POWER

There are other cases, particularly those involving local options, which explicitly assert the authority of the legislature to devolve local police powers upon counties. The Tennessee Supreme Court, for example, said in Wright v. Cunningham:110

"... legislative power cannot be delegated, except in those special instances in which the constitution itself authorizes such delegation, or those sanctioned by immemorial usage originating anterior to the constitution and continuing unquestioned thereunder. The immemorial usage referred to has found its expression in only two forms: Firstly, in the powers conferred upon municipal corporations in their several charters, and by general statutes applying to such corporations and pertaining to the ordering and administration of their local affairs; secondly, in the powers conferred upon the quarterly county courts of the several counties of the State for the management of local matters. It is said in our cases that the counties of the State are municipal corporations of a non-complex character, that the county courts constitute the governing body of these corporations, that these courts have judicial and police powers, that 'they can exercise that portion of the sovereignty of the State communicated to them by the legislature, and no more,' and that 'in the exercise of the powers so conferred they become miniature legislatures, and the powers so exercised by them, whether they are called municipal or police, are in fact legislative powers.'"111

In Haigh v. Bell,112 a West Virginia Supreme Court case upholding a county option stock law, it was declared:

"I have never heard it questioned that towns can exercise such police power delegated by the legislature. Why not the county court, which has been the police court of the county, continuously, for more than one hundred years?"113

is a "political subdivision of the state for the purpose of civil administration of such powers as may be delegated by the state." Kirkpatrick v. Board of Sup'rs, 148 Va. 113, 138 S.E. 186 (1926).

110. 115 Tenn. 445, 91 S.W. 293 (1905).

111. 115 Tenn. at 466-467, 91 S.W. at 297-298.

112. 41 W. Va. 19, 23 S.E. 666 (1895).

113. 41 W. Va. at 25, 23 S.E. at 668-669. This opinion contains also a historical summary of the position of the "county court" in West Virginia. As the county court "is the most ancient, so it has ever been one of the most important, of our institutions—for a long time, in respect to the administration of justice, and always in matters of county policy and economy." (41 W. Va. at 26, 23 S.E. at 669.)

A particularly forceful exposition is found in the New Jersey case, State v. Circuit Court of Gloucester County, 50 N.J. Law 585, 15 Atl. 272 (1888), cited at several points above.
Most in point, of course, are those rare cases in which the issue has been squarely presented. The most carefully reasoned of these is a decision by the Hawaiian Supreme Court in the case, Territory v. Whitney.\textsuperscript{114} Here a statute had conferred upon the boards of supervisors of the Territory's several counties sweeping power "to regulate by ordinance within the limits of the county, all local police, sanitary and other regulations not in conflict with the general laws of the territory, or rules and regulations of the territorial board of health, and fix a penalty for the violation of such ordinances." Pursuant to the authority thus granted, the Oahu county board had adopted an ordinance regulating gambling,\textsuperscript{115} which the district magistrate refused to enforce. The question of validity was raised on appeal in a mandamus proceeding to compel him to issue warrants for the arrest of violators. A large portion of the territorial supreme court's attention was devoted to a rebuttal of the contention that the statute involved an unconstitutional delegation of legislative power. Because of its interest, the main points of the opinion will be summarized.

The court remarked at the outset that "the difficulty arises not so much from decisions opposed to the proposition as from lack of authority in support of it and the uncertainty as to the precise reasoning upon which the question should be decided."\textsuperscript{116} Nevertheless, the legislature's power to grant the authority in question was supported by the following references: (a) general expressions in textbooks and decisions to the effect that ordinance powers can be granted to "other municipal corporations" than cities, or to "quasi municipal corporations," and likewise decisions which appear to have assumed without question the correctness of the proposition; (b) the principle, deep-seated in English and American political thought, of local self-government; (c) the validity of local option legislation; and (d) analogy to Congress' ability to grant legislative powers to the territories.

In an interesting concurring opinion, Justice Harwell devoted particular attention to an examination of the urban analogy. He expressed the conviction that the validity of granting local legislative powers to cities affords the strongest sort of support, and he pointed out a fact, already emphasized in this paper, that none

\textsuperscript{114} 17 Hawaii 174, 7 Ann. Cas. 737 (1905).

\textsuperscript{115} The ordinance provided a fine of not exceeding $500 or imprisonment not exceeding six months, or both, for violations. The court was not called upon to decide the punitive feature, but suggested that the imprisonment feature might be invalid since not specifically authorized in the statute.

\textsuperscript{116} 17 Hawaii 174, 177, 7 Ann. Cas. 737, 738 (1905).
of the various distinctions usually drawn between cities and counties are important in determining the validity of a grant of police power by the legislature. This concurring opinion also contains the following interesting comment on the historical argument:

"It is not true that historically it is generally towns and cities rather than counties which have regulated their own affairs, although the powers of counties have more frequently been defined by general laws of the state, and restricted to the administration of state laws . . . ."117

The Alabama Supreme Court has expressed the same proposition in equally emphatic terms:

". . . powers of local government are entrusted to the local authorities on the supposition that they possess more available means and opportunities to ascertain the needs and wishes of the people in respect to local matters, and are better qualified to determine what local regulations are important and contributive to their convenience and well being. From the origin of government counties have been organized and existed; and the entrusting to their local authorities quasi legislative powers and functions has never been considered as violative of the maxim that legislative power cannot be delegated . . . and conceding that the power conferred by the act is quasi legislative, it constitutes no valid objection to its constitutionality."118

Later this same court again upheld the county board's authority under a similar stock regulation statute, remarking that it was a "police regulation" involving a "question of local government," and in no sense was "legislation" in the sense of being an enactment of general law.119

In Haupt v. Maricopa County120 the Arizona Supreme Court upheld the exercise by county boards of what it termed "a broad grant of power" to eradicate and prevent the spread of epidemics, by virtue of a law which empowered these bodies "to adopt such provisions for the preservation of the health of their respective counties as they may deem necessary . . . [and] to make and en-

117. 17 Hawaii at 188, 7 Ann. Cas. at 742.
118. Stanfill v. Court of County Revenue, 80 Ala. 287, 290 (1885). The statute in issue had authorized county boards to create stock districts.
119. Dunn v. Wilcox County, 85 Ala. 144, 4 So. 661 (1888).
120. 8 Ariz. 102, 68 Pac. 525 (1902).
force all such local, police, sanitary and other regulations as are not in conflict with general laws.'

The courts of Louisiana have experienced no difficulty in upholding grants of legislative police powers to parishes. In State v. Bott and Luchini v. Police Jury parish control of the liquor traffic was sustained by the Louisiana court; and in State v. Westmoreland, the regulation of vagrancy was upheld. The language of this latter decision is interesting. The court said:

"The delegations of legislative power to municipal corporations and other political subdivisions by the statutes of this state are too numerous to mention. A parish, like a city or town, is a subdivision for the purpose of local government. Both derive their powers from the Legislature. The question what police powers shall be conferred on the parish, or the city or town, is one exclusively for the determination of the Legislature."

"If vagrancy be a nuisance in the city of Shreveport, it is no less a nuisance in other parts of the parish of Caddo."

Other illuminative cases have come up in states whose constitutions contain such generalized provisions as: "the board of supervisors shall... perform such other duties as may be required by law" (as in Mississippi), or the "powers and duties [of county commissioners] shall be such as now or may hereafter be prescribed by law" (as in Maryland). It should be noted that provisions of this sort are not necessarily susceptible of the interpretation that they envisage devolutions of local legislative powers. They may be regarded as truisms, having no bearing at all on the types of powers which may be conferred. Certainly,

121. 8 Ariz. at 105, 68 Pac. at 527. The specific issue before the court was the county's liability for the destruction of private buildings, under directives issued by the county board, in an effort to stamp out a diphtheria epidemic.
122. 31 La. Ann. 683 (1879).
123. 126 La. 972, 53 So. 68 (1910). See also Carnes v. Police Jury, 110 La. 1011, 35 So. 267 (1903).
124. 133 La. 1015, 68 So. 502 (1913).
125. 133 La. at 1019, 68 So. at 504. The enabling statute in question was Act 205 of 1908, which extended to parishes (the equivalents of "counties" in other states) the powers granted to cities by Act 178 of 1904.
126. Miss. Const., § 170.
127. Md. Const., Art. VII, § 1. Others include: Fla. Const., Art. VIII, § 5 ("The powers, duties and compensation of such county commissioners shall be prescribed by law"); Ga. Const., Art. XI, § 1 ("Each county shall be a body corporate, with such powers and limitations as may be prescribed by law"); W. Va. Const., Art. VIII, § 24 (County court "may exercise such powers and perform such other duties, not of a judicial nature, as may be prescribed by law").
they cannot, by any canon of interpretation, be so construed as to allow the conferring of those powers which must be exercised exclusively by the legislature. It follows that if devolutions of "local legislative" powers really constituted "delegations of legislative power" proper, one would confidently expect the courts to hold constitutional provisions such as above quoted to contemplate only "administrative" and "ministerial" powers. Actually, acknowledged devolutions of local legislative powers upon counties have been sustained in states governed by such provisions.

The broad language used by the courts of these states strengthens this view. Thus, in Ex parte Fritz, the Mississippi Supreme Court, in upholding a county ordinance regulating the taking of fish, as against "earnest insistence" that the legislature unconstitutionally delegated legislative power, said:

"The answer to this argument is that the board of supervisors is not within the scope and operation of the principles invoked. . . . the board of supervisors has performed many duties which are essentially legislative in their nature—as, the levying of taxes; . . . the making of regulations for the depasturing of cattle and the cultivation of crops without fences; the establishment of quarantines and regulations of hygiene; the inspection of articles of food; . . . the licensing or prohibition of the liquor traffic; . . . the regulation of the taking of oysters, fish, and game; and many others. Power to do none of these things is conferred in express terms by the constitution. . . . Legislation imposing duties of a similar kind upon the board of supervisors has been heretofore upheld by this court, and we see no reason now for departing from long-recognized principles, and thereby subverting a public policy which gives so large a measure of local self-government to the several counties of the state, and whose wisdom has been so fully vindicated in the beneficent results which have attended its operation."

128. These observations are given point by a propensity of the courts in such states, wherever possible, to discuss counties in the stock "administrative unit" terms, and often to justify particular devolutions on "administrative" grounds. Cases illustrating this phenomenon include Ex parte Lewis, 101 Fla. 624, 135 So. 147 (1931); Mensi v. Walker, 160 Tenn. 468, 26 S.W. (2d) 132 (1930).

129. 86 Miss. 210, 38 So. 722 (1905).

130. 86 Miss. at 221-222, 38 So. at 724. Other cases from the same jurisdiction are Barataria Canning Co. v. Ott, 84 Miss. 737, 37 So. 121 (1904); Ormond v. White, 85 Miss. 276, 37 So. 834 (1905).
The Supreme Court of Maryland, in holding valid a statute that conferred on the county boards the power to regulate cemeteries, placed the county on a par with the municipality as a "qualified agency of local government." In reply to the historical argument the court made the following comment:

"The fact that a county governmental organization created by the Constitution, with powers then or thereafter prescribed by law, may formerly have been granted more limited legislative functions, like those involved in the authority to levy taxes, is far from being a conclusive reason why their powers may not be enlarged."

The Supreme Court of Georgia has upheld a statute empowering the county governing authorities to change the boundaries of stock districts at discretion. It has also approved legislation giving the same authorities absolute control over the granting or refusal of liquor permits, as against the "delegation of powers" attack. Thus the cases in which the issue has been squarely or unavoidably presented, although comparatively few in number, have consistently upheld the devolution of local police powers to counties.

VIII

In a few states, peculiar constitutional provisions or phraseology might be regarded as affecting our general proposition that police powers may be devolved properly on counties. These problems and their solution can only be indicated in outline here.

In some states the provisions respecting county organization are allocated to the judiciary section of the constitution. The implication here might be that the conferring of local legislative powers would violate the separation of powers rule. However, we have already noted that the separation of powers doctrine does not apply to the local level of government. Moreover, in no

132. 164 Md. at 215, 164 Atl. at 678.
133. Hackney v. Leake, 91 Ga. 141, 16 S.E. 966 (1893); Dew v. Smith, 130 Ga. 564, 61 S.E. 232 (1908). This, of course is an exercise of local police power, in that individual rights and obligations in regard to stock running at large are thereby changed, as well as liability for contributions toward the erection and maintenance of fences.
136. Supra, p. 524, particularly note 8.
state is county officialdom limited to judicial functions. Counties everywhere (excepting perhaps the New England states) have regularly exercised considerable aggregates of non-judicial powers, such as the laying out, construction and maintenance of roads, the levying of taxes, the care of the indigent, the management of public education, and similar activities. The adoption of police regulations is neither more nor less "judicial" than these.

It is easy to be misled by isolated cases in which the county governing body has been declared to be a part of the state judiciary, serving a judicial function. Confusion will be avoided, however, if these cases are read in their setting. It will be found that the above type of statements are called forth by the particular question before the court. To say that the county governing body is judicial for one purpose does not mean that the same body cannot be equally non-judicial for other purposes. A few cases will suffice for illustration. In Haley v. State, the boards of supervisors of Mississippi counties were declared to be a part of the judicial department of the state; but, as already indicated, other cases from this same jurisdiction have declared these bodies to be capable of exercising police powers. The Indiana "county courts" have on occasion been declared to be essentially a part of the state judiciary, and governed by the rules applicable there-to; on other occasions they have been conceded the exercise of functions under the police power, or the performance of other acts of a legislative nature. In Tennessee, Oregon and West Virginia, where the county governing bodies are also known as "county courts" and are treated in the constitution as parts of the judiciary, it has been acknowledged that they may exercise local legislative powers.

Special problems are raised also by those constitutions which provide merely that the county governing body shall have charge of the "county business" or "county affairs." Whether this should by implication exclude the exercise of any except managerial functions will depend on several considerations. If the courts are willing to allow a liberal content to the phrase "county

137. 108 Miss. 899, 67 So. 498 (1914).
138. See note 135, supra.
139. Jay v. O'Donnell, 178 Ind. 282, 98 N.E. 349 (1912); Hastings v. Board of Com'rs, 205 Ind. 687, 188 N.E. 207 (1933). The latter was a 3-2 decision.
140. Pritchett v. Board of Com'rs, 42 Ind. App. 3, 85 N.E. 32 (1908); White v. Board of Com'rs, 129 Ind. 396, 28 N.E. 846 (1891).
141. Board of Com'rs v. Jewett, 184 Ind. 63, 110 N. E. 553 (1915).
142. See notes 104, 107, 108, supra.
affairs,” there should be no difficulty. As one court has put it, there is no call here for an “alphabetical tinkering of the constitution.”144 County “affairs” may be anything which properly concerns the county. Thus taxation (which is conceded to be a county affair) is a permissible grant. The same should be true of exercises of local police power compatible with the local governing purposes which counties are designed to promote. When approached in this light, a constitution which provides for “affairs” should be regarded as making no less ample provision for the county than a constitution which provides that the “powers and duties of the county shall be as prescribed by law.”145

The constitution of Indiana contains an interesting provision which reads: “The General Assembly may confer upon the boards doing county business in the several counties, powers of a local administrative character.”146 In determining whether or not this provision precludes by implication a grant of police powers to Indiana counties, the chief inquiry centers around the word “administrative.” This term, when taken in context with the body of the provision, is susceptible of two different interpretations. First, the term “administrative” may have been employed with reference to the three branches of government. If this is correct, reference to the maxim, *expressio unius exclusio alterius* leads to the conclusion that the framers intended to preclude the exercise by the county of any powers which could be regarded as either legislative or judicial. Such an interpretation, if consistently followed, would mean that the legislature is unable to authorize a tax levy by a county, since the power to levy taxes is generally regarded as legislative. By a more reasonable interpretation, “administrative” would be defined in context with the preceding term, “local.” When so regarded we find that the legislature may empower the county to administer, or manage, locally within the confines of the county. The intended limitation, thus regarded, is on the territorial extent of the authority which may be conferred, rather than on the nature of the power to be exercised. This interpretation comports with widely accepted principles of local

145. Cases under such provisions are discussed supra, in the preceding subsection.
146. Ind. Const., Art. VI, § 10.

In connection with the “county affairs” provisions, see Board of Com’rs v. Smith, 22 Colo. 534, 45 Pac. 357 (1896), which suggests the line of thought followed in the text. This case is often cited in support of the propriety of devolving local governing functions in general on county boards. See, for example, 11 Am. Jur. 834; 12 C.J. 862; Courtright, Colo. Digest (1915) 872.
government, and particularly with the idea that functions should be devolved upon those who are best equipped to exercise them, within the confines of their peculiar proficiency.\textsuperscript{147}

There are cases which are instructive in this regard. The Supreme Court of Virginia has allowed counties to regulate the width of wagon tires on the highways as a \textit{local legislative function};\textsuperscript{148} the Ohio Supreme Court has reached the same conclusion through the use of the term \textit{administrative function}.\textsuperscript{149} The Georgia Supreme Court has allowed the exercise of tax powers by a responsible local official, as an administrative duty,\textsuperscript{150} while the Pennsylvania Supreme Court has forbidden an identical exercise by an irresponsible local agency on the ground that it involved a delegation of legislative power.\textsuperscript{151} The Maryland Supreme Court sustained the regulation of cemeteries by a county board as an exercise of local legislative power,\textsuperscript{152} and the Tennessee Supreme Court reached an identical conclusion by regarding the function as administrative.\textsuperscript{153}

\textbf{IX}

This inquiry has sought to determine how the doctrine prohibiting a delegation of legislative powers affects a state legislature's authority to allow county governing bodies to exercise police powers for local purposes. It is concluded that such grants

\begin{itemize}
\item \textsuperscript{147} The Indiana Supreme Court has sustained the exercise by a county governing body of a concededly legislative function on a county scale. Board of Com'rs v. Jewett, 184 Ind. 68, 110 N.E. 553 (1915). This case is often cited in support of the proposition that local legislative powers may be granted to counties. See, 11 Am. Jur. 934, 12 C. J. 857n., 858n.\textsuperscript{148}
\item Polglaise v. Commonwealth, 114 Va. 850, 76 S.E. 897 (1913).\textsuperscript{149}
\item State v. Messenger, 63 Ohio St. 398, 59 N.E. 105 (1900).\textsuperscript{150}
\item Phinizy v. Eve, 108 Ga. 360, 33 S.E. 1007 (1899).\textsuperscript{151}
\item Wilson v. School District of Philadelphia, 328 Pa. 225, 195 Atl. 90 (1937).\textsuperscript{152}
\item Gordon v. Commissioners of Montgomery County, 164 Md. 210, 164 Atl. 678 (1933).\textsuperscript{153}
\item Mensi v. Walker, 160 Tenn. 468, 26 S.W. (2d) 132 (1930). The court went to great pains to show that the power granted was purely administrative—in contrast to the opinion of the chancellor of the lower court, who had found an unconstitutional delegation of powers. In its reasoning, the court declared that the power granted was \textit{administrative in the same sense that the power granted to cities by the Tennessee urban zoning enabling act was administrative}; and cited in this connection Spencer-Sturla Co. v. Memphis, 155 Tenn. 70, 290 S.W. 605 (1927). An examination of the latter does not reveal that the zoning act was there thought to vest in the city council merely "administrative power." Indeed similar urban zoning acts are universally conceded by the courts to involve devolutions of police power ("local legislative power") and are upheld on that basis. This opinion exemplifies the amusing and utterly unnecessary kowtowing to habitual word-patterns often exhibited by the courts in dealing with cases of local regulation.
\end{itemize}
of power are, as a matter of general public law, in no way inhibited by the non-delegability rule. There is a basic distinction in constitutional theory between those powers of local self-government whose exercise may properly be devolved upon local units of government, and those powers of general legislation which must be exercised by the legislature alone. Police powers, exercised for local purposes by county governing bodies, fall within the former group. It follows that such powers may be vested in counties in much the same way as they are given to municipalities proper. The extent to which peculiar provisions of certain state constitutions might modify the applicability of this principle in a few jurisdictions cannot here be settled definitively. The existence of the principle is not affected by the fact that there admittedly might be localized exceptions dictated by special considerations. The possibility of there being exceptions in certain jurisdictions, however, may be greatly exaggerated.