California and Dillon: The Times They Are a-Changing

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Introduction

> [T]he strength of free nations resides in the local community. Local institutions are to liberty what primary schools are to science; they bring it within people's reach, they teach people how to use and enjoy it. Without local institutions, a nation may establish a free government, but it cannot have the spirit of liberty. Transient passions, momentary interests, or the changes of circumstances, may create the external forms of independence; but the despotic tendency which has been repressed into the interior of the social body, will, sooner or later, appear on the surface.[1]

Looked at in this manner, strong and vibrant local communities are essential to individual freedom because they make it possible to increase involvement by individuals in societal decisions which regularly, significantly, and often profoundly affect their lives.[2] A city is thus not only a

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1. 1 Alexis de Tocqueville, Democracy in America 74-76 (Francis Bowen ed. 1863), *reprinted in* Gerald E. Frug, Local Government Law 4 (2d ed. 1994).

2.

> The basic critique of the development of Western [S]ociety that has emerged since the beginning of the nineteenth century has emphasized the limited ability of individuals to control their own lives.... As the tradition of Aristotle to Rousseau emphasizes, individual involvement in decisionmaking is impossible except on a small scale.... More than a reduction in the size of decisionmaking units is necessary, however, before popular participation in societal decision making can be realized. There must also be a genuine transfer of power to the decentralized units. No one is likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference in his life.

Gerald E. Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1057, 1068-70 (1980) (footnotes omitted).

relatively benign institution, as restraints on individual freedoms go, but, as the institution most accessible to the average citizen, it is actually a vehicle for constraining government excess.

Diametrically opposed to this comforting and even utopian notion of a city as a community of individuals participating in the development and pursuit of the collective good, is an historical suspicion of local governments based upon an equally unassailable proposition—that individual liberties must be protected from being trampled upon by a local citizenry inflamed by passion and prejudice.[3] Concerns about a tyrannical majority imposing its will on an oppressed minority are, of course, objections to the institution of democracy itself, not a flaw unique to local government. Further, there is historical evidence that participation by individuals in the institutions of a democracy is transformative, with individuals becoming better informed about the practical consequences of particular decisions and developing a genuine interest in promoting the welfare of the community.[4] Indeed, anyone who has been meaningfully involved in local government can attest to the educational and inspirational effect of assuming the responsibilities of public office.

Nonetheless, fear of the potential abuses of bureaucratic power, harnessed to dangerous provincial concerns, often translates into an untested assumption that state government should curb irrational local governments.[5] Largely ignored is the irony of perceiving a remote state government, awash in campaign contributions from large and powerful interests, as a protector of the individual and a guardian of democratic ideals. Each of us can attest, however, to the increasingly familiar phenomena of a hitherto unknown figure who has been catapulted overnight onto the national or state political stage by an army of handlers manipulating a blitz of television advertising financed by enormous private wealth.[6] And it is only at the local government level that it is truly possible for the ordinary citizen to become an elected official or for voters to feel they can accurately assess a candidate's true strengths and weaknesses and influence their representative's decisions.

These twin constructs of local government—the one highly desirable and the other troubling—form the backdrop of many structural legal questions which have faced the courts over the years about the proper role and responsibilities of local governments under the California Constitution.

3. "[An] objection to communal decisionmaking, an objection as old as Plato's, is that it appeals to the worst instincts of individuals and leads to a despotism of ignorance and prejudice." *Id.* at 1071.

4. *See id.*

5. *See generally id.* at 1118. This view was particularly prevalent during the era of local party bosses running cities and widespread corruption.

6. Ross Perot's candidacy for President in 1992, and Al Checchi's 1998 candidacy for Governor of California are illustrative in this regard.

Further, such ambivalence toward government in general, and local government in particular, mirrors another ideological paradox in American civic life. While most middle class Americans subscribe unequivocally to individualism as a central and defining value in their lives, they simultaneously emphasize that it is important to their individual sense of well being to contribute to their communities and participate in community life and institutions.[7] Admittedly, the very term "community" has different meanings and can be confused with a nostalgia for rural life, though there is nothing inherent in the term itself that requires such a view. Whatever the meaning, the complexity of late twentieth century society unfortunately prevents individuals from engaging in self determination to the extent seen in the communities of settlers.[8] Somehow, nonetheless, individuals must take part in shaping their institutions, if they are to implement their expected vision of simultaneous individual and community well-being. Such commitment to both individualism and shared community values and responsibilities complicates the search for a coherent definition of the role local government in American society as we approach the twenty-first century.

In this essay, I argue that the development of the law regarding local governments has been confused and contradictory, reflecting the societal tensions between individualism and community responsibility and between views of local governments as organs of self-determination on the one hand and obstacles to personal freedom on the other. I conclude that the California Constitution clearly rejects "Dillon's Rule" that a local government is a mere creature of the California legislature with only those powers specifically conferred upon it by the State. The constitution provides, rather, that within city borders, both general law cities[9] and charter cities[10] have broad powers which are co-extensive with that of the state itself to promote the public welfare.

Dillon's Rule and the California Constitution

Much of the academic literature regarding municipal governments has been devoted to weighing the benefits and burdens of Dillon's Rule. The rule provides that local government is a creature of the state and can exercise only that power which the State has delegated to it, construed narrowly. Any doubts are to be resolved against the exercise of power.[11] The

7. *See* ROBERT N. BELCH ET AL., HABITS OF THE HEART 144 (1985).

8. "The interdependence of modern society is particularly problematic for Americans. A political tradition that enshrines individual liberty as its highest ideal leaves us ill prepared to think about ways of managing the modern economy or developing broad social policies to meet the needs of society as a whole—and, indeed the world as a whole." *Id.* at 113.

9. *See* CAL. CONST. art. 11, §§ 2, 7.

10. *See* CAL. CONST. art. 11, §§ 2, 5, 7.

11. *See, e.g.*, Frug, *supra* note 2, at 1109-20; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8-18 (1990).

rule is named after John Dillon, a judge and writer of a municipal law treatise who formulated the doctrine embodied in the rule.[12] The rule was enunciated at a time when municipalities had incurred large debts to finance public improvements including railroads which subsequently failed.[13] According to one legal commentator, "Dillon's Rule thereupon became a weapon in the battle against fiscal overextension and its more vicious counterpart, municipal corruption."[14] The home rule movement resulting in creation of charter cities was a reaction to the inherent facilities of the view that local governments are inherently corrupt or foolish.[15] Many states, including California, have enacted constitutional provisions which create a constitutional basis for the existence and power of cities, and thus effectively abolish Dillon's Rule which postulates that cities exist only by virtue of state legislative consent and limitation. In California, the powers of the cities are set forth, in the main, in two constitutional provisions: article 11, section 7, which describes the power of all cities, and article 11, section 5, which embodies the principle that cities created pursuant to a charter have the ability to override general state laws with which they conflict as to any subject which can be classified as a municipal affair.[16]

In California, the most exhaustive discussion of city powers takes place in the context of the powers of charter cities.[17] Recent California Supreme Court cases have given new life and vibrancy to the constitutional powers of charter cities.[18] However, general law cities continue to struggle under Dillon's yoke.[19] This essay first describes the California constitutional provisions concerning cities.

Article 11, section 1 of the California Constitution provides that counties (as opposed to cities) are legal subdivisions of the State.[20] Article 11, section 2 provides in pertinent part that the legislature shall prescribe uniform procedures for city formation and city powers.[21] Construing these

12. *See* Clayton P. Gillete, *In Partial Praise of Dillon's Rule, Or Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 963 (1991).

13. *See id.* at 963-64.

14. *Id.*

15. *See generally* Sho Sato, *"Municipal Affairs" In California,* 60 CAL. L. REV. 1055 (1972).

16. CAL. CONST. art. 11, §§ 5, 7.

17. *See* Sato, *supra* note 15, at 1055.

18. *See, e.g.* Johnson v. Bradley, 841 P.2d 990 (Cal. 1992); California Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916 (Cal. 1991).

19. In light of the dearth of scholarly inquiry in California concerning the powers of general law cities, the powers of charter cities is only briefly described in this essay since this essay's focus is on the powers of all cities, including general law cities, under article 11, section 7, of the California Constitution.

20. CAL. CONST. art. 11, § 1.

21. CAL. CONST. art. 11, § 2.

two provisions, the California Supreme Court has held that a "county is a governmental agency or political subdivision of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government."[22] This principle has never been expressly overruled by any court despite later language evocative of Dillon's Rule.

The key defining constitutional provision is article 11, section 7.[23] It provides in pertinent part as follows: "A county or city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws."[24] This power is as broad as that of the state itself; in the absence of a conflicting state law, local governments, whether chartered or not, are not confined to regulating on purely local matters.[25] Moreover, the constitutional grant of power cannot be denied by the state legislature merely by enacting a law which prohibits the city from acting without any affirmative act of the legislature occupying the field.[26] Such denial would violate the express authority granted by the constitution to the municipality to enact local regulations. The California Supreme Court stated the principle thus: "In other words, an act by the legislature in general terms that the local legislative body would have no power to enact local, police, sanitary or other regulations, while in a sense a general law, would have for its effective purpose the nullification of the constitutional grant, and, therefore, be invalid."[27] Thus, while article 11, section 7 is referred to continually as the source of cities' "police" power, its explicit terms contain no such limitations, and in fact authorize the enactment of all police, sanitary or other ordinances and regulations.

Dillon Resurrected

Notwithstanding clear case law extending back to the adoption of article 11, section 7, holding that the power of a city, whether chartered or general law, finds its origins in the California Constitution itself,[28] there is a line of authority beginning in 1966 which describes the powers of general law cities in terms which appear to evoke Dillon's Rule. This aberra-

22. Abbot v. City of Los Angeles, 326 P.2d 484, 501 (Cal. 1958) (citations and internal quotations omitted); *accord* City of Salinas v. Souza & McCue Constr. Co., 424 P.2d 921, 928 (Cal. 1967).

23. CAL. CONST. art. 11, § 7.

24. *Id.*

25. *See* Bishop v. City of San Jose, 460 P.2d 137, 141 (Cal. 1969); Carlin v. City of Palm Springs, 92 Cal. Rptr. 535, 539 (Ct. App. 1971).

26. *See Ex parte* Daniels, 192 P.2d 442, 445 (Cal. 1920).

27. *Id.* This language has never been overruled. In this case the Court found that the area of traffic regulation was occupied by the state.

28. *See supra* text accompanying notes 23-27.

tion first emerges in the California Supreme Court decision of *Irwin v. City of Manhattan Beach*.[29] There the court describes municipal power thus:

> A general law city has only those powers expressly conferred upon it by the Legislature, together with such powers as are "necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation." The powers of such a city are strictly construed, so that "any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation."[30]

This statement from *Irwin* is a virtual reiteration of Dillon's Rule, seemingly abrogated by article 11, section 7 of the California Constitution. It has been cited without question on numerous occasions, though neither *Irwin* nor its progeny attempt to reconcile it with the plain terms of article 11, section 7 or with cases construing those terms.[31] Even more interestingly, the single case, *Hurst v. City of Burlingame*,[32] relied upon in *Irwin*[33] for the restatement of Dillon's Rule holds no such thing. In *Hurst*, the California Supreme Court stated, "[T]he city is limited in the exercise of the powers by the *constitution* and general laws. It has only the powers expressly conferred and such as are necessarily incident to those expressly granted or essential to the declared objects and purposes of the municipal corporation."[34] In other words, although a city is granted only that power which is expressly conferred on it, the source of that power is not the state legislature, as *Irwin* stated, but is the constitution itself.

Of course, article 11, section 7 is not only a grant of power. It is also a limitation on power because the exercise of the constitutional grant cannot conflict with general or state law. Even so, there appears to be no constitutional support for the proposition that general law cities need state enabling authority in order to act. article 1, section 2 of the constitution does clearly contemplate that the legislature must establish the manner in which cities are created and the nature of their structure. But article 11, section 7 confers broad powers on cities, including general law cities. Thus, the assumption in *Irwin* and its progeny that general law cities require a grant of authority from the legislature appears to be at odds with the constitution itself, a conflict the *Irwin* Court simply ignores. This con-

29. 415 P.2d 769 (Cal. 1966).

30. *Id.* at 773 (citation omitted).

31. *See id.*; *see also* Martin v. Superior Court, 286 Cal. Rptr. 513, 515 (Ct. App. 1991); Cerini v. City of Cloverdale, 237 Cal. Rptr. 116, 119 (Ct. App. 1987); Wiltshire v. Superior Court, 218 Cal. Rptr. 199, 202 (Ct. App. 1985); Coffineau v. Eu, 137 Cal. Rptr. 199, 202 (Ct. App. 1977); Norsco Enterprises v. City of Fremont, 126 Cal. Rptr. 659, 661-62 (Ct. App. 1976); Snyder v. City of South Pasadena, 126 Cal. Rptr. 320, 324 (Ct. App. 1975); Widdows v. Koch, 69 Cal. Rptr. 464, 471 (Ct. App. 1968).

32. 207 P. 308, 310 (Cal. 1929).

33. 415 P.2d at 773.

34. 207 P. at 310 (emphasis added).

ceptual confusion is just as prevalent when it comes to the powers of general law cities to raise revenues and to tax.

General Law Cities and the Taxation Power

In *Santa Clara County Local Transportation Authority v. Guardino*,[35] the California Supreme Court stated, apparently for the first time, that local governments' power to tax was a delegated power derived from the state legislature under article 13, section 24.[36] That section prohibits the legislature from imposing taxes for local purposes but allows it to authorize local governments to impose taxes for such purposes.[37] The court construed the section's first paragraph as a limitation on the power of the state legislature but then concluded that under its second paragraph the power to tax is delegated to local governments by the state legislature.[38] The court relied on four cases for this proposition.[39] In the first, a city council acting as a redevelopment agency was challenged by a flood control district and a school district for illegally taking away their taxing power.[40] There, the court merely held that the two non-chartered agencies before the court derived their taxing power from the state.[41] Of the remaining three cases relied upon by the court in *Guardino*,[42] two involved counties which are subdivisions of the state under California Constitution article 11, section 1,[43] and one involved a special hospital district, which of course has no separate constitutional existence.[44] All three involved legislation adopted to implement article 13A of the California Constitution, with the local agen-

35. 11 Cal. 4th 220 (1995).

36. *See id.* at 247-48.

37. *See* CAL. CONST. art. 13, § 24. That section provides as follows:

> The Legislature may not impose taxes for local purposes but may authorize the local government to impose them.
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> Money appropriated from state funds to a local government for its local purposes may be used as provided by law.
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> Money subvened to a local government under Section 25 may be used for State or local purposes.

38. *See* 11 Cal. 4th at 247-48.

39. *See id.* at 248 (citing *In re* Development Plan for Bunker Hill, 389 P.2d 538 (Cal. 1964); County of Mariposa v. Merced Irr. Dist., 196 P.2d 920 (Cal. 1948); County of Los Angeles v. Sasaki, 29 Cal. Rptr. 2d 103 (Ct. App. 1994); Martin Hosp. Dist. v. Rothman, 188 Cal. Rptr. 828 (Ct. App. 1983)).

40. *See Bunker Hill*, 389 P.2d at 571.

41. "The nonchartered taxing agencies *here involved*, the flood control and school districts, derive their taxing power from the general law and, subject to constitutional restrictions, the Legislature has absolute power over the organization, dissolution, powers, and liability of such corporations." *Id.* (emphasis added) (citations omitted).

42. 11 Cal. 4th at 248.

43. *Merced Irr. Dist.*, 196 P.2d at 924; *Sasaki*, 29 Cal. Rptr. 2d at 110.

44. *Rothman*, 188 Cal. Rptr. at 831-32.

cies arguing that the constitution precluded the state legislature from taking taxing power away from local agencies.

The issue of whether local government may be precluded by general law from assessing a particular tax or taxing particular entities is an issue of preemption under article 11, section 7 as to general law cities or under article 11, section 5 as to charter cities.[45] It does not go to the fundamental question of whether the state legislature must explicitly authorize cities to adopt taxes before they are permitted to do so, the proposition advanced by *Guardino*.[46] Indeed, the cases appear to state the contrary, as I next explain. They hold that the power to tax is an inherent dimension of local governance, a principle which appears to make far better conceptual sense. And even though these holdings concerned cities' inherent power to tax in the context of charter cities, their basis lay not in the fact that the cities were chartered but in the fact that the cities were municipal corporations.

In *Ainsworth v. Bryant*,[47] the California Supreme Court quoted the United States Supreme Court, stating:

> A Municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.... When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have power to raise money and control its expenditure.[48]

This principle has never been expressly overruled by the California Supreme Court and was reiterated in exactly these terms in a later California Supreme Court case.[49] It was also enunciated in *Watchtower Bible & Tract Society v. County of Los Angeles*,[50] where the court stated: "[T]he power of taxation for revenue purposes is probably the most vital and essential attribute of the government. Without such power it cannot function."[51]

It is difficult to imagine a proposition which is more self-evident. The power granted by article 11, section 7 to pass all police, sanitary and other laws and ordinances not in conflict with general law would be rendered meaningless if the city authorized to pass such laws was not even able to raise money to support its very existence. Zoning laws, for example, would be useless if the zoning ordinance could not impose fees or other

45. CAL. CONST. art. 11, §§ 5, 7.
46. 11 Cal. 4th at 247-48.
47. 211 P.2d 564 (Cal. 1949).
48. *Id.* at 566 (quoting United States v. Orleans, 98 U.S. 381 (1878)).
49. *See* City of Glendale v. Trondsen, 308 P.2d 1, 3 (Cal. 1957).
50. 182 P.2d 178 (Cal. 1947).
51. *Id.* at 180.

exactions including, for instance, property tax assessments to finance improvements in new subdivisions. Indeed, there is no area of regulation for which it would be possible to imagine a regulatory body without the power to impose its own revenue raising exactions. If the constitutional power to tax was in fact one which must be expressly delegated by the state legislature, then the legislature could prevent a city from exercising its constitutional grant of police power simply by denying it all power to tax and thus to support its operations. A city's police power would be meaningless if it could be defeated by such an obvious stratagem. Moreover, such a result would vitiate the principle, recognized even in *Irwin*,[52] that a city has those powers which are "necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation."[53] Accordingly, it would seem that under the reasoning of these prior California Supreme Court cases, all cities, and thus presumably even general law cities have the inherent power to tax under the California Constitution, notwithstanding the language of *Guardino*,[54] since it failed to distinguish or expressly overrule this aspect of these prior California Supreme Court cases. Thus, with respect to the power of general law cities to impose taxes, the case law is also contradictory.

Charter Cities

Charter cities are governed by article 11, section 5 of the California Constitution, providing that a city's charter may allow it to make and enforce all ordinances and regulations with respect to "municipal affairs," subject to its charter's restrictions, and with respect to other matters subject to general laws.[55] This section also provides that with respect to "municipal affairs," a charter city's laws shall supersede all inconsistent general laws.[56] Thus, although charter cities have a superior ability to trump, as it were, conflicting state laws, nothing in the language of article 11, section 5 suggests that charter cities have more inherent power in general. The source of most power for all cities, whether chartered or not, is Article 11, Section 7. The notion that general law cities but not charter cities are mere creatures of the state with limited delegated powers—a notion which periodically resurfaces in the cases—appears to be a curious anomaly with no actual support in the California Constitution.

52. Irwin v. City of Manhattan Beach, 415 P.2d 769 (Cal. 1966).

53. *Id.* at 773.

54. *Id.* at 773-75.

55. CAL. CONST. art. 11, § 5.

56. *See id.* A detailed history of the adoption of this "home rule" provision of the California Constitution is found in *Johnson v. Bradley*, 841 P.2d 990, 992-95 (Cal. 1992). The case also describes the municipal affairs doctrine and how modern cases have analyzed claimed conflicts between general laws and claimed municipal affairs. *See id.* The preemption analysis under article 11, section 5 is addressed in another paper at this symposium and is beyond the scope of this paper on the nature of cities, and thus is not addressed further here.

Conclusion

There is ample support in the explicit language of the California Constitution and the cases interpreting it that all cities, including general law cities, are not subdivisions or creatures of the state but derive their power directly from the California Constitution. This power is as broad as that of the state itself within a city's borders absent affirmative preemptive state legislation and includes the power to raise revenues and to tax. The case law in this area, however, is contradictory and confusing. It is therefore essential that general law cities, when submitting future appellate briefs, seek to lend conceptual structure and coherence to the body of law which governs them, thereby reclaiming powers which have been unwittingly eroded in the current analytical confusion.