The Urban County: Kentucky's New Structure for Local Government

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THE URBAN COUNTY:
KENTUCKY'S NEW STRUCTURE FOR LOCAL GOVERNMENT

Few problems have received greater attention in recent years in Congress and in state legislatures than have the many problems of governing our large metropolitan areas. One response has been an increase in efforts to provide new structures of local government which are better suited to cope with the exigencies of modern urban life than were their predecessors. As evidenced by the number and variety of innovative plans for metropolitan reform, this effort has not been wasted. In Kentucky, the push for reform in local government resulted in the passage of the Peak-McCann Act in 1970 by the Kentucky General Assembly. The express purpose of that Act, which is now codified in Chapter 67A of the Kentucky Revised Statutes, is

to facilitate the operation of local government, to prevent duplication of services, and to promote efficient and economical management of the affairs of local government. . . .

Although it is perhaps overly restrictive in its scope and somewhat misguided in various procedural aspects, this statute represents a progressive and enlightened approach to local governmental reform.

Chapter 67A is significant in two respects: (1) It provides for the consolidation of city and county governments into a new form of government called the urban county; and (2) it delegates home rule powers to the citizens of the cities and counties which elect to so consolidate. In order critically to evaluate the Kentucky statute, it is necessary to examine the development and present status of the concepts of "home rule" and "city-county consolidation." In addition, a comparison of Kentucky Revised Statutes Chapter 67 [hereinafter referred to as KRS] will serve to illustrate both the strong points of the Kentucky law and some of the difficulties that may befall those who attempt to proceed under its guidelines.

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4 This Comment will not present a line-by-line analysis of KRS § 67A.010-040; rather it will focus on the overall importance of the statute and some of the particularly troublesome questions that are raised by a careful consideration of its provisions.
I. Home Rule

The establishment of local autonomy by municipalities in many states has been an extremely difficult task, due largely to the vitality of "Dillon's law" or the "creature theory" as a basic constitutional doctrine. This doctrine, as first enunciated in the case of City of Clinton v. Cedar Rapids & Mo. R. R.R., holds that municipal corporations are creatures of the state and that they owe their origin to and derive their powers and rights from the legislature. Typical of the decisions rendered under this rule is Dortch v. Lugar, in which, despite the existence of a state constitutional provision declaring that the right to alter and reform the government is inherent in the people, the Indiana Supreme Court upheld a legislatively imposed consolidation of the governments of Indianapolis and Marion County. In its ruling, the court maintained that

Subordinate divisions of the government are but parts of the state government as a whole. The state, by its legislature, may abolish, consolidate, combine, eliminate, or create new governmental corporations, or authorize such alterations to govern those who live in a given area. There is no constitutional guarantee for the continued existence of a governmental subdivision of the state. They are all creatures of the legislature.

The principal legal device employed by municipalities and other units of local government to obtain some measure of freedom from state control is generally known as "home rule." The great number of variations of and sources of authority for home rule make broad generalizations about the doctrine almost impossible. Still, for most purposes, "home rule" can be adequately and accurately defined as "the autonomy of local government in the sovereign state over all purely local matters. . . ." This description generally holds true

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5 The following discussion of home rule is not intended as a thorough analysis of that subject, which in and of itself provides ample material for a paper of considerable length. It is included herein only in such detail as is deemed necessary to enable the reader to properly conceptualize and evaluate the delegation of power to local governmental units contained in KRS § 67A.020.

7 24 Iowa 455 (1868).
8 Lineberry 685.
9 266 N.E.2d 25 (Ind. 1971).
10 Ind. Const. art. I, § 1.
11 266 N.E.2d at 44.
12 Id.
13 Vanlandingham, Municipal Home Rule In The United States, 10 WM. &MARY L. Rev. 269 (1968) [hereinafter cited as Vanlandingham].
14 Id. at 280.
whether one is concerned with "constitutional home rule states" or with "legislature home rule states."

A. Constitutional Home Rule

Constitutional home rule was first authorized in 1875 by Article IX, Section 16 of the Missouri Constitution. Therein, it was provided that any city with a population greater than 100,000 could "frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the State." At present, thirty-three state constitutions contain home rule provisions, most of which were adopted during one or the other of two distinct historical periods. In the so-called "formative period" (1875 to 1912), eleven states adopted home rule constitutional provisions and in the post-World War II era fourteen states have adopted such provisions.

Constitutional home rule provisions fall into three basic categories: self-executing, mandatory, and permissive. Self-executing provisions, such as those of Colorado, California, Nebraska, Arizona, and Washington, enable a city to adopt and exercise home rule powers immediately without the necessity of implementing legislation. A mandatory home rule provision such as is found in the constitution of North Dakota, states that the legislature "shall enact implementing legislation to provide for home rule adoption." A permissive home rule provision, on the other hand, merely provides that the legislature at its discretion may enact home rule legislation. Such provisions are found in the constitutions of Georgia, New Hampshire, and Hawaii.

In "self-executing" and "mandatory" constitutional home rule states, the constitutional position of the cities vis-a-vis the state legislature

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15 Mo. Const. art. IX, § 16 (1875).
16 Vanlandingham 277.
17 Vanlandingham 277. Among the states which enacted constitutional home rule provisions in this era are California, Colorado, Michigan, Minnesota, Missouri and Texas.
18 Vanlandingham 277. Included in this group are Alaska, Florida, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico and North Dakota.
19 Lineberry 696 n.48; Vanlandingham 278.
20 Colo. Const. art. XX, § 1.
26 N. Dak. Const. § 130.
27 Vanlandingham 278; see N. Dak. Const. § 130.
28 Vanlandingham 278.
29 Ga. Const. art. XV.
30 N.H. Const. Part I, art. XXXIX.
has been altered\textsuperscript{32} and the legislatures are deemed powerless to interfere with the cities' conduct of municipal affairs.\textsuperscript{33} Of particular importance, the legislature cannot alter, modify, or merge such home rule cities without the consent of the affected electorate.\textsuperscript{34} In contrast, in permissive constitutional home rule states, in legislative home rule states, and in those states which do not allow home rule of any sort, the legislature retains considerable control over the affairs of local government, including the area of local government consolidation.\textsuperscript{35}

The traditional method for initiating home rule in constitutional home rule states (and in many legislative home rule states) has been the adoption of a charter.\textsuperscript{36} Indeed, in most instances, the adoption of charters or municipal constitutions drafted by local charter commissions which have been selected pursuant to constitutional guidelines is a prerequisite to exercising home rule powers.\textsuperscript{37} Not surprisingly, one of the great conflicts surrounding the implementation of constitutional home rule provisions has concerned the proper relationship between the terms of these charters and the dictates of general statutes of the state which are inconsistent with them. In some state constitutions, this issue is settled conclusively in favor of the local governments, giving them powers in local affairs superior to the general laws of the state. Such provisions,\textsuperscript{38} which are characteristic of most constitutional home rule provisions enacted in the "formative period" (1875 to 1912),\textsuperscript{39} expressly recognize the doctrine of \textit{imperio in imperium}. This doctrine, first enunciated in a case involving the Missouri constitutional provision,\textsuperscript{40} provides that there are certain areas, usually described as those of "purely local concern," within which the charter is supreme over state laws.\textsuperscript{41} States which accept the validity of \textit{imperio in imperium}, either expressly in their constitutions or in their courts' interpretations thereof,\textsuperscript{42} grant to units of local government complete home rule.

\textsuperscript{32} Vanlandingham 280.  
\textsuperscript{33} Consumers Coal Co. v. City of Lincoln, 189 N.W. 643 (Neb. 1922); Lineberry 686. The legislature in such cases is prohibited from interfering to the extent that the constitutional provision establishes home rule. As will be discussed later, however, complete home rule (such as is contemplated by the definition in the text accompanying note 14, supra) is not always granted.  
\textsuperscript{34} Fragley v. Phelan, 58 P. 923, 925 (Cal. 1899).  
\textsuperscript{35} See Dorch v. Lugar, 266 N.E.2d 25 (Ind. 1971).  
\textsuperscript{36} Vanlandingham 280; \textit{e.g.}, \textit{CAL. CONST.} art. XI, §§ 6-20; \textit{COLO. CONST.} art. XX, §§ 1-6; \textit{WASH. CONST.} art. XI, §§ 10-11.  
\textsuperscript{37} Vanlandingham 280; \textit{see} \textit{WASH. CONST.} art. XI, § 10.  
\textsuperscript{38} See, \textit{e.g.}, \textit{CAL. CONST.} art. XI, §§ 6-20.  
\textsuperscript{39} Vanlandingham 280.  
\textsuperscript{40} See, \textit{e.g.}, \textit{CAL. CONST.} art. XI, §§ 6-20.  
\textsuperscript{41} Vanlandingham 280.  
\textsuperscript{42} St. Louis v. Western Union Tel. Co., 149 U.S. 465 (1893); Mollner v. City of Omaha, 98 N.W.2d 33 (Neb. 1959).
On the other hand, many state constitutional home rule provisions, particularly those enacted since 1912, emphasize legislative supremacy. For example, Article XIV, Section 40 of the Louisiana Constitution, adopted in 1952, grants home rule to municipalities in the area of "local affairs, property, and government" but provides that:

The provisions of this Constitution and any general laws passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith.\(^43\)

In such states the permissible range of local autonomy is thereby considerably reduced unless the legislature, in spite of the constitutionally authorized opportunity to intervene, adopts a policy of non-interference.\(^44\)

B. Legislative Home Rule

Legislative home rule exists where—in the absence of a constitutional home rule provision—the legislature empowers the units of local government to adopt and exercise home rule powers. The validity of such delegations of power was upheld in *Barnes v. District of Columbia*,\(^45\) in which the United States Supreme Court declared:

A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality.\(^46\)

In spite of this, the power of the Kentucky General Assembly to delegate home rule to urban counties in the absence of constitutional authority to do so was challenged on two grounds in *Pinchback v. Stephens*.\(^47\) The first challenge was based on Section 60 of the Kentucky Constitution, the applicable portion of which states:

No law, except such as relates to the sale, loan or gift of vinous, spiritous or malt liquors, bridges, turnpikes or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation of counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the general assembly, unless otherwise expressly provided in this Constitution.\(^48\)

\(^{43}\) La. Const. art. XIV, § 40.
\(^{44}\) See Lineberry 685-86; Vanlandingham 278-80.
\(^{45}\) 91 U.S. 540 (1875).
\(^{46}\) Id. at 544.
\(^{47}\) 484 S.W.2d 327 (Ky. 1972).
\(^{48}\) Ky. Const. § 60.
The Court of Appeals resolved this issue by calling attention to the fact that one of the areas expressly excluded from the application of Section 60's prohibition is "the regulation of counties, cities, and towns and other municipalities in their local affairs."\textsuperscript{40} The Court could have added additional support to its conclusion by relying, as did Fayette Circuit Court Judge James Park,\textsuperscript{50} on \textit{Bryan v. Voss}\textsuperscript{51} in which it was held that:

... if the words 'regulation by counties, cities, towns or other municipalities of their local affairs' were not intended to include the matter of local self-government, we can hardly see why these words were inserted in the section after the other things which were named.\textsuperscript{52}

The second challenge to the home rule grant of KRS Chapter 67A raised in \textit{Pinchback v. Stephens} went directly to the heart of the concept of legislative home rule by asserting that, without a constitutional mandate, the legislature was powerless to grant home rule. In response to this proposition the Court merely declared that:

Absent any all-inclusive, straight-out prohibition in our Constitution against the grant to local voters of any power of self-government in regard to the structure of local government, this Court is not disposed to bar the door to any and all possibility of action in this area.\textsuperscript{53}

Once again, one must look to the opinion of the Circuit Court to find a less equivocal, better-supported statement of the rules of law applicable to the question raised. Therein, the court relies upon the constitutional principles delineated in \textit{Boone County v. Town of Verona},\textsuperscript{54} that if the General Assembly is not prohibited from enacting the particular type of legislation by a constitutional provision, it may do so.\textsuperscript{55} Since there is no provision in the Kentucky Constitution

\textsuperscript{40} \textit{Pinchback v. Stephens}, 484 S.W.2d 327, 330 (Ky. 1972).
\textsuperscript{50} \textit{Pinchback v. Stephens}, No. 31461 (Fayette Cir. Ct. 1972).
\textsuperscript{51} 136 S.W. 884 (Ky. 1911).
\textsuperscript{52} Id. at 886.
\textsuperscript{53} 484 S.W.2d 327, 330.
\textsuperscript{54} 136 S.W. 884, 805 (Ky. 1911).
\textsuperscript{55} At page 4 of Judge Park's opinion is inserted the following language from \textit{Boone} at 805:

The contention is made for the appellant that the foregoing act of the General Assembly is void, because in violation of certain provisions of the Constitution. A very well-settled principle, which has been continuously adhered to, is that the General Assembly has the authority to enact any legislation which is not prohibited by some provision of the Constitution of the state or of the United States, and in this respect a difference arises between the powers of the General Assembly of the state and the powers of the Congress of the United States. The powers of the latter in legislation are confined to such things as it is authorized by the

(Continued on next page)
which denies the legislature the power to establish home rule, then it follows that the enactment of KRS Chapter 67A is not invalid.

Home rule statutes, including KRS Chapter 67A,\textsuperscript{56} enacted pursuant to neither constitutional mandate nor authorization, may be classified according to the sources of the respective home rule charters, the body responsible for final approval of those charters, and the scope of the powers delegated thereunder. Under most legislative home rule statutes the charters are to be drafted by the municipalities themselves.\textsuperscript{57} In some of these, the charters are prepared by an appointed or elected charter commission,\textsuperscript{58} but in other cases the charter or amendments thereto may, alternatively, be proposed by the governing body of the municipality,\textsuperscript{59} or by petition of a specified portion of the electorate.\textsuperscript{60} Local charter commissions, governing bodies and groups of voters are not, however, the only residuaries of the power to promulgate local charters. In New Jersey, for example, the local voters merely have the opportunity to choose from among fifteen optional plans of local government set out in the New Jersey home rule statute.\textsuperscript{61}

As shown by the preceding text and footnotes, KRS Chapter 67A falls within the category of home rule statutes that provide for the promulgation of charters by local charter commissions. It provides that, upon proper petition by citizens of the city and county,

\[\ldots\text{the fiscal court and the council of the largest city within the county shall appoint a representative commission composed of not less than twenty (20) citizens which shall devise a comprehensive plan of urban county government.}\]

\textsuperscript{62}

\textsuperscript{56} KRS § 83.011, a former statute, is also listed as an example of legislative home rule. Repealed Ky. Acts ch. 243 (1972).
\textsuperscript{60} Miss. Code Ann. §§ 21-17-9 to -13 (1972); Vt. Stat. Ann. tit. 24, § 702(a) (Supp. 1973). This type of petition should not be confused with that authorized in KRS § 67A.020. In the Kentucky statute the petition is only for the appointment of a charter commission. In Mississippi and Vermont, however, the voters may actually petition that a specific charter or charter amendment be adopted.
\textsuperscript{62} KRS § 67A.020 (Supp. 1972).
This represents a notable departure from KRS § 83.011, Kentucky's only previous venture into home rule, wherein the legislature made no provision for local charters but merely authorized and empowered all first class cities to

... exercise all the rights, powers, franchises, and privileges not in conflict with any statute now or hereafter enacted which such legislative body [of the city] shall deem requisite for the welfare of the inhabitants of such city, and for the effectual administration of all local government ... within its territorial limits. ... 63

Statutory provisions in legislative home rule states, as noted above, also differ considerably as to the delegation of responsibility for the final approval of home rule charters. Understandably such power is often retained by the legislatures themselves64 in order to keep municipalities from getting "too independent." Mississippi offers a considerably different approach in providing that after approval by the electorate, local charters must be sent to the governor, who, with the assistance of the state attorney general, decides whether or not the charters are consistent with the United States Constitution and laws and the state constitution, and approves or disapproves the documents accordingly.65 In New Mexico,66 Delaware,67 and Kentucky,68 however, approval of the proposed charter by the local electorate is final and subject to no further ratification.

A final categorization of home rule statutes can be made according to the scope of the powers delegated therein. In those states which require final charter approval by the legislature or which only allow the electorate to choose from among several already delineated structures, this question is of little consequence; their municipalities always remain within the close supervision of the legislature. Elsewhere, the question is one of much greater importance. In Mississippi the provisions of home rule charters must be consistent with the United States Constitution and laws and the state constitution and must not be in conflict with any general state laws applicable to municipalities operating under the private or special charters.69 Other statutes allow home rule municipalities to exercise all powers not in conflict with the general laws of the state and specifically declare that the statutes are to be construed as giving to such local units all the

authority that it is within the power of the legislature to grant.\footnote{70} New Mexico appears to be the only legislative home rule state which expressly incorporates the doctrine of \textit{imperio in imperium} in its home rule statute. The only restriction placed upon home rule charters in that state is that they

\begin{quote}
shall not be inconsistent with the Constitution of New Mexico, shall not authorize the levy of any tax not specifically authorized by the laws of the state and shall not authorize the expenditure of public funds for other than public purposes.\footnote{71}
\end{quote}

The statute further states that a municipal corporation organized under its terms "shall be governed by the provisions of the charter adopted pursuant to"\footnote{72} those terms and that "no law relating to municipalities inconsistent with the provisions of the charter shall apply to any such municipality."\footnote{73}

It is quite possible that the Kentucky General Assembly has also incorporated the doctrine of \textit{imperio in imperium} into KRS Chapter 67A, although by implication rather than express directive. The applicable portion of KRS § 67A.020 reads:

\begin{quote}
... the fiscal court and the council of the largest city within the county shall appoint a representative commission composed of not less than twenty (20) citizens which shall devise a comprehensive plan of urban county government. The plan shall include a description of the form, structure, functions, powers, and officers and their duties of the proposed urban county government; the procedures by which the original plan may be amended; and such other provisions as the commission shall determine; and shall be consistent with the provisions of the constitution of Kentucky.\footnote{74}
\end{quote}

From the foregoing section it is evident that the \textit{only} express restriction on the provisions of urban county government charters is that they must be consistent with the Kentucky Constitution. In that respect it is almost identical to the New Mexico statute; the fact that it does not clarify the position of the urban county government charter relative to general state laws (as does the New Mexico statute) is perhaps frustrating but it is not surprising,\footnote{75} and it \textit{does not} prevent the con-

\begin{footnotes}
\footnote{70}{See, e.g., \textsc{Del. Code Ann.} tit. 22, § 802 (Supp. 1970).}
\footnote{71}{\textsc{N.M. Stat. Ann.} § 14-14-5 (1968).}
\footnote{72}{\textsc{N.M. Stat. Ann.} § 14-14-11 (1968).}
\footnote{73}{Id. (emphasis added).}
\footnote{74}{KRS § 67A.020 (Supp. 1972). The portion given emphasis was not a part of the law as originally enacted in 1970 but was added as an amendment in 1972. \textsc{Ky. Acts} ch. 257 (1972) (emphasis added).}
\footnote{75}{In fact, this is but one of several parts of KRS Chapter 67A which seem to have been left purposely vague, bequeathing to the court the task of discerning the intent of the legislature and the application of existing laws in order to fill in the gaps.}
\end{footnotes}
clclusion that the intent of the Kentucky General Assembly was identical with that of the New Mexico legislature.

Two lines of argument support the foregoing assertion. First, a comparison of the language of KRS § 67A.020 with that of previously enacted Kentucky statutes indicates a radical and probably significant departure on the part of the more recent statute. KRS § 67A.020, unlike KRS § 83.011, does not impose upon charters enacted pursuant to its provisions the restriction that they may not conflict with "any statute now or hereafter enacted." A careful reading of KRS § 83.010 and KRS § 84.010, the statutes in which the power to enact local ordinances is delegated to first and second class cities respectively, is also instructive in this regard. The first sentence in KRS § 83.010, which is identical in all pertinent respects to that of KRS § 84.010, provides that:

the inhabitants of each city of the first class shall constitute a corporation, with power to govern themselves by ordinances and resolutions for the municipal purposes not in conflict with the constitution and laws of this state or of the United States.78

The difference between these statutes and KRS § 67A.020 is undeniable and may well support the conclusion that the General Assembly intended urban counties to exercise broader control over local affairs than is possible in any of the traditional structures of local government in Kentucky.

A second line of reasoning in support of this conclusion is offered by the Fayette Circuit Court in Pinchback v. Stephens.77 In his opinion, Judge Park concludes that:

If any plan of urban county government must fit within the present general statutory provisions applicable to counties and cities of the second class, the commission devising the plan of urban county government may find itself in a strait jacket.78

Under this rationale, if one concedes that the legislature intended actually to authorize a new form of government designed to meet the goals set forth in KRS § 67A.010, it must have intended that the urban county government charter not be bound by the existing Kentucky Revised Statutes.

Whether or not the Legislature has actually intended to extend to urban county governments such a carte blanche is presently an

76 KRS § 83.010 (emphasis added).
77 No. 31461 (Fayette Cir. Ct. 1972).
78 Id. at 14.
unresolved issue. The Court of Appeals' opinion in Pinchback certainly did little to foreclose discussion on the matter. In saying that it was not convinced that any plan developed under KRS Chapter 67A would necessarily violate the Constitution, the Court may have merely been stating that the minimum standard for constitutionality had been met. On the other hand, the Court could have been suggesting that most such plans would in all likelihood be unconstitutional and that the delegation of power under Chapter 67A is more limited than it appears at first blush. If such was the Court's meaning, however, it gave no indication of the nature of the factors which require such limits or of the precise point at which those limits must be set. For the present, then, all that can be safely concluded regarding the home rule aspect of KRS Chapter 67A is: (1) that it establishes legislative home rule for urban counties in Kentucky; (2) that it appears to involve a delegation of power to local governments much broader than any heretofore authorized in this state; and (3) that the delineation of the precise scope of that delegation of power must await future litigation involving specific plans of urban county government.

II. CITY-COUNTY CONSOLIDATION

The second noteworthy aspect of KRS Chapter 67A (and by far the most important) is that it authorizes the voters of every Kentucky county except those containing first class cities to “merge all units of city and county government into an urban county government.”79 With this provision, Kentucky joins a growing list of states which offer city-county consolidation as one solution to the ever-increasing problems of local government.

The history of city-county consolidation in the United States is separable into two periods, conforming roughly to the 19th and 20th centuries.80 They are respectively: (1) the period of merger by state action—both constitutional and statutory; and (2) the period of merger by local referendum.81 In the period of merger by state action, all the successful mergers were accomplished by direct acts of state legislatures or constitutional conventions usually without effort to gain the consent or advice of the electorate in affected areas.82 The more notable mergers effected during this era involved New Orleans,83 Boston,84

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79 KRS § 67A.010 (Supp. 1972) (emphasis added).
80 Makielski 1.
81 Id.
82 Id.; See, e.g., COLO. CONST. art. XX, § 1.
83 1805.
84 1822.

In the 20th century, the period of merger by referendum, the number of successful mergers has steadily increased. The list of cities and counties consolidated by the local electorate includes Baton Rouge—East Baton Rouge Parish, Louisiana; Hampton—Elizabeth City County, Virginia; Miami—Dade County, Florida; Nashville—Davidson County, Tennessee; and Jacksonville—Duvall County, Florida. The most recent city-county consolidation, however, does not follow the modern trend. The merger of Indianapolis and Marion County, Indiana in 1969 presents a situation unique to this era—a city-county consolidation achieved solely by the state legislature. In searching for the factors which prompted the Indiana legislature to choose this approach it is enlightening to examine the success of the merger movement in the last 50 years. Between 1921 and 1969, some 31 merger proposals were submitted to voters in various localities across the country. Only seven of these were approved. In the period from 1921 to 1947, not one of the eight proposed mergers was adopted, and even in the period between 1947 and 1969, in which merger proponents claim considerable progress, defeats for merger proposals out-number victories by more than two to one. It is, therefore, not difficult to understand why the Indiana legislature chose the route that it did.

A. Types of City-County Consolidation

In most instances, city-county consolidation involves complete or nearly complete merger of all branches of the participating governments. This may come about by the abolition of the offices of the

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85 1854.
86 1856.
87 1874-1898. The present city of New York was formed during this twenty-four year period by a series of consolidations involving New York City, Brooklyn, New York County, Kings County, Queens County, and Richmond County.
88 1902.
89 1907.
90 1947.
91 1952.
92 1957.
93 1962.
94 1967.
96 Makielski 3-4.
97 Id.
98 Id.
99 Id. In that period seven merger proposals were adopted while fifteen were rejected.
100 See, e.g., KRS §§ 67A.010-.040; TENN. CODE ANN. 36-3701 to -3725 (1971).
county government and an assumption of those duties for the entire merged area by the city government, but a merger usually involves the creation of a new governmental structure that replaces both of the former ones. Some merger statutes, however, do not require such full participation. For example, while KRS § 67A.010 authorizes the merger of "all units of city and county government", North Carolina's merger statute merely provides for the consolidation of administrative functions of cities and counties "as far as is practicable." In addition, at least three merger provisions contemplate or specifically authorize the consolidation of the county and its principal city to the exclusion of some or all of the other cities and towns within the county.

A certain degree of confusion has always surrounded the concept of city-county consolidation, stemming in part from the view that ordinary city-county consolidation is the same as the separation of a city from its surrounding county. The basis of this misconception is the idea that once the city was separated from its parent county, it received all the powers that the county had formerly exercised within the city limits, thus, in effect, becoming a city and a county (for example, the City and County of San Francisco).

The difference between these two variations of city-county consolidation is primarily one of geography. Under city-county separation, which is currently in operation in Denver, San Francisco, and the recently merged municipalities of Virginia, the area over which the county has jurisdiction is reduced while the area over which the city has jurisdiction remains unchanged (although its powers within that area are increased). In contrast, under true consolidation, one government becomes responsible for exercising all or most of the powers that were previously held by the city and county governments and controls the entire area that originally comprised the city and the county. As a result, "the boundaries between the two units are

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102 See, e.g., KRS § 67A.010; TENN. CODE ANN. 36-3071 to -3725.
105 Makielski 1.
106 Id.
107 Id. One criticism of city-county separation is that it does have the advantage of removing the responsibility for rural government from city taxpayers, but unless annexation is permitted, it also tends to freeze city-county boundaries. If, as in Virginia, cities may annex portions of the county from which they have separated, the fiscal viability of the county could be threatened. Lineberry 694-95.
108 Makielski 1; see Dixon, supra note 1, at 63.
eliminated, and most or all governmental services are provided for the whole area."

The distinction between city-county separation and true consolidation would be of only academic interest for those affected by KRS Chapter 67A if it were not for the language of a portion of the Fayette Circuit Court's opinion in Pinchback v. Stephens: 110

... consolidated city-county government can best be illustrated by examining San Francisco. It is both a city and a county, although the boundaries of the two entities are coincident. San Francisco performs the functions of both a county and a city. The functions performed in a particular case determine whether San Francisco is to be viewed as a city or a county. Although chosen by the same body of voters, the functions of its officers are determined by the source of their authority, that is whether they are acting in a particular case as a city official or as a county official. This is true even in cases in which the official performs both county and city functions. 111

This part of the Circuit Court opinion was adopted verbatim by the Court of Appeals in its decision in Pinchback, 112 and although the Court did not also adopt the Circuit Court's conclusions based on that statement, 113 neither did it reject them.

A second permutation of the city-county consolidation concept, called the federation, has been employed by several Canadian cities, but only by the locality of Miami—Dade County in the United States. 114 Under this approach, local governmental functions in the affected area are allocated between two levels, "with the metropolitan government being assigned certain area wide functions and local units retaining responsibility for local functions." 115 In effect, this arrangement makes Miami—Dade County really more of a microcosm of a home rule state than a truly consolidated metropolitan government.

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110 Makielski 1.
111 Id. at 6.
112 484 S.W.2d 327, 329 (Ky. 1972).
113 Judge Park concluded that since a consolidated government is, like San Francisco, a city and a county, the city does not cease to exist by reason of the merger. This conclusion, if ultimately upheld, could have great practical implications for any community electing to operate under KRS Chapter 67A.
114 Lineberry 698. It should be noted, however, that under the North Carolina merger statute, Section 153-246 of the General Statutes of North Carolina, the federation structure appears to be quite feasible. Consolidation of administrative functions "as far as practicable" could well result in merger of various area wide functions (i.e., education, sanitation) without disturbing the operation of other "local" concerns.
115 Id. For a thorough discussion of the Miami-Dade County governmental structure see Note, The Urban County: A Study of New Approaches to Local Government In Metropolitan Areas, 73 Harv. L. Rev. 526 (1960).
B. Comparative Sources of Merger Authorization

As is the case with home rule powers, the source of authority for city-county consolidation varies greatly from state to state. In isolated instances, for example, the authority to merge city and county governments is established in special, self-executing constitutional provisions which delineate both the particular city and county that are to be merged and the method for doing so. In other, equally rare, special constitutional provisions, the power of merger is delegated to the electorates of specified cities to be exercised at their discretion. More commonly, however, the constitutional provisions authorizing city-county consolidation are general in nature and are implemented by special acts which are subsequently submitted to the populace of the affected area for approval or disapproval. For instance, Article VIII, Section 3 of the Florida Constitution states:

The government of a county and the government of one or more municipalities located therein may be consolidated into a single government which may exercise any and all powers of the county and the several municipalities. The consolidation plan may be proposed only by special law, which shall become effective if approved by a vote of the electors of the county, or of the county and the municipalities affected as may be provided in the plan.

Pursuant to this mandate, the Florida legislature appointed a charter commission in the mid-1960's to devise a plan of consolidation for Jacksonville—Duvall County. The charter thus drafted was enacted by the legislature in Chapter 67-1320 of the Florida Statutes of 1967 and was approved by the voters of Duvall County on August 8, 1967.

City-county consolidation is also authorized in a number of states by means of a general constitutional provision coupled with a general implementing statute. In such states, the power to raise the issue of merger and to devise a charter for the merged government is left exclusively with the local electorate or its representatives. A good illustration of this alternative is found in Tennessee where the general

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116 The word "special", as used herein, refers to statutes and constitutional provisions which pertain only to one particular city; "general" provisions, on the other hand, are those which apply to all cities within a particular classification alike.

117 Colo. Const. art. XX, § 1; Pa. Const. art. 9, § 13.

118 Mo. Const. art. VI, § 80(a).


120 Fla. Const. art. VIII, § 3 (emphasis added).

121 Lineberry 700.

constitutional merger provision is implemented by a statute which applies to all cities and counties in the state.\textsuperscript{123}

Finally, there are those states which permit consolidation by statute in the absence of any applicable constitutional provision. In such states, the legislature's authority to take such action (as is the case with legislative home rule, \textit{supra}) stems from the absence of constitutional language prohibiting passage of merger legislation.\textsuperscript{124} Both of the states which have adopted this approach, Indiana and Kentucky, have enacted \textit{general} merger statutes,\textsuperscript{125} equally applicable to all cities and counties which fit within their respective confines. It should be noted, however, that while the Indiana law is technically a general statute, it is, in spirit and effect, special legislation in that it applies only to first class cities and was tailored to fit the needs of the only qualifying locality, Indianapolis—Marion County.\textsuperscript{126} KRS Chapter 67A, in contrast, is truly a statute of general application which, though perhaps originally introduced with Lexington and other particular areas of the state in mind, is presently available to every city in this state \textit{except} Louisville.

III. \textbf{Other Noteworthy Features of Chapter 67A}

Beyond the two broad characteristics of KRS Chapter 67A discussed heretofore, there are three more specific features of the statute which require further analysis. The effect of these sections, although perhaps minor in comparison to the overall impact of the statute, may nonetheless be of great practical importance for those seeking to implement city-county consolidation.

A. \textit{KRS 67A applies to "any county except a county containing a city of the first class..."}

Under this provision it would seem that "local governmental reform" in Kentucky is hardly synonymous with "metropolitan reform." Kentucky has only one truly metropolitan area—Louisville, and only one other area that could arguably be classified as metropolitan—Lexington. Section 60 of the Kentucky Constitution defines first class cities as those with populations of 100,000 or more. Therefore, Louisville, which has a population in excess of 350,000\textsuperscript{127} is clearly outside the scope of Chapter 67A, and Lexington, which has a population of

\textsuperscript{123} \textit{Tenn. Code Ann. §§ 6-3701 to -3725 (1971).}
\textsuperscript{124} See note 52, \textit{supra}; Pinchback v. Stephens, 484 S.W.2d 327 (Ky. 1972).
\textsuperscript{125} \textit{Ind. Ann. Stat. §§ 48-9101 to -9507 (Supp. 1970); KRS § 67A.010-.040 (Supp. 1972).}
\textsuperscript{126} See Dortch v. Lugar, 226 N.E.2d 25, 30-31 (Ind. 1971).
\textsuperscript{127} 1970 Federal Census.
over 107,000\textsuperscript{128} is only within the purview of the statute by virtue of the General Assembly's failure to reclassify it when its population reached the prescribed plateau.

In this respect Chapter 67A is an anomaly among consolidation statutes. In every other state in which the application of merger laws is or has at one time been restricted according to the size of the participating units, only the largest cities have been allowed to avail themselves of the statute's provisions.\textsuperscript{129} In Frazer v. Carr,\textsuperscript{130} the Supreme Court of Tennessee held that in restricting the operative scope of the Tennessee statute to those counties with a population of 200,000 or more, the legislature had acted reasonably because

\[\text{all know that it is in these large counties that the problem of the large cities as to the ever increasing population just beyond the corporate limits become more acute, complex, and confusing.}\textsuperscript{131}\]

Similarly, in Dortch v. Lugar,\textsuperscript{132} the classification under which only cities of the first class fall within the scope of Indiana's consolidation law was found to be rational and valid.\textsuperscript{133} Notwithstanding these prior decisions, the Kentucky Court of Appeals in Pinchback v. Stephens\textsuperscript{134} declared that:

we think the exclusion of a county containing a first class city has a rational and reasonable basis in that in such a county the problems to be overcome in establishing an urban government are more complex by reason of the size of the population and its apportionment among the various local governmental units. As is the case with Louisville and Jefferson County, the first class city will ordinarily be larger in population than the unincorporated territory of the county; this is not usually the case with any cities of lower classes, and this distinction furnishes the justification for separate legislative treatment in the area of urban governmental organization.\textsuperscript{135}

It is submitted that, in so holding, the Kentucky Court has properly recognized that population does furnish a reasonable basis for statutory classification in the area of local government. It seems to have erred, however, in finding rationality in a particular classification which

\textsuperscript{128} Id.
\textsuperscript{129} See, e.g., IND. ANN. STAT. §§ 48-9101 to -9507 (Supp. 1970); ORE. Const. art. X, § 4. In addition, the Tennessee statute when originally enacted applied only to counties having a population of 200,000 or more. TENN. CODE ANN. § 6-8703 (repealed 1963).
\textsuperscript{130} 380 S.W.2d 449 (Tenn. 1962).
\textsuperscript{131} Id. at 452.
\textsuperscript{132} 266 N.E.2d 25 (Ind. 1971).
\textsuperscript{133} Id. at 31-32.
\textsuperscript{134} 484 S.W.2d 827 (Ky. 1972).
\textsuperscript{135} Id. at 830.
denies an important instrument of urban governmental reform to the areas that need it most.

B. The concluding sentence of KRS § 67A.020 provides that

[i]f it appears that a majority of those voting are in favor of adopting the plan, the commissioners shall enter such fact of record and shall organize the urban county government. (emphasis added).

The “majority” referred to in the foregoing section is “the majority of those voting in the city and the county together.” The Kentucky statute makes no allowance for a separate polling of the city and county electorates on the question of merger. Conversely, the merger provision of the Tennessee Constitution requires that proposed plans for city-county consolidation be

approved by a majority of those voting within the municipal corporation and by a majority of those voting in the county outside the municipal corporation.136

Florida occupies the middle ground between these two positions by allowing consolidation proposals to become effective “if approved by a vote of the electors of the county, or of the county and the municipal corporation affected, as may be provided in the plan.”137

Of the three, the Tennessee position seems to be the soundest since it alone removes the possibility that the government of a city or a county might be terminated through merger despite the fact that a majority of its residents opposed such a move. Still, the Kentucky provision is probably safe for the present in that the validity of such a section does not appear to have been challenged elsewhere and the prospects are not good for a final resolution of the issue by the Kentucky judiciary in the near future.138

C. KRS § 67A.040 states:

All powers and privileges possessed by the county and the class of cities to which the largest city in the county belongs on the date the urban county government becomes the effective government shall be exercised by the urban county government. (emphasis added).

This section conforms to the standard delegation of power to consolidated city-county governments,139 with one important exception:

137 Fla. Const. art. VIII, § 3.
138 This issue is not a factor in the Lexington-Fayette County merger since approximately 70% of the residents of the city and the county separately and collectively approved the plan.
it can easily be read as permanently restricting the powers of the urban county government to those available to it when it was originally created. Again, the law of Tennessee exemplifies the better approach (in terms of both substance and clarity) by endowing consolidated cities and counties with "all the powers and duties which cities and counties have or may hereafter have authorized to them"\textsuperscript{140} under the Constitution and general laws of Tennessee. Despite the apparent differences in the two statutes, the Kentucky law has already been interpreted by some as embodying a grant of powers identical to that under the Tennessee statute. Article 3, Section 3.01 of the charter of the Lexington–Fayette Urban County Government thus boldly asserts that

\begin{quote}
[p]ursuant to KRS 67A.040, the Lexington-Fayette Urban County Government shall have all powers and privileges which cities of the second class are, or may hereafter be authorized or required to exercise under the Constitution and general laws of the Commonwealth of Kentucky . . . [and in addition] . . . such other powers and privileges which counties are, or may hereafter be authorized or required to exercise. . . .\textsuperscript{141}
\end{quote}

Whether the Court of Appeals chooses to read KRS § 67A.040 strictly or decides instead to adopt the more liberal interpretation of the Lexington–Fayette Charter Commission will determine to a large extent the long-run attractiveness of the concept of urban county government for Kentucky's cities and counties.

\textit{Conclusion}

Chapter 67A of the Kentucky Revised Statutes is a forward-looking statute which, if properly construed, should enable Kentucky to keep pace in the area of local government reform with even the most progressive states. It delegates to local electorates not only the power to initiate governmental reform, but also the power to define the structure of that reform and the authority to finalize its adoption. The only serious defect in the statute is that it does not apply to the largest urban center of the state, which in reality may be the single area which could benefit the most by its provisions. Even this omission, however, does not greatly diminish its significance.

Hopefully, the Courts too will recognize the tremendous potential for positive governmental reform that is encompassed in Chapter 67A and will refrain from imposing upon it any statutory or constitutional straight jacket. If they do so refrain, the cities and counties of Ken-

\textsuperscript{140} TENV. CODE ANN. § 6-3711 (1971) (emphasis added).
\textsuperscript{141} Lexington-Fayette Urban County Government Charter art. 3, § 3.01 (1972) (emphasis added).
tucky will thereby move a giant stride closer to finding a permanent solution to many of their governmental woes.

**Addendum**

The Kentucky Court of Appeals, on December 28, 1973,\(^{142}\) handed down a far-reaching decision in *Holsclaw v. Stephens*.\(^{143}\) Therein, the Court upheld the Lexington-Fayette Urban County Government Charter in every important respect and enunciated several principles regarding KRS Chapter 67A that should serve to secure firmly the foundation of the urban county in Kentucky.

Treating first the question of city-county consolidation, the Court found "nothing in the constitution which requires that subdivisions of local government be limited to cities and counties"\(^{144}\) and concluded that the General Assembly "may . . . establish a new unit of local government in which are combined the powers of both city and county governments."\(^{145}\) In characterizing the urban county, the Court declared:

> This new form of government is neither a city government nor a county government as those forms of government presently exist but it is an entirely new creature in which are combined all of the powers of a county government and all the powers possessed by that class of cities to which the largest city in the county belongs.\(^{146}\)

The Court went on to resolve many of the questions left unanswered by the *Pinchback* decision\(^{147}\) by holding that

> the adoption of an urban county form of government extinguishes all city government and all county government, except units and functions of county government established by the Constitution, which theretofore existed in the county.\(^{148}\)

As such, neither the city nor its territorial jurisdiction will continue to exist within the structure of an urban county government.

The Court had more difficulty determining the scope and validity of the delegation of power to local authorities contained in KRS Chapter 67A. In resolving this issue it recognized a distinction between the exercise of the legislature's discretion as to "what the law

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\(^{142}\) At the date of completion of the foregoing article the decision analyzed herein had not been rendered. Any discussion of the current status of the urban county in Kentucky, however, would be incomplete without reference to this case.

\(^{143}\) No. 73-894 (Ky. Ct. App., Dec. 28, 1973).

\(^{144}\) Id. at 11.

\(^{145}\) Id. at 12.

\(^{146}\) Id.,

\(^{147}\) See footnote 113 and accompanying text, *supra*.

\(^{148}\) No. 73-894, at 22.
shall be” and the exercise of its discretion “in the administration of the law itself.” The Court then concluded that “the authorization of urban county government and the establishment of its powers was a legislative enactment within the sole discretion of the General Assembly,” and that no authority was, or could be, delegated to affect the powers and responsibilities of the urban county government which the legislature so established. In contrast, the Court held that

the structure of urban county government is nothing more than the machinery by which those powers and responsibilities may be executed and therefore the authority to provide the structure can be delegated.

It is evident, from an examination of the Charter provisions thereby upheld, that the Court intends the definition of the word “structure” as used above to include the whole range of powers conferred upon local authorities by KRS § 67A.020.

The Court of Appeals in Holsclaw did not, however, adopt the doctrine of imperio in imperium. Rather, it announced two broad principles which will for the present operate as the practical equivalent of that concept. First, in resolving the conflict between various charter provisions and the general laws of the state the Court held that

in enacting KRS § 67A.010-67A.040 it was the intent of the legislature to create urban county government as a separate classification of government and to exempt it as a class from the operation of general laws relating to city government and county government except those which confer powers upon city and county governments.

In other words, the present laws of the state of Kentucky are inapplicable to urban county governments, and in the absence of general laws other than KRS Chapter 67A which are applicable to that form of government, local authorities have virtually a free hand in structuring local government. Neither, apparently, will this freedom significantly be restricted by the provisions of the Kentucky Constitution. Indeed, the second of the Court’s broad principles, which follows from the determination that within an urban county government the

149 Id. at 13.
150 Id. at 14.
151 Id. at 15.
152 Id.
153 The effect of the Court’s decision in Holsclaw could be eroded by a proliferation of legislation pertaining specifically to urban county governments. Some proposals in this regard appear almost certain to come before the General Assembly in the current session as a special legislative task force commissioned to study urban county governments reports its findings and recommendations.
154 No. 73-894, at 20-21.
city ceases to exist, is that at least some of the provisions of the Constitution which relate to cities will not be extended, even by analogy, to apply to urban county governments. Thus the Court held Sections 160 (requiring at-large voting for city councilmen) and 246 (limiting the salaries of certain public officials) inapplicable to the Lexington-Fayette Urban County Government.

In this decision, the Court of Appeals refrained from imposing statutory and constitutional restrictions which could have rendered KRS Chapter 67A virtually impotent. For this it is to be highly commended. Hopefully, it will adhere to the propositions announced in Holsclaw in the future litigation than seems certain to arise involving urban county governments. If the General Assembly in the present and succeeding sessions accordingly remains devoted to the idea of self-determination for urban counties and if more communities follow the lead of Lexington and Fayette County, Kentucky will soon take a great step toward genuine governmental reform.

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