An Analysis of Authorities: Traditional and Multicounty

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Banking and Finance Law Commons, State and Local Government Law Commons, and the Transportation Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol71/iss7/3

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
An Analysis of Authorities: Traditional and Multicounty

I. INTRODUCTION

The ills that plague American metropolitan centers are all too familiar. Not least among them are the over-burdened system of financing municipal services and the lack of coordination of the services provided by the multitude of local governments that make up urban areas. It is thus surprising that little attention has been paid to recent developments concerning public authorities, autonomous government entities created for the solution of a single problem and primarily financed, not through new taxes, but through private investment in revenue bonds.

For years state and local governments have used the authority device to provide revenue-generating services. Among the reasons for the popularity of authorities have been their ability to finance capital facilities without increasing taxes or violating state debt restrictions on local governments and the belief that they operate more efficiently.


2. See, e.g., U.S. Advisory Commn. on Intergovernmental Relations, Alternative Approaches to Governmental Reorganization in Metropolitan Areas 8-10 (1962) (fragmentation of governmental units, failure to achieve coordination and economies of scale); U.S. Advisory Commn. on Intergovernmental Relations, Metropolitan America: Challenge to Federalism 30-37 (1961) (failure to achieve economies of scale, fragmentation of governmental units in provision of utilities) [hereinafter Metropolitan America].

than other governmental bodies because of their corporate structure and powers. In recent years, however, the jurisdictional flexibility of authorities, which allows them to be superimposed upon a given area without regard to existing city and county boundaries, has become increasingly important in decisions to create them. As a result, a new wave of powerful multicounty authorities has been generated throughout the country, as evidenced by such bodies as the New York Metropolitan Transportation Authority, the Massachusetts Bay Transportation Authority, the San Francisco Bay Area Rapid Transit District, and the New York State Environmental Facilities Corporation.

This Comment will briefly define and describe authorities in general, as well as the new multicounty authorities. Their legal status and practical advantages and disadvantages will be explored. Finally, an attempt will be made to isolate the uses to which multicounty authorities can most profitably be put in light of the conflicting goals of maximum governmental efficiency and public accountability.

II. PUBLIC AUTHORITIES: BACKGROUND

A. Definition and Description

Authorities are one of several types of governmental units that, unlike more traditional governmental bodies, are assigned a single responsibility. Single-purpose units can be divided into two categories: (1) agencies, bureaus, boards, and commissions, which are merely branches of such general-purpose governments as cities, counties, and states; and (2) special governments, which include special districts and public authorities. Special governments are characterized by corporate organization, financial and operational independence, and jurisdictional flexibility. Within this category, different methods of financing distinguish public authorities from special districts. See N.Y. PUB. AUTH. LAW §§ 1260-78 (McKinney 1970), as amended, N.Y. PUB. AUTH. LAW §§ 1263-76-a (McKinney Supp. 1972).


8. Authorities remain perhaps the least known and understood of all governmental units. One commentator characterized "special districts"—defined in a way that includes many of the authorities with which this Comment is concerned—as "the 'new dark continent of American politics,' a phrase applied earlier in the century to counties." J. BOLLENS, SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES 1 (1957).

cial districts are backed by the taxing power of the creating state or local government; they are financed through current tax revenues or through general obligation bonds that pledge future tax revenues. Apart from school districts, which outnumber all the other kinds combined, the most common kinds of special districts are soil conservation, drainage, fire protection, housing and urban renewal, water supply, cemetery, and sewerage districts. Public authorities, on the other hand, operate primarily through the sale of revenue bonds that are not backed by taxes. A typical authority constructs and operates a revenue-producing facility and pays its bondholders with self-generated revenue. Authorities are most frequently used in areas of traditional state responsibility, such as providing transportation (including port and terminal facilities, highways, bridges, tunnels, ferries, and transit systems), operating public buildings (including schools, dormitories, courthouses, and administrative offices), and constructing dams, airports, and hospitals. Yet, they have also been used to operate pollution control facilities, parking facilities, recreational facilities, garbage disposal plants, steam heating systems, industrial exhibits, municipal theaters, war memorials, planetariums, and mineral springs.

The numerical growth of special governments is an indication of their increasing importance in state and municipal government. Their number has increased from 8,299 in 1942 to 21,264 in 1967. The statistics do not distinguish between special districts and authori-


11. Id. at 5.

12. URBAN AREAS, supra note 3, at 246. It must be noted that there is not universal agreement on this distinction. See, e.g., J. BOLLEN, supra note 8; GOVERNMENTAL ORGANIZATION, supra note 10, at 14 (possession of taxing power "noncritical" to definition of "special district," no distinction made between special districts and public authorities); U.S. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, THE PROBLEM OF SPECIAL DISTRICTS IN AMERICAN GOVERNMENT 1 (1964). A vast semantic problem is also created by the various state systems of nomenclature, which use such terms as "authorities," "districts," "public corporations," "commissions," and "agencies," seemingly without regard to the actual characteristics of their creations. Gerwig, supra note 9, at 592-94. See also Novak, Legal Classification of Special District Corporate Forms in Colorado, 45 Denver L.J. 347 (1968).


14. Gerwig, supra note 9, at 597.

15. GOVERNMENTAL ORGANIZATION, supra note 10, at 28. The same figures show that "special districts," which by Census Bureau definition include authorities, increased in number 16.1 per cent between 1962 and 1967, while the next greatest percentage increase was only .5 per cent, for municipalities. Id.
ties, but almost half of the special-purpose units lack the power to levy property taxes.

The amount of outstanding debt of special governments is a rough measure of the number and size of the capital facilities that they finance and operate. The total debt outstanding of special governments in 1966-67 was 17.2 billion dollars, more than twice the total debt of county governments and about one fifth of the total debt of all local governments. Individual special governments, however, vary greatly in size and importance. Ninety per cent of the special governments had outstanding debts of less than 1 million dollars. The fact that there are twenty-five districts and authorities with debt greater than 100 million dollars, including the Port of New York Authority with expenditures of 210 million dollars and debt of 845 million dollars, indicates that financial power is concentrated in a few large units. These are found, as would be expected, in areas of dense population; although only about one third of all the special districts and authorities are within Standard Metropolitan Statistical Areas, most of the large special governments, which deal with transit, housing, water and sewerage, and port facilities, are found in urban areas.

One of the most important aspects of special governments is the fact that their jurisdiction can be defined to fit a particular need without regard to existing city or county boundaries. Thus, a water supply district or transit authority may be superimposed upon the grid of city limits and county lines, its shape dictated only by the dimensions of the problem to be solved. This unique characteristic has not been taken advantage of as frequently as might be expected. The vast majority of special districts and authorities are located entirely within one county, and nearly one fourth have the same boundaries as some

16. Id. at 14.
17. Id. at 12.
18. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, 1967 CENSUS OF GOVERNMENTS, VOL. 4, NO. 2: FINANCES OF SPECIAL DISTRICTS 3 (1968) [hereinafter FINANCES OF SPECIAL DISTRICTS]. About 13.2 billion dollars of the debt was unsecured and not "full faith and credit" debt. Id.
19. GOVERNMENTAL ORGANIZATION, supra note 10, at 5.
20. FINANCES OF SPECIAL DISTRICTS, supra note 18, at 4.
21. Altogether, the 25 largest (out of 21,264) special governments account for more than one fourth of the national totals of special-government revenue, expenditure, and indebtedness. In addition, only 12 state governments had a larger amount of debt outstanding than the Port of New York Authority. Id.
22. Standard Metropolitan Statistical Areas, defined by the U.S. Bureau of the Budget, generally consist of a single county or a group of contiguous counties that includes at least one central city of at least 50,000 inhabitants. In 1967, there were 227 SMSAs, within which nearly two thirds of the country's population resided. GOVERNMENTAL ORGANIZATION, supra note 10, at 10.
23. FINANCES OF SPECIAL DISTRICTS, supra note 18, at 3-4.
unit of general government. However, in 1967, there were some 2,300 special governments extending into two or more counties.24

B. Creation, Organization, and Termination

 Authorities usually originate in one of three ways,25 pursuant to a state's power to provide for the creation of local governmental entities: (1) through special act of the state legislature;26 (2) through a general act allowing counties and municipalities, singly or together, to create authorities;27 or (3) through a general act enabling the electorate of a defined region to approve their creation.28 Although usually less visible, authorities created by cities and counties under enabling acts have much the same legal structure and status as the larger authorities created directly by the state.29

As with any statutorily created body, a given authority's structure and powers can only be understood by reference to the specific legislation creating it. Nevertheless, some generalizations as to organization and management are possible. Most authorities follow a corporate pattern and are governed by a board of commissioners or directors, who are generally not paid a salary.30 Directors are likely to be middle-class businessmen or professionals.31 On the whole, there are more elected than appointed officials directing special govern-

24. GOVERNMENTAL ORGANIZATION, supra note 10, at 5-6. An authority that extends into two or more counties is not necessarily a "multicounty authority" as the term is used in this Comment. The multicounty authorities discussed herein have jurisdiction over the entire area of two or more counties.

25. COUNCIL REPORT, supra note 9, at 38-39, also mentions creation by the state executive pursuant to legislative authorization, a fourth method that is rarely encountered.


27. See, e.g., PA. STAT. ANN. tit. 16, § 12601 (Supp. 1975): "In each county of the second and second A class of this Commonwealth, there is hereby created a body corporate and politic to be known as the 'Authority' of said county . . . provided, however, that such 'Authority' shall not become operative nor transact any business until and unless the board of county commissioners . . . declare its creation, and appoint and designate the members thereof, as in this act herein prescribed." For similar authorization to cities, see PA. STAT. ANN. tit. 53, § 303 (1957). See also Mich. COMP. LAWS ANN. § 124.352 (Supp. 1975) (allowing the creation of mass transportation authorities by cities with populations of not more than 300,000); Mich. COMP. LAWS ANN. § 124.404 (Supp. 1975) (permitting one or more counties in major metropolitan areas to create regional transportation authorities).

28. See, e.g., WASH. REV. CODE ANN. § 35.58.030 (1965), which authorizes two or more cities, at least one of which is a "city of the first class," to organize metropolitan municipal corporations following voter approval. An election may be called by a resolution of (1) the city council of a central city or the board of commissioners of a central county, or (2) the city councils of two or more of the noncentral component cities. Alternatively, an election may be called by petition of four per cent of the registered voters within the metropolitan area. WASH. REV. CODE ANN. § 35.58.070 (1965).

29. See Gerwig, supra note 9, at 599.

30. COUNCIL REPORT, supra note 9, at 40-44, 47; Gerwig, supra note 9, at 601.

31. PUBLIC AUTHORITIES, supra note 3, at 57-64.
ments,32 but the more important authorities are usually governed by appointed directors.33 Occasionally, directors are appointed exclusively by the governor.34 In other authorities, some directors are appointed by the governor and others by local mayors.35 However, when a measure of localism is desired, the power to appoint or to approve the appointment of authority directors is often reserved to the governing bodies of the affected cities and counties.36

An authority is given a number of corporate powers in order to carry out its purposes. New York authorities, for example, are almost invariably allowed to sue and be sued, to have a seal, to borrow money and issue negotiable notes and bonds, and to make bylaws for internal management.37 Also, the control given an authority over a revenue-producing project usually explicitly includes the power to set rates for the service.38

Certain governmental powers, such as eminent domain,39 the subpoena power,40 and the power to establish a police force,41 may also be explicitly given to an authority if necessary to the accomplishment of its goals. In addition to these powers specifically designated by statute, authorities may also possess ancillary powers, which may be derived from a “necessary and proper” clause in the legislation42

36. E.g., CAL. PUB. UTIL. CODE §§ 28701, 28733 (West Supp. 1973) (San Francisco Bay Area Rapid Transit District); N.Y. PUB. AUTH. LAW § 1053 (McKinney 1970) (Erie County Water Authority). See Tobin, The Legal and Governmental Status of the Metropolitan Special District, 13 U. MIA. L. REV. 123, 148 (1959), for examples of special districts with city or county officials as ex officio directors, another concession to localism.
38. See, e.g., text accompanying notes 103 & 141 infra.
39. For examples of authorities with the power of eminent domain, see CAL. STS. & HWS. CODE § 30403 (West 1969) (California Toll Bridge Authority); CAL. PUB. UTIL. CODE § 29010 (West 1959) (San Francisco Bay Area Rapid Transit District). See also Gerwig, supra note 9, at 601; Tobin, supra note 36, at 149.
41. E.g., N.J. STAT. ANN. § 52:2-25 (1969) (Port of New York Authority in New Jersey); MASS. ANN. LAWS ch. 147, § 10D (1972) (Massachusetts Turnpike Authority).
42. E.g., MICH. COMP. LAWS ANN. § 124.406(i) (Supp. 1973) (Southeastern Michigan Transportation Authority); N.Y. PUB. AUTH. LAW §§ 1054(18) (Erie County Water Authority).
or may be implied by a court.\textsuperscript{43}

There is little control or supervision by the parent government over the means by which an authority carries out its functions.\textsuperscript{44} Because they are independently financed, authorities need not submit appropriations requests to be examined as part of a general government's yearly budget review. As one commentator summarizes, "In a very practical sense . . . they are the most autonomous units of government in the country."\textsuperscript{45}

Authorities were originally seen as temporary entities, which were to fulfill a specific purpose, pay off their bondholders, turn their property over to the state or city, and then dissolve.\textsuperscript{46} This pattern is sometimes followed in small authorities, but the virtual permanence of larger authorities is now taken for granted.\textsuperscript{47} Authorities are now responsible for projects whose cost and size require long-range planning, and they usually issue long-term bonds. Moreover, authorities in metropolitan areas are almost inevitably caught up in plans for additional capital construction, supplementary facilities, or improvements. Since the legislation creating many authorities pledges to the bondholders that the state will not alter the rights of the authority to collect revenues until all debts and the interest thereon are paid,\textsuperscript{48} each new issue of bonds for expansion that extends the final maturity date also extends the projected date of the termination of the authority.\textsuperscript{49}

\textsuperscript{43} See California Toll Bridge Authority v. Kuchel, 40 Cal. 2d 43, 53, 251 P.2d 4, 9 (1952) (authority has only such additional powers as are necessary for the efficient administration of powers expressly granted, or such as may be fairly implied).

\textsuperscript{44} See Council Report, supra note 9, at 41. See also Public Authorities, supra note 3, at 53-57.

\textsuperscript{45} Public Authorities, supra note 3, at 55.

\textsuperscript{46} The language found in many of the New York statutes creating authorities expresses this idea. For example, the statute creating the Nassau County Bridge Authority reads: "Such board and its corporate existence shall continue only for a period of fifteen years, and thereafter until all its liabilities have been met and its bonds have been paid in full or such liabilities or bonds have otherwise been discharged. Upon its ceasing to exist, all its rights and properties shall pass to the county of Nassau." N.Y. Pub. Auth. Law § 653 (McKinney 1970). See also N.Y. Pub. Auth. Law § 1402 (McKinney 1970) (Amsterdam Parking Authority).

\textsuperscript{47} See generally Urban Areas, supra note 3, at 1-48.


\textsuperscript{49} The legislation creating the Triborough Bridge and Tunnel Authority explicitly authorizes the continuation of the Authority's control over all its projects as long as any liabilities are outstanding, despite the fact that a particular project's bonds may have been paid off. N.Y. Pub. Auth. Law § 552(2) (McKinney 1970). See also Urban Areas, supra note 3, at 32: "It now is obvious that these agencies are not going to disappear from the scene of local government. They are units of government that must be worked into the fabric of American federalism."
C. Tax Exemption

Authorities, like other governmental units, enjoy tax exemption, which facilitates their operation in two ways. First, the interest received by investors on authority bonds is exempt from local, state, and federal income tax, which presumably renders the bond issues attractive to investors and thus makes possible the financing of public services at an interest cost lower than that which a profit-making corporation would have to pay. Second, authorities themselves are exempt from income taxes on their operating profit and from local property taxes, thus avoiding the anomaly of one branch of government taxing another branch.

The Internal Revenue Code provides that, generally, gross income does not include interest on the obligation of a state, or of any political subdivision of a state. A political subdivision is defined in the regulations to include any division of a state “to which has been delegated the right to exercise part of the sovereign power of the State...” In Commissioner v. Shamberg’s Estate, a case involving the taxability of the interest on bonds issued by the Port of New York Authority, the second circuit court of appeals found that the Port Authority was a “political subdivision” even though it lacked the power to tax because its activities were carried on for a “public purpose”:

Here the activities, even though some of them might have been exercised by private corporations under appropriate legislation, are exercised for a public purpose by an agency set up by the states and given many public powers, though not of taxation or control through the suffrages of citizens. It minimizes its public and political character to treat such an agency as a private corporation merely because of the lack of taxing power which is only one of the attributes of sovereignty.

The same court expressed much the same view in Commissioner v. White’s Estate, where it held that interest on the bonds of the Tri-
borough Bridge Authority was not subject to income tax, notwithstanding the fact that the bonds were the obligation of the Authority only and not of New York City. Since the issue has not been raised again, these cases appear to have settled the matter of federal income tax on authority bond interest. States follow the federal government in not taxing the income from these bonds, and most authority-creating legislation now pledges to bondholders that the bonds and notes, the income therefrom, and the fares and revenues pledged to secure the bonds will be free from taxation.

Since authorities are state created or authorized instrumentalities, they are not likely to be subjected to state and local property taxes; some statutes expressly exempt them. In Bush Terminal Co. v. City of New York, the plaintiffs sought to restrain the Port of New York Authority and the city from entering into a statutorily authorized contract for payments in lieu of the significantly greater regular property taxes. Despite the absence of an express provision in the statute exempting authorities from local property taxes, the court found the property immune under the general rule that property held by a state agency is immune from taxation when used for a public, rather than a profit-making, purpose. The immunity was not lost merely because the agency incidentally derived income from the property.

It is possible, however, that there will be increased pressure to tax authority property as it becomes known that authorities are increasingly involved in "proprietary" enterprises that may generate substantial surpluses and that they hold a great deal of valuable metropolitan property that would be taxed if owned by a private corporation.

55. At least three courts have discussed whether the income of authorities and the interest income of their bondholders can be exempted from taxation under their state constitutions. Orbison v. Welch, 242 Ind. 385, 179 N.E.2d 727 (1962); Opinion of the Justices, 334 Mass. 721, 136 N.E.2d 223 (1956); State ex rel. Thomson v. Gessel, 265 Wis. 185, 60 N.W.2d 378 (1953).

56. E.g., CAL. PUB. UTIL. CODE § 29290 (West 1965); GA. CODE ANN. §§ 95-2416, 95-2428 (1972); MASS. ANN. LAWS ch. 161A, § 18 (1970); N.Y. PUB. AUTH. LAW §§ 287-72, 536, 566, 566a, 1207g, 1225 (McKinney 1970).

57. E.g., N.Y. PUB. AUTH. LAW §§ 1243, 1299-o (McKinney 1970).


59. Under the statute the payments in lieu of taxes were not to exceed the tax that was collected on the land before the Authority purchased it. N.Y. UNCONSOL. LAWS § 6971 (McKinney 1961).

60. 282 N.Y. at 321-22, 26 N.E.2d at 276. See also Opinion of the Justices, 334 Mass. 721, 136 N.E.2d 223 (1956) (property—including that leased to commercial users—and income on bonds of proposed Massachusetts Port Authority tax exempt).

61. See text accompanying notes 84-87 infra.

62. See Gerwig, supra note 9, at 611 n.111. Some evidence that courts are occasionally willing to allow taxation of property over which the authority exercises control is found in Borough of Moonachie v. Port of New York Authority, 38 N.J. 414, 185 A.2d 207 (1962). The court there held that land acquired by the authority was tax exempt but that a manufacturing plant built by the Authority thereon and leased for revenue was subject to local taxes. See also Todd Shipyards Corp. v. Weehawken Twp., 45 N.J. 356, 212 A.2d 364 (1965).
As long as authorities carry out public purposes, there seems to be little point in taxing them, raising their costs, and using the revenue to carry out other public purposes, except perhaps in the case of an authority that accumulates a large surplus. In that case it might be argued that once the authority's duties are fulfilled, the other public purposes of the local governments ought to benefit from the revenues contributed by local citizens. Some authorities are already required to make payments in lieu of taxes by their creating legislation; the application of such a provision might best be triggered by the accumulation of a surplus.

D. History

At first the history of authorities was closely tied to that of special districts, which were in widespread use before the authority device was fully developed. Not only were many of the judicial doctrines relating to special districts carried over to authorities, but also legislative attitudes toward the two types of bodies tended to be similar because they were created for many of the same reasons.

The most important of these reasons may have been the desire to avoid constitutional and statutory limitations on the amount of debt that a state, county, or municipality may incur. These limitations originated in the economic disasters of the nineteenth century. The depression of 1837-39 found a number of state governments hopelessly overextended in their borrowing to finance public works; in a period of declining revenues and high fixed costs, nine state governments were forced to default, and four of these eventually repudiated portions of their outstanding debt. In the depression of 1873-79, it was primarily local, rather than state, governments that were...
overextended; defaults amounted to upwards of 150 million dollars out of a total of 750 million dollars of outstanding debt.\textsuperscript{67} These disasters, and further defaults in 1893, prompted many states to adopt constitutional restrictions on the types and amounts of debt that state and local governments could incur.\textsuperscript{68} As a result, a large number of states have long had constitutional restrictions on state debt, which set a debt ceiling, limit bond maturities to twenty years or less, or require referendum approval of debt proposals.\textsuperscript{69} Similarly, every state has restricted the incurring of debt by local governments, usually in one or more of five ways: (1) a limit on the amount of debt; (2) a time limit on the maturity of bonds; (3) a maximum rate of interest; (4) restrictions on the purposes for which bonds may be issued; and (5) requirements that a referendum be held before bonds are issued.\textsuperscript{70} Of these, the most common limit is on the amount of debt, usually expressed as a percentage of assessed valuation.\textsuperscript{71}

Special districts and authorities, although they may be subject to their own limitations,\textsuperscript{72} could finance projects without adding to the debt of the general governments, because they were considered to be entirely separate governmental units.\textsuperscript{73} Thus, whenever debt limitations restricted further financing, the creation of a special government offered a way around the law.


\textsuperscript{68} See generally A. Hillhouse, supra note 67; L. Lancaster, State Supervision of Municipal Indebtedness (1923); P. Studensky, Public Borrowing (1930). For a concise summary of the history of constitutional limitations on borrowing, see L. Goodall, supra note 65, at 4-17.

\textsuperscript{69} W. Mitchell, The Effectiveness of Debt Limits on State and Local Government Borrowing 33-37 (1967). Mitchell finds only seven states, one of which is Massachusetts, that allow borrowing through solely legislative action with no limits on the amount or purpose of debt that may be incurred. The nineteen that require voter approval of borrowing include California, New York, New Jersey, and Illinois, while states with constitutional debt ceilings include Michigan, Ohio, and Pennsylvania. See also Council Report, supra note 9, at 13-17.


\textsuperscript{71} L. Goodall, supra note 65, at 24-25. Sometimes such limitations are imposed in the form of maximum tax rates that may be levied for debt service. U.S. Advisory Commn. on Intergovernmental Relations, supra note 70, at 27. The limitations are constitutional in about thirty states and imposed by statute in the others. L. Goodall, supra, at 18.

\textsuperscript{72} See text accompanying notes 166-70 infra.

\textsuperscript{73} For a discussion of the decisions in which the bonds of special governments came to be seen as debt separate from that of the parent government, see text accompanying notes 166-79 infra.
While the method of financing improvements through current revenue, if not through revenue bonds, was fairly well known in the early part of the twentieth century, it seems to have been less often employed than the creation of special districts with their own taxing powers. The establishment of the Port of New York Authority in 1921 first dramatized revenue-bond financing and popularized the designation "authority" for a device that used this method. The Port Authority, modeled after the Port of London Authority, was designed to supervise the over-all development of New York harbor. The harbor lies in both New Jersey and New York waters, and its development had been hindered by duplication of facilities and by political rivalries and jealousies among the municipalities dotting the shores in both states. An interstate compact was drawn up, in which New York and New Jersey agreed to integrate development throughout the harbor. Thus, the prototype of the public authority was initially designed to solve a jurisdictional problem. Apparently, the method of financing through revenue bonds was devised only after the Authority was in actual operation. At first the Authority was financed by a state grant; the states found it necessary to turn over to the Authority projects already producing revenue in order to reassure bond buyers. Subsequently, the revenues and deficits of the various facilities were pooled, and the enterprise as a whole has been self-sustaining on revenue bonds alone.

The depression of the 1930's ushered in the era of real growth in the number of authorities. A nationwide decrease in the assessed value of taxable property plus increased resistance among taxpayers to government debt met head on with the desire of the federal government to aid economic recovery through the construction of public works. The model of the Port of New York Authority and its reliance on bonds paid off through user charges rather than taxes offered a partial solution. In 1934, President Roosevelt sent a letter to all forty-eight governors suggesting that states and cities cooperate with the federal government in stimulating public works by (1) authorizing existing governmental units to issue revenue bonds, and (2) creating


76. See E. Bard, supra note 74, at 226-46.

77. Id. at 295; N.J. Senate Report, supra note 75, at 12-15.

78. Council Report, supra note 9, at 25.
new public corporations that could do the same.\textsuperscript{79} There was an almost unanimously favorable response from the states, and increasingly the name "public authority" was applied to the revenue-financed special governments. As contrasted with special districts, which typically were created by local governments to provide services, authorities became primarily associated with state-initiated projects of capital construction, such as dams, bridges, electric power facilities, turnpikes, and buildings.\textsuperscript{80} World War II, which left a backlog of needs in areas of state responsibility, added momentum to this development, as did the unprecedented post-war demand for capital facilities to accommodate the increasingly mobile population.\textsuperscript{81} Thus, while revenue bond issues totaled about 188 million dollars in 1940, they reached about 600 million dollars in 1950, and 4 billion dollars in 1963.\textsuperscript{82} The number of special districts and authorities greatly increased as well.\textsuperscript{83}

One further indication of the success achieved by the larger authorities by the mid-1960's is the fact that many of them had a surplus of funds. Not only did the Port of New York Authority build the $575 million dollar World Trade Center with surpluses, it also took over the operation of the bankrupt Hudson and Manhattan Railroad, absorbing an 8 million dollar deficit in the first year in addition to spending 43 million dollars on modernization.\textsuperscript{84} The surplus of the Triborough Bridge and Tunnel Authority was a major point of contention in the debate over the development of an integrated New York transportation system.\textsuperscript{85} In 1968, the New Jersey Highway Authority opened a Garden State Arts Center with its surpluses,\textsuperscript{86} and a number of other already profitable authorities turned excess revenues or new bond issues into supplementary facilities or improvements on existing projects.\textsuperscript{87}

As would be expected, increased familiarity and continued success with authorities has resulted in greater reliance upon them and a search for further problems to which they may be profitably applied.

\textsuperscript{80} Urban Areas, \textit{supra} note 3, at 249. For a list of major authorities established in the 1930's and 1940's, see id. at 248-49.
\textsuperscript{81} Gerwig, \textit{supra} note 9, at 597.
\textsuperscript{82} Urban Areas, \textit{supra} note 3, at 250.
\textsuperscript{83} See text accompanying note 15 \textit{supra}.
\textsuperscript{84} The Super-Agency that Moves a Metropolis, \textit{Bus. Week}, May 11, 1968, at 73, 93.
\textsuperscript{86} Urban Areas, \textit{supra} note 3, at 257.
\textsuperscript{87} Id. at 256-57.
III. MULTICOUNTY AUTHORITIES

Toward the end of the 1960's, there was a great outburst of growth in "multicounty authorities," special governments overlapping traditional government boundaries and combining the financing methods of special districts and authorities. Their responsibilities to date have primarily been in the field of transportation: In the New York City area, a transportation authority covers the City and seven counties; in Kansas City, seven counties in two states; in Washington, D.C., the District of Columbia and three cities; in Detroit, six counties; in Niagara, two counties; in Minneapolis, seven counties; and in Boston, seventy-eight communities.

Multicounty authorities are already among the largest and most powerful of special governments and have the greatest potential impact on urban affairs. In order to help evaluate what has been and can be done with these experimental bodies, several of them will be described in detail.

A. The New York Metropolitan Transportation Authority (MTA)

The MTA was created in 1968 to unify responsibility for commuter transportation and related services, including air, water, and rail services, in the New York City area. The Authority has jurisdiction over all of the City and in seven surrounding New York counties, but contiguous counties in New Jersey and Connecticut are not in-
cluded. In the interest of a unified mass transportation policy, the MTA was given control over the extant New York City Transit Authority (NYCTA) and the Triborough Bridge and Tunnel Authority by the device of making the MTA's directors ex officio (and the only) directors of the earlier two Authorities. The MTA has a chairman and ten other members, at least nine of whom must reside in the area of the Authority's jurisdiction, and three of whom are to be appointed only on the recommendation of the mayor of New York City.

The MTA has typical broad corporate powers and general governmental powers, such as the powers to make surveys and recommendations, subpoena witnesses in investigations, and do all things necessary, convenient, or desirable to carry out its purposes. Unlike many other statutes creating authorities, the statute creating the MTA waives sovereign immunity and expressly consents to suits against the Authority. Special powers relating to transportation give the MTA virtually plenary authority over the entire range of transportation facilities. It may (1) acquire any transportation facility; (2) construct, maintain, improve, extend, or repair any such facility; (3) on a majority vote after a public hearing, establish and collect such tolls and charges for the use of its facilities as are necessary to keep the operations self-sustaining; (4) establish schedules and standards of operation, including rules and regulations governing the conduct and safety of the public; (5) carry out any of its powers or duties through a subsidiary corporation; (6) receive grants; and (7) do all it deems necessary to manage and control its facilities. The Authority's rules and regulations prevail over conflicting local laws and ordinances.

96. The Authority is authorized, however, to enter into agreements to build a New York-Connecticut bridge with any similar agency in Connecticut. N.Y. Pub. Auth. Law § 1266(9)(b) (McKinney 1970).
98. The members are appointed by the governor for eight-year terms with the advice and consent of the state Senate, N.Y. Pub. Auth. Law § 1263(1) (McKinney Supp. 1972), and are removable for cause by the governor, N.Y. Pub. Auth. Law § 1263(7) (McKinney 1970).
100. E.g., the power to sue and be sued, to borrow money and issue bonds and notes, to invest funds in reserve or sinking funds, to make bylaws, to enter into contracts, to acquire property, and to appoint officers and employees. N.Y. Pub. Auth. Law § 1265 (McKinney 1970), as amended, N.Y. Pub. Auth. Law § 1265 (McKinney Supp. 1972).
101. N.Y. Pub. Auth. Law § 1265 (McKinney 1970). The Authority is supposed to continue operations as long as it has bonds or other obligations outstanding and until its existence is terminated by law. N.Y. Pub. Auth. Law § 1263(8) (McKinney 1970).
104. No other political subdivision has jurisdiction over any of the Authority's activities. N.Y. Pub. Auth. Law § 1286(9) (McKinney 1970).
The MTA has the power to issue bonds backed only by its revenues.105 The Authority itself has no taxing powers and cannot pledge the credit of the state; yet, it is empowered to receive state funds.106 It was probably anticipated that state funding would be necessary, since the NYCTA had been running at a revenue deficit greater than the Triborough’s surplus.107 Indeed, in 1968, New York State voters approved a 2.5 billion dollar bond issue for transportation throughout the state, including MTA facilities.108

Although the public service commission is explicitly declared not to have any authority over the MTA, there is some supervision of the Authority by state and local governments. Like all New York authorities, the MTA must submit to the governor and other state officials a detailed annual report on its finances and operations, as well as a budget report and an audit report after examination by the state comptroller.109 More direct control within the City of New York is exercised by the mayor, city council, and city board of estimate, through the power to veto certain activities relating to the NYCTA,110

Lest the importance of political considerations be forgotten, it is worth noting that four plans for the organization of the MTA were hotly debated before the final choice was made.111 Commissioner Gilhooley of the NYCTA advocated a new authority with only managerial responsibility; its capital budget was to be controlled by New York City.112 A second model, proposed by Mayor John Lindsay, would have continued the NYCTA and the Triborough Authority without merger but would have reorganized their boards and given the mayor a veto power over the actions of each.113 A third proposal,


107. URBAN AREAS, supra note 3, at 194.

108. Id. at 212.


110. The mayor and the board of estimate have the power to veto NYCTA projects with capital costs in excess of 1 million dollars. N.Y. Pub. Auth. Law § 1203(b)(ii) (McKinney 1970). In addition, the mayor, city council, and city board of estimate can veto the schedule of transit facilities authorized to be provided by the Transit Construction Fund, a separate corporate governmental agency administered by three trustees, two of whom are appointed by the mayor. N.Y. Pub. Auth. Law §§ 1225-c, -g (McKinney Supp. 1972). The Construction Fund’s purpose is to assist the MTA through agreements with the NYCTA to provide transit facilities. N.Y. Pub. Auth. Law § 1225-d (McKinney Supp. 1972).

111. For a study of the politics of transportation in the New York area up to 1966, see J. DOIG, METROPOLITAN TRANSPORTATION POLITICS AND THE NEW YORK REGION (1966).

112. See URBAN AREAS, supra note 3, at 82-86.

113. See id. at 135-33, 143-50. Under this proposal a new administrator of trans-
put forward by State Senator Mackell, would have put both capital and expense budgets under the full control of the new authority, with a significant shift to state orientation provided by the requirement that the state make up any debt-service fund deficit.\textsuperscript{114}

The adopted plan was a modified version of a fourth proposal, suggested by Governor Rockefeller. Its strong state orientation is indicated by its regional, rather than citywide, jurisdiction, its state funding, its provisions for appointment and removal of members by the governor, and its extensive powers within the City of New York.\textsuperscript{115} The differences in the proposals reflect different views of an authority's role in areawide planning and of where ultimate control should lie. Interestingly enough, none of the proposals envisioned a role for the electorate, either in approving the creation of the new authority, in electing its directors, or in voting specific funds for its projects.

\textbf{B. Massachusetts Bay Transportation Authority (MBTA)}

The MBTA is among the most interesting of the new authorities, primarily because it must accommodate the interests of seventy-eight cities and towns in the Boston area.\textsuperscript{116} The MBTA has the usual corporate powers,\textsuperscript{117} and its powers over transportation are extensive. Within its jurisdiction the MBTA has exclusive power to provide mass transportation service; it is not subject to the control of any city, town, or other licensing authority.\textsuperscript{118} The MBTA may construct, extend, and modify mass transportation facilities\textsuperscript{119} and has the power of eminent domain.\textsuperscript{120} It may also establish, on a self-liquidating basis and backed by revenue bonds alone, separate units of mass transportation facilities.\textsuperscript{121}

\begin{itemize}
  \item Each authority would have an expense budget, but the capital budget of the NYCTA would be controlled by the city, while the Triborough Authority would continue to issue revenue bonds for its capital. \textit{Id.}
  \item See \textit{id.} at 166-78.
  \item See generally \textit{id.} at 181-226.
  \item \textit{Mass. Ann. Laws} ch. 161A, §§ 2-3 (1970) (e.g., power to sue and be sued).
  \item \textit{Mass. Ann. Laws} ch. 161A, § 3(f) (1970). The MBTA is subject to the Department of Public Utilities in so far as safety of its equipment and operations is concerned, but it is expressly provided that schedules and routes are not to be considered matters of safety and that the directors of MBTA shall exclusively determine the character and extent of the services and facilities to be furnished without the approval or direction of any state or municipal department, board, or commission. \textit{Mass. Ann. Laws} ch. 161A, § 5(i) (1970).
\end{itemize}
The financing of the MBTA is fairly complicated but worthy of note. The Authority is authorized to issue bonds for one or more of three broad purposes: (1) to acquire and construct mass transportation facilities for express service; (2) to design and acquire, for itself or for lease to a private company, facilities to provide local service; and (3) to pay capital costs. A limit of 349 million dollars is placed on the value of bonds that may be outstanding at any given time. Under certain circumstances the state participates in meeting Authority obligations.

If the state is required to make payments, the cities and towns under the jurisdiction of the Authority are to be assessed to reimburse the state. If there is a net cost of express service, seventy-five per cent of it is borne by the cities and towns in proportion to their respective number of commuters (with Boston paying at least thirty of the seventy-five per cent). Beginning in 1976, all cities and towns are to be assessed for the net cost of local service, half of the net cost in proportion to their populations and half in proportion to the amount of total losses attributable to their local routes.

The method of local control over the MBTA is unique. In addition to the five-member Board of Directors—one of whom must be

---

124. The Commonwealth's office for administration and finance is authorized to enter into a contract under which the Commonwealth agrees to pay a portion of the net cost of service. Mass. Ann. Laws ch. 161A, § 28 (Supp. 1972). This assistance is limited primarily to the annual debt service on bonds issued before 1971 for which such a contract was made and the annual debt service on 90 per cent of the bonds (up to 257 million dollars worth) issued thereafter. Mass. Ann. Laws ch. 161A, § 28 (Supp. 1972). However, if the Authority lacks enough cash to meet its obligations at any time during the year, the state will make the necessary payments, Mass. Ann. Laws ch. 161A, § 13 (1970), as it will at the end of the year if there has been a net cost of service, Mass. Ann. Laws ch. 161A, § 12 (1970). This latter case may be rare since all express service other than one named branch is to be operated so that no net cost of service other than debt service shall arise. Mass. Ann. Laws ch. 161A, § 5(d) (1970). If funds are not available at the time principal or interest comes due on a bond or note of the Authority, the state must also meet this obligation, and the Authority or any bondholder can require the state to pay. Mass. Ann. Laws ch. 161A, § 13 (1970).
125. Mass. Ann. Laws ch. 161A, § 8 (1970). The same section of the statute provides that the other twenty-five per cent of the cost is borne by those cities or towns having express stations.
126. A temporary plan for assessments to cover the cost of local service to fourteen cities and towns, paid by the state, was provided for the period from 1965 to 1975. See Mass. Ann. Laws ch. 161A, § 9 (1970).
128. The governor appoints the directors, no more than three of whom may be of the same political party. They serve for five years with modest salaries and are removable for cause by the governor. The Metropolitan Area Planning Council (on the structure and duties of the Planning Council, see Mass. Ann. Laws ch. 40B, §§ 24-29 (Supp. 1971)) approves two of them; the advisory board approves one, 14 cities and
experienced in transportation, one a member of organized labor, and one experienced in administration and finance—the creating statute establishes an independent advisory board, which oversees the actions of the MBTA. No "substantial change in mass transportation" may be made without thirty-days' notice to the board. Also, the advisory board must approve all fare changes and the mandatory periodic revisions of the MBTA's program for mass transportation. Finally, an itemized budget must be passed by the board, and yearly reports must be sent to the board, the governor, and the general court.

The advisory board, which acts by majority vote, consists of the city manager or mayor of the cities, and the chairman of the board of selectmen of the towns affected by the MBTA. Each city and town has one vote plus additional votes or fractions thereof determined by multiplying one and one-half times the total number of cities and towns in the Authority by the percentage of all assessments that the given city or town has paid. Since assessments of cities and towns are based on the number of commuters for express service and on the percentage of population and proportionate net cost of service for local service, the votes are very roughly weighted according to population, although each city and town has at least one vote.

C. San Francisco Bay Area Rapid Transit District (BARTD)

Unlike the MTA and the MBTA, which took over existing facilities, BARTD was created primarily to construct a new transportation system. After years of planning and construction, BARTD began operation in three counties in the summer of 1972. It has eminent
towns approve one, and 64 cities and towns approve the last. Mass. Ann. Laws ch. 161A, § 6 (1970). The 14 cities and towns are all those with more than two full votes under the representation scheme discussed in the text accompanying note 137 infra. The director elected by these units must receive the votes of at least four of the included municipalities. Since Boston has more votes than the other thirteen combined according to the weighted-vote scheme, the director must in effect be approved by Boston and three other cities. Mass. Ann. Laws ch. 161A, § 6 (1970).

137. The number of votes must be redetermined at the beginning of each new year. The 14 cities and towns are those with more than two full votes out of a total of 195. Boston was allocated 73.29 votes, and Cambridge had the second greatest number, 10.56. The smallest of the 14 is Belmont, with 2.31 votes. This leaves 64 cities and towns, each with between one and two votes. Mass. Ann. Laws ch. 161A, § 7 (1970).
138. The enabling legislation created BARTD in 1957, at which time five counties
domain powers and the usual corporate powers, as well as explicit authority to fix rates by a two-thirds vote. BARTD is more locally than state oriented, since most of its ultimate financial support comes from local property taxes. General obligation bonds payable from the tax revenues are permissible, but the debt thus incurred must not exceed fifteen per cent of the assessed value of property within the district. BARTD is also allowed to issue revenue bonds and in constructing a crucial link in its system—an underwater rapid transit tube connecting San Francisco and Oakland—it relied primarily on revenue bonds issued by the California Toll Bridge Authority and backed by the earnings of the San Francisco-Oakland Bay Bridge.

If the BARTD board of directors unanimously approves a new project, the issuance of bonds for this purpose must be approved by a three-fifths majority of voters in a special referendum. No referendum is required for the issuance of revenue bonds for the acquisition of equipment or rapid transit facilities if the issuance of general obligation bonds has been previously approved.


142. Taxes at a rate not greater than five cents per 100 dollars of assessed valuation of taxable property may be levied, but they are to be supplemental to revenues from the various facilities and are limited to actual requirements. Cal. Pub. Util. Code § 29123 (West 1965). There is provision for an additional property tax to meet all sums due (for principal and interest) on the district's general obligation bonds. Cal. Pub. Util. Code § 29121 (West 1965). In addition, a retail transaction and use tax (or alternate financing approved by the electorate) was required to be levied by the board of directors beginning in 1969, to be used to the extent of 150 million dollars plus costs and debt service to help finance the BARTD system. Cal. Pub. Util. Code §§ 29140-44 (West Supp. 1973).
In its selection of directors BARTD also allows for more local influence than the MTA and the MBTA. Each county has a “city selection committee,” composed of the mayor of each incorporated city within the county.\textsuperscript{146} This committee and each county’s board of supervisors select BARTD’s board of directors,\textsuperscript{149} who must be residents and voters of the county from which they are appointed.\textsuperscript{150} Finally, all meetings of the board must be open to the public,\textsuperscript{151} and an annual financial report is to be submitted to the cities and counties and to the general public on request.\textsuperscript{152}

D. The New York State Environmental Facilities Corporation (EFC)

The purposes of the EFC, created in 1970 to replace the New York State Pure Waters Authority, are the “planning, financing, construction, maintenance and operation” of sewerage collection and treatment systems, air pollution control facilities, water management and collection facilities, and solid waste disposal systems.\textsuperscript{153} Apparently allowed to operate throughout the State of New York,\textsuperscript{154} the EFC may effect its purposes with regard to sewerage, for example, in various ways. First, it may contract with a municipality or state agency to provide facilities.\textsuperscript{155} Second, it may make construction loans to municipalities and state agencies.\textsuperscript{156} Third, it may contract to construct and operate facilities on behalf of a municipality.\textsuperscript{157}

\textsuperscript{146} CAL. GOVT. CODE § 50270 (West Supp. 1973).

\textsuperscript{149} Each county with a population of over 500,000 is represented by four directors, two chosen by its board of supervisors and two by its city selection committee. A county with a population of more than 500,000 but less than 500,000 has three directors, two appointed by its board of supervisors and one by its city selection committee. And a county with fewer than 350,000 citizens is represented by two directors, one chosen by each group. CAL. PUB. UTIL. CODE § 28733 (West Supp. 1973). At present the board consists of eleven members serving four-year terms. URBAN AREAS, supra note 3, at 272. No provision is made for removal of directors.

\textsuperscript{150} CAL. PUB. UTIL. CODE § 28731 (West 1965).

\textsuperscript{151} CAL. PUB. UTIL. CODE § 28790 (West 1965).

\textsuperscript{152} CAL. PUB. UTIL. CODE § 28770 (West 1965).

\textsuperscript{153} N.Y. PUB. AUTH. LAW § 1283 (McKinney Supp. 1972).

\textsuperscript{154} Its activities are “on behalf of municipalities and state agencies”; it is to assist “municipalities, state agencies, the state and persons”; and its purposes are “for the benefit of the people of the state of New York.” N.Y. PUB. AUTH. LAW § 1283 (McKinney Supp. 1972). See also N.Y. PUB. AUTH. LAW § 1285(1)(b) (McKinney Supp. 1972) (Authority’s special powers allow it to deal with any municipality that meets certain conditions).

\textsuperscript{155} N.Y. PUB. AUTH. LAW § 1285(1) (McKinney Supp. 1972).

\textsuperscript{156} N.Y. PUB. AUTH. LAW § 1285(2) (McKinney Supp. 1972).

\textsuperscript{157} N.Y. PUB. AUTH. LAW § 1285(3) (McKinney Supp. 1972). If nine provisions, including one requiring that the municipality’s full faith and credit back its annual payments, are complied with, this contract can be converted into a lease-purchase arrangement whereby title to the facilities will eventually vest in the municipality. N.Y. PUB. AUTH. LAW § 1285(9)(c) (McKinney Supp. 1972).
The EFC has other special powers, including the renting and leasing of facilities, advising and planning in certain matters upon request, and contracting with private firms for help in pilot projects. All of these powers, with regard to sewerage, were possessed by the old Pure Waters Authority when the EFC was created, similar powers with respect to air pollution control, water management, and storm water collection facilities were added.

Like a traditional authority, the EFC may issue bonds and notes. It is expressly declared that neither the state nor any municipality shall be liable on these. Nevertheless, the state has a large role in financing the authority, for it is to appropriate money annually to make up any difference between the funds placed in reserve by the EFC and the maximum amount of principal and interest that may become due in the succeeding year.

The EFC is controlled by seven directors serving six-year terms: the commissioner of environmental conservation, the commissioner of health, the commissioner of the office for local government, and four others appointed by the governor with the advice and consent of the senate.

E. The General Nature of the Multicounty Authority

Although the new multicounty authorities derive considerable inspiration from the entities generally known as "authorities" and may indeed merge several of them (as does the NYMTA) or be financed in part by one (as is BARTD) the four bodies described above combine features of both special districts and authorities. All depend to some extent on tax funds. Both the EFC and the NYMTA have a firm state commitment to back their financial obligations if necessary, so neither need rely solely upon revenue bonds. The MBTA is backed by state contributions and assessments upon the constituent cities and towns, and BARTD is founded on local property taxes. However, these multicounty authorities are not merely enormous special districts, for each relies heavily on revenue bonds and is committed to finance services as much as possible through user charges.

165. See Urban Areas, supra note 3, at 267-74.
Multicounty authorities are larger and more powerful than most traditional authorities and are able to undertake deficit operations because of their hybrid financing. However, they share many of the legal and policy problems of their predecessors.

IV. LEGAL STATUS AND LEGAL ISSUES

A. Constitutionality

Challenges to public authorities under state constitutions frequently attack the very concept of a special government—without distinction between those financed by taxes and those financed by revenue bonds. Therefore, most of the doctrines and issues found in cases involving special districts are equally relevant to those concerning public authorities.

The earliest and most common attacks on special governments asserted that they impermissibly circumvent the debt limitations on counties and municipalities. In most states, the courts have rejected this argument, emphasizing that each special government is an independent unit, subject to the debt limitation individually, if at all. Consequently, where the jurisdictions of a city, a county, and a number of special governments overlap, the total debt possible within a given area is vastly increased. *Kennebec Water District v. City of Waterville* has been cited as the first case holding that the debt of a special government is not to be considered in calculating the debt of a city. The court found that the debt limitation in the state constitution applied only to cities and towns, and not to “quasi-municipal corporation[s]” such as the Water District. Another early case, *Paine v. Port of Seattle*, concluded that the special government in

---


167. *96 Me. 234, 52 A. 774 (1902).*


169. Despite its name, the Water District appears to have been an authority since it had no taxing power, *96 Me. at 256, 52 A. at 783*, but paid its bondholders with revenues from supplying water, *96 Me. at 258, 52 A. at 776.*

170. *96 Me. at 254, 52 A. at 782.* Special districts and authorities are usually subject to statutory debt limitations. See, e.g., *Kocsis v. Chicago Park Dist.*, 362 Ill. 24, 198 N.E. 847 (1935) (District held a municipal corporation; debt limitation statute applicable to municipal corporations); *Wilson v. Board of Trustees of Sanitary Dist.*, 138 Ill. 443, 27 N.E. 203 (1891) (District held a municipal corporation; debt limitation statute applicable to municipal corporations); *State v. Metropolitan St. Louis Sewer Dist.*, 365 Mo. 1, 275 S.W.2d 225 (1955) (all “political subdivisions” subject to debt limitation statute). At least one case, however, has suggested that, in the absence of a statutory provision, a special district is not subject to the debt limit for municipalities. *City of Lehi v. Melling*, 87 Utah 237, 48 P.2d 530 (1935).

171. *70 Wash. 294, 127 P. 580 (1912).*
question was a "municipal corporation" subject to its own debt limitation; it suggested that the Port's debt might be added to that of the general government if it could be shown that the legislature's sole purpose was to avoid the limitation.\textsuperscript{172} However, in the influential New York case, \textit{Robertson v. Zimmermann},\textsuperscript{173} the court gave no weight to the fact that, in creating the Buffalo Sewer Authority, the Common Council of Buffalo had been influenced by its finding that "the city because of its constitutional debt limitation cannot finance this undertaking by bond issue."\textsuperscript{174} The court held: "The project constitutes a self-liquidating public improvement. The Authority cannot pledge the credit of the city in any way, and its bonds are to be paid solely from the revenues of the 'Authority.' The act does not offend the provision of the Constitution referred to."\textsuperscript{175}

The independent status of special districts and authorities has been the source of one response to the argument that they unconstitutionally circumvent debt limitations. The "special fund" doctrine, a theory similar in result, allows counties and municipalities, as well as special governments, to operate revenue-producing projects without adding to their recognized debt. According to this doctrine, constitutional debt limitations only restrict that indebtedness that is to be satisfied from future taxation and do not affect those municipal obligations—or debts of authorities—that are payable solely from a "special fund" of revenues.\textsuperscript{176} This doctrine was accepted in \textit{Kelly v. Merry},\textsuperscript{177} which concerned a conditional sales contract made by a village for the purchase of machinery for a municipal lighting plant; payment was to be made solely from the revenues of the lighting system. The court rejected the contention that this arrangement created a debt of the village: "Although an obligation is created on the part of the village to collect the light rents and apply them to the payments due on the contract, the moneys thus raised are not a part of the general fund of the city to be applied in payment of any debt of the city, but merely of the special fund created for the purpose of paying the price of the machinery purchased with the light rents."\textsuperscript{178}

\textsuperscript{172} 70 Wash. at 321, 127 P. at 582. For the view that a special government must be sufficiently separate from the general government in order to be treated as separate from the general government, see Reynolds v. City of Waterville, 92 Me. 292, 42 A. 553 (1899); Ayer v. Commissioner of Administration, 340 Mass. 586, 165 N.E.2d 885 (1960).

\textsuperscript{173} 268 N.Y. 52, 196 N.E. 740 (1935).

\textsuperscript{174} 268 N.Y. at 57, 196 N.E. at 742.


\textsuperscript{176} See generally Williams & Nehemkis, supra note 65, at 186-201; Comment, \textit{Obligations of a State-Created Authority: Do They Constitute a Debt of the State?}, 55 Minn. L. Rev. 439 (1955).

\textsuperscript{177} 262 N.Y. 151, 196 N.E. 495 (1933). See also Department of Water & Power v. Vroman, 218 Cal. 206, 22 P.2d 698 (1933).
of the general income of the village, for they are pledged to the payment of the special contract indebtedness.”

Although the special fund doctrine has been widely accepted, the courts have had some difficulty applying it to building authorities where the city is to pay off the building bonds in yearly installments. If the court construes the arrangement as a lease, the payments are not debt under the common law rule that future rent is not debt; however, if the arrangement is seen as an installment contract, some or all of the contract price may be regarded as debt. Nevertheless, it can safely be said that the “separate entity” and special fund doctrines have in most states put revenue-bond financing beyond attack on the ground of the avoidance of debt limitations.

A number of other attacks have been, and continue to be, launched against authorities under state constitutions. None of these has met with more than scattered success. In several cases it has been urged that the creation of an authority violates a prohibition on lending to private parties or on taking property by eminent domain for other than a public purpose. The definition of “public purpose”

178. 262 N.Y. at 159, 186 N.E. at 428.
179. See, e.g., Fox v. Bicknell, 195 Ind. 537, 141 N.E. 222 (1923); Interstate Power Co. v. Incorporated Town of McGregor, 230 Iowa 42, 296 N.W. 740 (1941); Winston v. City of Spokane, 12 Wash. 524, 41 P. 888 (1895). See generally Gerwig, Public Authorities: Legislative Panacea?, 5 J. PUB. LAW 387, 393 (1956); Williams & Nehemkis, supra note 65, at 189. See Foley, Some Recent Developments in the Law Relating to Municipal Financing of Public Works, 4 FORDHAM L. REV. 13, 28 & n.73 (1935), for a list of states accepting or rejecting the doctrine. See also Williams & Nehemkis, supra, at 192-200, for exceptions to the special fund doctrine that may have some vitality.

By 1951 all but seven states had passed legislation authorizing counties and municipalities to issue revenue bonds. COUNCIL REPORT, supra note 9, at 27. Michigan has an interesting provision in its revenue-bond law whereby cities or counties can issue such bonds without voter approval unless a petition is signed by 10 per cent of the voters within 30 days after notice of the proposed bonds is given by newspaper publication. MICH. COMP. LAWS ANN. § 141.133 (1967).

In a number of states, counties and municipalities can finance services with additional property taxes without creating special districts through a statutory analogy to the special fund doctrine—“special taxing districts.” GOVERNMENTAL ORGANIZATION, supra note 10, at 13, reports that 5,910 such special taxing districts exist in 21 states. See, e.g., CAL. GOVT. CODE §§ 60000-163 (West 1966), as amended, CAL. GOVT. CODE § 60000 (West Supp. 1975).


has been greatly extended beyond the traditional class of “governmental” endeavors, so authorities constructed for such operations as transportation facilities, housing projects, industrial development parks, and even recreation facilities have survived this line of attack.

Other constitutional objections against state-created authorities that have met with little success in the courts include the arguments that authorities violate “home rule” provisions, that they constitute an improper delegation of legislative powers, that they violate prohibitions on the use of special acts where general acts could be used, and that the legislature has no power to create novel forms of local government.

Since multicounty authorities, unlike traditional authorities, rely in part on tax funds, those multicounty authorities governed by appointed officials may also be faced with a “taxation without representation” argument that has previously been urged only against special districts. This challenge, however, has met with a cool reception in the courts. One response of the courts has been to reject outright the notion that there exists any constitutional right to vote for the officials who impose taxes. Another response is to


185. Note, supra note 64, at 125-29.


188. See, e.g., Wilson v. Board of Trustees of Sanitary Dist., 133 Ill. 443, 27 N.E. 203 (1890); Huron-Clinton Metropolitan Authority v. Boards of Supervisors, 300 Mich. 1, 1 N.W.2d 430 (1942).


190. See, e.g., State ex rel. Bryant v. Akron Metropolitan Park Dist., 120 Ohio St. 464, 465, 108 N.E. 407, 413 (1920); "We are not, however, able to find any provision in the [Ohio] Constitution which limits the power to levy taxes to elected officials, as distinguished from those who are appointed to office." See also Golden Gate Bridge & Hwy. Dist. v. Felt, 214 Cal. 568, 5 P.2d 585 (1931); City of Pasadena v. Chamberlain, 204 Cal.
hold that voter approval of the creation of the district is a sufficient substitute for the election of its officials.\textsuperscript{191} One early case, \textit{Van Cleve v. Passaic Valley Sewerage Commissioners},\textsuperscript{192} did hold that the New Jersey legislature could not constitutionally delegate discretion to determine the amount of taxes to be levied to a sewerage district that previously had “no governmental functions.”\textsuperscript{193} However, such a body would not receive a similar characterization today.\textsuperscript{194} In addition, the \textit{Passaic Valley} court was particularly worried by the commissioners’ almost unlimited discretion as to the amount of tax to be levied,\textsuperscript{195} while modern special government legislation very carefully limits the permissible rate of taxation.\textsuperscript{196} As a result, the \textit{Passaic Valley} case does not pose a substantial threat to the taxing power of special governments.

Two of the multicounty authorities discussed above have been challenged on constitutional grounds with predictable lack of success. In \textit{City of Rye v. Metropolitan Transportation Authority},\textsuperscript{197} it was argued that the creation of the MTA was not by “special act” as required by the constitution of New York because the creating statute dealt with other matters as well. The court held that the constitutional provision meant only that such a public corporation must be created by the state legislature itself, rather than by a local government or an administrative officer.\textsuperscript{198} In another attack on the MTA, \textit{Metropolitan Transportation Authority v. County of Nassau},\textsuperscript{199} the court held that the MTA is not a “super-local government” with an unconstitutional power to tax because it merely collects charges as empowered by the legislature. Further, the MTA does not violate the constitution’s “home rule” provision, for it affects a large portion of the state.\textsuperscript{200} The MBTA has also survived constitutional attack, in \textit{Massachusetts Bay Transportation Authority v.}...
Boston Safe Deposit & Trust Co., where the Supreme Judicial Court of Massachusetts held, among other things, that the provisions for the apportionment of the net transportation costs among the constituent cities and towns are reasonable “deviations from an ideal apportionment plan” in view of the cost and complexity of alternative schemes. It was also decided that the statute does not entail a forbidden loan of credit to private parties because the benefit, if any, to private transportation companies is indirect and incidental.

Authorities have thrived in the face of a barrage of constitutional objections. Although an occasional court frowns upon a certain authority, and although each new authority must almost invariably run the gauntlet of constitutional attacks, the constitutionality of the device is now firmly established in most states.

B. One Person–One Vote

Although authorities may withstand attacks on their existence brought under state constitutions, the possibility must be considered that a particular form of electoral control over these bodies is mandated by the federal constitution under the one person–one vote doctrine. The Supreme Court first articulated the principle that electoral districts must be apportioned as nearly as possible on an equal population basis in the well-known cases of Baker v. Carr, Wesberry v. Sanders, and Reynolds v. Sims, which were concerned with congressional and state legislative districts. Several cases involving various kinds of local governments have developed the principle in holdings relevant to public authorities.

Two 1967 cases\(^1\) hint that there will be a greater tolerance when local, rather than congressional and state, legislative districts are involved.\(^2\) *Sailors v. Board of Education*\(^3\) involved county school boards the members of which were chosen by delegates from local school boards. Each local board was elected by popular vote and, regardless of the population it represented, sent one delegate to the selection meeting. The court characterized this system of selection as "basically appointive rather than elective" since the county board members were selected, not by the general electorate, but by the delegates from local school boards without regard to the wishes of the electorate.\(^4\) Because no election was involved, the principle of one person-one vote was held inapplicable. And since the board was found to perform "essentially administrative" functions\(^5\) the Court held that the state was free to choose among methods of selecting its officials: "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election."\(^6\) The Court emphasized the importance to local governments of flexibility in dealing with changing urban conditions.\(^7\) The question of whether a state is required to provide for the election of a local legislative body rather than for its appointment was not decided.\(^8\)

---

\(^1\) See also *Abate v. Mundt*, 403 U.S. 182 (1971), in which a deviation of 11.9 per cent from exact equality in district population was allowed a county board of supervisors. In fact, *Mahan v. Howell*, 410 U.S. 315 (1973), which allowed a 16 per cent population variation in regard to the Virginia General Assembly on the ground that it resulted from the state’s rational objective of preserving the integrity of the boundaries of political subdivisions, made it clear that the requirements of the one person-one vote doctrine are less strict even when applied to state, as opposed to congressional, districts.


\(^3\) 387 U.S. 110 (1967).

\(^4\) See *Mahan v. Howell*, 410 U.S. 315 (1973), which allowed a 16 per cent population variation in regard to the Virginia General Assembly on the ground that it resulted from the state’s rational objective of preserving the integrity of the boundaries of political subdivisions, made it clear that the requirements of the one person-one vote doctrine are less strict even when applied to state, as opposed to congressional, districts.

\(^5\) 387 U.S. 105 (1967).

\(^6\) 387 U.S. at 109-10 & n.6.

\(^7\) The board’s powers did, however, include preparing an annual budget and levying taxes. 387 U.S. at 110 n.7.

\(^8\) 387 U.S. at 108 (emphasis added). The Court did note, however, that a state could not “manipulate its political subdivisions so as to defeat a federally protected right, as, for example, by realigning political subdivisions so as to deny a person his vote because of race.” 387 U.S. at 108.

\(^9\) 387 U.S. at 110-11.

\(^10\) 387 U.S. at 109-10.
In *Dusch v. Davis*, decided on the same day as *Sailors*, the Supreme Court upheld a plan for the consolidation of three urban and four rural boroughs that provided that the eleven councilmen of the resulting city were all to be elected at large, while each of the city's seven boroughs, which varied considerably in population, was to be the residence of at least one councilman. Although the Court assumed *arguendo* that the one person–one vote principle required by *Reynolds* governed municipal legislative bodies, the residence requirement was not found to be fatal. The consolidation plan, the Court said, used boroughs "merely as the basis of residence for candidates, not for voting or representation," since the affected councilmen were responsible to the entire city electorate rather than to the residents of the borough in which they resided. As in *Sailors*, the Court recognized the need for flexibility in local government: "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside."

However, in *Avery v. Midland County*, the Court for the first time squarely applied the one person–one vote doctrine to local governments. The Court held unconstitutional a plan whereby each of the four districts in Midland County, Texas, elected one commissioner to the County Commissioners Court, the governing body of the county, when one of the districts contained over ninety-five per cent of the county's population. Distinguishing "special-purpose" governmental units, the majority opinion by Justice White said, "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." Noting such powers as taxation, bond issuing, and

---

221. The Court suggested that a different result might ensue if a councilman in fact represented only one borough, if the plan were a scheme to avoid the consequences of reapportionment, or if it cancelled the voting strength of racial or political elements. 387 U.S. at 116-17. *See also* *White v. Regester*, 41 U.S.L.W. 4885 (U.S., June 18, 1973).
222. 387 U.S. at 117.
224. The fact that the state legislature that created the districts might be properly apportioned was of no relevance to the question of whether the districts met the equal representation test. 390 U.S. at 481.
225. 390 U.S. at 483-86. The Court also rejected the argument that the Commissioners Court's functions were more "administrative" than "legislative" and thus need not be equally apportioned, 390 U.S. at 482-83, even though the Texas supreme court had found that the legislative functions of this body were "negligible," *Avery v. Midland County*, 406 S.W.2d 422, 426 (1966).
budget-making, the Court concluded that the Commissioners Court was such a body.\textsuperscript{226}

Again emphasizing the complexity of local government, the Court issued a caveat: "Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions."\textsuperscript{227} However, Justices Harlan and Fortas, in separate dissents, were not convinced by the Court's distinction between special-purpose units and those with "general governmental powers."\textsuperscript{228} Justice Harlan foresaw "undesirable ‘freezing’ effects on local government," such as the hindrance of the development of metropolitan governments based on a compromise between central city and suburban representation.\textsuperscript{229} Justice Fortas felt that the distinction between special-purpose and general governments was not justified by the difference in their powers: "The functions of many county governing boards, no less than the governing bodies of special-purpose units, have only slight impact on some of their constituents and a vast and direct impact on others."\textsuperscript{230}

The prediction of the dissent that the logic of \textit{Avery} could not be restricted to general-purpose governments appears to have been fulfilled in \textit{Hadley v. Junior College District},\textsuperscript{231} where the Court held, "as a general rule," that the one person–one vote doctrine applies to any state or local governmental unit that selects its officials by election.\textsuperscript{232} In that case, the Court upheld a challenge brought by residents of a Kansas City junior college subdistrict that contained approximately sixty per cent of the district population to a statutory apportionment plan that permitted them to elect only fifty per cent of the college's trustees. The Court did not wholly abandon the \textit{Avery} test;\textsuperscript{233} "We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{226} 390 U.S. at 483-84.
\item \textsuperscript{227} 390 U.S. at 483-84.
\item \textsuperscript{228} Justice Harlan, for example, called the Commissioners Court "slightly specialized." 390 U.S. at 492.
\item \textsuperscript{229} 390 U.S. at 492-94.
\item \textsuperscript{230} 390 U.S. at 500.
\item \textsuperscript{231} 397 U.S. 50 (1970).
\item \textsuperscript{232} 397 U.S. at 56.
\item \textsuperscript{233} 397 U.S. at 53-54. It is arguable that \textit{Hadley} is not as great an extension of \textit{Avery} as it might seem. The court in \textit{Hadley} does mention the special status of education; perhaps the election of the junior college trustees could be said to be as important to the Kansas City voters as the election of county commissioners was to the Midland voters in \textit{Avery}. The Court's opinion notes, however, that it would be impossible to try to determine how important an individual election is to the average voter. 397 U.S. at 54-56. \textit{See also} Comment, \textit{supra} note 210, at 647 n.54.
\end{enumerate}
\end{footnotesize}
trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in Avery should also be applied here.”

However, the language of Hadley suggests that the Court puts little weight on the “general governmental powers” characterization. In Hadley the existence of an election was emphasized, not its purpose. The majority rejected any test based upon the “importance” of an election, feeling that the decision of the state to choose an official by election is sufficient indication of his importance.234 It also refused to distinguish between “legislative” and “administrative” officials.235 Justice Black, for the majority, did leave a small crack in the door for “certain functionaries whose duties are . . . far removed from normal governmental activities and . . . disproportionately affect different groups . . . .”236 Moreover, the Dusch approach in at-large elections with limited residency restrictions and the Sailors approach where officials are appointed were cited with approval.237 But, after Hadley238 the conclusion is hard to resist that once a state decides to elect officers, equality of voting power is required for almost any unit of local government.239

234. 397 U.S. at 55.
235. 397 U.S. at 55-56.
236. 397 U.S. at 56.
237. 397 U.S. at 58-59.
238. Justice Harlan, again in dissent, stated that the decision “forebodes, if indeed it does not decide, that the rule is to be applied to every elective public body, no matter what its nature.” 397 U.S. at 60. He further argued that the need for local flexibility at least suggests that the Avery test be retained and that the Court from time to time face difficult issues of what are general governmental powers. 397 U.S. at 61-63.
239. In two recent cases, the Supreme Court has indicated that the nature of a particular special government may justify the election of its officials by only a certain segment of the population despite the one person-one vote doctrine. In Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973), the Court, relying on the exception noted by Justice Black in Hadley, 410 U.S. at 727-28, quoting 397 U.S. at 56 (see text accompanying note 236 supra), upheld a plan whereby only landowners were permitted to vote for the directors of the District and where the number of votes possessed by each landowner was proportionate to the assessed value of his land. Justice Rehnquist, for the majority, pointed out that the activities of the District had a disproportionate effect upon landowners as a class and also that the District had a special limited purpose. 410 U.S. at 728. Despite its powers to plan and execute projects “for the acquisition, appropriation, diversion, storage, conservation, and distribution of water,” 410 U.S. at 723, quoting CAL. WATER CODE § 42200 (West 1966), and its ability to fix charges for the use of water and assess the costs of its projects against district land, 410 U.S. at 724, he characterized the District as without “normal governmental” authority: “It provides no other general public services such as schools, housing, transportation, utilities, roads or anything else of the type ordinarily financed by a municipal body . . . . There are no towns, shops, hospitals or other facilities designed to improve the quality of life within the district boundaries and it does not have a fire department, police, buses, or trains.” 410 U.S. at 728-29. Justice Douglas, with whom Justices Brennan and Marshall conurred, dissented strongly in Salyer and its companion case, Associated Enterprise, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973), arguing that the tests laid down in Avery and Hadley of “perform[ing] important gov-
Taking these cases together, it is clear that, although not all the questions are answered, the one person–one vote doctrine applies to many authorities. Its application will depend on whether or not the officials in question are elected. If an authority elects any of its directors, Hadley would seem to require that there be equal representation from constituent units. The powers of most authorities over such services as water supply, transportation, and pollution control will be at least as great as those of the Midland County Commissioners Court or the Kansas City Junior College District and will thus be considered “general governmental powers,” if that concept retains any vitality. Not even all authorities that do elect some officials, however, need worry about apportionment standards; their directors may well be elected at large. Moreover, under Dusch an authority embracing several counties or cities within a single county can apparently elect its directors at large and yet impose certain residency requirements. Thus, it is probable that only those authorities with elected directors that represent constituent counties or cities are required to apportion.

The application of the one person–one vote doctrine to multi-county authorities, which by definition are composed of constituent parts, may threaten various accommodations that might be worked out between the central city and surrounding suburban or rural areas. Suppose, for instance, that the advisory board of the Metropolitan functions . . . having sufficient impact throughout the district” were met by these special districts. 410 U.S. at 749, quoting Hadley, 397 U.S. at 53-54 (emphasis added by Toltec dissent).

240. That is to say, either the districts from which officials are elected must be approximately equal in population, or, perhaps, if officials are from districts of varying population, their votes must be weighted according to how many people they represent. In 1967, it was estimated that only 25 per cent of “local governing boards” were elected from districts or elected at large subject to district residence requirements. Avery v. Midland County, 390 U.S. 474, 482 n.7 (1968), quoting Brief for the United States as Amicus Curiae at 22 n.31, Sailors v. Board of Educ., 387 U.S. 105 (1967).

241. It might be suggested that certain specialized authorities qualify for the one person–one vote loophole in Tulare Lake for units “far removed from normal governmental activities and . . . disproportionately affect[ing] different groups.” 410 U.S. at 927-28, quoting Hadley, 397 U.S. at 56. This loophole is probably illusory, however, in cases dealing with whether equal weight must be given to votes cast from different areas, rather than, as in Tulare Lake, with whether the vote may be limited to certain classes of voters. Any activity undertaken on a scale that entails representation from a number of different districts is unlikely to be characterized as lacking sufficient general impact. At any rate, none of the metropolitan multicounty authorities discussed above could be so characterized.

242. In White v. Regester, 41 U.S.L.W. 4885, 4889 & n.10 (U.S., June 18, 1973), the Court indicated that such an arrangement might even be preferred if in its absence “opportunity for racial discrimination” might be enhanced because all candidates could be selected from the majority areas.

243. This was suggested by the dissents in Hadley, 397 U.S. at 60-61 (Harlan, J.), and Avery, 390 U.S. at 490-94 (Harlan, J.).
sachusetts Bay Transportation Authority were its governing body. As the board now stands, with each of the cities and towns having at least one vote plus additional votes and fractions based upon population, Boston has 73.29 votes out of a total of 195. Under a strict one person—one vote calculation, roughly estimated by subtracting one vote from each city's allocation, leaving only the amount based upon population, Boston would have 72.29 votes of a total of 117. The consequent dominance of Boston might make the surrounding cities think twice before they joined the Authority. Nor is it difficult to imagine similar situations in which compromise efforts at metropolitan governance would be politically impossible under the one person—one vote doctrine. As a practical matter, it does not seem improbable that some state legislatures will regard the circumvention of the complications of metropolitan representation as one reason for making the positions in areawide authorities appointive rather than elective.

The ways in which authorities that have no direct popular elections select their directors must be evaluated individually. Under Sailors most, if not all, of the authorities with appointed directors would avoid apportionment problems. In addition, a plan such as that provided for BARTD, whereby elected local officials from several constituent areas of varying size select authority directors, would seem to be appointive by analogy to Sailors. A system of appointment of directors combined with a residency requirement would not appear to violate the one person—one vote doctrine by analogy to the at-large elections in the Dusch case.

The practice of making certain elected officials ex officio members of authority boards raises a problem of characterization. If the mayors of the cities within a county automatically become members

244. See text accompanying notes 130-37 supra.
245. The vote allocation procedure is described in text accompanying note 137 supra.
246. See, e.g., Huston, Special Service Districts in a City-County Consolidation: Conflict Between Metropolitan Reform and "One Man—One Vote" in Indianapolis, 47 IND. L.J. 101 (1971).
248. In 1965, it could perhaps be said that it was "rather farfetched" to argue that appointed officials should come from constituent areas of nearly equal population, because authorities then typically relied solely on user charges. Weinstein, supra note 210, at 34. This argument is no longer quite so strained because of the appearance of multicity authorities financed by property taxes and/or state funds as well as user charges.
249. See text accompanying notes 148-49 supra.
250. Compare text following note 213 supra.
251. Such a system has been upheld by a court relying on Sailors. See People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 555 (1971).
252. See COUNCIL REPORT, supra note 9, at 42-44; Tobin, supra note 36, at 148.
of the board of a countywide authority, are they appointed or elected? It may be that elected officials from various cities or counties are made directors of an authority that embraces them all because they are expected to represent their constituencies, in which case the one person–one vote principle should apply because they are, in effect, elective. This situation is unlike *Sailors*, where elected local officials selected county board members without regard to the wishes of the electorate. The Court characterized the system in *Sailors* as appointive because “the county board is not determined, directly or indirectly, through an election in which the residents of the county participate.” When local officials automatically become directors, an election by the local residents is determinative of the position, which ought therefore to be characterized as elective.

Given the variety of organizational forms used by authorities, special problems are inevitable. For instance, if major new capital projects, bond issues, and tax changes undertaken by an authority must be approved by the general electorate, the case for applying the one person–one vote principle is not so compelling. Division of powers among an authority, a state, and affected local government,

---

253. In *Bergerman v. Lindsay*, 25 N.Y.2d 405, 255 N.E.2d 142, 306 N.Y.S.2d 898 (1969), *cert. denied*, 398 U.S. 955 (1970), where elected presidents of boroughs of varying population were made ex officio voting members of a board of estimate, the New York Court of Appeals upheld the arrangement, but on the pre-*Hadley* ground that the board did not have general governmental powers. The court did not reach the issue of whether the board members were “elected” or “appointed.” See also *Cohen v. Hoye*, 280 A.2d 778, 783-84 (Me. 1971); *Meadowlands Regional Dev. Agency v. State*, 112 N.J. Super. 89, 270 A.2d 418 (1970).

254. A system of weighted votes or some similar plan might then be necessary to assure equal representation. See *Dixon, Rebuilding the Urban Political System: Some Heresies Concerning Citizen Participation, Community Action, Metros, and One Man–One Vote*, 58 Geo. L.J. 955, 979-80 (1970); *Weinstein, supra* note 210, at 40-49; Note, *supra* note 210, at 260.

As a practical matter, however, it could be that appointments are made ex officio, not because elected officials represent the respective interests of their constituencies, but because it is an easy, shortcut method of appointing presumably competent people. 255. 387 U.S. at 109-10 n.6.

256. The same argument suggests that whenever a local elected official has the power to appoint a member of an authority and when the board of directors is made up of a number of similarly appointed directors from constituent cities or counties, then the one person–one vote principle should apply because each appointee theoretically represents his governmental unit. This is to be distinguished from the situation in which one elected official, such as the mayor, has the power to appoint all the directors of a city or county authority. Here the mayor is presumably representing all the people of his city, so no one person–one vote problems arise. The latter situation is analogous to appointment by the governor or the state legislature; when the appointer represents all the people of the jurisdiction over which the authority is given power and not just a component, smaller unit, the one person–one vote principle should be inapplicable.

257. Bond issue approval is required in BARTD. See text accompanying note 146 *supra*.

258. For one thing, this would leave the authority with independent responsibility only for operating facilities, rather than for planning them, and would cut against finding the authority to be so “governmental” that its directors must be elected.
ments could also prove troublesome. In the MBTA, for instance, the advisory board, composed of ex officio members, approves one director appointed by the governor, a power that probably does not raise one person–one vote problems. However, the board also has more substantive powers, such as veto power over the Authority's budget, its program for mass transportation, and its fare changes. Can it be said that the one person–one vote principle applies to a body staffed with ex officio members that has veto powers over an authority with appointive directors?

In addition to the problems that arise under a given selection system, there is the further issue of when, if ever, the officials of a given government must be elected rather than appointed. It seems unlikely that a state legislature would ever attempt to change traditionally elective city or county offices into appointive ones. However, the same effect could be achieved by the creation of a multicounty authority that has appointed directors and broad powers approaching those of a general government. In Sailors, the Supreme Court held that the officers of an “administrative” body need not be elected but reserved this question as to a “legislative” body. The Avery court, however, found this distinction difficult to apply. A more useful distinction may be that discussed in Avery, between general governmental and special powers. Although Hadley may have devalued this test for purposes of deciding which elections require the application of the one person–one vote principle, it may yet be useful in determining whether some offices must be elective. It is one thing to say that a legislature need not provide for the election of a director of an authority the only specific responsibility of which is managing the waterworks; it is another thing entirely to conclude that the legislature can do this in the case of a director of an authority that can promulgate rules, assess taxes, exercise the power of eminent domain, direct its own police force, and plan economic development over a metropolitan area. This issue is likely to be

259. See note 128 supra.
260. See text accompanying notes 130-33 supra.
261. 387 U.S. at 109-10.
262. 390 U.S. at 482.
263. 390 U.S. at 483-85.
264. The constitutional guarantee of a republican form of government in article IV, section 4, applies only to the states and probably could not be used to argue that a state has no power to provide for the appointment rather than the election of officials who exercise full governmental powers at the local level. See O'Neill v. Leamer, 239 U.S. 244 (1915). Other arguments could be made, however. For example, a doctrine of inherent right to local self-rule was once advanced and might be revived. See generally Eaton, The Right to Local Self Government (pts. 1-3), 13 HARV. L. REV. 441, 470, 638 (1900); McBain, The Doctrine of an Inherent Right of Local Self Government, 16 COLUM. L. REV. 190 (1916).
C. Sovereign Immunity in Tort

Once the constitutionality of the existence and organization of a special government has been established, the question arises of whether such a body partakes of certain immunities granted to general governments. For instance, many courts have assumed that in the absence of a "sue and be sued" clause in its creating legislation, an authority is entitled to a full measure of sovereign immunity. However, most creating legislation enables authorities to sue and be sued, and an issue of sovereign immunity arises in determining whether this provision allows only contract actions or tort claims as well.

In one line of cases, which emphasize that special governments are part of the governmental structure, the courts appear reluctant to depart from older holdings that "sue and be sued" clauses for executive agencies and departments permit suits for breaches of contract but not for torts, unless the clause is accompanied by an explicit waiver of tort immunity. In *Masse v. Pennsylvania Turnpike Commission*, a personal injury suit, the Commission argued that it was immune from suit as an instrumentality of Pennsylvania. The

---

265. The argument that the appointment of the MTA directors violated the one person-one vote doctrine was rejected in *Metropolitan Transp. Authority v. County of Nassau*, 28 N.Y.2d 385, 271 N.E.2d 213, 322 N.Y.S.2d 228 (1971). The court stated that there is no constitutional requirement that members be elected rather than appointed, apparently having in mind the principle that the one person-one vote doctrine does not apply to appointed officials. 28 N.Y.2d at 390, 271 N.E.2d at 214, 322 N.Y.S.2d at 230.


267. See, e.g., text accompanying note 37 supra.

268. Rarely, as, for example, in the case of the Port of New York Authority, this issue is settled by an express statutory waiver of all kinds of immunity. See N.J. STAT. ANN. § 49:1-117 (1963); N.Y. UNCONSOL. LAWS § 7101 (McKinney 1961). See also MASS. ANN. LAWS ch. 92, §§ 15, 56 (1972) (Mass. Metropolitan Dist. Comm.); N.Y. PUB. AUTH. LAW § 1276 (McKinney 1970) (N.Y. Metropolitan Transp. Authority); OKLA. STAT. ANN. tit. 69, § 1703 (1969) (fact that Oklahoma Turnpike Authority is empowered by statute to carry liability insurance suggests that tort suits are permitted).


271. The court held that eleventh amendment immunity was a federal question that had previously been decided adversely to the Commission. 163 F. Supp. at 511. See also S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, 268 F. Supp. 568 (D.N.J. 1967), for a carefully reasoned holding that an authority is not entitled to sovereign immunity under the eleventh amendment as an alter ego of the state.
court felt that the Commission was immune under state law from liability for its employees' negligent acts unless otherwise provided by statute. Immunity was expressly waived with regard to damage to property but not for personal injury, so the suit was dismissed.272

Another line of cases of equal or greater weight has construed the "sue and be sued" clause as an effective waiver of tort, as well as contract, immunity.273 Petty v. Tennessee-Missouri Bridge Commission274 involved a suit under the Jones Act against an agency created by Tennessee and Missouri, with the consent of Congress, under the interstate compact clause of the Federal Constitution.275 The Supreme Court, applying federal law, held that the "sue and be sued" clause that Congress had included in the compact made "it clear that the States accepting it waived any immunity from suit which they otherwise might have."276 In Taylor v. New Jersey Highway Authority,277 the Authority defended a negligence action on the ground that tort

---


277. 22 N.J. 454, 128 A.2d 915 (1956).
liability had not been expressly waived. The court disagreed, noting the "sue and be sued" clause in the Authority Act and remarking on the disfavor, especially at the federal level, toward the doctrine of sovereign immunity:278

The hostility towards the doctrine of governmental immunity is also evidenced in the states and it seems to us that pertinent statutory waivers should fairly receive as liberal construction in the states as in the federal sphere. In recent years there has been a noticeable tendency of legislative bodies to entrust to independent Authorities functions which necessitate relationships comparable to those ordinarily existent between private parties. It would seem that in all justice such Authorities should generally not be afforded the highly special immunities of the State acting in its sovereign capacity; that much has been recognized by the New Jersey Highway Authority Act, particularly in its broad terminology which unrestrainedly permits the Authority to sue and be sued in its own name.279

The split between courts on the sovereign immunity issue may not be as deep as it appears. Most courts would agree that a state or municipality is immune from suit, if at all, only when it acts in a governmental, as opposed to a proprietary, capacity.280 Logically, a subdivision such as an authority should have no greater immunity than a general government. Therefore, even when a court construes a "sue and be sued" clause to allow sovereign immunity in tort to an authority, it should look to the nature of the authority's activities before allowing or disallowing suit. A transit authority, for example, may be predominantly governmental, and a planetarium authority predominantly proprietary. Thus, even where there is no statutory waiver, two questions should be answered affirmatively before immunity is allowed: (1) Is the authority sufficiently part of the sovereign so that sovereign immunity might apply? and (2) If so, does it carry out governmental, rather than proprietary, functions? Some courts that answer the first question affirmatively fail to go on to ask the second.281 If the courts that now allow immunity


279. 22 N.J. at 470, 126 A.2d at 322.


would follow this two-step analysis, their theory would in some
cases converge with that of the courts that construe the “sue and be
sued” clauses to waive immunity, for many of the latter decisions
emphasize the proprietary nature of a given authority’s activities
and the anomaly that would result if the authority were to be im­
mune where a city would not.282

The governmental-proprietary distinction for municipal tort
liability, however, is far from satisfactory,283 and its complexities
could be avoided if courts were to decide that authorities are not
entitled to sovereign immunity under any circumstances. Even in the
absence of a statutory waiver of all immunity,284 authorities should
be required to assume liability for their tortious acts and thus bear
the full cost of their operations. Since traditional authorities by defi­
nition rely on revenue bonds for financing, the policy of avoiding a
tort suit that unduly burdens the taxpayers will not be subverted.
Only the users, who, in theory, should pay the full costs of operation
through tolls, and the bondholders, who voluntarily assume the risk
of authority default, would bear the burden. Multicounty authorities,
which to some extent do depend on tax funds, plan and operate
enormous revenue producing enterprises in the manner of private
corporations, and it is similarly appropriate to require them to insure
themselves against liability. Sovereign immunity is not yet unalter­
ably affixed to special governments by history, legislative will, or an
irreversible trend of judicial authority. At a time when the justifica­
tions for the doctrine ring rather hollow even in the case of general
governments, this fading doctrine should not be affixed to authori­
ties.285

Miller v. Board of Commrs., 1 S.2d 97 (La. Ct. App. 1941); Rice Hope Plantation v.

282. As the court said in Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 55 (1930):
It would certainly be an anomalous situation if a municipality engaged in a pro­
prietary function, such as running, operating or constructing water works, would
be liable for the torts of its agents, but if that same municipality should join with
other municipalities and organize a municipal utility district it would thereby
immunize itself from all such liability. Such a rule does not appeal to our sense of
justice nor to our reason. 211 Cal. at 45, 293 P. at 62. For other cases that deny immunity while focusing on the
proprietary function involved, see Gerr v. Emrick, 283 F.2d 293 (3d Cir. 1960), cert.
denied, 365 U.S. 817 (1961); Knowles v. Housing Authority, 212 Ga. 659, 95 S.E.2d
305 (1958); Hoffmeyer v. Ohio Turnpike Comm., 12 Ohio Op. 2d 436, 166 N.E.2d
543 (C.P. Cuyahoga County 1959).

283. See, e.g., 2 F. HARPER & F. JAMES, supra note 280, at 1622-23; 18 E. McQUILLIN,
supra note 280, at 167-168; W. PROSSER, supra note 280, at 978-86.

284. For express waivers, see statutes cited in note 268 supra.

285. See Note, The Applicability of Sovereign Immunity to Independent Public Au­
would not seem to be significantly infringed by a complete refusal to apply the doctrine
to independent authorities.”
D. Reviewability

Beyond immunity from tort actions, the possibility of court review of the decisions, plans, and activities of authorities remains unexplored. For example, rate setting by authorities—unlike that by public utilities—is not supervised by state or federal commissions, yet courts are unlikely to review authority rate setting other than to make sure that specified procedures are complied with,286 for the breadth of the statutory mandate usually makes it difficult to argue that an authority has exceeded or avoided its responsibilities. The nature of the proceeding wherein the actions of an authority may be challenged, when a challenge is allowed, is quite varied287 and includes the use of extraordinary writs, such as mandamus,288 and declaratory judgment actions.289

The sovereign immunity doctrine that authorities may be sued only when they consent will frequently be a stumbling block even in a nontort action. Thus, one case has held that claims to realty cannot be adjudicated against an authority where the legislature has waived immunity only with regard to suits based on torts or breaches of contract;290 another has denied an injunction, holding there is no equity jurisdiction over an authority without express authorization.291

It might be argued that state administrative procedure acts waive sovereign immunity and thus make certain activities reviewable, but the potential for this approach under present acts is small. First, ad-

286. See, e.g., County of Nassau v. Metropolitan Transp. Authority, 57 Misc. 2d 1025, 293 N.Y.S.2d 1017 (Sup. Ct. 1968); Application of Love, 155 N.Y.S.2d 266 (Sup. Ct. 1956) (court can act if rate arbitrary or capricious). Cf. Massachusetts Bay Transp. Authority v. Boston Safe Deposit & Trust Co., 348 Mass. 538, 549-50, 205 N.E.2d 346, 355 (1965): “The determinations of the Authority, however, as to how to exercise its powers for the declared public purpose, if within the scope of the delegated power and in conformity with the express and necessarily implied statutory requirements, are not to be set aside by the courts.”


291. Town of Amherst v. Niagara Frontier Port Authority, 38 Misc. 2d 906, 238 N.Y.S.2d 710 (Sup. Ct. 1963). While the Port of New York Authority consents to actions at law or equity, its governing statutes expressly exclude injunctive actions against the Authority or its officers or employees other than those brought by the Attorneys General of New York or New Jersey. N.J. STAT. ANN. §§ 32:1-161, 1-165 (1963); N.Y. UNCONSOL. LAWS §§ 7105, 7109 (McKinney 1961). See also Lewis v. Lefkowitz, 32 Misc. 2d 434, 223 N.Y.S.2d 221 (Sup. Ct. 1961) (mandamus not available to compel Attorney General to seek injunction).
ministrative procedure acts are usually applicable only to state agencies, presumably excluding the myriad of county and city created authorities. Second, even state created authorities may be excluded, for state administrative procedure acts usually define agencies as bodies empowered to make rules or to adjudicate cases, and a court may view an authority as more analogous to a proprietary private corporation than to a rule-making or adjudicative entity for this purpose. Indeed, given the independence of authorities from the state and their revenue-producing purpose, as well as the possible cost and delay attendant to court review, it is highly doubtful that state legislatures intend to waive immunity as to authorities through administrative procedure acts.

And yet, particularly in the case of the larger and more powerful authorities, such as the multicounty authorities, many decisions, from rate fixing to route planning, do seem to constitute "rules" of general application that seriously affect the rights, duties, and benefits of citizens. For these authorities, at least, it would not be unreasonable to provide a method of review easier than the cumbersome extraordinary writs, so that a person aggrieved by authority

\[292. \text{See 1 F. Cooper, supra note 287, at 98-107, for a discussion of the various ways in which states define "administrative agency."} \]

\[293. \text{An authority created by a county or municipality under an enabling statute would be at most identified as an "alter ego" of its creator, and municipalities are not ordinarily within the contemplation of "agency" in administrative procedures acts. See, e.g., Slon v. Olson, 98 N.W.2d 115 (N.D. 1959) (city held not to be an agency under act that defined agencies as having statewide jurisdiction). But see Housing Authority v. City of Los Angeles, 38 Cal. 2d 853, 243 P.2d 515 (1952) (city and city-created authority acting under the state housing authorities law is an agency of the state).} \]

\[294. \text{See generally 1 F. Cooper, supra note 287, at 99-107. See id. at 109-27 for decisions and statutes defining "rules" and "adjudicatory proceedings." See also Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 687 n.1, 355 P.2d 905, 906 n.1 (1960) (court noted that the Authority's creating act declared it to be a public corporation rather than a state agency).} \]

\[295. \text{The question of whether or not an authority is a "citizen" for purposes of diversity jurisdiction in federal courts appears to turn on how closely the authority is identified with its creating state. The view that the authority is the "alter ego" of the state, rather than a separate citizen, is on the wane, and, consequently, authorities are increasingly less likely to be immunized by the eleventh amendment from federal diversity suits brought by private parties. See S.J. Groves & Sons Co. v. New Jersey Turnpike Authority, 268 F. Supp. 568 (D.N.J. 1967). See also Guaranty Trust Co. v. West Virginia Turnpike Commn., 109 F. Supp. 286 (S.D. W. Va. 1952). But see Weyerhaeuser Co. v. Roads Commn., 187 F. Supp. 766 (D. Md. 1960).} \]

\[296. \text{Actions taken by a governmental agency that are not in the nature of an individualized trial-like adjudication are commonly called "rules." See 1 K. Davis, Administrative Law Treatise \$ 5.01 (1958). The rules issued by an agency are commonly grouped into "interpretative" rules, e.g., definitions of words in the statute creating the agency, and "legislative" rules, e.g., regulations issued under the express authority of the statute. Courts are likely to give more deference to the agency's adoption of legislative rules and will only examine such actions to see if they are authorized and constitutional. In the case of interpretative rules, the courts often substitute their interpretation of a statute for that of the agency. Id. at \$ 5.09-94.} \]
action could get a determination on whether the authority was acting ultra vires or in violation of required procedures.297

V. CLAIMED ADVANTAGES OF AUTHORITIES

From the birth of the Port of New York through the postwar boom in authorities, this form of government has had both severe critics298 and vigorous defenders.299 However, the more recent appearance of larger, multicounty authorities has not yet generated a great deal of debate. The arguments advanced for and against traditional authorities may not always be equally relevant to the newer developments. For example, the multicounty authority may be less vulnerable to such charges as that it serves no function other than facilitating the issuance of bonds, which a city could issue on its own,299 perhaps at a lower cost.300 On the other hand, the multicounty authority, by virtue of its size and importance, may exacerbate certain problems, such as lack of local control, which are said to afflict the ordinary authority.

Whether authorities are created because other governmental bodies are unable to solve a particular problem, because other bodies are anxious to avoid the problem, or for another reason,302 their use is usually justified on three grounds: (1) they have financial advantages, in that they are separate bodies for purposes of state debt limitations; (2) they are more efficient because, among other reasons, they attract superior personnel, "de-politicize" an undertaking, and must be run in a businesslike manner in order to keep their bond ratings; and (3) they have a jurisdictional flexibility, so their boundaries may be made coterminous with the range of a needed service.

A. Financial Advantages

As has been pointed out above,303 one of the major reasons for the rapidly spreading use of authorities has been the desire to escape

297. In at least one case, Guaranty Trust Co. v. West Virginia Turnpike Commun., 109 F. Supp. 286 (S.D. W. Va. 1952), a federal district court showed some willingness to review a particular decision made by a public authority in a declaratory judgment action.

298. See, e.g., McLean, Use and Abuse of Authorities, 42 Nat'l Mun. Rev. 438 (1953); Morris, supra note 65; Porter, A Plague of Special Districts, 22 Nat'l Mun. Rev. 544 (1933); Quirk & Wein, supra note 3.

299. See, e.g., Edelstein, supra note 9; Gerwig, supra note 9; Nehemkis, supra note 9.

300. Cities are, in most states, authorized to issue revenue bonds. See note 179 supra.

301. If the city has not reached the limit imposed upon its debt, it may issue general obligation bonds, which may have lower interest rates than revenue bonds. Cf. note 314 infra and accompanying text.


303. See text accompanying notes 65-73 supra.
state-imposed debt restrictions.\textsuperscript{304} However, the impact of debt limitations is decreasing because increases in property values and assessments have given local governments more debt to work with.\textsuperscript{305} Moreover, where the "special fund" doctrine is accepted, traditional authorities have no financial advantages, since municipalities can finance special projects through their own revenue bonds without adding to the debt figure.\textsuperscript{306} Nevertheless, avoidance of debt limitations seems to have been a factor in the formation of authorities, for there is a positive correlation between restrictive debt provisions and the number of special governments.\textsuperscript{307}

The criticism that the use of authorities subverts the public policy embodied in the debt limitations is not persuasive. Debt limitations, for the most part, originated in financial abuses of the distant past.\textsuperscript{308} Neither private debt nor governmental debt (as symbolized by federal deficit spending) attracts the public suspicion and disapproval that it once did, and authority defaults have never been a major problem.\textsuperscript{309} Moreover, because present-day governments engage extensively in activities once thought appropriate only for proprietary enterprises, the modern demand for capital projects could not have been foreseen at the time most debt limitations were enacted. Over the years, as state legislatures, the courts, and often the electorate have sanctioned the authority device, authority debt has grown enormously.\textsuperscript{310} Clearly, the public policy in favor of providing services has proved more compelling than that of limiting state and local debt. Most commentators conclude that debt limitations are ineffective and unnecessary, and ought to be revised or abolished.\textsuperscript{311} It could be argued that the constraints on local financing should be attacked directly by changing or eliminating debt limitations, rather than circumvented by the creation of authorities. However, new projects are

\begin{footnotesize}
\begin{enumerate}
\item[304.] See note 65 \textit{supra} and accompanying text. See also Gerwig, \textit{supra} note 9, at 596-98, 612-13; Council Report, \textit{supra} note 9, at 21-28, 103.
\item[305.] U.S. Advisory Commn. on Intergovernmental Relations, \textit{supra} note 12, at 54.
\item[306.] See text accompanying notes 176-79 \textit{supra}.
\item[307.] States with constitutional debt limitations have an average of 336 special governments per state, while those states without such limitations average 245 special governments. Moreover, in states that limit municipal debt, on the average, 38.68 per cent of the total municipal debt is unsecured, while in nonlimit states only 20.32 per cent of the debt is unsecured. L. Goodall, \textit{supra} note 65, at 44-45, 54-55. See also U.S. Advisory Commn. on Intergovernmental Relations, \textit{supra} note 12, at 32.
\item[308.] See text accompanying notes 66-68 \textit{supra}.
\item[309.] As of 1967, there had been only thirty known defaults since World War II by the thousands of special governments that periodically issue bonds. Of the thirty defaulted issues, nineteen were of nonguaranteed bonds. W. Mitchell, \textit{The Effectiveness of Debt Limits on State and Local Government Borrowing} 29-30 (1967).
\item[310.] See Gerwig, \textit{supra} note 9, at 598.
\item[311.] See, e.g., L. Goodall, \textit{supra} note 65, at 33-34; W. Mitchell, \textit{supra} note 309, at 16-17; U.S. Advisory Commn. on Intergovernmental Relations, \textit{supra} note 70, at 6; Bowman, \textit{The Anachronism Called Debt Limitation}, 52 Iowa L. Rev. 663 (1967).
\end{enumerate}
\end{footnotesize}
constantly in demand, and it may be time-consuming and politically
difficult to obtain a constitutional or statutory amendment, especially
one that would on its face increase the ability of governments to con­
tract debt.312

However, the method of financing used by traditional authorities
cannot be embraced without reservation. First, it injects a considera­
tion for the wishes of absentee bondholders into the management of
a project supposedly operating in the public interest.313 Second, it
could be argued that revenue bond financing lacks flexibility in that
it must guarantee that a specific project will continue to exist and
collect revenues for, say, thirty years. Most importantly, a higher in­
terest cost appears to be attached to revenue bonds than to general
obligation bonds, presumably because of the greater risk perceived
by investors.314

Multicounty authorities seem able to maximize the advantages
and to minimize the potential drawbacks of traditional authority fi­
nancing. Like other authorities, they provide a means to avoid debt
limitations on the cities, counties, or state involved, although they
may be subject to debt limitations of their own. When an authority
embraces several cities or counties, it seems logical that if the new
entity has any debt limitation of its own, it would be equal to the
combined limits of the counties under its jurisdiction unless the
enabling statute declares otherwise.315

312. Morris, supra note 65, at 265-68, suggests that courts might have declared build­
ing authorities unconstitutional in order to force legislatures to re-examine debt limita­
tions, but he notes that the Maine and Georgia experience when such a stand was
taken indicates that judicial firmness might be futile.

313. See PUBLIC AUTHORITIES, supra note 3, at 23-28.

314. The Council of State Governments tentatively concluded that the cost of
borrowing by authorities is greater than the cost of borrowing by a parent state and
greater than the average cost of borrowing found in the Bond Buyer's Index. COUNCIL
REPORT, supra note 9, at 70-74. See W. MITCHELL, supra note 69, at 28-31, citing studies
that estimate that the interest rate differential ranges from .25 per cent to a full 1.25 per
cent for longer maturities. This difference is significant; a .5 per cent difference in the
interest rate (e.g., from 5.0 to 5.5 per cent) will raise the aggregate interest cost by 19
per cent on a thirty-year serial bond. See also J. MAXWELL, FINANCING STATE AND LOCAL
GOVERNMENTS 204 (1965). A defender of the authority device can, of course, reply that
the alternative of general obligation bonds is not available because of debt limitations,
and that the nonfinancial advantages of authorities more than compensate for the extra
interest cost. Cities in most states can issue their own revenue bonds without using the
authority device and still avoid debt limitations by invoking the "special fund" doc­
trine. See text accompanying notes 176-79 supra. However, these city revenue bonds
would probably appear to investors to be just as risky in relation to general obligation
bonds as are authority bonds. Thus, the interest rate differential would still exist, unless
it should appear highly probable that the city would be willing and able to step in
should the lack of project revenue threaten to cause default. Nevertheless, interest costs,
and consequently the rates charged for use of the facilities so financed, may be higher
than they would be if debt limitations were removed, allowing general obligations to
predominate.

315. Since debt limitations are usually expressed in terms of a percentage of assessed
value, see text accompanying note 71 supra, the debt limitation of a multicounty author­
ity could be based on the total of the assessed values of the separate counties.
The financing method of most multicounty authorities—by various combinations of revenue bonds, local property taxes, and state funds—gives them another advantage in that they can undertake projects of great magnitude that could not be financed any other way (outside of federal involvement).  

Nor do multicounty authorities raise the problems connected with the financing of authorities to such a great degree. A state or municipal stake in the financing of an authority dilutes bondholder influence in its operation and minimizes any chance of bondholder control following default. Also, although the continued reliance, at least in part, on revenue-bond financing does irrevocably commit the general government to the project, undertakings by multicounty authorities commonly involve facilities that are intended for long-term use, so the loss of flexibility is not damaging. Finally, the charge that revenue bonds result in higher interest costs may not be appropriate when applied to the typical multicounty authority. The massive commitment of state and local resources to such projects as metropolitan transportation systems suggests that they will not be allowed to fail, and an investor might well believe that the revenue bonds offered to finance them are not significantly more risky than general obligation bonds.

B. Efficiency

Another reason for the use of the authority device is the desire to promote efficiency in providing services. The origin of the belief that authorities can more efficiently manage new revenue-producing projects lies in the history of government activities. Many such projects, such as mass transportation, port facilities, and even toll bridges, tunnels, and ferries, were once thought too proprietary to be undertaken by a government. As local governments moved into these areas they adopted the corporate form, which they felt to be more appropriate to such business-like activities.  

Local governments wanted their service enterprises to be efficiently run and “profit-making” (i.e., able to pay off the borrowed funds plus interest over and above the costs of operation, maintenance, and, sometimes, expansion), yet they had no desire or capability to supervise the operational details closely.  

It has been suggested that a meaningful comparison of the efficiency of authorities with that of general governments is impossible because such a comparison pits different kinds of bodies with different purposes and methodologies against each other. It may indeed

316. See Gerwig, supra note 9, at 613, 615.
318. Id. at 22.
be impossible to compare the efficiency of these bodies generally. However, arguments about their relative efficiency in handling a particular project can be adduced from the very differences in their purposes and organization. First, the typical authority, unlike a general government, usually has only one responsibility, so authority directors can concentrate on the one project and develop an expertise, which may be important if a complicated service such as mass transit is involved. Also, those in charge of a single-purpose enterprise need not worry about making the delicate balance among competing needs and constituencies that is required of general governments. Second, authorities may be free of certain constitutional or state law requirements that restrict general governments, such as civil service laws and laws governing state agencies in such respects as wage rates, contract specifications, and the acceptance of low bids. Third, and more generally, authorities seem to have greater flexibility in their methods of operation. For example, when they negotiate leases, guarantees, and loans with private businesses they run less risk than a general government of being charged with acting beyond their proper sphere or of diverting public funds to private purposes. It also seems likely that policy decisions are more quickly made and more easily altered in authorities than in local governments. The board of directors is not subject to the procedures, political maneuvering, and bureaucratic delays that may act as a drag upon general government decision-making. The advantages that come with corporate form would seem to carry over fully into multicounty authorities. It is sometimes suggested that authorities are particularly efficient because they must be run in a "business-like" manner in order to maintain their bond ratings and attract investors. Perhaps the shadowy presence of bondholders does promote efficiency in authority operation. Because an authority usually has the responsibility for

---

320. It is interesting to note that cases so holding, see text accompanying notes 321-24 infra, excuse authorities from the operation of certain state laws on the ground that authorities are too independent to be agencies or branches of the state. But see Port of New York Authority v. J.E. Linde Paper Co., 205 Misc. 110, 127 N.Y.S.2d 155 (N.Y. City Mun. Ct. 1953), excusing the Authority from emergency rent control laws on the ground that as an arm of the state it was exempt from general legislation unless specifically included.

325. See Public Authorities, supra note 3, at 92-93, 195-96.
326. See Council Report, supra note 9, at 51; Public Authorities, supra note 3, at 90-92, 195-96. Note that this view is a counterweight to the argument that the influence of absentee bondholders is an undesirable feature of authorities.
only one service, its financial situation is far more exposed than it would be if the service were merely one of many items on a general government's annual budget. And the major investors in state and municipal bonds are financial institutions capable of detailed and sophisticated analysis. Thus, authority directors may well work out costs, rates, and future plans with an eye cast toward the bondholders. Whatever effect a concern for bond ratings has on efficiency, it is probably enhanced in the multicounty authority because the very size of its projects encourages careful scrutiny by investors.

The fact that the presence of bondholders may encourage efficiency does not necessarily lead to the conclusion that authorities are more efficient than general governments. Whatever the influence of bondholders—and it is probably easy to overvalue—authorities are not subject to the direct outside control that shareholders potentially exercise over corporations and the electorate exercises over cities. All local governments have credit ratings and public confidence to worry about, and it is hard to see why they should be any less motivated than authorities to conduct their affairs efficiently. The influence of bondholders is merely another incentive to act efficiently and is not as telling as the organizational and operational differences between authorities and general governments.

It may also be suggested that authorities are more efficient than general governments because they permit capital facilities to be constructed and managed in the public interest by an organization that maintains the low profile of a private business—in short, an authority can depoliticize the provision of a service. It is difficult to evaluate this contention because the virtues of being "out of politics" are conjectural and not susceptible of easy proof. Perhaps an unexpressed assumption that accompanies this view is that the decisions made in operating authority facilities are basically economic, "business" decisions. It would follow that, while it is in the public interest to have the facilities available, once they do exist it is not the public interest but ordinary business considerations that should guide their operation. This assumption may merely reflect a popular view that private businesses are better managed than government bodies. Thus, "depoliticized" would simply mean that a "business-like" decision-making process is used instead of a governmental one, which is just another way of stating the organizational advantages discussed above.

Another meaning that "out of politics" may carry is that authorities are relatively immune from partisan considerations. In this sense authorities are depoliticized in that neither their personnel nor their

\[327.\] In 1967, banks, insurance companies, other corporations, and miscellaneous investors held 68.3 billion dollars (par value) of state and municipal bonds, as compared to the 39.8 billion dollars held by individuals, partnerships, and personal trading accounts. Moody's Investor Service, Inc., Municipal and Government Manual 216 (1968).
policies are usually subject to voter approval. This suggests an analogy to the insulation afforded appointed judges so that the objectivity of their decision-making will not be undermined by the prospect of upcoming elections. Perhaps directors of authorities can similarly make decisions without having to play to the sympathies of various blocs of voters or to worry that their political opponents will be presented with a campaign issue. Moreover, the fact that there are no periodically elected directors, who may feel obligated to make changes because they openly criticized their predecessors, promotes continuity in long-range planning.

Finally, if authorities are sufficiently depoliticized, they may attract more competent personnel than do other governmental institutions. 328 Studies of public authority boards show a high preponderance of business and professional people serving as directors. 329 The multicounty authority can be expected to do an even better job in attracting superior personnel, for the job to be done is both challenging and vital to the community, and, while a director's position will not require the unpleasantness of an election, it may command a considerable amount of prestige and power. 330 In some instances a substantial salary is also offered. 331 It might be feared that authorities will drain competent manpower from other local governments, but it should be kept in mind that authorities probably attract many people who would not otherwise enter politics. 332

It may be true that depoliticization promotes efficient operations, but it is not clear that all authorities are truly depoliticized. The size and function of the authority is again relevant: An industrial exhibit, planetarium, or parking authority may indeed be out of the political limelight; the Port of New York Authority clearly is not. Such multicounty authorities are frequently subject to the vicissitudes of politics. 333 In the first place, the creating statute may pre-

328. public authorities, supra note 3, at 13, 57-64.
329. See text accompanying note 31 supra.
330. public authorities, supra note 3, at 66-68. For example, Robert Moses has been one of the most important and controversial figures in public service in New York for many years. Much of his reputation was generated by his chairmanship of such authorities as the New York State Power Authority, the Triborough Bridge and Tunnel Authority, and the Jones Beach State Parkway Authority. See J. Doig, supra note 111, at 37-41; public authorities, supra, at 145-46. Austin Tobin, long-time director of the Port of New York Authority, achieved a similar reputation. See J. Doig, supra, at 33-35; urban areas, supra note 3, at 330-33.
331. public authorities, supra note 3, at 67-68. For example, in 1964, Tobin's salary as Director of the Port of New York Authority was 60,000 dollars, higher than that of the Mayor of New York City or the Governor of New York. The head of the New Jersey Turnpike Authority received 29,500 dollars. Id. at 107.
332. public authorities, supra note 3, at 64-68.
333. See public authorities, supra note 3, at 140-44. The choice among the plans submitted for the New York MTA, discussed in the text accompanying notes 111-15 supra, was not entirely free from partisan concerns. On the political background against which the MTA was created, see J. Doig, supra note 111. See also S. Mermin, jurispud-
scribe various political checks and balances on authority action, such as New York City's veto powers over certain transit operations of the MTA \(^{334}\) and the powers of the advisory board of the MBTA over fare changes and other important decisions. \(^{335}\) In the second place, it is impossible to keep multicounty authorities out of the public eye given the impact that their decisions as to fares and routes have on metropolitan life. \(^{336}\) Nor can they stay entirely clear of interest groups, such as labor unions, merchants' associations, and, in recent years, environmental organizations. Increasingly, the question becomes not whether authorities are involved in politics, but rather how do they, and how should they, fit into the political decision-making process. \(^{337}\)

There is another sense in which it might be said that authorities increase efficiency. It could be argued that the use of revenue-dependent authorities results in a better allocation of resources than does providing the same services through taxation, for those who benefit directly from the facilities, rather than the general body of taxpayers, pay for them. The economics of user charges \(^{338}\) are beyond the scope of this article, but, according to traditional economic models, if an authority's unsubsidized rates reflect the full cost of a given project, a use pattern will tend to develop that accurately reflects the demand for, and relative value of, the service. Projects supported by tax funds, on the other hand, shift the cost to the entire public; artificially low rates, or no rates at all, may be charged, resulting in a greater demand than the relative value of the service would ordinarily dictate. This is theoretically an inefficient allocation of resources, although it may be justified by public policy considerations. \(^{339}\)

Even disregarding the serious objection that many authority functions are vital enough to warrant tax financing in order to insure a certain minimum level of services, \(^{340}\) this argument is not completely...

---

\(^{334}\) See text accompanying note 110 \(\text{supra}\).

\(^{335}\) See text accompanying notes 130-32 \(\text{supra}\).

\(^{336}\) Of course, the statutory checks on authorities often operate in just those situations most likely to arouse public concern.

\(^{337}\) See generally text accompanying notes 598-401 \(\text{infra}\).

\(^{338}\) See generally National Industrial Conference Board, Use of Service Charges in Local Government (1965); Tax Foundation, Government Finances Brief No. 20, Special Assessment and Service Charges in Municipal Finance (1970).

\(^{339}\) Insofar as this argument is concerned, if a local government issues its own revenue bonds rather than financing a project through taxation, it would be as efficient as an authority in regard to allocation of resources.

\(^{340}\) It has been pointed out in connection with authorities that the choice between financing on a benefit-received principle or financing through taxes because of a desired minimum level of services for the entire community is a basic question of public policy that should be decided by traditional political methods. Shestack, \(\text{supra}\) note 19, at 508-09.
convincing, for the charges levied by authorities may not always reflect the actual costs of particular facilities. For example, an authority may pool its revenues and equate total revenues and total costs, so that profitable facilities help finance deficit ones.\textsuperscript{341} Also, reflection of the full cost is undercut by tax exemptions,\textsuperscript{342} government grants, and the use of government facilities. Finally, the monopoly power possessed by some authorities may negate a meaningful expression of demand.\textsuperscript{343} The resource allocation argument is weakest in the case of multicounty authorities because they are most likely to pool revenues, receive substantial government grants, facilities, and tax revenues, and have a monopoly.

Multicounty authorities, however, benefit from another important source of efficiency that may not be shared by other local governments. Because they are responsible for a single function on an area-wide basis, multicounty authorities can achieve economies of scale. For instance, they may be able to obtain financing at lower costs and to purchase materials in large quantities for lower prices.\textsuperscript{344} Also, the use of the latest technology—for example, the use of computers to monitor transportation—is more likely to be economically warranted on a multicounty basis than in an individual county or town.

Multicounty authorities can also avoid duplication of facilities and personnel. A single board of directors can be substituted for the multitude of boards required if each city or county is to provide the service on its own. Water supply or sewer authorities can integrate pipeline systems and efficiently link them with reservoir and treatment facilities. Transportation authorities can design rail and bus lines to complement each other and can eliminate underutilized stations, depots, and tracks in order to locate new ones where service is most needed.\textsuperscript{345} The economies of scale and the avoidance of duplication of facilities and personnel, together with the advantages of corporate organization, singleness of function, and depoliticized operation, do indicate on balance that authorities, and particularly

\textsuperscript{341} COUNCIL REPORT, supra note 9, at 105-06.
\textsuperscript{342} See text accompanying notes 50-62 supra.
\textsuperscript{343} Authorities may be granted monopolies by statute for certain kinds of services, such as specific modes of transportation, or they may have natural monopolies in the case of projects such as dams, bridges, tunnels, and some public buildings. Even for operations, such as dormitories or parking facilities, that could be subject to competition, authorities have some advantages, as, for instance, tax exemption.
\textsuperscript{344} One source reports, for example, that per-capita investment for a sewerage plant to serve 500,000 people is only 75 per cent that of a facility for 50,000, and that it costs fifty-eight dollars per million gallons to treat sewage with a 1 million-gallon capacity plant, but only twenty-three dollars with a 10 million-gallon plant and eight dollars with a 100 million-gallon plant. METROPOLITAN AMERICA, supra note 2, at 43.
\textsuperscript{345} One of the main reasons that the Port of New York Authority was created was to unify and consolidate competing enterprises, particularly the railroads, which each desired terminal facilities in strategic harbor areas. See E. BARD, supra note 74, at 37-39; F. Bird, supra note 74, at 10-13.
multicounty authorities, can furnish services more efficiently than a general government can.

C. Jurisdictional Advantages

A persuasive argument in favor of authorities arises from their jurisdictional adaptability.\textsuperscript{346} An authority can be created to plan and administer a single bridge, tunnel, or dam that is already wholly contained within a city or county. Or, if a turnpike is needed across the one hundred miles from one city to another, an authority can be responsible for that thin strip spanning several counties.

This jurisdictional flexibility has its greatest impact in metropolitan areas, which are typically composed of a large central city surrounded by a group of smaller, governmentally independent suburbs spread across several counties. Some degree of interdependence among these communities is inevitable: They share natural resources, such as water supplies and recreation areas, and they share man-made facilities, such as highways, airports, and utility systems.\textsuperscript{347} There is a constant interchange of people who work, shop, and seek entertainment outside their own communities. Therefore, the policies of a city often have serious consequences—known as "spillover effects"\textsuperscript{348}—for its neighbors. The failure to control air pollution in central city factories, for example, affects the air of the surrounding suburbs; the failure to treat sewage adequately in upper river communities burdens the downriver central city.

Paradoxically, one of the most persistent problems with special governments has been a product of their marked success: Their use has resulted in a bewildering maze of too many governments.\textsuperscript{349} Within the 227 Standard Metropolitan Statistical Areas (SMSAs), there are 8,636 counties, municipalities, and townships and another 7,049 authorities and special districts, or about sixty-nine local governments per SMSA.\textsuperscript{350} Rather than creating new jurisdictions coterminous with particular needs or uniting municipalities and counties in joint projects, the creators of special governments have tended to

\textsuperscript{346} This same argument, of course, is advanced for special districts, with the difference that in that case a taxing unit is created coterminous with the service to be provided. Thus, a soil conservation district can include the whole of a natural watershed lying in several counties, and only residents within the district are taxed.

\textsuperscript{347} See \textit{METROPOLITAN AMERICA}, supra note 2, at 5-7.


\textsuperscript{349} See, e.g., \textit{PUBLIC AUTHORITIES}, supra note 3, at 167-75; R. Wood, \textit{1400 GOVERNMENTS} (1961); McLean, supra note 298, at 438, 441; Nehemikis, \textit{supra} note 9, at 30-31; Porter, \textit{supra} note 298.

\textsuperscript{350} In 1967, 29 SMSAs counted 200 or more local governments within their boundaries, and the Chicago area contained 1,113. \textit{GOVERNMENTAL ORGANIZATION}, \textit{supra} note 10, at 12.
give them the same boundaries as existing cities or counties. Furthermore, the majority of special governments appear to have been created on an ad hoc basis with little attention paid to consolidation with, or elimination of, existing special governments.

The consequent fractionalization of government has two detrimental effects. First, when activities are committed to the control of small, single-purpose bodies and are not coordinated into an over-all plan, problems of cooperation, competition, definition of respective powers, or merely the establishment of relationships among the local governments are inevitable. Second, citizen involvement in local government is discouraged. Not only are citizens likely to be confused about the jurisdiction and powers of special governments and unable to keep informed about their operation, but also there may seem to be no one person or body to hold accountable for the over-all drift of local development.

This proliferation may be to some degree unnecessary. In the first place, it might be better if some projects given to special governments—such as industrial exhibits, planetariums, mineral springs, commercial office buildings, and luxury housing—were left in private hands. In the second place, it is far from clear that special governments are always the best way of managing even those activities suited for governmental control. Cemeteries, libraries, and parks take no special technical expertise to manage and may appropriately be left to general governments. Corporate decision-making and insulation from politics are unlikely to be important in the routine management of such activities as war memorials and parking lots.

351. See Public Authorities, supra note 3, at 151. See also Porter, supra note 298, at 546.

352. It is usually necessary to wade through an immense variety of statute headings to find the scattered laws on particular authorities. Gerwig, supra note 9, at 592. See also New York Post Co. v. Moses, 10 N.Y.2d 199, 207, 176 N.E.2d 709, 713, 219 N.Y.S.2d 7, 12 (1961) (Desmond, C.J., dissenting): "The legislation applicable to the various Authorities is mostly ad hoc, a 'wilderness of special instances,' so policy considerations to some extent control us in deciding whether particular statutes which do not mention Authorities do or do not apply to them."

353. Despite the fact that the large, important authorities are headed by appointed officials, many special governments do have at least some elected officials. In 1967, 8,699 special governments did not have any elected officials, while 12,055 had an average of 4.3 elected members each. U.S. Bureau of the Census, Dept. of Commerce, 1967 Census of Governments Vol. 6, No. 1: Popularly Elected Officials of State and Local Governments 11 (Table 5), 30 (Table 12).

354. Once the capital facilities are built—and general governments routinely contract for such projects on an individual basis—the mere collection of revenues and the discharge of revenue bonds, which keep some single-facility authorities in business, can be done by general governments.

355. It has already been noted that, because of the "special fund" doctrine, constitutional debt limitations are no bar to general governments that wish to issue their own revenue bonds and keep the facilities under their own control. See text accompanying notes 176-79 supra. However, in the larger cities, where new construction and planning of these facilities are constantly going on, a separate governing body may be justified.
Before creating an authority, the legislature should consider whether it is legitimately needed for increased efficiency or jurisdictional flexibility, as well as for its financial advantages.

VI. MULTICOUNTY AUTHORITIES AND ALTERNATIVE AREA-WIDE GOVERNMENTS

The use of the authority device is but one of many plans that have been offered to improve various aspects of metropolitan government;356 like the others, it has unique strengths and weaknesses. As suggested above, the strengths of multicounty authorities lie in increased efficiency and flexibility of jurisdiction. Among the services that are best suited for administration by this kind of body are those that require accumulated expertise and technological sophistication in their management. Continuity of management, attraction of superior personnel, and corporate powers and decision-making will be most beneficial in such areas as transportation, water supply and sewerage, port direction, and pollution control. Services in which area-wide administration and planning would result in significant economies of scale and integration of separate facilities are also likely to benefit from administration by multicounty authorities.357 An area-wide policy is mandatory, for instance, if a transportation plan is effectively to coordinate bus, train, and subway services with auto travel on the roads, ferries, and bridges, and through tunnels.

Yet, while the use of a multicounty authority aids rational planning in the distribution of a single service, it might be argued that general governments are better suited to area-wide administration. Not only can they, too, achieve economies of scale, but they alone have an overview of all the service needs of an area and are directly responsible to the voters. However, the current proliferation of governments within metropolitan areas has made area-wide administration by general governments almost impossible. The planners in each city and county are not only limited to their own jurisdictions, but also run into a variety of autonomous single-purpose governments within their own boundaries.

Because of these problems, many suggestions have been made for

356. See text accompanying notes 358-67 infra.

357. Needs that are merely common to all parts of a metropolitan area must be distinguished from those that are more effectively administered on an area-wide basis. It may well be, for instance, that a dearth of parking lots is a problem throughout a metropolis; it is far from certain, however, that area-wide administration of parking lots is necessary to solve the problem. Individual cities may or may not remedy such problems without risk of serious spillover effects. Sewage disposal and transportation, on the other hand, may be handled inefficiently if each city cares only for its small domain. See Banfield & Grodzins, Some Flaws in the Logic of Metropolitan Reorganization, in METROPOLITAN POLITICS 142-52 (M. Danielson ed. 1966). As is implied by the title of their article, the authors do not believe that the case for area-wide government is as strong as is often stated.
coordination or consolidation of traditional general governments in order to allow area-wide planning. Cooperation has been promoted through intergovernmental agreements and the council of governments approach. Such arrangements do have a broad geographical base and increase awareness of area-wide problems. However, because they are voluntary and lack extensive legal powers, they are limited in their ability to deal with the difficult and controversial issues of resource allocation, the setting of priorities, and the resolution of conflicting interests. Regional planning authorities or commissions, which have merely advisory powers, have made contributions in projecting future growth and suggesting appropriate governmental action, but they too seldom translate advice into action. Extensive efforts have also been made to merge a group of general governments into a single unit. But such reforms as city-county consolidation, annexation, federation of local governments, and "urban counties" have met with a noticeable lack of enthusiasm among the electorate.  

---

360. Metropolitan America, supra note 2, at 90.  
361. Only about a quarter of these bodies have mandatory referral power to review local plans, and their implementing powers are severely limited. Joint Center for Urban Studies, The Effectiveness of Metropolitan Planning 44 (1964).  
362. See Metropolitan America, supra note 2, at 110-12; Joint Center for Urban Studies, supra note 361, at 59-66. Recently there have been efforts to give regional advisory boards mandatory powers over local governments and private parties. See, e.g., Assembly Bill No. 220, Cal. Legis., 1972 Regular Sess. (not enacted).  
363. See Metropolitan America, supra note 2, at 102-04; Lineberry, supra note 348, at 698-701.  
365. See Metropolitan America, supra note 2, at 104-06; Lineberry, supra note 348, at 701-06.  
366. See Metropolitan America, supra note 2, at 90-93; Lineberry, supra note 348, at 683.  
367. A summary of 47 referendums on metropolitan reorganization undertaken in 36 of the nation's 527 SMSAs shows that 18 efforts were successful (although one in Denver created a metropolitan district later declared unconstitutional). This success rate is not as impressive as it may appear for three reasons. First, the summary includes only those campaigns in which reform forces were strong enough to get the issue on a ballot; looking at the statistics another way, only ten per cent of metropolitan areas have even held referendums on reorganization. Second, only four of the 36 areas holding referendums included a city with a 1960 population greater than 500,000. Thus, in the larger metropolitan areas, where reform efforts are most urgently needed, few major reforms have been undertaken. Third, it has been the modest changes, rather than the far-reaching ones that have had the greatest success. Lineberry, supra note 348; at 715-17.
Reasons for political resistance to areawide general government will vary from case to case, but they may include (1) voter unawareness of the need for change, (2) mutual distrust between residents of suburbs and central cities, (3) fear that urban reorganization means higher taxes and loss of neighborhood influence in such matters as education and law enforcement, (4) opposition from politicians who face the loss of their jobs, and (5) opposition from black voters who do not want to dilute their central city political strength. Authorities do not face these stumbling blocks, in part because they are often simply imposed by state legislatures, in part because each authority deals with only one service and leaves general governments intact, and in part because the kinds of services performed by authorities are usually the less politically volatile ones.

To date, multicounty authorities have permitted areawide planning for at least some individual services. Whether multicounty authorities will evolve further into areawide general governments is uncertain. The intriguing model of Metropolitan Seattle suggests an intermediate step, in which one multicounty authority provides a number of services areawide, while leaving other governmental functions in the hands of more traditional units.

The Seattle plan was made possible by a Washington statute that allows the residents of a city of 500,000 and at least one other city to form a metropolitan municipal corporation to perform one or more of six functions: sewage disposal, water supply, public transportation, garbage disposal, parks and parkways maintenance, and comprehensive planning. What results is a two-layered government: A single multipurpose authority carries out its functions areawide, but all other functions are retained by the local governments. Those services handled by the multipurpose second layer are financed by revenue bonds and an areawide property tax.

368. See Metropolitan America, supra note 2, at 107-10; Lineberry, supra note 348, at 690-96. See also J. Bollens & H. Schmandt, The Metropolis 491-524 (1965); G. Steiner, Metropolitan Government and the Real World: The Case of Chicago 7-12 (1966); Adrian, Suburbia and the Folklore of Metropology, in Metropolitan Politics 172-79 (M. Danielson ed. 1966); Ylvisaker, Why Mayors Oppose Metropolitan Government, in Metropolitan Politics 180-88 (M. Danielson ed. 1966); Tobin, The Metropolitan Special District: Intercounty Metropolitan Government of Tomorrow, 14 U. Miami L. Rev. 355, 348-53 (1960).


370. This development is in accordance with the 1961 recommendations of the United States Advisory Commission on Intergovernmental Relations that states consider the enactment of legislation authorizing local units of government within metropolitan areas to establish, in accordance with statutory requirements, metropolitan service corporations or authorities for the performance of governmental services necessitating areawide handling, such corporations to have appropriate borrowing and taxing power, but with the initial establishment and any
The development of two-layered government is not necessarily inconsistent with the recent movement for decentralization, local control, and community involvement in government. The thrust of this movement has been directed toward such traditionally local services as law enforcement and education, in which most citizens have a strong personal stake, and these services can be left with the "first layer" of local general governments. Services that are more technological and less controversial can appropriately be given to the second layer.

VII. Accountability

The greatest cause for concern about the increasing impact of authorities is the lack of public supervision of their activities. However, although the policies of most authorities are not subject to electoral approval, their activities are subject to some legal checks.
State legislatures have the final power over authorities in that they may dissolve them once their bonds are discharged. Similarly, as an ultimate check on mismanagement there are various statutory, and possibly common law, remedies for the bondholder constituency should an authority default. Other provisions to deter misconduct include the powers possessed by governors to remove directors for cause, or, more rarely, to veto authority activities. Some authorities are empowered or required to hold public hearings before taking certain actions, and a majority of authorities are required to submit annual reports to executive officials or state legislatures. The presence of state or locally elected officials as ex officio members of an authority's governing body may also keep authority policies in harmony with those of general governments. There have been scattered attempts to provide for supervision of authorities by other government units through such means as the Advisory Board of the Massachusetts Bay Transportation Authority. Such an arrangement is now unique but may well become more common.

---


377. The Port of New York Authority has been required since 1927 to submit the minutes of each meeting to the governors of both New Jersey and New York, either of whom can veto any action taken. N.J. Stat. Ann. §§ 32:2-2 to -9 (1963); N.Y. Unconsol. Laws §§ 7151-54 (McKinney 1961). This power must also be seen only as an ultimate reservation of power; it had been used only nine times up to 1969. Urban Areas, supra note 3, at 568-72.

378. The New York Metropolitan Transportation Agency is required to hold a public hearing before changing its fares or fees. N.Y. Pub. Auth. Law § 1266(4) (McKinney 1970). County of Nassau v. Metropolitan Transp. Authority, 57 Misc. 2d 1025, 293 N.Y.S.2d 1017 (Sup. Ct. 1968), characterized the MTA as a semi-legislative body for purposes of rate setting and held that the required public hearing was primarily to provide information for the hearing body and need not be conducted as a judicial hearing. See also Educational Broadcasting Corp. v. Ronan, 50 Misc. 2d 776, 313 N.Y.S.2d 107 (Sup. Ct. 1972), holding that the MTA was within its rights in refusing to permit live television broadcasts of its public hearings; Glen v. Rockefeller, 61 Misc. 2d 942, 307 N.Y.S.2d 46 (Sup. Ct.), affd. mem., 34 App. Div. 2d 930, 313 N.Y.S.2d 938 (1970), holding that it was not a denial of due process for the City Transit Authority to raise fares without a public hearing when it was not statutorily required to hold such a hearing.

379. Council Rep. note 9, at 57. See also U.S. Advisory Commn. on Intergovernmental Relations, supra note 12, at 51-52, on the inadequacy of the reporting of authority activities.

380. See text accompanying note 252 supra.

381. See Council Report, supra note 9, at 41-43.

382. See text accompanying notes 130-34 supra.

383. An analogous development may be seen in California’s attempt to deal with the problem of the proliferation of special governments by creating in each county a Local
Direct accountability to the public remains a major problem. In one sense, this problem arises from the relative anonymity of authorities. An authority may only rarely embark upon major new projects, and its routine duties are seldom considered newsworthy by the press. Moreover, the information released about those large authorities that are in the public eye frequently comes from within the authority itself. It may be difficult to require an authority to divulge additional information. In New York Post Corp. v. Moses, the Post sought an order permitting it to inspect the files and records of the Triborough Bridge and Tunnel Authority. The court refused, on the grounds that no statutory provision expressly allowed “a tollpayer or a citizen to examine the papers of an Authority.” Stressing the Authority’s separate existence from the state, the court also rejected the argument that the Authority was an agent of the city or a “public office” for the purposes of a general public records law. Despite the desirability of citizen access to information about the conduct of government departments, the court held that it was up to the legislature to decide the extent to which an authority’s operations should be open to public scrutiny.

Tobin v. United States involved the Executive Director of the Agency Formation Commission (LAFCO), see CAL. GOVT. CODE §§ 54773-99.5 (West 1966), as amended, CAL. GOVT. CODE §§ 54774-54863 (West Supp. 1973), to encourage the orderly development of local government agencies. These commissions have extensive powers, including the power to disapprove the creation or modification of special districts. See generally Note, LAFCO: Is It in Control of Special Districts?, 23 HASTINGS L.J. 913 (1972).

See U.S. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, supra note 12, at 67-68. See also J. BOLLEN, supra note 8, at 1. See also J. BOLLEN, supra note 8, at 1.

It has been suggested that this anonymity opens the contracts and directorships of authorities to political patronage. PUBLIC AUTHORITIES, supra note 3, at 142; McLean, supra note 298, at 442. The problem of patronage does not seem to have been extensive in practice, at least in part because salaried directorships and large construction contracts are normally connected only with the important authorities that receive a fair amount of public attention.

The Port of New York Authority, an extreme example, has both a public relations department with an annual budget of over $28,000 dollars and a community relations department. PUBLIC AUTHORITIES, supra note 3, at 12, 131-33.


10 N.Y.2d at 203, 176 N.E.2d at 710, 219 N.Y.S.2d at 9.


10 N.Y.2d at 205, 176 N.E.2d at 712, 219 N.Y.S.2d at 11. The court was not swayed by an argument that this holding would result in a system whereby no representative of the public could investigate what happened to the vast sums of money spent. The statute creating the Authority provided for investigation by the State and City Comptrollers, the State Commission of Investigation, the Mayor of New York City, the Chairman of the Senate Finance Committee, and the Chairman of the Assembly Ways and Means Committee. 10 N.Y.2d at 205, 176 N.E.2d at 711, 219 N.Y.S.2d at 10. Accord, Brown v. Minuse, 41 Misc. 2d 427, 245 N.Y.S.2d 60 (Sup. Ct. 1965). See also MICH. COMP. LAWS ANN. §§ 141.421-439 (Supp. 1973) (provisions for reports, auditing, and access to confidential information of “local units” of government).

Port of New York Authority, who had been found guilty of contempt of Congress by the district court for refusing to produce certain subpoenaed documents in connection with an investigation conducted by a subcommittee of the United States House of Representatives. The court sidestepped the question of whether Congress could constitutionally reserve the right to amend or revoke its approval of an interstate compact. Rather, the court held that the investigatory power granted to the committee by Congress was only intended to cover documents relating to the actual activities and operations of the Authority. Therefore, "the administrative communications, internal memoranda, and other intra-Authority documents demanded by the subpoena" were not required to be furnished.

Even if access to internal information about an authority is gained, the public usually has no means of input into an authority's decision-making process more direct than the election of state representatives. The lack of representation of various minority segments of society on authority boards may aggravate the problem of accessibility.

However, the impact of an authority's plans and policies on the public can be direct indeed. A new bridge may spark a building boom in a given neighborhood; a decision on the placement of a thru-way interchange may cause a great fluctuation in property values; the availability of public transportation may dictate the commuter pattern and thus affect air pollution; and the availability of a water supply linkage may be crucial to a new real estate subdivision.

The concern about lack of public control is particularly acute in the case of multicounty authorities for three reasons: (1) their size and scope magnifies their impact; (2) they rely in part on property taxes and/or state funds; and (3) they have a potential for evolving into areawide general governments or, at least, multifunctional "second layers" of government. Perhaps for these reasons, multicounty authorities have stronger provisions for control than most traditional authorities.

393. 306 F.2d at 271.
394. 306 F.2d at 275-76.
395. In recognition of the problem of representation, the Boston Metropolitan Area Planning Council is required to have among its council members "sufficient representation of minority and low-income groups so as to substantially represent their viewpoints in the area to be served by the council." Mass. ANN. LAWS ch. 40B, § 24 (Supp. 1971).
396. See PUBLIC AUTHORITIES, supra note 8, at 56; Gulick, "Authorities" and How to Use Them, 8 TAX REV. 47, 50-51 (1947).
397. See text accompanying notes 109-10, 115 (MTA), 130-34 (MBTA), 146, 148-52 (BARTD) supra.
Assuming that, as seems probable, the ability of authorities to plan for and meet service needs is enhanced not only by their jurisdictional flexibility but also by their corporate form and separation from traditional general government, the dilemma is clear: To what extent are the advantages of efficiency in providing a service more important than the maintenance of citizen involvement in, and ultimate control of, its operation?

The answer to this question is finally a matter of judgment and political philosophy. As has already been noted, the one person--one vote doctrine does not constitutionally require any particular form of control. Given that, there are three basic postures that a legislature could take. First, it could conclude that the advantages of economy, of efficiency, and, perhaps, of obtaining financing that can be achieved by separation from direct public control are critically important. Many of the smaller authorities have been, and might reasonably continue to be, kept as autonomous as possible for this reason. However, the impact of multicounty authorities is such that absolute autonomy for them is undesirable.

Second, a legislature could conclude that authorities should be controlled by the public to the same degree as are local general governments. It may be argued that authorities are subverting constitutional debt limitations and that their organizational advantages, if any, are outweighed by their inherent lack of public accountability. The adherents of this position would turn the functions of authorities over to general governments. Alternatively, it may be felt that the scope of some authorities so closely approaches the full panoply of governmental powers that, while their separateness and form should be retained because of their jurisdictional advantages, their directors should be elected by the people. The first of these two positions is unconvincing. Debt limitations are anachronistic, and their avoidance is not the only basis on which authorities can be justified. Moreover, not all authorities are important enough to merit full public accountability, and the impossibility of adequately controlling the others is far from certain. The second argument must be accorded more weight, particularly in the case of multicounty authorities, insofar as it suggests the need for public controls; that direct election of the board is the most desirable form of control is less clear.

The third position that a legislature could take, and the one most commonly adopted, is a middle course between these two, a balance between public accountability and operational independence. Indirect control that is sufficient to protect the public interest, yet not so re-

398. See generally text accompanying notes 206-65 supra.
399. For example, this seems to be the conclusion of Quirk & Wein, supra note 3, at 597.
400. See text accompanying notes 308-09, 511 supra.
strictive as to hamper efficiency, can be maintained. At least in the case of the more technologically oriented services, it is reasonable to sacrifice a certain amount of public control in return for economy and efficiency. A great deal of experimentation with different forms of state and local control is necessary to find an appropriate balance, and the variety of arrangements seen in the NYMTA, the MBTA, and BARTD is a healthy sign.

VIII. CONCLUSION

Public authorities effectively fuse governmental powers and immunities with corporate organization. While it may be that more projects have been turned over to them than is strictly necessary, authorities do exist in great numbers and are certain to remain on the local scene for the foreseeable future. At the same time, uncertainties persist as to their legal status, powers, and liabilities. Whether state legislatures create authorities directly or authorize cities and counties to do so, they can improve the present situation. Careful delineation of the powers, activities, and limitations of each authority, old and new, is the minimum that should be asked. A compilation under a single heading of all the statutes of a given state relating to authorities, as New York has done, might facilitate public acquisition of information and encourage legislatures to re-examine their over-all policy toward authorities. Perhaps uniform statutes could be designed for such matters as annual reports, access to authority records, and reviewability of decisions under state administrative procedure acts.

Much that has been said in regard to traditional authorities is applicable to multicounty authorities. But multicounty authorities do differ in both their structure and their potential. Because of their size and the vital functions that they typically perform, they magnify the virtues and the vices of the ordinary authority. Moreover, they carry within themselves the seeds of metropolitan governmental reorganization. In a sense, they represent a new strain of the species, and their proper function and structure are not yet settled. Much work remains to be done. Sharpening the analysis of the powers and duties of multicounty authorities, experimenting with nondisabling restraints, and increasing public understanding of the role of these bodies are among the most important tasks. On balance, the record of authorities in efficient capital construction and operation and the jurisdictional potential of multicounty authorities make the effort seem worthwhile.

401. See A. Bronage, Political Representation in Metropolitan Agencies 78-99 (1962), for a discussion of alternatives in appointing or electing authority officials.