

5-1969

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Recommended Citation

Louis F. Comus, Jr., *The Council-of- Governments Approach To Governmental Fragmentation*, 22 *Vanderbilt Law Review* 811 (1969)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol22/iss4/4>

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The Council-of-Governments Approach To Governmental Fragmentation

*Louis F. Comus, Jr.**

I. METROPOLITAN GOVERNMENTAL FRAGMENTATION—A “PROBLEM”?

A. The Popular View

Much of the current literature in the field of metropolitan government either sets forth examples of governmental difficulties and inefficiencies which result from the urbanization of our population or merely assumes that such difficulties exist. In either case the prescription usually involves some sort of “metropolitanization” of urban governmental structure. Since such prescriptions are aimed either at metropolitan difficulties in general or at particular inefficiencies, it is useful to consider some of the more frequent complaints.

One factor often cited as contributing to various urban ills is the archaic governmental structure of many county governments in metropolitan areas.¹ Counties which were originally set up merely as localized agents of the state governments are not equipped to handle many of the functions required when the county includes urbanized areas, either incorporated or unincorporated. Thus, functions usually considered to be duties of the local or municipal government either are not undertaken for the county residents or are handled on an ad hoc basis by the county government in connection with other governmental units. This type of inadequate handling of governmental functions in various locales of the metropolitan area can contribute substantially to the urban “problem.”

Shifting from the problem of inadequate local governmental services to the more common situation in which governmental services are provided by a municipality or special service district, the problems seem to stem from fragmentation of the governmental structure.

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1. *Report of Committee on Inter-Municipal Cooperation*, 28 NIMLO MUN. L. REV. 164, 174-75 (1965); Wood, *The New Metropolis*, in *DEMOCRACY IN URBAN AMERICA* (O. Williams & C. Press ed. 1961).

Arising from the gradual growing together of many smaller units originally planned as autonomous municipalities, this "fractionalization" of governmental duties is seen as contributing to the breakdown of local government in metropolitan areas, or to the diminution of popular control over local government. Loss of control results when each citizen in a given area is subject to the exercise of governmental functions and the provision of governmental services by several different units, usually with differing boundaries, thus diluting and diffusing the citizen's efforts and interest in his government. Closely akin to this problem is the possibility that if requisite functions are not undertaken locally, they will be taken over by the state, again removing local government from local control.

One of the most frequently mentioned difficulties with governmental fragmentation is the resultant piecemeal approach to various projects which are area-wide in impact and which thus transcend the various units which attempt to undertake them. Whenever governmental proliferation results in the undertaking of similar services by several different units in the same general area, there will be an overlapping of responsibilities by units which are not capable of handling the whole job or even a significant part of it. Needs for services do not often respect geographical boundary lines, and when a special service district is created to meet a specific need for a small locality, that special district may also disregard other governmental boundary lines, thus creating an overlapping of responsibilities. Moreover, where services and functions do not actually overlap, they are usually duplicated many times throughout the metropolitan area, as where each of the many municipalities in the area levies and assesses its own property tax. Finally, in addition to the inadequacies resulting from proliferation, the proliferation itself is often cited as a problem, consisting of continuous complication of an already highly complicated governmental structure. The whole complex of proliferation-oriented problems generally involves such specific items as: apportioning a limited common resource (water supply); non-uniform and occasionally subnormal social standards in some of the units; incompatible land use restrictions for contiguous properties in different jurisdictions; non-coordination of street planning and construction; non-coordination of related public programs (various licensing programs and enforcement procedures); and widely divergent taxation schemes.

Another serious problem of urbanization-proliferation is rural-to-urban and urban-to-suburban migration. The movement of prosperous

citizens from the core city to the suburbs and their replacement by unassimilated migrants to the core city has usually resulted in a rather serious urban-suburban split along economic, social and racial lines. In many instances this causes a loss of awareness of core city problems by suburban residents and a consequent divergence of interests along core city-suburban geographical lines. Politics tend to become bifurcated in the same manner, with the core city becoming generally Democratic and the suburbs usually Republican, again contributing to the cleavage between the two types of governmental units.

Overlying all the urban-suburban differences and the proliferation problems are myriad inequalities and inequities in governmental services, functions and powers. Use of services becomes divorced from payment for such use when the urban worker resides in the suburbs. Services and conveniences provided and completely paid for by the core city "spill over" their benefits to the suburbs. Conversely, if the city has its own income tax, which is paid by the suburban dweller but is used for various city welfare programs rather than fiscal services, the suburban citizen is paying for something he is not getting. Of course, whenever there are many different units of government supplying a similar service to different populations, there is likely to be substantial inequality in the level of such services among the several municipalities.² While this enumeration of inequalities is quite superficial and incomplete, it does indicate that such inequities are problems which plague all of our metropolitan areas.

B. *The Banfield Query*

Contrasted to the popular view that governmental fragmentation in metropolitan areas is bad per se are occasional dissents suggesting that there may be positive values in fragmentation which would be sacrificed in a complete consolidation of the metropolitan area. Edward C. Banfield, a strong advocate of this position, criticizes the "strong bias toward simplicity, uniformity, and symmetry of structure,"³ suggesting that values such as community independence, sociability and status should be weighed against advantages of consolidation. While Banfield does cite certain definite advantages to

2. Grant, *Trends in Urban Government and Administration*, 30 *LAW & CONTEMP. PROB.* 38, 46 (1960).

3. Banfield & Grodzins, *Limitations of Metropolitan Reorganization*, in *DEMOCRACY IN URBAN AMERICA* 171, 176 (O. Williams & C. Press ed. 1961).

some regionalism in governmental administration, he believes that the bigness of any consolidation will probably remove the government further from the governed.

The suggestion that there may be virtue in governmental fragmentation is supported by the fact that a growing concept of "community," found in suburban communities, may be leading toward more homogeneity, especially along job lines. Moreover, the creation of neighborhoods of internal cohesion is a basic goal of urban planners⁴ and has become a requirement under the federal government's urban renewal programs.⁵ Finally, even those who strongly advocate centralization and consolidation of functions in the metropolitan area are beginning to realize the desirability of keeping governmental units small and close to the citizen where this can be done pursuant to a coordinated plan for the whole metropolitan area. This is an avowed purpose of the President's Commission on Intergovernmental Relations.⁶

C. *Mere Efficiency*

Efficiency in the performance of governmental functions is usually discussed as a peripheral attribute of almost any plan for metropolitan consolidation or coordination, but too often this factor is largely ignored in favor of the more "political" aspects of fragmentation. Thus, when we discuss the problem of duplication of efforts, the emphasis is often on the effort itself, rather than on the costs of that effort. Stated somewhat differently, the emphasis seems to lie upon the potential conflict between two officials or offices which perform the same function in different areas, or on the citizen confusion which arises from subjection to overlapping jurisdictions, rather than on the economic inefficiency of proliferation.

There are some obvious efficiencies to be realized in the coordination of multiplicity of efforts. These efficiencies need not find their justification in the complicated concepts of closeness of government to governed, of bifurcated politics, or of other problems. In other words, the economic costs of wasted efforts, when viewed on the larger metropolitan scale, would seem to justify "problem" status on their own.

4. Babcock & Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 LAW & CONTEMP. PROB. 220, 228-231 (1967).

5. Demonstration Cities and Metropolitan Development Act of 1966, § 103(a)(2), 42 U.S.C. § 3303(a)(2) (Supp. 1967).

6. See *Report of the Committee on Federal-City Relations*, 29 NIMLO MUN. L. REV. 48 (1966).

To illustrate this argument, assume that in Central City the tax collection activities require most of the working time of a supervisor, an accountant, an attorney, and several secretaries. This pattern is duplicated, with minor adjustments according to work load, in the several adjacent suburbs, in area school districts, in other special service districts, and in any county governments included in the metropolitan area. It seems clear that if the tax collection activities of all area governmental units and special districts were consolidated, some personnel could be eliminated, especially at the supervisory level, resulting in a dollar savings to the area as a whole. Add to this the potential effects of automation, made more economically feasible by the increase in work, and the dollar savings is increased.

Economic inefficiency is implicit in any discussion of the problems of duplication of efforts and overlapping of functions. But in most discussions of duplication and overlapping, the conclusion is merely that there is waste, without more. What is of primary significance in this particular type of inefficiency is the inherent misallocation of financial resources at the metropolitan level. Every dollar which is inefficiently used in duplication of functions cannot be used for other needed metropolitan services which would significantly benefit the entire metropolitan area as well as each constituent governmental entity.

It should be noted that efficiency in itself need not necessarily be deemed an overriding consideration, but should rather be placed in the balance along with the other arguments for coordination of metropolitan services. It is quite possible that the interests of neighborhood solidarity and homogeneity will still outweigh, or at least temper, the arguments for consolidation. However, recent developments in our cities suggest that these latter considerations can be sacrificed if such sacrifice will permit the allocation of additional funds to explosive problem areas, while somewhat alleviating the already prohibitive tax burdens upon all the citizens.

II. THE NATURE OF A COUNCIL OF GOVERNMENTS

A. Structure

1. *Essential Form.*—In order for a Council of Governments (COG) to be eligible for planning grants under the Housing and Urban Development Act of 1965,⁷ it must meet specific standards set

7. 40 U.S.C. § 461(g) (Supp. 1967).

forth by the Housing and Home Financing Agency,⁸ predecessor to the Department of Housing and Urban Development (HUD):

- (1) Voting members of the organization must be, for the most part, elected officials;
- (2) Members must represent about 90 per cent of the aggregate population of the area encompassed by the organization;
- (3) The organization must be a corporation or other legal entity established pursuant to local law or interstate compact, or must have the membership of each participating jurisdiction authorized by a resolution of the governing body of that jurisdiction, or must otherwise demonstrate that it has official standing in the area;
- (4) The organization must have a competent professional, technical and administrative staff sufficient to carry out its proposed activities; and
- (5) The organization must be able to assure that non-federal funds to match the grant will be provided.

Although this form is not essential to the COG concept and was not followed exactly in the COGs which were founded prior to the HUD requirements, it is assumed herein that COGs will conform to the specifications set forth in the Planning Agency Letter in order to take full advantage of the two-thirds matching grant from the federal government.

Within the framework of the HUD specifications, a COG is usually comprised of units of general government⁹ in an area in which the citizens share common metropolitan interests.¹⁰ Each county and municipality is represented on the Council¹¹ which meets semiannually. An executive committee, constituted from among the members of the Council by vote of the Council, carries on the COG functions between semiannual Council meetings. The major units of government in both the counties and the central city are usually represented on the executive committee. In addition, most COGs appoint standing committees from among their members for continuing study of the various specific areawide problems.¹² The

8. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN COUNCILS OF GOVERNMENTS 60 (Housing & Home Finance Agency, Planning Agency Letter No. 50, 1966).

9. This criterion excludes special districts from voting membership. However, where a given project would involve the functions of a special district, or of several special districts, the cooperation of such districts should be sought (as where the COG undertakes water pollution control projects).

10. For example, the communities in the eight-county area around Nashville, Tennessee, were found to have interests in common regarding the growth of this region. The geography of the area apparently oriented communities in the eight counties toward the Nashville metropolitan area rather than toward any other population center or toward rural detachment.

11. Usually, each unit has one representative, as in Nashville, Dallas, St. Louis and Philadelphia. However, the Seattle organization includes as participating members all the county commissioners of participating counties and three members from each participating municipality. PUGET SOUND GOVERNMENTAL CONFERENCE—A DESCRIPTION I (1968).

12. For example, the Metropolitan Washington Council of Governments maintains five standing policy committees: Health and Welfare; Environmental Health; Land Use; Public

functions of the two-tier organization are coordinated by a professional staff, headed by an executive director.¹³

The COGs, of course, have no "power" in the sense of their being able to formulate policies which will be enforceable upon the various governmental units. COGs are completely voluntary organizations with each member having an effective veto on any subject, at least insofar as that subject may affect that member's municipality. However, COGs may find enforcement potential in the Demonstration Cities and Metropolitan Development Act of 1966, which provides that any federal grants for federal open-space projects and other federally assisted development projects must be approved by an "areawide [planning] agency."¹⁴ The area planning agency is defined so as to suggest that the draftsmen of the statute had COGs in mind for this requirement.

2. *Comparison with Similar Coordination Concepts.*—The Council of Governments concept can be more easily illustrated and its value more readily assessed if it is compared with other available forms of governmental devices aimed at coordination of efforts in metropolitan areas.¹⁵

(a) *Use of Extraterritorial Powers.*—The Advisory Commission on Intergovernmental Relations (hereinafter ACIR) defines extraterritorial powers as "powers which a city exercises outside its ordinary territorial limits to regulate activity there or to assist in providing services to its citizens within its own boundaries."¹⁶ To be effective this method of arresting helter-skelter development of the urban fringe requires statutory authorization by the state. Most states currently authorize at least limited extraterritorial jurisdiction by central cities, usually for essential health services such as water supply, garbage dumps, and sewage disposal and treatment. In

Safety; and the Transportation Planning Board. There are, in addition, fourteen technical advisory committees to counsel the above standing policy committees, such as the Air Pollution Advisory Board of the Air Pollution Technical Evaluation Committee. METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, HERE, NOW . . . AND TOMORROW 32 (1968-1969).

13. Philadelphia has a three-tier COG, including a "conference" with members from all governmental units, a "council" including the members from all cities of population in excess of 25,000, and the executive board. Letter from Fred Eibell, Administrative Assistant to the Executive Director, Regional Conference of Elected Officials, April 22, 1968.

14. 42 U.S.C. § 3334(a) (Supp. 1967).

15. The metropolitan coordination concepts listed here are derived from the ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, ALTERNATIVE APPROACHES TO GOVERNMENTAL REORGANIZATION IN METROPOLITAN AREAS (1962) [hereinafter cited as ACIR, ALTERNATIVES].

16. *Id.* at 20.

addition, some thirty states have granted cities power to exercise planning, zoning and subdivision controls outside their territorial boundaries.¹⁷ Of course, extraterritorial powers are limited to unincorporated areas of the fringe and are completely impotent within suburban municipalities where many of the coordination problems arise.

While this method of coordination can certainly prevent completely uncontrolled development outside the central city, the existence of this power may also promote hasty incorporation in the outlying areas, thus frustrating evenly planned development. Moreover, if the central city is not careful in its extraterritorial statesmanship, it may create friction which will retard the development of more comprehensive coordination. The ACIR recommends wide use of extraterritorial power, but further recommends that residents of the unincorporated areas be given a voice in the exercise of this power.

A COG has one distinct advantage over extraterritorial jurisdiction. The COG "jurisdiction" is areawide, including more territory than could be covered by extraterritorial powers, thus permitting increased coordination within its sphere of influence. Since COGs include members from incorporated areas of the region, the suburban municipalities are included in the COG deliberations. However, since COGs have little or no effective power, their decisions cannot be enforced as can exercises of the power jurisdiction.

(b) *Intergovernmental Agreements.*—This coordination concept is best illustrated by the Lakewood Plan or its variations, whereby each governmental unit contracts either with the county or with other municipalities for the performance of services within its boundaries.¹⁸ Agreements under this plan may include just about any city service or activity, such as the provision of water supply or sewage service, joint purchasing, or reciprocal fire protection activities. This type of cooperation also requires state statutory approval, and many states have granted such approval.¹⁹ Advantages of this method of coordination include broadening of the geographic base for planning and administering governmental services, providing economies of scale in projects such as sewage disposal which require a

17. *Id.* at 21.

18. Will, *Another Look at Lakewood*, in READINGS IN STATE AND LOCAL GOVERNMENT 328 (Zimmerman ed. 1964).

19. See, e.g., CAL. GOV'T CODE §§ 6500-13 (1966); OHIO REV. CODE ANN. § 715.02 (Baldwin 1964); TENN. CODE ANN. § 5-113 (1955).

large capital outlay, and avoiding the creation of multiple special districts and the consequent overlapping and duplication of functions. These arrangements also have high political feasibility since they require a minimum of voter approval. However, such agreements are useful only when each community involved has vital interest in the service provided. Therefore, the agreements will not usually cover a whole metropolitan area, but will be limited to those sections of the area where the need for the particular service is felt. This could impede comprehensive planning and development for the entire region. The fact that each municipality is a vital participant gives any unit an effective veto in that it can withdraw from the agreement, subject to contract enforcement procedures in the courts. Moreover, although such agreements have the effect of preventing the creation of special districts within the region, they are reported to have encouraged increased incorporation in California.²⁰

COGs have many characteristics in common with the intergovernmental agreement form of cooperation. The COG also broadens the geographic base of influence in the region, but the expansion is limited presently to planning functions. However it seems possible, especially with the infusion of federal grants through the 1965 Housing Act, that COGs could undertake some of the governmental services noted above on an areawide basis and provide them on a contractual basis to constituent municipalities, just as counties do under present Lakewood Plans.²¹ Joint projects of this nature could achieve economies of scale and avoidance of multiple special service districts as in the existing intergovernmental agreement programs. COGs would have the added advantage of extending the geographic base to the whole metropolitan region, rather than merely to isolated locales throughout a metropolitan area, and would result in more comprehensive coordination of planning efforts. Under the COG concept, each community has an effective veto which can be exercised by a course of non-cooperation. A COG does not have the enforcement potential of legal contracts, unless, as noted above, it employs the contractual approach. Moreover, there is no reason for a COG to foster the creation of more municipalities, since the COG is completely voluntary and may contract with unincorporated areas

20. ACIR, ALTERNATIVES 31.

21. There is precedent for such provision of services, especially in the planning functions performed in most existing COGs, both in the sense of coordination of planning efforts in the region and in the provision of original planning studies for areawide problems, such as air and stream pollution control.

represented on the Council by the county government. Such an organization might even retard the multiplication of incorporations by removing some of the incentives for individual community action.

(c) *Transfer of Functions to County Governments.*—This approach involves a general transformation of the county government from a mere local functioning division of the state government to a more municipal form of government which provides governmental (municipal) services much like any city. There are several advantages to this form of coordination. The coordination efforts can take advantage of an existing governmental structure, thereby eliminating the need for formation of a new structure for coordination effect. The transfer can be effected with minimum alteration of existing geographical boundaries of other jurisdictions and can provide a good base for planning and operational coordination. When governmental functions are transferred to the county, subsequent county actions have the force of law, rather than a mere agreement or voluntary association of municipalities. However, a county system is not particularly useful in those metropolitan areas which encompass more than one county.²² Further, county governments, originally set up to perform only state functions in a rurally based system, are generally not equipped to provide urban services. Finally, only those services and functions which are transferred can be coordinated, and to the extent that constituent municipalities retain their own functions, coordination cannot be complete.

COGs are different from county-transfers mostly in scope and in legal effect of proposals. Urban counties are preferable to the extent they can enforce coordination. COGs are preferable to the extent they provide a forum for cooperation on all functions performed within the entire metropolitan region, rather than merely for some services in a one-county area.

(d) *Transfer of Functions to State Governments.*—This approach to fragmentation usually involves the transfer of certain aspects of a metropolitan function to the state, such as provision of a trunk line for water supply by the state, with actual distribution by local units. Of course this approach is itself only fragmentary, as it attacks only a small part of the total problem. Moreover, such transfer has been eschewed as an abdication by municipalities, and it seems to be generally accepted that local functions should be carried on at the local, rather than the state level.

22. This includes about one-third of our metropolitan areas. ACIR, ALTERNATIVES 44.

(e) *Limited-Purpose Special Service Districts.*—The ACIR defines a limited purpose district as a separate unit of government set up to perform one or a few urban functions throughout part or all of the metropolitan area, including the central city.²³ Such districts are usually established by state law without a referendum, and they usually supply services rather than perform regulatory functions. Members are generally appointed, either by the state governor or by governing bodies of municipalities of the area to be served. Activities are generally financed by service charges.

Advantages of this form include: high political feasibility, since no voter approval is required and the effect upon existing governmental units is minimal; easy formation by legislative act rather than constitutional amendment; and broad coverage of the entire metropolitan region even when it spreads beyond a single county. However, creation of another unit of government to serve only a single or limited function complicates the existing governmental morass. When several different special districts are set up and authority is progressively diffused, the possibility of overlapping and duplication of efforts is increased. Because of its method of composition, it is remote from the voters. Thus, creation of special purpose districts for limited functions can easily add to the coordination problem.

It is difficult to compare a limited special purpose district with a COG, except to point out that a COG can probably achieve the same advantages without similar drawbacks. From the standpoint of legal acrobatics, the COG is more easily constituted, being merely a forum for consultation and agreement. The COG is areawide in scope, does not impose an additional governmental unit, can provide similar coordination of services and is not restricted to a limited number of special services for the metropolitan area.

(f) *Multipurpose Districts.*—As the name implies, the multipurpose district performs more functions than a limited purpose district and therefore usually requires voter approval for its formation. This requirement brings the performance of functions closer to the electorate but makes the multipurpose district somewhat less politically feasible. Since it constitutes more of a threat to other general local governments (being more general in nature itself), it is likely to be less acceptable to competing local governments. However, by performing many functions, it forestalls creation of several limited

23. ACIR, ALTERNATIVES 49.

purpose districts, and it retains local control over local matters while treating areawide problems on an areawide basis.

The effects of a multipurpose district are similar to those of a COG. Since the multipurpose district is itself a government, there is no question as to its enforcement powers as there is with the voluntary COG. However, a COG can be more easily formed, does not require voter approval, and does not provide the competition (potential and real) for existing units of local government. Thus, a COG may be more politically feasible but less governmentally effective than a multipurpose district.

(g) *Annexation*.—This form involves the complete absorption of territory by a municipality and may be carried out by any of the following methods: legislative action extending municipal boundaries; popular vote of the annexing city, the annexed territory, or both; unilateral action by the municipality; judicial fiat upon petition by affected citizens or municipalities; or determination by a commission or board.²⁴ Because annexation is usually limited to unincorporated territory, it cannot meet the prime reason for seeking metropolitan cooperation—avoidance of piecemeal approaches to metropolitan-wide problems. Moreover, a COG does not confront the voter-approval problems inherent in many annexation procedural requirements.

(h) *Consolidation*.—Consolidation is the joining together of two or more units of government of approximately equal stature into a single governmental unit. Consolidation is usually voluntary, requiring petition for and voting upon the consolidation in the units to be merged. The effect is to produce a different city, with general municipal powers. If we are to idolize the effective coordination of governmental functions for a metropolitan area, the consolidation route seems preferable to any of the other forms considered. However, the Nashville experience indicates the extreme difficulty of such a move, even for an area with relatively few constituent municipalities. Consolidation is complicated by the large number of governmental units to be consolidated, increased popular resistance as the relative sizes of the central city and the outlying municipalities increase, and the interstate characteristics of some metropolitan areas. These factors indicate that the consolidation solution to fragmentation is not presently realistic in most of our metropolitan areas. It must be emphasized that this is definitely not to say that consolidation should be abandoned where the obstacles seem insurmountable. But it does

24. *Id.* at 58.

suggest that an alternative approach should be available so that all is not lost in the struggle for an ideal form. In fact, it is precisely this apparent impasse which suggests that the COG approach may be extremely useful. By initiating areawide approaches to regional problems, the COG can pave the way for increasing cooperation among governmental units, and if fate directs eventual consolidation, such consolidation could be facilitated by present efforts at coordination. This valuable function of the COG concept is illustrated by the impression among some observers that as the COG matures and gains experience in areawide problem solving, there tends to be less friction for areawide programs, even within the *voluntary* organization.²⁵

(i) *City-County Consolidation*.—This approach is essentially the same as the consolidation noted above, except that here the consolidation involves different levels of government. The legal procedure for such consolidation may be different from that for inter-municipal consolidation, but the effect is essentially the same. Since it encompasses only a single county, this type of consolidation may be more limited in usefulness than a general consolidation, but there will be more universal influence of the resultant unit on the area than in a random consolidation of cities.

(j) *Federation*.—This type of organization involves creation of a two-level government in a metropolitan area, one for areawide problems and services in which the still-existing constituent municipalities participate jointly, and one for the performance of local functions and services by the constituent municipalities.²⁶ Federation seems to provide the sought-after objective of thinking big on larger problems while leaving local government in charge of other matters. For this reason it is probably more politically feasible than consolidation. But since it encroaches upon existing local functions, it is probably less politically feasible than would be a piecemeal assumption of functions by a county government. There is also the problem of determining the appropriate distribution of powers and

25. Although all COG officials contacted strongly indicated that their organizations were not, and did not intend to become, "super-governments," all were encouraged by an apparent increasing acceptance of COG recommendations among the members. The forum-for-agreement approach was invariably emphasized, usually with the hope that COG influence would continue to increase, not in the consolidation-type governmental sense, but merely in the voluntary cooperation of members in the solution of serious areawide problems. In no case did a correspondent indicate or even intimate that he had any designs on consolidation.

26. See Rose, *A Decade of Metropolitan Government in Toronto*, 13 BUFFALO L. REV. 539 (1964).

functions between local units and the central government. Since the federation approach is relatively new in this country, it is likely that it would require constitutional amendment. Finally, the federation would be a new governmental unit and would require major reformation of existing structures.

A federation is similar to consolidation in its comparison to the COG. If the desired result of coordination efforts is some sort of eventual consolidation effect, a reasonable approach might be to set up a COG, followed in the future by a federation in which the local units retain at least some of their governmental functions, and culminating eventually in complete consolidation.

B. *Subject Matter of COG Activities*

The structure and essential nature of a Council of Governments are applied by COG representatives to types of processes which can be classified into three categories: (1) promotion of intergovernmental communication; (2) preparation of special studies; and (3) actual performance of municipal functions.

1. *Intergovernmental Communication.*—Initially, the COG concept is geared to provide a forum for discussion of problems shared by governmental units in a metropolitan area. One COG official has observed that the most important function of his COG to date has been to bring together the heads of area governments for consultation on area problems.²⁷

Another useful form of intergovernmental communication is COG sponsorship of seminars for member government officials. The Metropolitan Atlanta Council of Local Governments (MACLOG) has held three such seminars in connection with its program for coordination of law enforcement activities in the Atlanta area.²⁸ The North Central Texas Council of Governments (NCT COG—Dallas-Fort Worth) has held seminars in conjunction with local universities on a "Systems Approach to the Development of the North Central Texas Urban Region" and on the impact of a regional airport on small towns.²⁹

27. Letter from Wallace Altes, Administrative Assistant to the Executive Director, East-West Gateway Coordinating Council (St. Louis), to Louis F. Comus, Jr., Jan. 16, 1969.

28. Subjects of these seminars included "Safe Burglary Investigation," "Auto Theft" Year 1969 (Nov. 16, 1967); Mid-Willamette Valley Council of Governments. "Statement of METROPOLITAN ATLANTA COUNCIL OF LOCAL GOVERNMENTS, ANNUAL REP. [hereinafter cited as 1967 MACLOG ANNUAL REP.]."

29. NCT COG, *Your Region in Action* (March, 1968).

2. *Special Studies.*—A prime function of all COGs surveyed is the conduct of special studies of problems and the presentation of proposals for their solutions in the metropolitan areas involved. Studies on air pollution have been or will be undertaken by the Regional Council of Elected Officials (RCEO—Philadelphia), the Association of Bay Area Governments (ABAG—San Francisco), the Mid-Cumberland Council of Governments (MC-COG—Nashville), the East-West Gateway Coordinating Council (E-WGCC—St. Louis), the Metropolitan Washington Council of Governments (MWCOCG—Washington, D.C.), and the Southeast Michigan Council of Governments (SEMCOG—Detroit). The St. Louis study resulted in the drafting of a Model Air Pollution Control Ordinance for the area.³⁰ Regional transportation problems have been the subject of extensive study by the Puget Sound Governmental Conference (PSGC—Seattle) and by the Philadelphia, San Francisco and Washington Councils, and such studies are scheduled in the future by the Nashville and Detroit councils. Other subjects of special studies include county planning commission procedures and platting procedures in Seattle; solid waste disposal programs by the Mid-Willamette Valley Council of Governments (M-WVCOG—Salem, Oregon) and in the Atlanta, Dallas-Fort Worth, Detroit and St. Louis councils; cooperation in dealing with civil disorders in Nashville; and gun control programs in Washington.

3. *Active Participation Programs.*—Some COGs have undertaken more active programs in their areas. The Salem council coordinates the public capital improvement programs of its members. The San Francisco council has been designated the official planning agency for that region. In the Atlanta area, the council has set up METROPOL, a regional police coordination agency, and the Dallas-Fort Worth council has established a police academy to provide uniform training for its member government police forces. The St. Louis council has begun training minority group members in the planning profession. The Washington council, which does most of the regional transportation planning for that area, is preparing an area-wide model building code, working on development of a computerized health and welfare register, and has developed a “hot-line” system of communication among the region’s public safety agencies.³¹ Although

30. Letter, *supra* note 27.

31. The lists in this section of active or proposed studies were drawn from the following sources: COMMITTEE OF ONE HUNDRED, A PROPOSAL FOR A VOLUNTARY COUNCIL OF GOVERNMENTS IN SOUTHEAST MICHIGAN (1966); 1967 MACLOG ANNUAL REP. *supra* note 28;

these examples are only representative of the varied functions of COGs around the country, they do indicate the potential value of the COG concept in some of our larger metropolitan regions.

C. *Analysis of the COG Process*

Having set forth some examples of the types of functions performed by COGs, it is now necessary to determine the abstract nature of these functions—that is, whether COG functions and processes are classified administrative or legislative in nature.

The legislative function is generally considered one of policy formulation, or the “establishment of permanent rules for the government of the municipality.”³² Needless to say, policies formulated by municipalities in their legislative capacity, absent some overriding statutory or constitutional objection, will have the force of law. The administrative function, on the other hand, involves carrying out the dictates of a previously formulated legislative policy. The administrative functions usually involve filling in details in the legislative scheme to effectuate the legislative policy as determined and promulgated by the municipal council. With these rather vague outlines of the differentiation between the legislative and administrative functions, a distinction which often becomes blurred in municipal government, let us now analyze some of the COG processes listed above.

The intergovernmental communication functions, including provision of a forum for discussion of area-wide problems and sponsorship of seminars for member officials, would seem to be neither legislative nor administrative since there is neither a policy-formulation nor a policy-implementation function involved. Similarly, the conducting of special studies, which may result in unenforceable recommendations, would seem to be outside the scope of the

METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS HERE, NOW . . . AND TOMORROW (1968-1969); Metropolitan Washington Council of Governments, Proposed Budget for Fiscal Year 1969 (Nov. 16, 1967); Mid-Willamette Valley Council of Governments, “Statement of Agency Programs” (December 10, 1968); NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS, A PROGRAM OF ACTION FOR THE NORTH CENTRAL TEXAS REGION—PRELIMINARY STATEMENT (June, 1967); NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS, STATE OF THE REGION REPORT (1968); PUGET SOUND GOVERNMENTAL CONFERENCE, PUGET SOUND GOVERNMENTAL CONFERENCE—A DESCRIPTION (January, 1968); Letter, *supra* note 27; Letter from Wayne Moore, Jr., Coordinator, MACLOG, April 22, 1968; Letter from Robert R. Weaver, Admin. Asst. NCT COG, January 29, 1969; Interview with Frank Ziegler, Mid-Cumberland Council of Governments, April 25, 1968.

32. 37 AM. JR. *Municipal Corporations* § 52 (1941).

legislative-administrative distinction. However, activities involving actual participation by the COG may fall within the legislative sphere. Of course, if some other body must act before a planning function becomes a positive rule for the area, it is clearly outside the scope of the distinction. But if the COG plan, as finally adopted by the Council, is the official policy for the area without further action by constituent members, the COG would seem to be performing a legislative function.

It has been suggested that the requirement of the Model Cities Act that a COG-type organization review and approve local applications for federal grants might impart illegal authority to the COGs, which are non-elected and non-representative.³³ This might be so if the authority so bestowed upon the COGs is deemed to be legislative in character. However, a close reading of the Model Cities provision for COG review of grant applications suggests that even here the COG is merely functioning administratively. The Act provides that:

[E]ach application shall be accompanied (A) by the comments and recommendations with respect to the project involved by the areawide agency and governing bodies of the units of general local government to which the application has been submitted for review, and (B) by a statement by the applicant that such comments and recommendations have been considered prior to formal submission of the application. Such comments shall include information concerning the extent to which the project is consistent with comprehensive planning developed or in the process of development for the metropolitan area or the unit of general local government . . . and the extent to which such project contributes to the fulfillment of such planning. The comments and recommendations and the statement referred to in this paragraph shall . . . be reviewed by the agency of the Federal Government to which such application is submitted for the sole purpose of assisting it in determining whether the application is in accordance with the provisions of federal law which govern the making of the loans or grants.³⁴

It could be argued that in its review of the application, the COG is merely performing an administrative function—that of matching the application against the general plan for the area in order to determine whether it fits. It is the federal agency which actually makes the decision as to whether to grant the funds. The language of the Act suggests that the COG's recommendations are to be only one factor in this determination. Thus, in the review itself, the COG is merely interpreting policy rather than making it. On the other hand, since the COG itself formulated the plan which now takes on the force of

33. Lecture by Professor Stason, Urban Development Seminar, Vanderbilt University School of Law, April 17, 1968.

34. Demonstration Cities and Metropolitan Development Act of 1966 § 204, 42 U.S.C. § 3334(b) (Supp. 1967).

policy, it can be argued that the total effect of the COG action is policy-making in nature.

Here a distinction must be made between two different levels of policy. One level is the COG policy to develop the metropolitan area in accordance with a specified plan promulgated by the COG. This policy is not self-enforcing and would probably not be considered a legislative function. The second level is a federal policy not to grant funds for projects which do not conform to a plan for orderly development of the whole metropolitan area. The statute does not require agencies to deny funds to applicants which do not conform to the area COG plan, but only makes such non-conformance one factor to be considered. The statutory language leaves room for approval of applications by the federal agency, even though the application deviates somewhat from the area plan. The scope of permissible deviation is left up to the agency involved, and presumably the applicant could, in its statement under part (B) of the statute, indicate that it had considered the COG report and recommendations and found them inappropriate for given reasons. All this is to say that even the application-review function of COGs under the Model Cities Act is, at least arguably, only administrative.

Finally, it is possible under the federal grant program for COGs to undertake the provision of various areawide services for member municipalities. This would clearly be an administrative function performed by the COG, with the municipalities maintaining control, at least ostensibly, over the types of services to be bought and the amount of service to be supplied by the COG.

III. COGS AND "ONE MAN, ONE VOTE"

A. *Application of "One Man, One Vote" to Local Government—The Cases*

In two recent cases, the United States Supreme Court has been faced with the question of the applicability of the "one man, one vote" principle to local governmental bodies. The circumstances of these cases and the language of the Court must be examined in order to determine whether it is probable that "one man, one vote" will be applied to COGs.

In *Sailors v. Board of Education*,³⁵ Kent County, Michigan, contained several local school boards elected from their respective

35. 387 U.S. 105 (1967).

municipalities. Each local school board selected a delegate to sit with other similarly selected delegates from other local boards to select the county school board. Functions of the county board included selection of a county school superintendent, preparation of its annual budget and levy of taxes to meet the budget, furnishing of consulting or supervisory services to local school districts upon request, conduct of teacher cooperative education classes, employment of teachers for special education programs, and power to transfer areas from one district to another. The Court held that although populations of the local districts were far from equal, giving highly populated and sparsely populated districts the same vote in selecting the county board, the system does not violate the "one man, one vote" principle, since the county school board is essentially administrative rather than legislative in nature and membership is appointive, not elective.

The legislative-administrative distinction as applied by the Court is not consistent with the distinction developed in this article. While selection of the county superintendent, the conduct of special classes for teachers, and the furnishing of services upon request would seem to be clearly administrative, the preparation of the county school board budget, the levy of taxes and the power to transfer areas from one local district to another would seem equally clearly to be legislative. However, the Court found all these functions not to be legislative "in the classical sense."³⁶

The multi-tiered process by which board members are selected was found to be appointive rather than elective. The Court noted that delegates who chose the county board did not purport to represent their electorates and did not have any means of determining what their electorates wished in county board selection. Since no general election was provided for in selecting the county board, the board could not be malapportioned under the "one man, one vote" principle.³⁷

More recently, in *Avery v. Midland County*,³⁸ the Court held that the Midland County (Texas) Commissioners Court was malapportioned. Four of the court members were elected, each from a district within the county. Since representation from four districts was quite obviously malapportioned, the Supreme Court was asked to

36. *Id.* at 110. Unfortunately, the Court did not attempt to define what it means by "legislative in the classical sense."

37. It should be noted that this factor clearly distinguishes *Sailors* from other earlier lower court decisions. In the earlier cases, the body which was required to be reapportioned was chosen directly by the voters of the governmental unit involved. See cases cited in notes 42 & 43 *infra*.

38. 390 U.S. 474 (1968).

determine whether the functions performed by the Commissioners Court were essentially "legislative" or "administrative" pursuant to the test under *Sailors*.³⁹ Curiously, the Court seemed to disregard the legislative-administrative test and held that the Commissioners Court was unconstitutionally malapportioned, reasoning that:

[T]he court does have power to make a larger number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop—whether industry should be solicited, roads improved, recreation facilities built, and land set aside for schools—and immediate choices among competing needs.⁴⁰

The Court expressly limited its opinion as follows:

We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.⁴¹

The test now seems to be drifting away from the legislative-administrative distinction toward one which involves the extent to which the governmental body affects all the citizens in the area.

The lower federal courts and the state courts have had little opportunity to define further the distinctions in *Sailors* or the broader test of *Avery*. Most of the earlier cases dealt with governmental bodies which are clearly legislative, such as city councils and county boards of supervisors.⁴² Moreover, in a recent decision, a federal district court in Tennessee anticipated the *Avery* decision to some extent by noting that the legislative-administrative distinction is not particularly helpful, thereafter applying "one man, one vote" to a county school board.⁴³

39. The Texas Supreme Court, in finding the Commissioners Court unconstitutionally malapportioned, had determined that the "legislative" functions of the body were "negligible". *Id.* at 483.

40. *Id.*

41. *Id.* at 484-85.

42. *Ellis v. Mayor*, 352 F.2d 123 (4th Cir. 1965) (city council); *Miller v. Board of Supervisors*, 63 Cal. 2d 343, 405 P.2d 857 (1965) (county board); *Hanlon v. Towey*, 274 Minn. 187, 142 N.W.2d 741 (1966) (county board); *Seaman v. Fedourich*, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965) (city council); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 132 N.W.2d 249 (1965) (county board).

43. *Strickland v. Burns*, 256 F. Supp. 824 (M.D. Tenn. 1966).

B. *COGs and the Present State of the Law*

The obvious question now becomes whether “one man, one vote” applies to COGs. Extrapolating from the *Sailors* case, it appears that it will not. As to the legislative-administrative distinction, to the extent that various COG processes are “clearly administrative,” there will be no trouble with “one man, one vote,” even though the COGs do not remotely approach proportional representation. But what is “clearly administrative” under the *Sailors* holding? An investigation of the functions of the county school board in *Sailors* presents a striking similarity to the functions of most COGs. The COGs select the administrative head of the organization’s staff; they approve the COG budget; they provide special services to members; and they facilitate intermunicipal communication. The only COG activities which were even arguably legislative were the planning functions which appear to have the force of law and the review of federal grants. These two characteristics certainly do not seem to be as obviously legislative as the levy of taxes and the transfer of areas among local boards in *Sailors*. Thus, there is no reason to believe that the Supreme Court would any more readily apply “one man, one vote” to COGs than to the Kent County School Board, especially since COGs are completely voluntary and generally perform only advisory functions.

Moreover, the method of designating members of COGs is quite similar to the process for selecting the county school board in *Sailors*—the latter being quite obviously appointive rather than elective in the view of the Supreme Court. Thus under this argument, the COG still seems immune to the “one man, one vote” principle.

However, the addition of the *Avery* decision requires a reappraisal of the question. On the face of the *Avery* case, the apparent immunity should not be disturbed. The functions of the Commissioners Court were clearly “legislative” and would thus have been subject to “one man, one vote” even under *Sailors*. The Court in *Avery* took note of the commentary in the official version of the Texas statutes, to the effect that the Commissioners Court is “the general governing body of the county.” This would readily explain the language quoted above from the Court’s dictum. Adding to this the Court’s express limitation of its own holding, we might conclude that COGs will maintain their exemption from “one man, one vote”. However, the Court’s dictum is disquieting, since the nearer we approach a test based upon all-inclusiveness of traditional municipal functions performed by the body involved, the nearer we come to

applying "one man, one vote" to COGs. If the *Sailors* legislative-administrative and appointive-elective tests are to be discarded in favor of the broader and even more subjective test in *Avery*, there is an increased possibility that COGs will be affected.

IV. CONCLUSIONS

The Council of Governments concept can be a viable approach to the solution of metropolitan problems arising from governmental fragmentation. It has the advantage of being able to cope with problems on a truly area-wide basis since its only boundaries are the interests of the constituent municipalities in a metropolitan region. It appears to be politically quite feasible since it does not seriously threaten existing governments in the region. Even though membership is completely voluntary, the influence of the COG has been increased by federal assistance in the form of grants to the COG itself for services to member units and by the COGs effect upon the granting of federal funds to constituent units for individual projects. In fact, the potential contributions of COGs to the morass of metropolitan problems is so encouraging that a word of caution is well taken:

I feel that the greatest danger to a Council is the assumption, after one is formulated, that intergovernmental problems have somehow been taken care of and local elected officials need not be as concerned with it.⁴⁴

Moreover, it appears that if the Supreme Court does not decide to extend *Sailors* and *Avery* significantly, COGs will be immune from "one man, one vote" difficulties, at least as they are presently constituted. COG proponents should find encouragement in dictum of the Court in *Avery* which might be seen as directed to the COG concept:

the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar . . . the emergence of a new ideology and structure of public bodies, equipped with new capacities and motivations'.⁴⁵

44. Letter from Wesley M. Howe, Executive Secretary, Mid-Willamette Valley Council of Governments, January 24, 1969.

45. 390 U.S. at 485. This language of the Court is even more encouraging than words of similar import and direction expressed in *Sailors*. 387 U.S. at 110-11.