HEINONLINE

Citation:
Richard Briffault, Local Government and the New York
State Constitution, 1 Hofstra L. & Pol'y Symp. 79
(1996)
Provided by:
Charles B. Sears Law Library

Content downloaded/printed from HeinOnline

Thu Sep 6 10:37:36 2018

-- Your use of this HeinOnline PDF indicates your
acceptance of HeinOnline's Terms and Conditions
of the license agreement available at
https://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

Use QR Code reader to send PDF
to your smartphone or tablet device

LOCAL GOVERNMENT AND THE NEW YORK STATE CONSTITUTION

Richard Briffault[*]

On November 4, 1997, the question "Shall there be a convention to revise the [state] constitution and amend the same?" will be submitted to the New York state electorate pursuant to the provision in the state constitution requiring that every twenty years the voters be given the opportunity to call for a constitutional convention.[1] A longstanding constitutional concern in New York is local government and the relations between local governments and the State. With an eye to the upcoming vote on whether to hold a constitutional convention, this paper examines the place of local government and state-local relations in the New York Constitution.

Part I frames the analysis with a brief discussion of basic principles of local government and the state-local distribution of power and responsibility. Part II then reviews the principal provisions of the state constitution that address local government and intergovernmental relations. Finally, Part III brings together the themes of Parts I and II by addressing the disparity between the normative ideals of state-local relations and the actual provisions of the current constitution and by presenting some proposals for constitutional reform that might narrow the gap between principle and practice and thereby perhaps improve the performance of the state-local system in New York.

---

* *Professor of Law, Columbia Law School. Director, Legislative Drafting Research Fund.*

1. N.Y. CONST., art. XIX, § 2.

I. BASIC PRINCIPLES

Local government has a double aspect. From a "bottom-up" perspective, local government is government elected by and responsive to people at the local level. Local governments provide many of the public goods and services, such as public safety, education, and land use regulation, that most affect people in their families, homes, and neighborhoods. Many people are, therefore, particularly concerned that they be able to have a voice in shaping public policy with respect to these matters. The relatively small size of local governments — compared to the state and the federal government — enhances the ability of the individual to have an impact on government actions at the local level, much as the fact that local governments are closest to the "grass-roots" increases the possibilities for popular oversight of government and popular involvement in the decision making process. Such popular participation is valuable in itself, and it also increases the responsiveness and accountability of government to the people.

Not only are local governments relatively small in size and relatively close to the people — relative, that is, to the state — but there are also many local units. The multiplicity of local governments permits a variety of different local rules, or different mixes of taxes, services, and regulation, that respond to the preferences of the people of different localities.[2] Given the variations in local needs, circumstances, and desires, a large number of localities with independent decision making power may result in greater overall satisfaction with government actions than would be the case if one rule were applied uniformly throughout the state.

In short, this "bottom up" tradition in thinking about local governments emphasizes local decision making autonomy, interlocal variation in policy making, local responsibility for local services, and local government accountability to a local electorate.

Local governments, however, are not just small, locally-controlled polities. Local governments are also political subdivisions of the state. They are established by the state, and derive their legal authority and their regulatory and public service powers and responsibilities from the state constitution, state statutes, and state-granted charters. From this

2. *See, e.g.*, Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

"top-down" perspective, the state role with respect to local powers, responsibility, and even local government existence within particular borders is fundamental.

Indeed, the "bottom-up" principles of local self-government necessarily imply some basic components of the "top-down" perspective. Local governments are territorially based communities, but there is no generally accepted principle for determining what the territorial dimensions of a community are, or whether a particular area ought to be in one local government or another. Put another way, the concept of local self-government does not dictate what is the "self" that does the governing. A higher level government — the state — must determine which local government will have jurisdiction over what territory.

Further, inherent in the "bottom-up" concept of democratic local self-government is the assumption that all the people significantly affected by a local government action have the right to participate in its decision making. To be subject to the jurisdiction of a local government when one is excluded from the electorate that selects that government is not self-government but colonialism. Yet, with so many local governments adjacent to each other, they inevitably have effects beyond their borders. Only the state government — legally superior to local governments, encompassing all local units, and electorally accountable to all the people in the state — can police such local spillovers. Some state limits on the ability of local governments to impose costs on outsiders, state requirements that local governments take such external effects into account, or state judgments as to whether the aggregate benefits of local responsibility for a certain government function are greater than the aggregate costs of externalities of local action are necessary to assure that local governments live up to the very accountability and responsiveness values that underlie the "bottom up" vision of local autonomy.

State governments also have a duty to assure fair treatment to all people within their borders. That obligation affects the state's delegation of powers to local governments. If, due to the terms of that delegation or to other background conditions such as the disparity in local resources, some localities are significantly less able than others to provide basic public services or can do so only at much greater cost, only the state can address such interlocal inequalities and assure fair treatment to all state residents regardless of the local resources of the locality in which they reside. In other words, the "top-down" perspective may be a source of responsibility as well as power for the state, obliging it to take steps to assure basic standards of local public service adequacy and promote equity among all state residents with respect to the local performance of

state-delegated functions.

Taking the "top-down" and "bottom-up" models together — and recognizing that a state constitution ought to set up a general framework but not a detailed blueprint for governance — the constitution ought to assure that local governments are locally accountable and enjoy autonomy with respect to local matters, but also ought to provide for the state's oversight of local performance and the state's capacity to revise local borders and shift powers from one local government to another in light of changing political, economic, social, demographic, and technological circumstances. The state would set up local governments, give them their powers and responsibilities, provide them with legal authority and fiscal resources adequate to their governmental role, and then step back. Local governments would be protected from state interference in their exercise of their powers and from state impositions that would impinge on local government accountability to local residents. The state, however, would be empowered to monitor the system, to alter local borders, and to redistribute powers and resources among different levels of government in light of new settlement patterns, changes in the ability of particular areas (or local governments generally) to efficiently and effectively perform the functions entrusted to them, increases in the scope and significance of local spillovers, or the impact of interlocal disparities on the quality of state-delegated services.

As I will suggest in the next Part, the New York Constitution fails to comply with some of these basic principles. Local governments have relatively limited autonomy, limited fiscal resources, and precious little protection from state interference or state impositions. Nor is there any assurance that local governments have the resources necessary to discharge their state-delegated functions. On the other hand, the constitution places constraints on the realignment of local borders and the transfer of functions among different local governments. Moreover, even where system reorganization is not constitutionally restricted and the legislature is free to alter local boundaries and responsibilities, political inertia may inhibit the possibilities for change. The goals of local government constitutional reform in New York, then, should be to enhance local governments' capacity to perform the powers vested in them by the state, and to facilitate the restructuring of local borders and local powers in light of changes in those circumstances that affect the ability of local governments to carry out their powers in an effective, efficient, and accountable manner.

II. LOCAL GOVERNMENT UNDER THE NEW YORK CONSTITUTION: HISTORY AND CURRENT PROVISIONS

A. Local Autonomy

Local autonomy has three components. First, local people must be able to control their own local governments. Second, local governments must have power to make policy with respect to local matters. Local control over local governments would be meaningless unless those governments enjoy powers with respect to matters of local importance. This is the gist of the legal concept of "home rule." Third, local governments must have the fiscal resources sufficient to carry out the functions and to provide the services for which the state has made them responsible. Again, local control would be illusory if local governments were too poor to implement the programs their people wish to adopt.

With these three components in mind, the New York state constitution is only partially successful in providing for local autonomy. The constitution goes the furthest in assuring local control over local officials. Even with respect to local officials, however, the state retains considerable authority to regulate many local officers, particularly those charged with the performance of state functions.

The constitution is less successful in providing for local policy-making control over local matters. Local governments enjoy broad discretion to initiate new legislation; but the complexity of the relevant constitutional provisions has bred an unfortunate uncertainty concerning the scope of home rule. Moreover, local governments enjoy little protection from state legislation that displaces local initiatives.

Finally, the state constitution utterly fails to provide local governments with fiscal autonomy. The constitution limits the ability of local governments to raise their own funds out of local resources. Moreover, it provides no guarantees of state fiscal assistance. Nor does it provide localities with protection against state impositions that would increase local costs.

(1) Local Control of Local Government

The first two provisions of the first section of Article IX establish the principle of local popular control of local government, providing that

every local government[3] "shall have a legislative body elective by the people thereof"[4] and that local governments shall provide for the selection of all other officers whose election or appointment is not provided for by the constitution.[5]

The concern for local control of local officers has a long lineage in New York. This basic principle of local autonomy may be seen in the Constitution of 1777 which, although it did not grant local elections, confirmed that town officers should continue to be elected by the people. The Constitution of 1821 extended this to county, city and village officers. The Constitution of 1846 provided for the local election or appointment of local officers whose selection is not provided for in the constitution — the forerunner of the current provision. The 1894 Constitution prohibited the legislature from transferring out of local hands the local functions performed by locally elected officials.

Local control over local officers is somewhat limited by Article XIII. Section 3 authorizes the legislature to provide for filling vacancies; section 5 authorizes the legislature to provide for removal from office for misconduct; and section 8 provides that city officers are to be elected in odd-numbered years. Section 13 addresses the terms, powers and duties, and removal of certain county officers, including the sheriff, the county clerk, the register, and district attorney. Section 14 authorizes the legislature to regulate and fix the wages, hours, and health and safety conditions of local public employees and contractors or subcontractors performing work for local governments.

Beyond the local election of local officials, local autonomy also requires that local people have the power to define the responsibilities of those officials and, in general, to control the structure and operations of local government. Several recent cases demonstrate that the scope of local control over local government is uncertain.

On the one hand, relying on the provisions of Article IX, section 1(h) concerning county power to adopt alternative forms of county government, the courts have upheld the power of a county to authorize the setting of real property tax equalization rates by the county executive rather than by the board of assessors, as provided by the state's Real

3. Article IX defines "local government" to include counties, cities, towns and villages. School districts and other special districts are not local government for the purposes of Article IX, although school districts are subject to some of the taxation and debt restrictions in Article VIII.

4. Art. IX, § 1(a).

5. Art. IX, § 1(b).

Property Law;[6] to shorten the term of the sheriff by merging that office with another office;[7] and to provide for the filling of vacancies in the office of county legislator in a manner inconsistent with the state's County Law.[8] More importantly, in *Resnick v. County of Ulster*,[9] the Court of Appeals extended to noncharter counties the power to provide for the filling of vacancies in county office, despite an inconsistent provision of state law. In so doing, the Court relied on the general constitutional principle of local power to select local officers, rather than on the specific provision dealing with alternative county charters.

On the other hand, in *Matter of Kelly v. McGee*,[10] the Court of Appeals sustained state legislation concerning the salaries of a district attorney. The court determined that although district attorneys are local officers, the adequacy of the salary for that office implicates the state's concern for the enforcement of the state's laws — a classic concern of the "top-down" perspective. Similarly, in *Carey v. Oswego County Legislature*,[11] the Court upheld the governor's exclusive right under state law to appoint an interim district attorney. Arguably, these cases suggest a judicial inclination to treat local law enforcement as a matter of state concern, while granting counties greater autonomy with respect to the structure of county government. One commentator, however, has suggested that the district attorney cases "severely limited" the significance of the earlier county officer decisions.[12] In any event, the relationship between local power to determine terms and duties of local officers and state power over the same subject is not clearly resolved. Moreover, where a locally-provided service — such as public elementary education — is seen as one delegated by the state, then the state's power over the structure of the local delivery of that service is unconstrained by notions of local control of local government.[13]

(2) Home Rule

Home rule consists of both the grant of power to local governments

---

6. Matter of Heimbach v. Mills, 67 A.D.2d 731 (1979).
7. Westchester County Civil Service Employees Ass'n v. Del Bello, 47 N.Y.2d 886 (1979).
8. Nydick v. Suffolk County Legislature, 36 N.Y.2d 951 (1975).
9. 44 N.Y.2d 279 (1978).
10. 57 N.Y.2d 522 (1982).
11. 59 N.Y.2d 847 (1983).
12. PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE, 220-21 (1991).
13. Board of Education v. City of New York, 41 N.Y.2d 535 (1977).

to adopt their own policies and restrictions on the state legislature's power to displace local decision making with respect to matters subject to local legislative initiative. The constitution expressly grants local governments certain powers; it authorizes the legislature to grant local governments additional powers; and it limits the ways in which the legislature may act in relation to local matters. But, although the constitution gives local governments considerable decision-making initiative, it imposes few real checks on the state's power to preempt local actions.

The first constitutional provision for a measure of home rule, adopted in 1894, addressed legislative interference with local governments. The 1894 provision embraced two concepts which shaped all subsequent constitutional restrictions on legislative power to act concerning local matters. First, it sought to protect the "property, affairs, and government" of cities from legislative meddling. Second, it focused on the legislature's ability to act by special laws, e.g., those targeted on some subset of local governments. The constitution has never restricted the legislature's power to affect local property, affairs or government by general laws.

The 1894 constitution divided cities into three classes based on population; a special law was defined as one that related to less than all cities in a class. A special law relating to the property, affairs and government of a city had to be submitted to the city's mayor, who had 15 days to determine whether or not the city accepted it. If the city accepted the bill, it would be submitted to the governor; if not, the legislature would have to re-pass the bill before it could be submitted to the governor. The mayor, thus, had a "suspensory veto."

The 1923 Home Rule Amendment revised the limitation on the legislature's authority to pass special laws relating to cities, and provided the first constitutional grant of local law-making authority. The 1923 amendment provided that the legislature could pass a special law relating to a city's property, affairs or government only on a message from the governor declaring that an emergency exists, and then only with a two-thirds vote in each house of the legislature. Moreover, the 1923 amendment gave cities power to adopt local laws relating to a number of distinctly local matters and the legislature was authorized to confer upon cities by general laws such further power of local legislation and administration as it deemed expedient.

The 1938 amendments extended home rule to counties, and the legislature was directed to extend it to villages of more than 5,000 people by 1940. Local legislative power was widened to include the entire area

of local "property, affairs or government." This made home-rule-as-local-legislative-power coextensive with home-rule-as-protection-from-special-laws. The provision for protection from legislative interference was revised. All special laws relating to local property, affairs, or government would require the approval of two-thirds of each house of the legislature. Moreover, no special law concerning a city could be adopted without a local request; no special law concerning a county could be adopted without both a local request and a gubernatorial message of necessity; and no special law concerning a home rule village could be adopted without either a local request or a gubernatorial message.

The current home rule provision, Article IX, was adopted in 1963. It extended home rule to towns and to all villages. It added an express declaration that "effective local self-government and intergovernmental cooperation are purposes of the people of this state" and a bill of rights for local governments.[14] Article IX expanded local legislative powers to include both "local laws not inconsistent with the provisions of this constitution or any general law relating to its property affairs, or government"[15] and laws with respect to ten enumerated subjects whether or not they related to the property, affairs or government of local governments. The legislature, however, may restrict the adoption of local laws with respect to matters other than the property, affairs or government of a local government. The ten enumerated areas of local law-making, whether or not they relate to local property, affairs or government, are:

> "(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees . . . .
>
> "(2) In the case of a city, town, or village, the membership and composition of its legislative body.
>
> "(3) The transaction of its business.
>
> "(4) The incurring of its obligations. . . .
>
> "(5) The presentation, ascertainment and discharge of claims

14. Article IX, section 1 — the "bill of rights for local governments" — guarantees that every local government "shall have a legislative body elective by the people thereof," gives local governments the power to enter into intergovernmental agreements with respect to facilities and services, addresses local boundary change, and gives localities the power to take by eminent domain private property within their boundaries. In addition, the "bill of rights" bars the legislature from prohibiting any local government from making a fair return on the value of property used in a public utility service or from using utility profits to pay refunds to consumers or "any other lawful purpose." Art. IX, § 1(f).

15. Art. IX, § 2(c)(i).

against it.

"(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.

"(7) The acquisition of its transit facilities and the ownership and operation thereof.

"(8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.

"(9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for it.

"(10) The government, protection, order, conduct, safety, health, and well-being of persons or property therein."[16]

Article IX, section 2 further provides that the legislature "shall enact" a "statute of local governments" granting local governments additional powers "including but not limited to" matters of local legislation and administration. A power granted in the statute of local governments can be repealed or reduced only by a law passed and approved by the governor in each of two successive calendar years.[17] The legislature may also confer on local governments powers not relating to their property, affairs or government and not limited to local legislation and administration "in addition to those otherwise granted by or pursuant to this article;" the legislature, however, may withdraw or restrict such additional powers.[18]

Article IX, section 3 provides that the "rights, powers, privileges and immunities granted to local governments" by Article IX "shall be liberally construed," thereby repudiating Dillon's Rule, the traditional judicial rule of interpretation that local powers are to be narrowly construed.

Article IX also revised the restrictions on the adoption of special laws concerning local property, affairs or government to permit state legislative action either by a simple majority on a home rule request or on a message of necessity from the governor and a two-thirds vote in

16. Art. IX, § 2(c)(ii).

17. Art. IX, § 2(b)(1).

18. Art. IX, § 2(b)(3). Other provisions authorize the legislature to grant additional powers to local governments, including the power to apportion the cost of a government service or function upon any portion of the area within the local government and the exercise of eminent domain outside local boundaries. Art. IX, § 1(e)(g). Article XVIII authorizes the legislature to grant various powers to cities, towns, and villages for the financing of low rent housing and nursing home accommodations for persons of low income.

each house.[19]

In short, Article IX provides local governments with a number of general and specific grants of power that together constitute a rather broad authorization to initiate local policy-making. But Article IX is an extremely complex provision, reflecting layer-upon-layer of drafting, revision, and amendment over the period of a century, and incorporating several different, and conflicting, theories of home rule. By raising questions concerning the extent of local autonomy, Article IX gives the courts a considerable role in determining the scope of home rule. In the past, the courts have tended to construe home rule narrowly. As a result, many local governments doubt whether they have sufficient authority to initiate new programs without first obtaining the approval of the state.

By the same token, the constitution places little restriction on the power of the state to act with respect to local matters or to displace local decisions with respect to such matters. No area of local "property, affairs, or government" is immune from the state's general legislation, that is a law "which in terms and in effect" applies alike to all counties, all cities, all towns or all villages.[20] Further, as a result of judicial interpretation, the restriction on special laws[21] does not apply if the special law — aimed, for example, at just one city — addresses a matter of "state concern."

A matter may be of state concern even if it also affects local property, affairs or government. As then-Chief Judge Cardozo put it in the leading case of *Adler v. Deegan*,[22] the state may legislate by special law — and without a home rule request, gubernatorial message, or legislative supermajority — "if the subject be in a substantial degree a matter of State concern . . . though intermingled with it are concerns of the locality."[23] The court has found that housing, local taxation, municipal sewers, planning and zoning, cultural institutions, and the residential mobility of municipal civil servants are all matters of state concern sufficient to sustain the state's power to legislate concerning

---

19. The second option — the governor's message and legislative supermajority — is unavailable for special laws concerning New York City. Art. IX, § 2(b)(2).

20. Moreover, article IX, section 3 provides that nothing in article IX shall restrict or impair the power of the legislature to act in relation to "the maintenance, support or administration of the public school system," including any retirement system relating to a public school system; the courts; or matters other than the property, affairs or government of a local government.

21. "Special law" is currently defined as a law which in terms or effect applies to one or more, but not all counties, cities, towns or villages. Art. IX, § 3(d)(4).

22. Adler v. Deegan, 251 N.Y. 467 (1929).

23. *Id.* at 491 (Cardozo, J., concurring).

these matters by special law without either a home rule request or a legislative supermajority.[24] The fact of a state concern will nearly always outweigh the local interest.

Although the state concern doctrine long predates the adoption of Article IX, the scope of the doctrine has been largely unaffected by the new home rule provision. Indeed, the court of appeals has continued to apply the state concern doctrine vigorously over the last three decades, notwithstanding the apparent intent of Article IX to expand local autonomy. Thus, as long as the state is able to make a colorable case that it is acting with respect to a matter of state concern, the constitutional home rule provision provides little restriction on the legislature's ability to act by special law. The legislature can adopt special laws with respect to most matters, including local property, affairs or government. Such laws can preempt inconsistent local laws either through a finding of outright conflict or a determination that the state has occupied the field. This possibility of preemption casts a shadow over local autonomy, often leading local governments to question whether they have the authority to act. As a result, local governments may fail to exercise fully their constitutional home rule powers.[25]

(3) Local Finances

Home rule concepts do not apply to local finances. Local spending, borrowing, and taxing are tightly regulated by the constitution and subject to the plenary power of the legislature to impose further restrictions. The tradition of state restriction of local finances dates back to the middle of the nineteenth century and remains quite powerful today.

---

24. *See, e.g.*, Adler v. Deegan, *supra* note 22 (multiple dwelling law for New York City); New York Steam Corp. v. City of New York, 268 N.Y. 137 (1935) (local taxation); Robertson v. Zimmerman, 268 N.Y. 52 (1938) (Buffalo Sewer Authority); Floyd v. Urban Development Corporation 33 N.Y.2d 1 (1973) (housing, planning and zoning); Wambat Realty Corp. v. State, 41 N.Y.2d 490 (Adirondack Park and local zoning); Hotel Dorset Co. v. Trust for Cultural Resources, 46 N.Y.2d 358 (1978) (special legislation to aid the Museum of Modern Art); Uniformed Firefighters Ass'n v. City of New York, 50 N.Y.2d 85 (1980) (legislature's restrictions on City's power to require local residency for certain public employees).

25. On the other hand, the state can provide for a form of "reverse preemption" — that is, state laws that provide general rules for local governments but which permit localities to adopt alternative rules in lieu of the state's. Thus, a number of provisions of the Municipal Home Rule Law allow towns and villages to supersede various general provisions of the Town Law and Village Law. These supercession statutes do grant real home rule powers to towns and villages but they can be repealed by ordinary legislation. See Galie, *supra*, note 12, at 219.

(a) Caps and Controls.

The first constitutional provision concerning local finances was adopted in 1846, when the legislature was given the mandate to restrict local "taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debts." Much of this language has been carried forward into current article VIII, section 12. The provision was a response to the borrowing excesses, especially for the financing of railroads and canals, of the 1820s and 1830s which created a financial crisis for the state in the aftermath of the Panic of 1837. The 1846 measure prohibited the gift or loan of state funds, and the lending of state credit, to private activities, and restricted the state's power to incur indebtedness, but it did not impose restrictions on local governments. Thus, private enterprises, especially railroads, seeking public support turned to local governments.

In the aftermath of the Tweed Ring scandal, abuses in the local financing of railroads, and the Panic of 1873, the constitution was amended in 1874 to prohibit municipalities from giving any money or property or lending their money or credit to private undertakings, except in aid of the poor. The 1938 amendments prohibited local governments from giving or lending their credit to public corporations. Thus, as a result of these successive generations of constitutional amendment, local governments today: may not give or loan any money or property to or in aid or any individual, private corporation or association, or private undertaking, or become the owner of the stock or bonds of any private corporation or association, or give or loan credit in aid of any individual, public or private corporation or association, or private undertaking. These prohibitions are subject to a number of very specific exceptions.[26]

26. Two or more localities may join together pursuant to law in providing any municipal facility, service, activity or undertaking which each has the power to provide separately. In addition, article VIII, section 1 makes numerous exemptions for health and welfare programs and for the payment of pensions and benefits to certain public employees and their survivors. Further, article XVIII empowers the legislature to authorize cities, towns, and villages to make payments to, and guarantee the debts of, public corporations that provide housing facilities or nursing home accommodations, and to make loans to the owners of existing multiple dwellings for their rehabilitation and improvement.

In addition, the courts have liberalized some of the local public purpose restrictions by frequently upholding state laws that enable or require one local government to contribute to the support of another – often public authorities or non-self-sustaining public corporations created to get around restrictions or limitations on local spending or local debt. Thus, in Comereski v. City of Elmira, 308 N.Y. 248 (1955), a public parking authority was authorized to sell bonds and construct

In 1884, continued concern over the graft and corruption of the Tweed era, the overextension of local credit during periods of boom leading to subsequent defaults, and the increase in taxes caused by debt service obligations led to the adoption of the first debt and tax limitations. Debt was limited to 10% of local assessed valuation for cities with populations over 100,000 and for the counties in which they were located; real estate taxes were limited to 2% of local valuation. The 10% debt limit was extended to all cities and counties in 1894.

The local finance article was comprehensively revised in 1938 in response to the fiscal difficulties occasioned by the Depression. With respect to local debt, the 1938 amendments required that local governments pledge their faith and credit for the payment of the principal and interest on local indebtedness; assured bondholders of the first claim on all available local revenues; required that original or refunded debt be retired within the period of probable usefulness of the object or purpose for which it was contracted; extended the debt limits to towns and villages; generally lowered the permissible debt percentage; and changed the base for the calculation of the debt limit from current assessed valuation to a five-year moving average.[27] In 1951, the base was changed from assessed valuation to full valuation, thereby substantially raising the limit; at the same time, the percentage limit was lowered for all the covered units except Nassau County and the big cities. Article VIII has been amended several times since 1938 — e.g., to permit borrowing by localities for common or cooperative purposes with other localities, and to exempt water supply and sewage projects from the debt limits — but the basic policies and structure of the debt limitations have not changed over the past six decades so that the constitution prescribes

---

and operate parking lots in the City; the City of Elmira, in turn, was authorized to contract with the authority to pay any yearly deficits incurred by the authority up to a limit. The Court of Appeals sustained the arrangement against the challenge that it fell afoul of the prohibition of the lending of credit to another public entity. Comereski was subsequently extended in Wein v. City of New York, 36 N.Y.2d 610 (1975), which sustained a state law requiring New York City to commit its funds to maintain the debt service reserve fund of the Stabilization Reserve Corporation even though the bonds and other obligations of the SRC were, by law, not the debt of the city. Although it can be argued that in such cases the local government expenditure does benefit the people of the local government, the assisted entity is not subject to the direct control of the popularly elected local government, and the local government's new financial obligation does not count against its debt limit.

27. The 1938 amendments also added Article XVIII and its special provisions for the financing of low-income housing and slum clearance projects.

how local governments contract debt,[28] and the time and method for the repayment of debts,[29] and limits the amount of local debt.[30]

The 1938 amendments also extended the tax limits, first adopted in

---

28. Local governments may contract debt only for local public purposes (or as part of cooperative projects with other local governments). No debt shall be contracted for longer than the period of probable usefulness of the object or purpose for which the debt is incurred, to be determined by state law, but in no event greater than forty years. Local debts are to be repaid in annual installments starting no more than two years after the debt was contracted. Art. VIII, § 2.

29. Article VIII provides for local sinking funds, subject to such requirements as the legislature shall impose by general or special law, and for annual local appropriations into the sinking funds to cover the cost of servicing the debt. Art. VIII, § 2.

30. No county, city, town, village or school district shall contract debt for any purpose if such debt, taken together with existing debt, shall exceed an amount equal to the following percentages of the full valuation of taxable real estate in such locality:

New York City — 10%
Nassau County — 9%.
Cities with population greater than 125,000, other than New York City — 9%.
Counties other than Nassau — 7%.
Cities with population under 125,000 — 7%.
Towns — 7%.
Villages — 7%.

School districts wholly or partly within cities with populations under 125,000 — 5%, but this limit can be increased with the approval of (i) 60% of local voters in a referendum: (ii) the Regents; and (iii) the Comptroller.

There is no constitutional debt limit for school districts wholly outside cities. There are no independent school districts operating in cities with populations greater than 125,000.

The full valuation tax base which is used to calculate the debt limit is the average of the local valuation for the five preceding years. Indebtedness contracted by smaller cities for education purposes is excluded from those cities' limits and assigned to the appropriate school districts.

Generally exempt from the debt limitations are: short-term debt (to be repaid within two years); debt contracted for the supply of water or for sewage treatment and disposal projects; debt contracted for a self-supporting local public improvement or service; and debts related to certain local pension or retirement systems. Art. VIII, § 5. There are also certain specific historic exemptions from the limits for particular debts of Buffalo, Rochester, Syracuse and New York City. Art. VIII. §§ 6, 7, 7a.

In addition, article XVIII empowers the legislature to authorize any city, town or village (but not counties) to contract indebtedness in an amount up to 2% of the local assessed valuation for low-income housing and slum clearance projects. For cities and villages, this 2% debt may be in addition to the debt limit imposed by Article VIII, provided that these municipalities levy a tax, other than an ad valorem tax on real estate, sufficient to provide for the payment of the principal and interest of the debt. Note that in Article XVIII the debt limit is calculated based on a five-year average of *assessed* valuation, whereas the Article VIII debt limit is based on the five-year average of *full* valuation.

Further, Article XVI, section 6 provides that the legislature may authorize local governments to incur debt to redevelop "economically unproductive, blighted or deteriorated areas" through tax increment financing: A locality may pledge for the payment of a redevelopment project's debt "that portion of the taxes raised by it on real estate in such area which, in any year, is attributed to the increase in value of taxable real estate resulting from such redevelopment." Such redevelopment debt may be excluded from the debt limitations of article VIII.

1884 for large cities, to all cities and to villages. The base for calculating the limit was changed from annual assessed value to a five-year moving average.[31] In 1949, the base for the tax limit was changed to full valuation, effectively increasing the limit, and a 1 1/2% limit was imposed on counties, with the proviso that the legislature could raise it to 2%. In 1953, the limit for New York City and its component counties was set at 2 1/2%. With other modifications, the 1938 amendments continue to set the basic structure of local property tax limits.[32]

The impact of the tax and debt caps on local revenue-raising capacity is uncertain; nor is it clear just how well these limits actually protect local taxpayers. The constitutional limits on taxation and debt are *not* cumulative. Rather, they are imposed with respect to categories of local government and not with respect to the rate or amount of tax an individual taxpayer can be required to pay. Many areas of the state fall within the jurisdiction of two or three local governments simultaneously. An area may be within a county and a city; or within a county, a town, and a village. Thus, property taxes can be far greater than the 2% city or village limit. In addition, there are no limits on town property taxes. Similarly, although the debt limit for most general purpose local governments is 7%, the effective limit for an area that is in both a city and a county is 14%.

Moreover, both the tax and debt limits refer to the assessed valuation of real property. Although the taxation of property by a particular locality is capped, a locality may, with state approval, impose other kinds of taxes. This has the effect of weakening the protection the

---

31. This was designed to prevent rapid fluctuations in taxing power during times of recession. The legislature was empowered to exclude amounts raised for educational purposes from the limitations applying to cities with fewer than 100,000 people and to villages. Where a school district was wholly or partly within a city, the property tax levy raised within the city for educational purposes was excluded from the city's limit.

32. The property tax limits imposed by Article VIII, section 10 based on a rolling five-year average of full valuation of taxable real estate within the jurisdiction are:

New York City: 2.5%
Other Cities with Population > 125,000: 2.0%
All Other Cities: 2.0%
Counties: 1.5% (which the legislature may raise to 2%)
Villages: 2.0%
There are no limits on town taxation.

Local governments subject to tax limits may make appropriations for capital expenditures or improvements for which they might otherwise borrow and to exclude the taxes raised for such appropriations from the tax limits. In effect, property taxes for capital expenditures are not under the constitutional limit. For New York City, however, such appropriations for capital purposes are counted against the debt limit.

constitution appears to provide taxpayers while strengthening the power of the state with respect to local finances.

The theory of the debt limits is to limit local debt to the local government's "carrying capacity." On the assumption that local revenues are based on local real estate, the constitutional debt limits are calculated in terms of local taxable real estate. But many local governments derive substantial revenues from nonproperty taxes, such as the sales tax or the personal income tax. For these localities, the base for the debt limit may understate the ability of the locality to carry the debt.

An unintended consequence of the debt limits may have been to contribute to the rise of public authorities, and thereby increase the fragmentation of local government and interfere with local electoral control of local finances and local decision making. Public authorities are not subject to the debt limitations. Thus, public authorities may be created to issue bonds to finance new facilities. Those bonds will be repaid from revenues generated by the projects financed by the authorities. These debts are not subject to the debt limits. Thus, the local government debt limits may have led to the proliferation of such public authorities, and to public authority control of revenue-generating infrastructure projects and facilities. This simultaneously reduces the effect of the debt limits in protecting local residents from the consequences of rising public debt while shifting the power over local public finance and local public infrastructure from the elected local governments — which are subject to the debt limits — to unelected authorities.

(b) Legislative Control of Taxation.

Beyond the debt and tax caps, the entire subject of local taxation is subject to state regulation. The power to tax is not one of the home rule powers of local government. Indeed, Article XVI expressly provides that the "power of taxation shall never be surrendered, suspended or contracted away" and any state laws which delegate the taxing power "shall specify the types of taxes which may be imposed thereunder and provide for their review." This prohibits blanket enabling acts empowering localities to impose taxes at their own discretion.

Although the principal tax delegated to local governments is the ad valorem tax on property, the legislature is authorized to provide for the supervision, review and equalization of assessments. The constitution forbids local ad valorem taxation of intangible personal property and prohibits any alteration or repeal of the exemptions from taxation of real or personal property used exclusively for religious, educational or

charitable purposes and owned by a corporation or association organized for one of those purposes and not operating for profit.[33] Moreover, nothing in article VIII shall be construed to prevent the legislature "from further restricting" the local powers with respect to contracting indebtedness or levying taxes on real estate.[34]

B. Local Government Formation, Restructuring, and Cooperation

Article IX, section 2(a) provides that the "legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges, and immunities granted to them by this constitution." The constitution contains no other general standards or procedures for the formation of local governments, but it does provide some restrictions.

Article III, section 5 prohibits the formation of a new county unless it has a sufficient population to entitle it to an Assembly seat.[35] Article III, section 17 bars the incorporation of villages by "private or local bill."[36] There is no similar ban on the formation of other local governments, and article X, section 1 exempts "corporations . . . for municipal purposes" from the general ban on the creation of corporations by special act.[37]

Article X, section 5 provides that no public corporation (other than a county, city, town, village, school district, fire district or improvement district) possessing both the power to contract indebtedness and the power to collect rentals, charges, rates or fee for services furnished by it shall be created except by a special act of the legislature.

The local government "bill of rights" provides that no territory of any local government shall be annexed without (i) the consent of the people, in a referendum, of the area proposed for annexation, and (ii) the approval of the governing board of each local government whose area is affected by the annexation. The legislature must provide for judicial

---

33. Art. XVI, § 1.

34. Art. VIII, § 12.

35. The same provision explicitly exempts Hamilton County from the requirement that every county be large enough to have one seat in the Assembly.

36. Twelve villages are currently incorporated under special charters. These apparently predate the adoption of the constitutional ban on such special charters. In addition, six other villages were first incorporated by special charters and then reincorporated under general law.

37. All the cities in New York have been incorporated by special laws.

review, applying an "over-all public interest" standard, of the refusal of a local governing board to consent to an annexation.

The "bill of rights" also directs that counties shall be empowered by general law, or special law enacted upon county request, to adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt or repeal alternative forms of their own. Any such change of form of government may entail the transfer of functions or duties of the county or of any local government unit within the county and the abolition of local offices, department, agencies or units of government.

However, no change in the form of county government can become effective unless approved in a referendum by both (i) a majority of the votes in the county cast outside of cities and (ii) a majority of the votes cast in the cities of the county considered as a unit. Moreover, if an alternative form of government involves the transfer of function from a village, or the abolition of a village office, the double referendum becomes a triple referendum: Changes affecting villages must be approved in a referendum of a majority of the votes cast in all the villages so affected, considered as one unit.[38]

These provisions make certain forms of local restructuring difficult. The annexation provision requires the consent of both the people of the area proposed for annexation and of the governing boards of affected local governments. Although the refusal to consent by affected local governments can be overcome by judicial review, the need for an affirmative vote in referendum of the people in the area proposed for referendum is an absolute requirement. Similarly, the double referendum requirement for the adoption of an alternative county charter, and the triple referendum requirement for the transfer of functions from villages to the county or other local governments is also a barrier to local government restructuring.

Despite the restrictions on boundary changes and restructuring, Article IX does provide for a measure of interlocal cooperation. Local governments may agree, "as authorized by act of the legislature," with the federal, state or one or more local governments within the state "to

38. Art. IX, § (1)(h)(1). After the adoption of an alternative form of county government, any subsequent amendment, by either state or local law, which abolishes or creates an elective county office, changes the voting or veto power or the method of removal of a county officer during his term, transfers his function to another county officer or agency, or changes the form or composition of the county legislature shall be subject to a permissive referendum, as provided by state law. Art. IX, § (1)(h)(2).

provide cooperatively, jointly or by contract any facility, service, activity or undertaking which each participating local government has the power to provide separately."[39]

III. REVISING THE CONSTITUTION

Although the constitution establishes the principal local control over local legislative bodies, it provides only limited guarantees of local policy-making authority and no assurances of local fiscal autonomy. Yet, although local governments are not assured of adequate legal or fiscal resources, their boundaries are to a considerable extent protected from change. This is very much at odds with the goal, outlined in Part I, of developing local decision-making autonomy within a framework of state oversight and control over boundary questions. This Part addresses possible approaches for closing the gap between the normative aspirations of state-local relations and the current provisions of the state constitution.

A. Local Autonomy

(1) Power to Initiate Local Legislation.

Article IX does provide local governments with multiple grants of power to undertake new measures with respect to local matters. Yet the complexity of the relevant constitutional provisions, and the older tradition of narrow judicial interpretation, has raised doubts concerning

39. In so doing, each participating local government "shall have power to apportion its share of the cost thereof upon such portion of its area as may be authorized by act of the legislature." Art. IX, § 1(c). Moreover, Article VIII, section 1 provides an exemption from the general constitutional ban on a local government's giving or lending its credit by allowing two or more local governments to "join together pursuant to law in providing any municipal facility, service, activity or undertaking which each of such units has the power to provide separately." In financing such joint projects each involved local government may contract joint or several indebtedness, pledge its faith and credit for the payment of the indebtedness of the joint undertaking and levy real estate or other taxes or charges. The Legislature is empowered to regulate the amount of such indebtedness and the manner in which it is incurred, and to provide a method for allocating and apportioning such debts among the local governments participating in a joint project. Article VIII, section 2-a enables the legislature to authorize any county, city, town or village to incur indebtedness to provide water supply, sewage treatment and disposal in amounts greater than the local government's own needs so that the locality may sell the excess capacity to any other public corporation or improvement district.

the scope of local legislative initiative. One way to assure local power to initiate measures, without need for state approval, would be to simplify constitutional home rule by replacing the arcane structure of Article IX with a provision — similar to that in several other states — that simply grants to local governments all legislative powers not specifically denied to local governments by the legislature. This is sometimes known as "legislative home rule," on the theory that it vests localities with all the powers that the legislature could delegate to them.

Such a definition of home rule powers would greatly reduce the role of the courts in determining whether local governments have power to act. It could also embolden local decision making by clarifying that local governments presumptively have the power to act, with the burden of persuasion on those opposed to a particular action to demonstrate that the state has specifically denied to the local government the power to take the action in question. In effect, legislative home rule would eliminate gray areas and uncertainty in favor of the claim of local power, unless and until the legislature has acted affirmatively to take a power away from local governments.[40]

(2) Immunity from State Interference.

As pointed out in Part II, the constitutional proviso that the state can act with respect to local "property, affairs or government" by general laws only, and not by special laws, gives local governments next to no protection — and the judicial doctrine of "state concern" reduces the constitutional protection still further.

There is no ready solution to the problem of state interference in local government actions. Strong local immunity from state action would require a sharp demarcation between local matters and state matters, but that line is inherently difficult to draw, will certainly change over time, and should not be frozen into the constitution. Local spillovers are endemic in a state containing hundreds of local governments. The resulting interlocal conflicts will often require state action, including state limitation on local powers, or state requirements that local powers be exercised according to state specifications that would require local

---

40. The 1967 constitutional convention considered such a proposal to shift the constitutional basis for local power to legislate from the traditional focus on local "property affairs or government" and specific areas designated as local to a broad delegation of all legislative power (except taxation) to local governments, subject to the legislature's power to limit local legislative authority by general law. The proposal was not adopted by the convention.

governments to take extra-local interests into account. Moreover, many problems can arise in many localities simultaneously. Even if these do not have cross-border effects, state-wide treatment of a problem that exists state-wide may permit a more economical or more effective response.

At the heart of the immunity problem is the conundrum of a multi-tier government system in which a higher level government includes the lower ones. The state includes all the local governments, and all local residents are also state residents. It is appropriate for the state to be accountable to its citizens, including those who reside within local units. Often, the most interfering state legislation is a response to interests within a particular locality that failed to achieve political success at the local level. But the ability of losers in local politics to refight their battles by taking an appeal to the state legislature, or even to Congress, may be endemic to our multilevel system. It is, thus, extremely difficult to write a constitutional provision that would secure local immunity from state interference without also limiting the state's ability to address state-wide problems or mediate interlocal conflicts, and without locking in a "state"/"local" distinction that would almost certainly become out of date with the passage of time.

One response to the inability to craft a general immunity provision would be to focus on specific problem areas. One problem is the ability of the state to interfere with particular local governments. General legislation interfering with all local governments may be resisted politically since it may prompt all local governments to unite in opposition. By contrast, a special law focused on one or a few localities may be easier to pass since a target that is alone and without allies may be particularly vulnerable. Article IX attempts to condition some special laws on the approval of the target locality, but this provision has been eroded by judicial interpretation. One solution might be to revitalize the ban on special acts by making it clear that it applies to all special acts, regardless of whether there is a "state concern." This would not interfere with the state's ability to adopt general laws or special laws that have received the consent of the locality in question.

A second focus could be on state actions that interfere with the ability of local people to control their own local government. As already indicated, the constitution should not determine what is "state" and what is "local," or guarantee local governments particular powers. The state should be able to shift responsibility for different functions among the different levels of government in light of changing circumstances. Thus, any local immunity from state action ought to be limited. But consistent

with the "bottom-up" perspective, the constitution should guarantee that local governments are controlled by and accountable to local people. The constitution should, thus, protect the power of local people to decide on the basic institutions and procedures of their governments, and, for those functions entrusted to local governments, to formulate and carry out local decisions.

A frequent impediment to local control of local government is state regulation of local government contracting practices and the local public employment relationship, particularly the state imposition of obligations on local governments that have no analogue to the obligations that the state imposes on private firms. To perform their public service functions local governments typically must hire workers and contract with vendors and other private providers. State regulations that drive up local public employment and contracting costs drain local revenues and interfere with the ability of local governments to perform their functions. These regulations divert local funds to programs chosen by the state rather than by local constituencies, thus, interfering with local accountability. The constitution ought to protect the structural integrity of local governments, broadly defined to include employment, contracting, and other "housekeeping" aspects of local performance of local government functions. State cost-imposing regulation of local public employment and contracting is also one piece of the unfunded mandates problem, which is addressed more fully below.

(3) Fiscal Autonomy.

Local governments must have the resources necessary to carry out their functions. To give a local government the legal authority to undertake various activities without also assuring that it has the funds necessary to pay for those activities is a cruel trick. Moreover, the question of local fiscal resources is also an issue of interlocal inequality. Due to enormous interlocal differences in tax base, some localities have far greater resources than others. Local government is far more able to advance the programs of local residents and provide high quality public goods and services where local fiscal resources are substantial than where local resources are lacking. At least partly as a result of differences in local resources, there are enormous differences in local government effectiveness and in the quality of local services. The sufficiency of local fiscal resources, then, is essential both for local autonomy and as a matter of fairness to the residents of different localities.

Among the striking features of New York's intergovernmental

relations is the relative lack of local autonomy with respect to fiscal matters. Home rule concepts do not apply to local taxation and borrowing. Local property taxation is subject to constitutional levy and debt limits, to state regulation of the assessment process, and to the legislature's power to create exemptions from taxation, and local governments have no constitutional authority to levy taxes other than the tax on real property. If a local government seeks an additional source of revenue, or seeks to raise the rate of any nonproperty tax previously authorized by the legislature, it must go to Albany for the necessary authority. Nor is the state under any obligation to assure that local governments have tax bases adequate to their needs or to furnish localities with funds if the local governments are unable to raise sufficient revenues locally. Indeed, the state has unlimited authority to impose new functions, new service delivery requirements, or other expenses on local governments without having to supply the localities with the funds necessary to meet the costs of such mandates.

(a) Fiscal Home Rule.

There are several ways to increase local fiscal autonomy. One would be to increase local power to tax, either by placing authority to levy specific taxes in the constitution, or by providing that home rule includes the power to tax. Given the overlapping jurisdictions of many local governments, and the possibility that multiple local governments could claim the authority to tax the same event — e.g., both the locality of the taxpayer's residence and the locality in which the taxpayer works could claim the authority to tax personal income — there would have to be some mechanism to allocate taxing authority among competing localities. Once the allocation among localities is resolved, however, the prime constraint on local taxation would be local preferences rather than the state legislature or the constitution.[41]

This would increase the formal fiscal autonomy of local governments, but it is not clear how far it would go towards assuring localities resources adequate to meet their service-provision responsibilities. First, the value of an expanded power to tap local resources depends on the

41. The 1967 convention considered proposals to grant local governments power to levy nonproperty taxes; to liberalize the tax and debt limits; and to provide for single, consolidated area-wide tax and debt limits rather than different overlapping limits for each type of local government. These proposals were not adopted by the convention. A more narrow proposal — to remove the 5% debt limit on school districts outside the largest cities — also failed at the convention, although a similar amendment was adopted by the voters in 1985.

extent of local wealth. Fiscal home rule would be far less valuable in poor areas than in more affluent ones. Second, interlocal competition is likely to operate to constrain new local taxation. With large numbers of localities in every metropolitan area and even in non-metropolitan regions of the state, it is easy for people and businesses to move from one locality to another. Local governments may be reluctant to raise additional revenue if they believe that such action would drive taxpayers out of the locality and into the waiting arms of adjacent communities. Developments in transportation, communication, and production technologies have increased the ease of movement of both people and capital. The locational advantages of particular places are of decreasing significance in the age of aviation, computers, and the electronic and telephonic transmission of data and documents. It is relatively easy for many taxpayers who become dissatisfied with local tax policies to exit the locality for an adjacent community. As a result, communities increasingly compete for tax base, and that competition powerfully constrains local taxation.

Thus, although fiscal home rule might logically complete legal home rule, the combination of limited local resources and the dynamics of interlocal competition could mean that some localities would still lack the local revenues necessary to provide local residents with services and facilities comparable to those provided by other localities in the state.

(b) Guaranteed Fiscal Capacity.

To address the dilemma of limited local fiscal capacity, the constitution could be amended to require that the state assure all local governments the resources to perform the functions entrusted to them, with the state obligated to provide the funds where local resources are inadequate. The state could be required to determine a basic level of local public services for all communities; to determine the cost of that basic level; and to determine whether each locality has the resources, including both the taxing power and the tax base, to provide the basic level of services. If a given locality does not have sufficient revenue-raising power, the state would be required to provide additional taxing authority. Further, to address the interlocal inequality problem, the constitution might provide that no locality would have to collect in local revenues more than a certain percentage of the local tax base in order to meet the state-set service minimum. A locality that taxes at this levy limit but is unable to pay for the service minimum would be entitled to state funds to make up the difference. Localities would, however, be free to tax and spend above

the service minimum if they so choose. Such a constitutional provision would guarantee all localities the fiscal resources — in terms of taxing power and mandatory state assistance — necessary to carry out their state-delegated responsibilities, but would not interfere with the ability of localities to provide additional services if they were willing to pay for it.

This proposal is based on some initiatives in the school finance reform movement that would require the state to guarantee to each school district the resources necessary to meet a state-set standard of basic education,[42] but it would not be limited to education. Its central idea is to force the state to assume the responsibilities as well as the powers of the "top-down" perspective on state-local relations. If, as the top-down perspective indicates, local governments are created by and obtain their powers from the state, then the state is to a considerable degree responsible when, due to limited local resources, some localities are unable to discharge their state-delegated functions adequately. When it entrusts the responsibility for certain public services, like safety, health or education, to local governments, the state has the obligation to assure that those services are provided, at acceptable standards, to all local residents. Guaranteeing localities the tax base to carry out their state-delegated functions would both enhance local self-determination — since localities would actually have the resources to implement local programs — and vindicate the state's responsibility for the overall functioning of the local government system.

(3) Mandates Relief.

Another way to enhance local fiscal autonomy is to amend the constitution to prohibit unfunded mandates. Unlike the proposals for fiscal home rule and a guaranteed tax base, mandates relief would not increase local resources. However, by limiting the ability of the state to impose new costly requirements on localities mandates relief could increase local control over local funds and thus, indirectly, expand local fiscal independence.

Unfunded mandates are a central issue in intergovernmental relations today. At the national level, Congress enacted the Unfunded Mandates Reform Act of 1995, to curb federal impositions on state and local

42. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979).

governments,[43] and many states have adopted rules attempting to prevent the imposition of state mandates on localities. Many local leaders in New York have sought relief from, including constitutional prohibitions against, unfunded state mandates.

Unfunded mandates can be a major infringement on local fiscal autonomy, as they commandeer local governments to state ends and divert local resources from local control to state-determined programs. Unfunded mandates impair government accountability in general, since the state legislature is free to impose costs on local taxpayers without paying any political penalty while local officials are held accountable for costs over which they have no control. Thus, some commentators have argued that to protect local governments, state constitutions ought to be amended to authorize localities to ignore mandates unaccompanied by the funds necessary to carry them out.[44]

Nevertheless, it is not certain that *all* unfunded mandates are undesirable. The attack on unfunded mandates assumes that individual localities ought to make the decision, by weighing the costs and benefits to themselves, of whether to undertake a program, provide a service, perform a function, or make a payment. This makes sense when all the costs and benefits of the program, service, function or payment are borne within the particular jurisdiction; when there is no broader interest in the matter; and when there is no cost from locality-to-locality variation in programs or standards. But that is not always the case.

Sometimes actions in one locality have effects in other localities. Pollution emitted in one municipality can have its principal effect downwind or downstream in another municipality. For the emitting locality, the costs of pollution control might outweigh the benefits, but when the interests of the other affected localities are taken into account, the benefits from pollution control might outweigh costs. The state is in a better position to address problems with such external effects. Nor is it clear that a locality forced to curtail its pollution ought to be compensated for its costs. The attack on *unfunded* mandates assumes, as a baseline matter, that localities have a protected interest in not assuming

---

43. P.L. 104-4. The Act creates new procedures for Congressional consideration of proposals that would impose new mandates; seeks to bar Congressional consideration of new unfunded intergovernmental mandates; and requires federal agencies to adopt new procedures to analyze the impact of new regulations on subnational governments and the private sector.

44. *Cf.*, Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1356, 1405-06 (1993).

certain costs. But if the people of a state make a decision that certain behavior is unacceptable as a matter of state policy, then it is certainly debatable whether localities should be compensated for no longer engaging in such unacceptable behavior.

Similarly, in a mobile society and an economy in which people, goods, services and capital are constantly crossing local borders, multiple and divergent local rules can drive up the cost of doing business and the costs consumers pay for goods and services. Thus, there may be some benefit in state determination of state standards and mandating them on localities.[45]

Intergovernmental competition may limit the capacities of localities to pursue their own political agendas, particularly when they would regulate business, promote equality, or aid the needy within their borders. Mandates may at times be necessary for the enactment of programs that localities would adopt but for the prisoner's dilemma of intergovernmental competition.

Thus, a ban on all unfunded mandates might go too far. Mandates involve the analysis of the cross-cutting concerns of state and local autonomy, the desirability of interjurisdictional variation in programs and standards, and the effective and equitable resolution of a vast array of policy problems. The model here might be the proposal for partial protection of local autonomy from state interference, discussed above. Mandates relief might focus on state legislation that drives up local costs with respect to entirely local or internal "housekeeping" matters, such as local public employment and contracting. Here state mandates impose costs that drain local revenues and interfere with the ability of local governments to perform their functions, but, unlike environmental mandates, they do not address problems of interlocal spillovers. Mandates should be permitted where justified in terms of the dynamics of interlocal relations; they should be restricted when they are no more than state displacement of local preferences with respect to matters whose costs and consequences are largely borne within local borders and by local

---

45. In some situations, mandates might actually empower localities. The easy ability of capital, some businesses, and more mobile taxpayers to relocate from one place to another tends to constrain local autonomy. The threat of business and taxpayer exit makes it more difficult for localities to engage in certain forms of regulation or to adopt redistributive policies. As the Supreme Court noted in sustaining federal taxation of employment in order to fund an unemployment compensation program in the 1930s, the failure of most states to adopt such a program was "not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm, lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors." Steward Machine Co. v. Davis, 301 U.S. 548, 588 (1937).

constituents and taxpayers.

B. Local Restructuring

The flexibility to reorder local boundaries in light of changing patterns of settlement, new technologies of transportation, communication and production, new economic relationships, and other developments that affect the geographical dimensions of the efficient performance of local government functions is essential to the effective operation of the local government system. But the provisions of Article IX make many forms of local restructuring difficult. The annexation provision requires the consent of both the people of the area proposed for annexation and of the governing boards of the affected local governments. Although the refusal of the affected local governments to consent can be overcome by judicial review, the requirement of an affirmative vote of the people in the area proposed for annexation is absolute. Similarly, the double referendum requirement for the adoption of an alternative county charter, and the triple referendum requirement for the transfer of functions from villages to the county or other local governments is also a barrier to local government restructuring.

One first step to greater flexibility in reordering local governments would be to reduce or eliminate many of the existing impediments to boundary change and the transfer of powers. Functions could be transferred from local units to a county government subject only to a single county-wide referendum, thereby eliminating the double and triple referendum procedures of Article IX. Indeed, the referendum requirement for the transfer of functions, as well as the referendum requirement for annexations, could be eliminated.[46]

More dramatically, the state could take a more active role in reviewing, and ultimately, reordering the configuration of local governments. New York State is composed of 62 counties (57 outside New York City), and 62 cities. The number and the borders of the counties have not changed in eighty years, and the number and borders of the cities have not changed in fifty years. There have been slightly greater

46. The 1967 convention considered a proposal to authorize, for every county outside New York City, the transfer of any function possessed by any city, town or village therein to the county government, subject to a single county-wide referendum — thereby eliminating the double and triple referendum procedures of Article IX. The proposal was not adopted by the convention.

fluctuations in the number and borders of towns and villages — there are now about 930 of the former and 550 of the latter — but overall the pattern has been one of great stability for most of this century. Although it is possible that the arrangement of local governments established well before the Second World War is suitable to address contemporary needs and concerns, it seems likely that some other arrangement might be better. To be sure, there have been changes to the system resulting from the creation of special districts and public authorities, but many of these entities are either run by the state directly or by state appointees and, therefore, are not directly accountable to local electorates.

The constitution ought to be amended to provide for some state-level institution responsible for actively examining the boundaries of particular local governments and the powers delegated to categories of government, proposing changes to the current structure, and, perhaps, implementing those changes. Most important, such an entity — a Boundary and Powers Review Commission — ought to have the power to initiate changes, such as the merger of existing local units, the shifting of territory from one locality to another, or the transfer of functions.

Although about a dozen states have boundary review commissions, they are primarily reactive. They pass judgment on locally initiated proposals for boundary change. These commissions can block changes — such as the incorporation of new communities on the metropolitan fringe — that may be undesirable from the perspective of the region or the state as a whole, but they cannot initiate changes that might reduce the large number of adjacent or overlapping governments in a region. To be most useful in assuring that local boundaries and powers are appropriate to meeting local service and regulatory responsibilities, a Boundaries and Powers Commission needs the authority to launch a process of restructuring, even over the opposition of current local officials.

To be sure it is unlikely that such a commission would be (or ought to be able) to force changes unilaterally. The constitution ought to provide standards that would govern a commission's proposals for local restructuring. Affected local governments ought to have procedural rights to participate in the commission's deliberations and to challenge the commission's proposals. Moreover, there ought to be some review — either judicial or legislative — of the commission's recommendations before they could take effect. But the central idea behind the proposal would be the creation of a mechanism that provides for the comprehensive examination, from a regional or state perspective, of the structure of the local government system, and its relationship to the underlying values

of effective and accountable government, in a setting which emphasizes the possibilities for adapting the local government system to economic, demographic, and technological change. Although this could lead to the reduction in the size or powers of individual local governments — or outright elimination in some cases — such a comprehensive review would enhance the ability of the local government system as a whole to meet local needs and perform local functions in an efficient and responsive manner.

Without such a mechanism for forcing the periodic reconsideration of local boundaries and powers, the current combination of constitutional impediments and political resistance to reorganization is likely to extend deep into the next century a structure adopted many decades ago.