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Recommended Citation

Richard Briffault, *Article IX: The Promise and Limits of Home Rule*, COLUMBIA PUBLIC LAW RESEARCH PAPER No. 14-436 (2015).

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COLUMBIA LAW SCHOOL

PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP



PAPER NUMBER 14-436

ARTICLE IX: THE PROMISE AND LIMITS OF HOME RULE

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JANUARY 16, 2015

Article IX: The Promise and Limits of Home Rule

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A fundamental purpose of a constitution is to establish the structure of government. A constitution creates the component parts of the government, allocates powers and responsibilities among them, and sets out rules for how the parts are to interact in the course of governing. American governments typically have both vertical and horizontal dimensions, that is, they consist of different tiers of government with different territorial jurisdiction and functional authority, and also separate powers among different institutions within a given level of government. The United States Constitution, for example, divides power vertically by establishing a federal structure consisting of the United States government and the states, and then allocates power within the federal government horizontally among three different branches. The New York State Constitution, similarly, provides for both a state government, with a horizontal separation of powers among the legislature, executive and judiciary, and a vertical division between the state and local governments.

The federal-state and state-local relationships, however, are quite different. The federal Constitution does not create the states, give the states powers or authority, or treat the states as subordinate branches of the national government. Indeed, it says little about the states and leaves their internal organization and powers to the states themselves. The federal Constitution is focused on creating the federal government and simply assumes there are and will continue to be states with broad law-making powers. It does shift some governmental functions from the states to the federal government; imposes some constraints on the states; provides a role for the states

in the organization of the federal government; and addresses federal-state conflicts. But state autonomy is a given, not a product of the Constitution.

The state-local relationship is something else altogether. Legally, local governments are creatures of the state. They are established by the state, and wield only those powers delegated to them by the legislature. The state can require them to take on certain responsibilities or bar them from other activities. Of course, active, locally-elected local governments have long been considered crucial for democratic self-government, particularly in a large and diverse state like New York. Local governments provide many of the public goods and services and adopt and enforce many of the regulations that most affect people in their homes and neighborhoods. Public safety, sanitation, street and road maintenance, and land use regulation have long been traditional local functions, as people typically want to keep these matters “close to home.” In fact, New York has had a tradition of active local governments going back to the colonial era. But legally local powers derive from the state – that is, laws enacted by the state legislature -- and can be taken back by the state. And there has also been a long tradition of the state keeping local governments on a relatively short leash and interfering with local decision-making.

Against this backdrop, the role of the state constitution for local governments and state-local relations is to protect and promote local self-government by providing local units with a greater measure of independent governing authority, not dependent on the whims of the legislature, and by giving them some protection from state interference. Initially, the New York constitutional provisions dealing with local government focused on assuring local popular control. Following the pre-Revolutionary practice, the Constitution of 1777 provided that town officers previously elected by the people should continue to be filled by popular election.¹ The Constitution of 1821 extended the filling of local offices by local election to counties, cities, and

villages.² The Constitution of 1846 confirmed the norm of local selection – either by popular election or by appointment by other locally elected officials – of local government officers whose selection was not otherwise provided for in the Constitution.³ But these early constitutions did little to guarantee that local governments, even though elected by local residents, would actually have any real governing authority. Instead for nearly a century, from the post-Civil War period to the 1960s, New York’s constitution-writers struggled over how to establish local autonomy and entrench it from state interference – what is known as “home rule.” Each constitutional revision incrementally improved the status of local governments, culminating in the ratification in November 1963 of Article IX, which established a “bill of rights for local governments,” but also confirmed a continuing role for the legislature concerning local matters.⁴

Article IX, unamended since its adoption, establishes the basic constitutional framework for addressing questions of local power, local government organization, and state-local and interlocal relations. It is premised on a commitment to “[e]ffective local self-government.”⁵ Has it given New York’s local units – its counties, cities, towns and villages -- the powers and resources they need to function as efficient, effective, locally accountable governments? Not really. Article IX has bolstered local control over local government organization and personnel and has provided a firmer foundation for local law-making. Yet, as New York’s highest court recently put it, more than fifty years after Article IX’s ratification, the fundamental principle that “the authority of political subdivisions flows from the state and is, in a sense, an exception to the state government’s otherwise plenary power” still controls and “the lawmaking power of a county or other political subdivision ‘can be exercised only to the extent it has been delegated by the State.’”⁶ Article IX has done little to protect local governments from state interference, and has done nothing to provide local governments with financial autonomy. It has also left in place

an extremely complex and fragmented local government structure, with multiple levels of overlapping governments, without any assurance that these local governments have the jurisdiction or resources needed to address the needs of their residents.

This Chapter will initially examine how Article IX both promotes and constrains local self-government. Some limits on local autonomy are written into the text of the constitution while others grow out of judicial decisions that have tended to bolster state power over local matters. It will also analyze the constitution's treatment of the financial position of local governments and questions of interlocal relations. It will conclude by considering measures by which the gap between the constitution's promise of local autonomy and the reality of limited local power can be addressed.

Home Rule

Home rule has two strands: (i) initiative, that is, the ability of local governments to make decisions concerning such local matters as local government organization, the delivery of local services, and the adoption of regulations dealing with local issues without having to seek specific permission from the state; and (ii) immunity, that is, the ability of local governments to protect such local decisions from state displacement. Traditional legal concepts provided for neither local initiative nor local immunity. Instead, the governing legal principle known as Dillon's Rule held that local governments enjoyed only those powers expressly granted by the state, necessarily implied in the express grant, or essential to carrying out the delegated powers. Doubt about a local power was to be resolved against its existence. And any power once granted could subsequently be modified, reduced or eliminated by the state.

The home rule movement emerged in the late nineteenth century to counteract Dillon's Rule and provide a firm constitutional foundation for local self-government. In New York, the Constitution of 1894 took the first step towards some form of constitutional home rule, followed by additional home rule amendments in 1923 and 1938. The earliest provisions were focused on a version of immunity by seeking to make it more difficult for the legislature to engage in targeted meddling into local affairs in individual localities, particularly New York City and other cities; over time, though, the constitution began to provide a foundation for local initiative as well. The 1963 amendment revamped and expanded these early measures into Article IX.

Article IX.

Section 1 of Article IX declares "[e]ffective local self-government" is one of the "purposes of the people of the state," and provides that every local government – defined broadly to include counties (other than those making up New York City), cities, towns, and villages – "shall have a legislative body elective by the people thereof." (Art. IX, sec. 1(a)) As already indicated, the commitment to locally elected local governments grows out of a much older constitutional tradition.

Section 2 then establishes a constitutional foundation for the "rights, powers, privileges and immunities," again including counties, cities, towns, and villages. Section 2 provides that (i) "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government" and that (ii) "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law" concerning ten specified subjects "whether or not they relate to the property, affairs or government of such local

government,” although the legislature may restrict the adoption of local laws relating to these ten areas to the “property, affairs or government of such local government.” (Art. IX, sec. 2(c)). The ten enumerated areas of local law-making would likely fit under the general category of local “property, affairs or government” even if not specifically addressed, as they include such basic local government issues as the powers, duties, qualifications, terms of office, compensation, etc. of local government officers and employees; the membership and composition of the local legislative body; the transaction of local government business; the acquisition, care and management of local roads, streets, highways, and property; dealings with government contractors; and an omnibus provision that would probably cover all the others concerning the “government, protection, order, conduct, safety, health and well-being of persons or property therein.” (Art. IX, sec. 2(c)(10)). The last provision is, in effect, a brief statement of what is generally known as “the police power.” A different section of Article IX enables local governments to exercise the power of eminent domain by taking private land within their borders for public use. (Art. IX, sec. 1(e)).

Section 2 also provides that the legislature shall enact, and may amend, a Statute of Local Governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by the rest of Article IX. (Art. IX, sec. 2(b)(1)). The legislature may diminish or suspend any power granted by this statute only by a law passed by and approved by the governor in each of two successive calendar years. Finally, section 3(c) of the article declares that the “[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.” (Art. IX, sec. 3(c)).

Local Initiative.

Taken together, the rhetorical commitment to local self-government, the endorsement of local power to enact local laws concerning local “property, affairs or government” and the health, safety and well-being of local people, and the rule of liberal construction go far toward establishing the local initiative component of home rule. Local governments have authority to pass laws addressing local problems and concerns without having to first obtain Albany’s consent. Although the scope of the phrase “property, affairs or government” may be open to debate, the ten enumerated grants specifically confirm local power to act with respect to most matters that are likely to be of local concern. Indeed, there has been relatively little litigation concerning local power to act concerning local matters in the first instance.

State Preemption.

The real problem for local governments is that frequently their powers are hemmed in, and thus preempted, by state laws. Hard-wired into section 2 is a fundamental constraint on local action: A local law must not be “inconsistent” with the constitution of the state or with any “general law,” that is, any state law that applies statewide to all local units within any category of local government (e.g., all cities, all counties, all towns, or all villages). In other words, in cases of conflict between local laws and general state laws, the state law prevails and preempts the inconsistent local law. As the court of appeals has observed, “the preemption doctrine represents a fundamental limitation on home rule powers.”⁷ Given the pervasiveness of state legislation, this can seriously constrain local action. For example, the state’s Vehicle and Traffic Law denies local governments the power to require a motor vehicle owner to obtain a permit to use any public highway. As a result, no New York locality may adopt residential parking permit programs as a means of addressing traffic congestion without obtaining specific authorization from the state legislature.⁸

Moreover, the concept of “inconsistency” goes well beyond state laws that expressly prohibit certain types of local action. A local law may be found to be deemed “inconsistent” with state law if it adds a requirement to the state’s requirements, raises the standard above that set by the state, or provides for a local variation from the state’s procedure. Thus, for example, when the New York City Council sought to prohibit city agencies from contracting with firms that failed to provide their employees’ domestic partners with employment benefits equal to those provided to spouses – and the regulation of contractors is one of the ten enumerated areas of local authority listed in Article IX, Section 2 – the New York Court of Appeals held the local measure preempted by the state’s competitive bidding law for municipalities. The state law did not bar local measures to require municipal contractors to provide benefits to domestic partners. But the court determined that the state’s directive “that municipalities contract with the lowest responsible bidder is plainly in tension with the right of a municipality to say that it will contract only with firms that provide certain benefits”⁹ as the lowest responsible bidder might not provide those benefits. Similarly, the court of appeals has held that the provision of the state’s Village Law setting the standard for determining when a landowner is entitled to a variance from a local zoning ordinance preempted the efforts of two villages to set a different standard even though the court acknowledged the villages’ zoning variance standards had no extra-local effect and the decision limited “the right of localities to govern in matters of purely local concern.”¹⁰

Field Preemption.

The courts have further constrained local autonomy by determining that if the state extensively regulates a subject the state has “occupied the field,” thereby preempting any additional local regulation in the “field,” including local rules that do not actually conflict with any provision of the state law. Such “field preemption” need not be expressly stated by the

legislature but may be inferred from the scope and details of the state legislative scheme. Thus, when the town of Guilderland sought to fund improvements to its roads through a transportation impact fee, the court found that the state's "comprehensive and detailed regulatory scheme in the field of highway funding" occupied the field and preempted the town's impact fee even though nothing in the state scheme barred such fees.¹¹

Determining whether state regulation is sufficiently comprehensive as to "occupy" a field and determining what exactly are the contours of a "field" will inevitably be the subject of dispute. To be sure, the courts at times have been respectful of local decision-making. In the hotly contested question of whether towns may use their power over zoning to prohibit oil and gas production activities, thereby blocking any hydrofracking within their borders, the court of appeals concluded that although the state had occupied the field of the regulation of oil and gas production, the local zoning power to determine what is a permissible land use constitutes a different field, not preempted by the state oil and gas production law.¹² The court affirmed "[t]here is no dispute" that the state law barred local regulation of how fracking is conducted and that the legislature could go further and eliminate local power to use zoning to exclude fracking. But the oil and gas regulation law did not preempt local action to bar fracking. Similarly, New York City's "adult establishment" zoning ordinance, which required that bars featuring topless dancing be confined to certain manufacturing and high-density commercial districts, was not preempted by the state's comprehensive regulation of establishments licensed to sell alcoholic beverages under the Alcohol Beverage Control Law.¹³

Local governments have been given a bit more freedom to refashion some aspects of their internal organization. For example, the courts have upheld the power of a county to authorize the setting of real property tax equalization rates by action of the county executive, not, as state law

provides by the board of assessors,¹⁴ and to depart from the process prescribed by state law for the filling of vacancies in county offices.¹⁵ In the county office vacancy case, the court of appeals emphasized the significance of the “philosophy and the explicit formulations” of the constitutional provisions dealing with local control over local offices as well as the lack of clear evidence of legislative intent to deny to counties “[a]n aspect of government organization as limited as the method of filling [local] legislative vacancies.”¹⁶

The point is not so much that judicial preemption doctrines necessarily result in the imposition of restrictions on local home rule authority as that these doctrines always cast a shadow over local power and provide a legal theory for challenging local decisions.

Doctrine of State Concern.

Arguably an even more significant factor limiting local autonomy has been the judicial willingness to sustain state laws that target individual local governments for state displacement. Article IX clearly permits the state to completely take over certain fields to the exclusion of local action. But building on an older constitutional tradition, Article IX also seeks to bar state legislation aimed at an individual locality or a small number of localities. To that end, Article IX distinguishes between “general” and “special” laws. A general law is one that applies to all counties, all cities, all towns, or all villages; a local law is presumptively preempted if it is inconsistent with a general law. A law which applies to less than the full class of counties, cities, towns or villages is a “special” law; in order for a special law to displace a local measure, Article IX requires that the law must have been enacted: (a) on the request of either two-thirds of the local legislature or the combination of the local chief executive officer and a majority of the local legislature – this is known as a “home rule message”, or (b) on a certificate of necessity from the

governor and with the approval of two-thirds of both houses of the legislature; however the certificate of necessity procedure does not apply for special laws concerning New York City. (Art. IX, sec. 2(b)(2)). The idea here is that when a local government requests special treatment, such as the grant of special authority to deal with a particular local problem, it is all right for the legislature to adopt a targeted special law. So, too, for local governments other than New York City the combination of a special gubernatorial request and legislative supermajorities provide a constitutional foundation for a targeted special law.

However, due to the “state concern” doctrine, the legislature’s ability to adopt measures aimed at specific local governments is much broader than the text of the Constitution suggests. As the court of appeals has determined, state and local interests are not mutually exclusive and, in the words of then-Chief Judge Benjamin Cardozo, the state may adopt a special law affecting local property, affairs, or government – without a home rule message, gubernatorial request, 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.”¹⁷ The state concern doctrine was adopted decades before the ratification of Article IX, but the court of appeals has continued to apply it, thereby confirming the scope of state power over local matters. Indeed, in 2013, the court emphatically asserted “there must be an area of overlap, indeed a very sizeable one, in which the state legislature acting by special law and local governments have concurrent powers. . . . A great deal of legislation relates *both* to ‘the property, affairs or government of a local government’ and to ‘[m]atters other than the property, affairs or government of a local government’ – i.e., to matters of substantial state concern.”¹⁸

Over the last several decades, the court has invoked the state concern doctrine to uphold special state laws dealing with such diverse local matters as residency requirements and dispute-

resolution mechanisms for local public employees,¹⁹ bidding on public contracts,²⁰ the disposal of solid waste by landfills in two Long Island counties,²¹ local taxation of commuter incomes,²² and aid to local cultural institutions.²³ The court has held that the doctrine of state concern applies to powers granted specifically by the Statute of Local Governments as well as those deriving from the more general grants of authority in Article IX.²⁴ On one unusual occasion the court of appeals found that a targeted state law did not advance a substantial state interest. The state law created an exception, applicable only to negotiations between New York City and its police, from the statewide rule that local governments could opt out of the state's impasse-resolution mechanism and use an impasse arbitration panel appointed by a local collective bargaining board. In a later opinion explaining the decision, the court stated that the relationship between the law and the asserted state goals of creating state-wide uniformity with respect to impasse procedures and a fairer forum for New York City police was "pretextual" and not advanced by the legislation so that the law constituted "the sort of state meddling in purely local affairs that the Home Rule section was enacted to prohibit."²⁵ Subsequently, however, the court upheld a less narrowly targeted state law that had the same substantive effect of transferring the resolution of bargaining impasses from local governments to a state agency.²⁶

A recent decision illustrates the power of the state concern doctrine. In *Greater New York Taxi Ass'n v. State of New York*,²⁷ the court unanimously upheld a state law – adopted without the benefit of a home rule message -- regulating medallion cabs and livery vehicles in New York City only. The court concluded that despite the long tradition of the City's control over its taxi service, taxis within the five boroughs are "not a purely local issue" but instead a "matter of substantial state concern."²⁸ The state concern was based on the fact that "[m]illions of people from within and without the State visit the City annually" and that "[e]fficient transportation

service in the State's largest city and international center of commerce is important to the entire State."²⁹ By that measure of "substantial state interest" there appears to be little constraint on the state legislature's ability to address New York City issues by special law without a home rule message. With the court having observed in another recent decision that the "Home Rule provisions . . . were never intended to apply to legislation [affecting matters of state concern]" and instead aimed only at preventing "unjustifiable state interference in matters of purely local concern,"³⁰ it is evident that Article IX provides not much protection to local governments.

Classification.

In addition to the state concern doctrine, the court of appeals has upheld the authority of the state to adopt targeted local laws under the doctrine of classification. Under classification, a law is a general law even if it is limited to a subset – or class – of localities provided "entry into" the class is "governed by conformity or compliance with specified conditions,"³¹ typically based on population size provided that population is "reasonably related to the subject of the statute."³² The court has frequently upheld state laws addressed to cities of one million or more people even though there has only been one city in New York state's history that ever had that population on the theory that the "class" is technically open and because "conditions in a city of such size, inevitably the center of a megalopolis, are demonstrably different from conditions in smaller cities."³³ Although New York City and other big cities have been the primary focus of the classification defense, classifications based on small population size have also been sustained.³⁴ However, the court has also invalidated very narrow population classifications where population had little relation to the subject.³⁵

Local Fiscal Autonomy

An essential precondition for the “[e]ffective local self-government” promised by Article IX is fiscal autonomy. Local governments must have access to the funds they need to pay for the programs local residents want. Although local resources are inevitably constrained by the taxable wealth available within local borders, fiscal autonomy would enable localities to tap local resources by adopting local taxes consistent with the preferences of local residents. However, localities in New York enjoy little fiscal independence. Article IX grants no powers of local taxation. The ten enumerated grants in section 2 include the power to adopt local laws dealing with the “levy, collection and administration” of local taxation and assessments for local improvements, but only to the extent authorized by the legislature and consistent with laws (not limited to general laws) passed by the legislature. A separate provision of the constitution, Article XVI, Section 1, declares that the “power of taxation shall never be surrendered, suspended or contracted away” by the state, in effect confirming that home rule does not include any taxing authority. That section further provides that any state laws that delegate the taxing power “shall specify the types of taxes which may be imposed” and “provide for their review.” This prohibits general enabling acts that could otherwise authorize local governments to adopt local taxes at their own discretion. Another article of the Constitution, Article VIII, imposes caps on local real property tax levies and on local indebtedness.³⁶ The debt limits are percentages of the value of local taxable real estate – even if the locality derives a significant fraction of its revenue from other sources, such as sales or income taxes. The tax limits are also calculated as a percentage of the value of taxable real estate within the locality, with the limits ranging from 1.5% for counties to 2.0% for villages and most cities, and 2.5% for New York City.³⁷

The lack of any local taxing power is a real constraint on local autonomy. If a local government seeks an additional source of revenue, or wants to raise the rate of any tax (other

than the property tax) which the legislature previously authorized it to levy, it must go to Albany for the necessary authority. The existence and magnitude of county and municipal sales or income taxes, thus, turn entirely on the decisions of the state legislature. New York City required state approval before it could impose an income tax, and it was legally powerless when the legislature repealed its authorization to tax commuter incomes.³⁸ Even a relatively minor question, such as whether real property tax refunds are to be paid by a county or by the individual taxing school districts within the county, is up to the state. As the court of appeals recently observed in striking down a Nassau County measure that sought to change the refund obligation, “only a clearly expressed, rather than implied, grant of relevant legislative power could have authorized” the county to pass the challenged local law.³⁹ “The constitutional power of taxation extends not just to the collection of taxes or the setting of tax rates, but also to the administration of the tax system and the direct allocation of tax burdens and benefits.”⁴⁰

Local tax expenditures – that is, credits or deductions designed to encourage certain behaviors by taxpayers – are also typically governed by state law. A study found that all but one of the tax expenditures listed by New York City in a recent annual report on tax expenditures had to be authorized by the state legislature.⁴¹ These matters are entirely outside the scope of local home rule so that they cannot be addressed by a local law “unless the State has expressly delegated to the [locality] the power to pass such a local tax law.”⁴²

Beyond denying a local role in adopting new taxes, revising pre-existing ones, or implementing changes to the administration of the tax system, the lack of fiscal home rule also constrains local regulatory authority and, thus, the local ability to promote local health, safety and well-being. Taxation can be an important policy tool for discouraging undesirable behavior in a manner potentially more nuanced and less intrusive on personal autonomy than direct

command and control regulation.⁴³ For example, it has been suggested that Mayor Bloomberg advanced New York City's sugary drink portion limit⁴⁴ to reduce the consumption of sugary drinks because a tax on such drinks would have required state legislative authorization. Similarly, one observer contends although bag fees "have proven successful in promoting the reuse of bags in several cities, . . . New York City abandoned efforts to impose such a tax because of the state approval requirement."⁴⁵ And the City was unable to implement a congestion pricing program to alleviate the ills associated by an excess concentration of automobiles in Manhattan partly because the program involved taxation that required, but could not obtain, Albany's approval.⁴⁶

Local Restructuring

Article IX also addresses local government cooperation and structural changes. Section 1 provides that local governments shall have the power to agree "as authorized by the legislature" with the federal government, the state or one or more local governments in the state to jointly or cooperatively provide any facility, service or activity which each participating local government has the power to provide on its own. (Art. IX, sec. 1(c)). Another subdivision of section 1 bars any local government from annexing new territory without the consent by referendum of the people in the area proposed to be annexed and the approval of the governing board of each local government whose area is affected by the proposed annexation. (Art. IX, sec. 1(d)).⁴⁸ The section also provides for changes in the form of county government and the transfer of functions among local governments within a county: Counties "shall be empowered by general law, or by special law enacted upon county request" to adopt, amend or repeal alternative forms of county government provided by the legislature, which can include the transfer of duties among governments within a county or the abolition of certain offices or units of local government.

(Art. IX, sec. 1(h)(1)). However, no change in the form of county government can become effective unless approved in a referendum by both a majority of the votes cast outside of the cities in the county and a majority of the aggregated votes cast in all cities in the county; and if the alternative form of government involves the transfer of function from a village or the abolition of a village office, a third majority of votes cast in all the affected villages, taken together, is also required. (Art. IX, sec. 1(h)(1)).

Article IX was inserted when the role of counties was in transition. Traditionally, counties were subdivisions of the state that existed primarily to perform state functions – like record-keeping, law enforcement, property assessment, road maintenance – locally. Increasing urbanization and suburbanization and the growth of metropolitan areas led to calls for stronger counties that could function as municipal governments for unincorporated areas and as “regional governments” coordinating the activities of the municipalities within their borders.⁵⁰ However, counties traditionally lacked an independent executive or chief administrator, and the county legislatures were usually boards of supervisors consisting of the town or city supervisors within the county, rather than representatives elected for the purpose of serving on a county law-making body. The legislature, initially by special act and then via an alternative county government law, moved to provide counties with the opportunity to create stronger government structures. Article IX’s transfer of function and county restructuring provisions build on that. Although Article IX essentially confirms what the legislature had previously been doing, in the decade after its adoption ten counties moved to strengthen their governments, with nearly all providing for a county executive with budgetary power and the authority to appoint and remove department heads.⁵¹ The courts have also relied on the transfer of function provision to sustain county organizational changes, such as shortening the term of a sheriff by merging the position into

another office,⁵² or adopting a mechanism for filling vacancies in the office of county legislator that differs from that provided by state law.⁵³

A key theme in the cooperation, boundary change, and restructuring provisions is local control. No change or agreement can be forced on a local government through these provisions without local consent -- often the consent of local voters in a referendum, with the separate consents of different local voters from different communities or types of communities required for annexation and county restructuring and transfer of functions. Although the thrust of the constitutional text appears to be to authorize and facilitate change, the multiple consents required may have the effect of making such changes difficult to achieve.

Moving Forward

Effective local self-government requires that local people be able to control their governments and that local governments have the authority to make policy with respect to important local concerns. Such authority entails (i) the ability to act in the first instance, (ii) the power to protect local decisions concerning local matters from state displacement, and (iii) adequate resources to implement the programs that local people want. Article IX does a reasonable job in providing the first power, fails on the second, and does not even address the third. To be sure, these are difficult matters to address in a constitution. Local immunity from state displacement is not necessarily a good thing. Local decisions can have effects beyond local borders, and multiple and divergent local laws on many subjects can make it difficult for people to know the law and can burden the free movement of people and goods within the state. Most metropolitan areas are fragmented into large numbers of relatively small local governments, and most places are typically within the jurisdiction of at least two general purpose local

governments with home rule power – a county and either a city, a town, or a village. There is surely some role for the state in standardizing and coordinating local government activities, controlling their external effects, and preventing conflicts. Many environmental, infrastructure and economic issues implicate regional concerns that will span multiple localities. Many local governments are very small – 415 towns (that is 45% of all towns) have populations of less than 2,500; and 344 villages (62% of all villages) have fewer than 2,500 people. Even many cities are relatively small: 32 of the state’s 62 cities have fewer than 20,000 people.⁵⁴ Many would lack adequate resources to handle their problems even if they had broader revenue-raising power. Local government might work better with fewer, bigger localities, with controls that prevent localities from impinging on each other. In other words, the constitutional goal of “effective local self-government” requires both local autonomy and state involvement in assuring adequate local resources and addressing the overall structure of the local government system.

Limiting State Preemption.

There is no ready solution to the problem of state interference with local government actions. Strong local immunity from the state would require a sharp demarcation between local matters and state matters. Such a line is inherently difficult to draw and would certainly change over time. The state needs to be able to address local spillovers and problems that are bigger than a single locality even if less than statewide. Moreover, some state-local disputes are really interlocal conflicts or even intralocal conflicts refought at the state level. Both the issues of whether the state competitive bidding law barred New York City from requiring its contractors to provide benefits to their employees’ domestic partners and whether the state could regulate the New York City taxi industry were really internal local conflicts, with one branch of the city government (in both cases the mayor) turning to the state to outflank the city council.

Still, sometimes state legislative action interferes with local decisions without really advancing a state goal, and sometime local actions technically inconsistent with state law are not really at odds with state policy. The legislature might enact general legislation binding all local governments, but be willing to accept some local laws that vary somewhat from state law. Indeed, some state laws expressly authorize some local “supersession,” that is, a departure within a specified range from the state rule. Towns, for example, may depart from the Town Law with respect to some aspects of the process of subdivision approval,⁵⁵ and villages may supersede the Village Law with respect to the appointment and termination of village personnel.⁵⁶

One way to promote local autonomy while still protecting the ultimate power to enact a general law displacing local action would be to limit preemption to (i) situations of outright conflict where it would be impossible for a person to comply with both state law and local law at the same time and (ii) instances of explicit state prohibition of the local action. This would in effect reverse the presumption and generally permit local supersession with respect to local matters unless clearly precluded by the legislature.

This change in preemption doctrine could be accomplished by constitutional amendment. Illinois’s home rule article, for example, provides: “Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.”⁵⁷ This would preserve state supremacy while also expanding local autonomy. The court of appeals could also change its thinking about preemption, although there is little evidence that the court is inclined to do so. Still, if the court were to become more sympathetic to the claims of local autonomy, it could be argued that Article IX’s provision for the “liberal” construction of local rights, powers, privileges and

immunities (Art. IX, sec. 3(c)) supports a judicial presumption against preemption.⁵⁸ Alternatively, the legislature could adopt such a rule to guide the courts, although, again, there is little reason to believe the legislature will do so.

The other preemption matter that needs to be addressed is the use of the state concern doctrine to sustain the preemptive effect of special laws enacted without regard to the constitution's procedural requirements for special laws – a home rule message or, for any municipality other than New York City, a gubernatorial request followed by supermajority legislative votes. The special law requirements are intended to address the most troubling form of state intrusion into local autonomy – laws meddling with specifically targeted localities. The state concern doctrine was first articulated by the court of appeals nearly four decades before Article IX was adopted but the court continues to apply the doctrine as if Article IX and its commitment to effective local self-government did not exist. To be sure, the state concern doctrine accurately captures the idea that there are areas of both state and local concern. But where the state action singles out specific localities without local consent the prospect of unwarranted state interference is enhanced. In any event, the state concern doctrine comes close to nullifying the carefully wrought constitutional provisions dealing with special laws.

To be sure, the state needs to be able to adopt laws that focus on some limited groups of local government, such as big cities or those in a distinct region, like Long Island, the Hudson Valley, or near the Finger Lakes, that share environmental, infrastructure, or economic problems. The classification doctrine has provided the state with some – maybe too much -- flexibility in defining general law in light of the distinct circumstances of different types of local governments. Building on, and refining that experience, “special law” could be redefined and narrowed to mean a law applicable to just one or perhaps a very small number of localities. State

adoption of special laws would then be limited to the home rule message requirement – or message of necessity plus supermajority vote for localities other than New York City -- and the doctrine of state concern could be scrapped. This would be consistent with the long-established constitutional goal of preventing state meddling with targeted localities while also allowing the state to address groups of local governments with common problems. As with the proposed presumption against preemption, this could be done by constitutional amendment or by the efforts of local governments as litigants or amici in court of appeals cases to persuade the court to be more respectful of the state-local balance already embodied in Article IX’s limits on state power to act by local law.

Fiscal Autonomy.

There are several ways to promote local fiscal autonomy. First, local governments could be given the power to tax by amending the constitution to provide that home rule includes the power to impose taxes on people and activities within the jurisdiction. Given the overlapping jurisdictions of many localities, with multiple local governments able to make colorable claims of authority over the same taxable event, there would have to be some mechanism, either in the constitution or ordinary legislation, to allocate taxing authority among them. Alternatively, home rule taxing power could be vested in higher-level local governments – counties (with the City of New York treated as a single “county”) – subject to some constitutional or statutory requirement for allocating revenues among localities within the county. This would leave the question of local taxation primarily up to local decision-making rather than the state.

Second, local governments could be better protected from costs imposed on them by the state – what are known as “unfunded mandates.” Unfunded mandates can be a major

infringement on local fiscal autonomy as they commandeer local governments to serve the state's ends by diverting local resources to state-determined priorities and programs. Unfunded mandates impair government accountability in general as the legislature is free to impose costs on local taxpayers without paying any political penalty while local officials may be held accountable by the voters for costs over which they have no control. A number of state constitutions address unfunded mandates. The California Constitution, for example, provides that whenever the legislature or a state agency "mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."⁵⁹ Mandates requested by the local government or dealing with crime or certain other subjects are excepted. To be sure, not all mandates are necessarily inappropriate. For example, some local actions may impose burdens, such as pollution, on other communities; requiring a locality to ameliorate these costs could be treated as a mandate. Some state constitutions address mandates not by barring them but by requiring their legislatures to attach fiscal notes to bills proposing mandates that provide notice of the local government costs the mandates would impose. A fiscal note requirement – which could also be adopted by ordinary legislation – would not limit the State's ability to impose new mandates,⁶⁰ but by increasing awareness of a mandate and its costs such a rule could produce a more vigorous debate over measures proposing mandates.

Third, even with additional taxing authority and mandates relief many local governments may be unable to provide the local services and programs their residents want. This may be due to the limited local tax base, high levels of poverty and need, or the small size of the locality. In these situations, enhancing local ability to engage in the effective self-government the constitution promises may require affirmative state assistance. One form state aid could take is

financial. The state could provide grants to those localities where local resources are inadequate, or where tapping into local resources would require high levels of local taxation. The state could be required to determine a basic level of local public services for all communities, the cost of providing that basic level, and whether each locality has the tax base to provide those services at a reasonable tax rate. For those localities that cannot raise local revenues sufficient to pay for the program at the state-determined maximum reasonable local tax rate, the state could be required to make up the difference with state aid. This proposal builds on a concept developed in many state school finance reforms of requiring states to meet their obligation to provide all school children with a constitutionally required level of education by providing a guaranteed tax base to all school districts (with state aid going to districts that lack sufficient local taxable resources) to do the job. Such a state basic local services guarantee could be added to the constitution or, given the need for some flexibility in determining what constitutes the basic local service package or reasonable local tax rate, by legislation.

Local Government Restructuring.

Alternatively, the state could act to improve local fiscal capacity by reducing the number of small, overlapping, resource-poor localities. The state currently has nearly 1,600 general purpose (that is county, city, town or village) local governments. Many are quite small, and most have boundaries that date back to the nineteenth century. These better reflect nineteenth century settlement patterns and economic interactions than today's sprawling, commuter-based metropolitan areas. As a result, not only are many localities too small to have adequate resources, but they may cover only a fraction of a socio-economic area. Moreover, not uncommonly, more than two local governments have overlapping jurisdiction over the same territory, producing inefficiencies, unnecessarily large government sectors, and uncertainties about the location of

governmental responsibility. If someone sat down to design a local government system today, it is very unlikely the result would look like our current system. The constitution does little to facilitate modernizing the local government structure. It authorizes annexation and the transfer of functions within counties, but subject to referendum requirements that make these reorganization actions difficult.

The state could improve local government performance and make local self-government more effective by taking an active role in reviewing and, ultimately, reordering the configuration of local governments. There ought to be a state-level institution responsible for examining local boundaries, the powers delegated to or exercised by categories of governments, or the local government structure within particular regions and proposing changes to the current local government system that could include abolition or merger of particular governments that are too small or that unnecessarily fragment the governance of a region.

The details of such a Local Government Review Commission are well beyond the scope of this essay. Probably it ought to be able only to recommend changes, with final action up to the legislature. Affected local residents and governments ought to be able to participate in its deliberations. It ought to be given standards to apply, recognizing that those standards are likely to be relatively general and will take on meaning only as applied in particular local or regional settings. The key point is that there ought to be some state-level mechanism that provides for a comprehensive, periodic examination of the structure of the local government system and local governance in different areas of the state in light of both the constitutional goal of “effective local self-government” and the ever-changing social, economic and technological “facts on the ground.” Such a Local Government Review Commission could be created either by the

legislature or by the constitution, although constitutional authorization would be valuable in confirming that measures to “right-size” local governments are consistent with home rule.

The constitutional goal of effective local self-government turns on more than the formal legal rights and powers of local governments. To succeed, local governments must be provided with the resources they need to meet their responsibilities. So, too, their size, their relationship to adjacent and overlapping localities and their jurisdiction and boundaries must realistically relate to the size and economic and social organization of the neighborhoods and communities they are intended to govern.

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1. N.Y. Const. of 1777, § 29.

2. N.Y. Const. of 1821, art. IV, § 15.

3. N.Y. Const. of 1846, art. X, §§ 1, 2.

4. Other provisions affecting local governments are scattered throughout the constitution, including Article III, section 5 (setting population minimum for the creation of new counties); Article III, section 17 (restriction of the legislature’s power to pass private or local bills); Article VIII (local finance); Article X, section 1 (exempting municipal corporations from the general ban on the creation of corporations by special act); Article XIII (various provisions dealing with public officers, including local government officers); Article XVI (taxation); and Article XVIII (housing).

5. N.Y. Const. art. IX, § 1.

6. *Baldwin Union Free Sch. Dist. v. County of Nassau*, 22 N.Y.3d 606, 619 (2014).

7. *Albany Area Builders Ass’n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989).

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8. See Erin Adele Scharff, “Taxes as Regulatory Tools: An Argument for Expanding New York City’s Taxing Authority,” *New York University Law Review* 86, no. 5 (November 2011): 1573-74.
 9. *Council of City of New York v. Bloomberg*, 6 N.Y.3d 380, 392-93 (2006).
 10. *Cohen v. Bd. of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395, 398 (2003).
 11. *Albany Area Builders’ Ass’n*, 74 N.Y. 2d at 377.
 12. *Wallach v. Town of Dryden* 23 N.Y.3d 728 (2014).
 13. *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91 (2001).
 14. *Heimbach v. Mills*, 67 A.D.2d 731 (1979).
 15. *Resnick v. Cnty. of Ulster*, 44 N.Y.2d 279 (1978); *Nydick v. Suffolk Cnty. Legislature*, 36 N.Y.2d 951 (1975). Local power over local officers does not apply to district attorneys, who are treated as state officers even though locally elected. See, e.g., *Hoerger v. Spota*, 21 N.Y.3d 549 (2013); *Carey v. Oswego Cnty. Legislature*, 59 N.Y.2d 847 (1983); *Kelley v. McGee*, 57 N.Y.2d 522 (1978).
 16. *Resnick*, 44 N.Y.2d at 286-87.
 17. *Adler v. Deegan*, 251 N.Y. 467, 491 (1929).
 18. *Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith*, 21 N.Y.3d 309, 316-17 (2013) (emphasis in original).
 19. See, e.g., *Patrolmen’s Benevolent Ass’n v. City of New York*, 97 N.Y.2d 378 (2001); *Uniformed Firefighters Ass’n v. City of New York*, 50 N.Y.2d 85 (1980)
 20. *Empire State Chapter of Associated Builders & Contractors*, 21 N.Y.3d 309.
 21. *Town of Islip v. Cuomo*, 64 N.Y.2d 50 (1984).
 22. *City of New York v. State of N.Y.*, 94 N.Y.2d 577 (2000).

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23. *Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358 (1978).
 24. *Wambat Realty Corp. v. State of N.Y.*, 41 N.Y.2d 490 (1977).
 25. *Empire State Chapter of Associated Builders & Contractors, Inc.*, 21 N.Y.3d at 318.
 26. *Patrolmen's Benevolent Ass'n v. City of New York*, 97 N.Y.2d 378 (2001).
 27. *Greater New York Taxi Ass'n v. State of N.Y.*, 21 N.Y.3d 289 (2013).
 28. *Ibid.* at 302.
 29. *Ibid.* at 302-03.
 30. *Empire State Chapter of Associated Builders & Contractors, Inc.*, 21 N.Y.3d at 319.
 31. *Farrington v. Pinckney*, 1 N.Y.2d 74, 78 (1956).
 32. *Ibid.* at 80-81.
 33. *Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358, 377 (1978) (Breitel, C.J., dissenting). See also *Adler v. Deegan*, 251 N.Y. 467, 483 (1929) (“To exact that laws peculiarly adapted to conditions existing in the city of New York must apply alike in terms and effect to all cities, is to deny to the Legislature all powers of reasonable classification based on population in matters within its field of operation.”); *McEneny v. Bd. of Estimate & Apportionment*, 232 N.Y. 377, 392-93 (1922) (The act is general in terms. It applies to all cities in the state having a population of a million or more. It may be conceded that at the present time it is applicable only to the city of New York, but if so it by no means follows that it was intended only for that city, since there may and probably will in the near future be one or more cities to which it will be applicable. Certainly there is no conclusive presumption to the contrary).
 34. *Farrington*, 1 N.Y.2d 74 (upholding special provision for jury selection in counties with fewer than 100,000 people).

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35. See, e.g., *Stapleton v. Pinckney*, 293 N.Y. 330 (1944) (invalidating law that applied only to counties that contained a city with a population of 125,000 and had a population of not less than 200,000 and not more than 250,000, in effect, applying only to Albany County).
36. N.Y. Const. art. VIII, § 4 (debt limits); N.Y. Const. art. VIII, § 10 (tax limits).
37. There is no tax limit for towns.
38. *City of New York v. State of N.Y.*, 94 N.Y.2d 577 (2000).
39. *Baldwin Union Free Sch. Dist. v. County of Nassau*, 22 N.Y.3d 606, 621 (2014).
40. *Ibid.*
41. Scharff, “Taxes as Regulatory Tools,” 1575-76.
42. *Baldwin Union Free Sch. Dist.*, 22 N.Y.3d at 622.
43. Scharff, “Taxes as Regulatory Tools,” 1585-89.
44. *Ibid.*, 1588. This rule was struck down by the court of appeals in *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681(2014).
45. Scharff, “Taxes as Regulatory Tools,” 1587.
46. *Ibid.*, 1556-57.
47. Article IX also directs the legislature to provide by law for judicial review, applying an “over-all public interest standard,” of any governing board decision refusing to consent to an annexation. N.Y. Const. art. IX, § 1(d).
48. State of New York, Department of State, *Local Government Handbook*, 6th ed. (2009; repr., New York State Department of State, 2011), 39-49.
49. *Ibid.*, 42-45.
50. *Westchester Cnty. Civil Serv. Emps. Ass’n v. Del Bello*, 47 N.Y.2d 886 (1979).

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51. *Nydick v. Suffolk Cnty. Legislature*, 36 N.Y.2d 951 (1975).
52. State of New York, *Local Government Handbook*, 5, 54-55.
53. Cf. *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423 (1989) (finding town had authority to supersede section 274-a of the Town Law but had failed to properly comply with the formal requisites for exercising supersession authority).
54. *Rozler v. Franger*, 46 N.Y.2d 760 (1978), *aff'g* 61 A.D.2d 46 (4th Dep't 1978).
55. Ill. Const. art. VII, § 6(i).
56. Professor Hills makes this argument. See Roderick M. Hills, Jr., "Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York," *Albany Law Review* 77, no. 2 (2013/2014): 653-58.
57. Cal. Const. art. XIII B, § 6(a).
58. See Robert M.M. Shaffer, "Unfunded State Mandates and Local Governments," *University of Cincinnati Law Review* 64, no. 3 (Spring 1996): 1065-68.