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To: The Commission on Local Government
Efficiency and Competitiveness

From: Professor Richard Briffault
Columbia Law School

Re: Constitutional Considerations in Local Government Reform

I. Introduction: The State Constitution and Local Government in New York

The New York State Constitution affects local government in multiple ways. Article IX of the Constitution provides that “effective local self-government and interlocal cooperation are purposes of the people of the state.”¹ It provides for local popular control of local governments; endows local governments with certain powers over local matters; addresses the state legislature’s authority over local governments; authorizes interlocal and intergovernmental cooperation, and deals with certain specific issues with respect to local government boundaries and organization.

Article IX’s provisions often cut in different directions and their implications for changes in local government structure and interlocal shifts in power and responsibility are from far clear. Article IX is also, to a surprising degree, ad hoc rather than comprehensive, particularly with respect to such basic issues as boundary change, local services, and differences among local governments.

Article IX is the main provision of the constitution dealing with local government, but not the only one. Article VIII addresses local finances, including the rules and procedures for local borrowing, and the imposition of local tax and debt limits. Other provisions of the constitution that give some attention to local government include Article III, §17 (limitation of the legislature’s power to enact private of local bills), Article X (corporations), Article XIII (public officers), Article XVI (taxation), and Article XVIII (housing).

These constitutional provisions must be read against the background norm of plenary state power. As a matter of state constitutional law, the legislature is fully vested with the police power. It has broad authority to act with respect to the health, safety, and well-being of the people of the state, subject of course to the federal constitution. The state constitution operates to give the state government a set of institutional structures and law-making procedures, to impose certain restrictions on the legislature, and also to impose certain requirements. In other words, the constitution operates to constrain the state. Where the constitution is silent, the legislature has power to act.

¹ Art. IX, § 1.

II. The Definition of Local Government and Differences Among Local Governments

Article IX provides that for purposes of that article “local government” means county, city, town or village.² Interestingly, Article VIII (the local finance article) sweeps more broadly by including school districts in its gift and loan, tax, and debt restrictions. These provisions clearly indicate that all other special districts are not local governments for constitutional purposes. Beyond that, the constitution does not define “county,” “city,” “town,” or “village.” It does not say any thing about what makes a particular local government a county, a city, a town, or a village, or what the differences among these different local governments are. Nor does it allocate a specific activity, function, or responsibility to one type of local government in contrast with another.

Given the background norm of plenary state power, these are presumably matters for the legislature, which can also could reclassify local government designations and structures under a rationalized approach, differentiating structures based on current population and conditions. The only difficulty would be if reclassification adds new types of local governments. These would not receive constitutional protection unless the constitution’s definition of local government was amended. So, too, there would not appear to be any problem with the state’s recodification of local government powers, provided that the state acted by general law.

Similarly, there appears to be nothing in the constitution that prevents the legislature from providing that certain functions, such as property tax assessment and collection, purchasing, building code enforcement, highway maintenance and 911 emergency response systems, be provided by counties. Nothing in the constitution appears to interfere with the ability of the legislature to authorize counties to undertake any public purpose deemed in the public interest, similar to the powers enjoyed by cities. For most purposes, Article IX treat counties just like cities. Indeed, under the constitution, counties already, like cities, have the power to adopt and amend any local law relating to the “government, protection, order, conduct, safety, health, and well-being of persons or property therein.”

Nor does the constitution preclude the creation of other types of local or regional entities, such as metropolitan municipal corporations, which would be empowered to provide functions on a regional basis. However, unless Article IX is amended to include these entities in the definition of local government, they would not benefit from any of the protections or powers Article IX provides to local governments.

III. Local Government Formation and Boundary Change

There is no general constitutional treatment of local government formation or boundary change. Given the norm of plenary state power, such matters as

² Art. IX, §3(d)(2).

incorporation, dissolution, and consolidation or merger of local governments are matters to be regulated by the legislature. Indeed, 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 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, or for their dissolution. It does, however, impose a handful of 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.³ Article III, Section 17 bans the incorporation of villages by “private or local bill.” There is not similar ban on the formation of other local governments by special law, and Article X, Section 1 exempts “corporations . . . for municipal purposes” from the general ban on the creation of corporations by special act.

The constitution does have a special procedure dealing with annexation. Article IX, Section 1(d) sets up a complex annexation process which requires that: (1) “the people, if any, of the territory proposed to be annexed shall have consented by majority vote on a referendum” and (2) that “the governing board of each local government, the area of which is affected, shall have consented thereto upon the basis of a determination that the annexation is in the overall public interest.” Consent of the local government governing boards is not strictly necessary, however. The constitution directs the legislature to provide for “adjudication and determination . . . of the issue of whether the annexation is in the overall public interest” if a governing board declines to provide consent. There is no provision for judicial review, or judicial override, of the refusal of local voters to consent. There is also no constitutional restriction on other forms of boundary change, such as incorporation, consolidation, detachment, or dissolution of a local government. Indeed, there are older cases – predating Article IX – which uphold the legislature’s power to detach a new county from an older one⁴ or shifting territory from one municipality to another.⁵ The scope of local boundaries is arguably a matter of state concern, and not simply a question of the property, affairs, or government of the locality.

IV. Intergovernmental Cooperation and Service Sharing

The constitution authorizes local governments to make agreements with the federal government, the state government, and other local governments “to provide cooperatively, jointly or by contract any facility, service, activity, or undertaking which each participating local government has the power to provide separately.”⁶

³ The same provision explicitly exempts Hamilton County from the requirement that every county be large enough to have one seat in the Assembly.

⁴ *People ex rel Unger v. Kennedy*, 101 N.E. 442 (1913) (upholding the detachment of Bronx County from New York County).

⁵ *City of New York v. Village of Lawrence*, 167 N.E. 705 (N.Y. 1929).

⁶ Art. IX, §1 (c).

The “each . . . has the power to provide separately” is an important restriction; a similar restriction is also found in the provision of Article VIII authorizing local governments to give or lend credit in support of cooperative undertakings.⁷ Interlocal cooperation might be facilitated if these restrictions were removed to permit service-sharing among local governments as long as one of the participating governments has the power to provide the service in question.

On the other hand, there is nothing in the constitution that sets forth or limits the service-provision powers of specific local governments. So, there would be nothing preventing the legislature from adding to the powers of a particular locality or category of local government, so that all participants in a service-sharing arrangement had the same powers. Presumably, the legislature could make such a grant of additional powers contingent on local participation in a service-sharing arrangement. In other words, if a city and a county wanted to undertake a joint service agreement with respect to a service that only the city is authorized to undertake, there is nothing in the constitution that would prevent the legislature from giving counties the power to undertake that service.

Nor does there appear to be anything in the Constitution that would interfere with the ability of the legislature to promote so-called “Lakewood Plan” arrangements, in which smaller local governments purchase most of their services from larger ones, such as a county. Although mandatory service-purchase might bump against the rules governing “transfer of function,” discussed in the next section, if the participating subcounty governments retain some control over the extent and nature of the services, then requiring that them to purchase the services from a county on terms negotiated by the local governments ought to pass constitutional muster. It might be helpful to resist the characterization of such an arrangement as a “transfer” if such an agreement were for a term of years, rather than presented as a permanent arrangement.

V. Alternative County Government and Transfer of Function

Article IX, Section 1(h) is a complex provision that addresses alternative forms of county government and transfers of functions among local governments within a county. It provides that counties may be authorized to “adopt, amend or repeal alternative forms of county government provided by the legislature or to prepare, adopt, amend or repeal alternative forms of their own.” Further, “any such form of government, or any amendment thereof, by act of the legislature or by local law, may transfer one or more functions or duties of the county or of the cities, towns, villages or other units of government wholly contained in such county to each other or when authorized by the legislature to the state, or may abolish one or more offices, departments, agencies, or units of government provided.” However, “no such form or amendment . . . shall become effective unless approved on a referendum by a majority of the votes cast thereon in the area of the county outside

⁷ Art. VIII, §1 .

of cities, and in the cities of the county, if any, considered as one unit.”⁸ In addition, if the alternative form of county government involves the transfer of any function or duty to or from a village – or involves the abolition of any village office, department, agency or unit of government – then it cannot become effective without additional approval in referendum of a majority of the votes cast in all the villages so affected, considered as one unit.

The constitution, thus, draws a distinction between interlocal service contracts – authorized by Article IX, Section 1(c) – and interlocal transfers of function, some of which are subject to Article IX, Section 1(h)(1)’s referendum requirement. The constitution does not address when an interlocal service agreement, by which one locality provides services to another, becomes a transfer subject to 1(h)(1)’s referendum.

It is also a little unclear which transfers of functions are subject to the referendum requirement. Changes by county law or county charter amendment, and state legislation targeted at a specific county would appear to trigger the constitutional referendum. Indeed, the handful of opinions interpreting § 1(h) concern county laws, not state laws.⁹

On the other hand, state legislation transferring powers from one level of local government to another on a state wide basis ought not to be subject to the provision. Textually, the constitution speaks of “the county” or “such county” in the singular, suggesting that the constitution’s concern is with changes in one county, not an across-the-board shift in power to counties generally. Moreover, the constitution makes no provision for a statewide referendum, or for multiple county referenda with possible results differing from county to county. Would the referendum have to pass every county? Would the transfer of power be effective in some counties, not in others, depending on the different referenda. There is nothing in the constitution that supports such a reading. Moreover, Article IX, Section 2(b)(2) provides broadly that the legislature has the power to confer powers on local governments in addition to those conferred by the constitution, as well as to “withdraw or restrict” such powers. This suggests that the legislature, acting generally, could confer new powers on a category of local governments while taking those powers away from another category of local governments. Presumably,

⁸ This double referendum requirement was upheld against a federal equal protection challenge by the United States Supreme Court in *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259 (1977).

⁹ See Op’n of the Attorney General, No. 2000-15 (Nassau County law amending county charter to grant zoning power to Village of Atlantic Beach, thereby transferring function from Town of Hempstead); *Mahler v. Gulotta*, 297 A.D.2d 712 (2d Dept 2002) (same); 1999 N.Y. Op. A.G. (Inf) 1008 (Nassau county charter provision); *Nassau County v. Inc’d Village of Woodsburgh*, 86 A.D.2d 856 (2d Dept 1982) (Nassau County charter provision); 1973 N.Y. Op. A.G. 231 (Oneida County charter amendment transferring function of Board of Contract and Supply of City of Utica to the county); Office of Real Property Services, Opinions of Counsel, 3 SBRPS No. 79 (1972) (“our opinion has been requested concerning the options open to the county board of supervisors to effect county assessment”).

across-the-board transfers of function which can be justified in terms of the state's Article IX, Section 2 power, are not subject to Section 1(h)'s referendum requirement, but there is no case law on this, either way.

It would appear also that agreements among localities other than counties are not subject to Section 1(h)(1).

VI. Local Home Rule and State Preemption

A signal feature of the 1963 amendment which added Article IX to the constitution is the provision for local home rule. Under Article IX, each local government – e.g., county, city, town, and village – has the power to “adopt and amend local laws not inconsistent with this constitution or any general law relating to its property, affairs or government.”¹⁰

In addition, local governments can adopt and amend local laws “not inconsistent with the provisions of the constitution or any general law” with respect to 10 enumerated subject matter areas, whether or not they relate to local property, affairs or government; however, the legislature has the power to restrict local adoption of such laws not relating to local property affairs or government.¹¹ These subjects include such matters as the powers, duties, qualifications, number, terms of office, etc., of local officers and employees; the membership and composition of the local legislative body;¹² the transaction of its business; the management and use of its highways, roads, streets, avenues and property; and, in a catch-all provision, “the government, protection, order, conduct, safety, health, and well-being of persons or property therein.”¹³

Although these are broad grants of power, they contain a major limitation – the power of the state to displace – technically “preempt.” All local actions, including those in the core area of local “property, affairs, or government” are subject to preemption by general law, that is, a law that applies to all local governments in a particular class, such as all counties, all cities, all towns, or all villages.¹⁴ Moreover, the legislature also has the power to act by special law – that is a law aimed at a particular locality – to preempt local laws outside the core area of local home rule. Indeed, the constitution specifically provides that nothing in Article IX restricts the power of the legislature to address “matters other than the property, affairs, or government of a local government.”¹⁵

¹⁰ Art. IX, §2(c)(i).

¹¹ Art. IX, § 2 (c)(ii).

¹² In one of the very few instances in which the constitution distinguishes among local governments, this power is given to cities, towns, and villages, but not counties. Art. IX, §2 (c)(ii)(2).

¹³ Art. IX, § 2(c)(ii)(10).

¹⁴ Art. IX, § 3((d)(1).

¹⁵ Art. IX, §(a)(3).

In short, although it is not always clear from the complex structure of Article IX, the constitution does grant local governments fairly broad powers to adopt local laws on matters of local concern, but it gives localities relatively little protection from state preemption. There is no limit on the state's power to act by general laws with respect to local matters. Even the prohibition on special laws concerning local "property, affairs, or government" has been eroded by some court decisions upholding the authority of the state to act by special law on a question of "state concern" even if the matter also affects local property, affairs or government.

For local governments, then, the question is often not which level of government – state or local – wins in case of a conflict – as the state typically wins – but whether there is a conflict, or more technically, *whether* the state has preempted local legislation. The state courts have on occasion interpreted state law on a subject as precluding local legislation on the same subject even if the state law is not literally in conflict with or does not literally prohibit the local law. For example, a state law establishing minimum standards for certain activity could be read as prohibiting local laws setting higher or additional standards. Or a number of state laws on a subject can be seen as "occupying the field" and precluding additional local laws. Although in recent years the courts have narrowed their approach to preemption, the doctrine is far from settled, and state legislation continues to cast a broader shadow over local law-making than the express terms of the state laws themselves.

VII. Local Elected Officials

Article IX provides that each local government – that is, each of the four named categories of local government – shall have a locally elected legislative body,¹⁶ and that all local officers whose election or appointment is not provided for by the constitution shall be elected by the people of the local government or appointed by such officers of the local government as may be provided by law. Article IX does not provide for any other locally elected officials. Article XIII, Section 13 provides for the selection, terms, powers, duties and removal of certain county officers, such as the sheriff, clerk, register and district attorney. Such constitutional reference, however, may not make such a post immune from change. In 1979, the Court of Appeals held that as a matter of general home rule authority a charter county may abolish the office of sheriff and transfer the functions of the office to a newly created appointive office.¹⁷ The Constitution does not specifically provide for any other local elected officials.

One other constitutional provision is also relevant to changes in the powers, or offices, of elected local officials. Art. IX, Section 1(h)(2) provides that after a county adopts an alternative form of county government, any charter changes which abolishes an elective office, changes the voting or veto power of such an office, or abolishes, curtails or transfers to another county officer of agency the power of an

¹⁶ Art. IX, § 1(a).

¹⁷ *Westchester County Civil Service Employees Ass'n v. Del Bello*, 47 N.Y.2d 886 (1979).

elective county officer shall be subject to a permissive referendum, as provided by the legislature.

Apart from these provisions, the constitution provides no barrier to shifting certain local government positions which primarily involve the discharge of administrative functions – such as assessors, clerks, receivers of taxes, highway superintendents – from elective to appointive status. Article IX, Section 1(b) states that all local officers “whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or some division thereof, or appointed by such officers of the local government as may be provided by law.” Thus, with the exception of the very small number of local officers expressly made elective by the constitution – county clerk, county register, county sheriff, and district attorney – local positions may be elective or appointive, so long as the appointees are appointed by locally elected officials. In other words, the shift from elective to an appointive cannot involve shifting the appointment to officials not locally elected. On the other hand, a number of court of appeals decisions have held that Article IX’s strengthening of local home rule powers limits the *state’s* power to change the rules governing local officers¹⁸ -- although these cases involved only the filling of vacancies, rather than the mode of selection more broadly.

In short, the state can probably convert some locally elected positions to locally appointive, but its not clear if such a state law would prevail if a local government wanted to continue the positions as elective. But the offices of district attorney, sheriff, register, and clerk enjoy constitutional status and changing any of these from elective to appointive, or merging their functions with other appointive officers, would require constitutional change.

VIII. Local Finance

Home rule concepts do not apply to local finances. Local governments have no constitutionally based power to levy taxes other than the property tax. Article XVI expressly provides that the “power of taxation shall never be surrendered, suspended or contracted away” and that 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. If a local government seeks an additional source of revenue, or the authority to raise the rate of any nonproperty tax the legislature previously authorized it to impose, it must obtain the necessary authority from Albany.

Even with respect to property taxation, local autonomy is tightly limited. The constitution mandates exemptions for property used for religious, educational, or charitable purposes or owned by a corporation or association organized for one of

¹⁸ See, e.g., *Nydick v. Suffolk County Legislature*, 36 NY2d 951 (1975); *Resnick v. Co. of Ulster*, 44 N.Y.2d 279 (1978).

those purposes and not operating for profit.¹⁹ Moreover, the constitution imposes limits on the amount of real property taxation by most local governments. These are calculated based on a rolling five-year average of full valuation of taxable real estate within the jurisdiction. The limits are (a) New York City, 2.5%; (b) other cities with populations greater than 125,000, 2.0%; (c) all other cities, 2.0%; (d) counties, 1.5%, which the legislature may raise to 2.0%; (d) villages, 2.0%; and (e) towns, no limit.²⁰

Note that these limits apply to localities, not property. A parcel of real estate that is located within two local governments, such as a city and a county, can be taxed by both governments up to the constitutional limit for each. And, of course, these limits apply only to the property tax, and not other forms of local taxation.

Similarly, the constitution limits local debt. The debt limits are stated as a percentage of local real property; like the tax limits they are measured in terms of a five-year rolling average of the full value of local assessed valuation. The debt limits are: (a) New York City, 10%; (b) Nassau County, 10%; (c) all other cities and counties, and all towns and villages, 7%; (d) school districts wholly or partly within cities with a population under 125,000, 5%; (e) school districts wholly outside cities, no limit.²¹ Like the tax limits, the debt limits apply to each government separately. In most places, the effective limit for an area that is within both a city and a county would be 14%. And although the debt limits appear to reflect an effort to tie debt to a measure of local carrying capacity, that capacity is measured solely in terms of the property tax base, not other forms of local revenue-generating capacity.

These tax and debt limits date back to 1884. They were revised intermittently in the late nineteenth and early twentieth centuries, most comprehensively in 1894 and 1938, with more modest changes in 1951 and 1953. Their basic features – the levels at which the limits are set; the different levels for different categories of local government, the interplay of different limits for properties which are located in more than one locality, the base to which the limits apply – have not been seriously examined in seventy years.

IX. Election Administration

Local boards of elections, like the state board of elections, are subject to a constitutional requirement that they consist of an equal number of representatives of the two political parties which received the most votes at the last general election. Their members shall be selected “upon the nomination of such representatives of said parties.” Article II, Section 8. This constitutional mandate precludes the creation of nonpartisan boards of elections, boards that contain representatives of minor parties or independents, and even boards with partisan members not chosen by the parties themselves.

¹⁹ Art. XVI, §1.

²⁰ Art. VIII, § 10.

²¹ Art. VIII, § 4. In addition, Article XVIII empowers the legislature to authorize cities, towns, or villages to incur debt up to 2% of local assessed valuation for low-income housing and slum clearance projects.