

Constitutional Change Recommendations

This brief describes the Commission's five recommendations for constitutional change, and provides draft amendment language for four of the five recommendations (one is a study recommendation). While a short background on constitutional issues is provided below, a more comprehensive discussion is provided in a [memorandum](#) to the Commission from Professor Richard Briffault of Columbia University Law School, who also assisted in the development and drafting of these recommendations.

Background

Since colonial times, citizens of New York State have looked to local governments for basic services. The rules under which local governments operate were established in the State Constitution, which is infrequently updated. Amending the State Constitution is not a simple process. A proposed amendment must pass two separately elected legislatures, and then pass in a statewide referendum. Alternatively, every twenty years (next in 2017) citizens vote on whether to convene a constitutional convention.

Local government authority can be viewed in two aspects. From a "bottom-up" perspective, local government is government elected by and responsive to people at the village-, town-, city- or county-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 daily lives. Individuals often feel as though they are more likely to have an impact on government actions in the community in which they live, and that their local officials are more accountable to them.

The second aspect is local governments as 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 "top-down" perspective, the state role with respect to local powers, responsibility, and even local government existence is fundamental.

Taking these perspectives together, there should be local decision making autonomy within a framework of State oversight. It is within this framework, that we are recommending changes to the NYS Constitution in five areas affecting local government: home rule and implied preemption; expansion of service sharing powers; conversion of elective offices; election system reform; and modernizing and rationalizing taxation and finance powers.

Home Rule and Implied Preemption

Strengthen and clarify home rule by prohibiting the judicial application of implied preemption. An amendment to prevent such interpretations from being made in the future would allow local governments to act except where state law has expressly declared state authority in the area to be exclusive or has specifically limited local governments' ability to act in that area or field.



Judicial interpretation of the Home Rule provisions of the Constitution has created confusion as to whether local governments or the State can act with regard to various subject matters. Currently the Constitution precludes local action which is "inconsistent" with the provisions of general law, but it does not define "inconsistent." This has allowed the courts to find that a local law is inconsistent with state law when the local law merely adds to or supplements state law in the light of particular local interests or concerns, even where local residents or businesses could comply with both state and local requirements. The following proposed amendment would define "inconsistent" to require that the State Legislature affirmatively bar local action on the subject either by expressly denying local power to act on the subject or by expressly declaring that state law occupies the field of regulation to the exclusion of local action. This would limit the amount of preemption, vest the preemption decision in the legislature, not the courts, and require the legislature to do so clearly and thus eliminate the current confusion regarding when a local government is authorized to act. Further information is available in the Commission brief on [strengthening home rule](#).

Article IX, § 3(e) (Create a new section)

A local law shall be deemed inconsistent with a general law only if the legislature expressly denies to local governments the power to adopt such a local law or expressly declares the state's authority to be exclusive over the subject of the local law.

Service Sharing Powers

Allow any two or group of local governments to share a function if at least one of the governments has the power to perform it.

Constitutional provisions hamper local service sharing to a certain extent, and present a significant impediment to allowing services to be performed at the county level where feasible and appropriate. Two articles in the Constitution would need to be amended to expand service sharing powers. A staff brief on [expanding service sharing powers](#) is available.

Article VIII, § 1 (in part)

No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, except that two or more such units may join together pursuant to law in providing any municipal facility, service, activity or undertaking which [~~each~~] any of such units has the power to provide separately.



Article IX, § 1(c)

(c) Local governments shall have power to agree, as authorized by act of the legislature, with the federal government, a state or one or more other governments within or without the state, to provide cooperatively, jointly or by contract any facility, service, activity or undertaking which [~~each~~] any of the participating local governments has the power to provide separately. Each such 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.

Conversion of Elective Offices

A county sheriff, county clerk, district attorney and “register” are the only local officers mentioned in the constitution and are required to be elected, outside of NYC. Given their role in the administration of justice, district attorneys should remain as a separate, independently accountable officials and “registers” do not exist today outside of NYC. However, sheriffs and clerks might reasonably be appointed by county legislatures, boards, or executives. Charter counties already have the ability to convert or abolish the position, subject to a permissive referendum. An amendment removing the Constitution’s references to sheriff, clerk, and register would allow any county to convert these positions and enable the Legislature to amend the County Law to provide for these offices to become appointive.

Anachronistic provisions provide for certain county public officers to be elected. In modern government, it is often beneficial to efficient operations if these officers are appointed, and at least the local government should have that option. One article in the Constitution would need to be amended to eliminate the requirement that the specified positions be converted. Further information is available in the Commission brief on [conversion of elected local offices](#).

Article XIII, § 13(a)

(a) [~~Except in counties in the city of New York and except as authorized in section one of article nine of this constitution, registers in counties having registers shall be chosen by the electors of the respective counties once in every three years and whenever the occurring of vacancies shall require; the sheriff and the clerk of each county shall be chosen by the electors once in every three or four years as the legislature shall direct.] Sheriffs shall hold no other office. They may be required by law to renew their security, from time to time; and in default of giving such new security, their offices shall be deemed vacant. The governor may, in the manner now or hereafter prescribed by law, remove any elective or appointive sheriff, county clerk, district attorney or register within the term for which he or she shall have been elected or appointed; but before so doing the governor shall give to such officer a copy of the charges against him or her and an opportunity of being heard in his or her defense. In each county a district attorney shall be chosen by the electors once in every three or four years~~



as the legislature shall direct. The clerk of each county in the city of New York shall be appointed, and be subject to removal, by the appellate division of the supreme court in the judicial department in which the county is located. In addition to his or her powers and duties as clerk of the supreme court, he or she shall have power to select, draw, summon and empanel grand and petit jurors in the manner and under the conditions now or hereafter prescribed by law, and shall have such other powers and duties as shall be prescribed by the city from time to time by local law.

Election System Reform

The role of boards of elections in administering State and local elections should be eliminated from the State Constitution, which would allow the system to be modernized through legislative amendment to existing statutory provisions addressing boards of elections.

Article II of the New York State Constitution requires “equal representation of the two political parties” for all boards and officers that have anything to do with elections in the State. Village, school district, fire district and other special district elections not held at the time of the general election are exempt from this constitutional requirement. New York and Virginia are the only two states that provide in their Constitutions a role for political parties in state and local election administration. To allow the State Legislature to begin to reform the state elections system, one article of the Constitution would need to be repealed. A staff brief on [reforming the election system](#) provides further information, and more study would be necessary to produce alternative statutory language. The constitutional amendment to accomplish this, however, is quite simple.

Article II, § 8

~~[All laws creating, regulating or affecting boards or officers charged with the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct. Existing laws on this subject shall continue until the legislature shall otherwise provide. This section shall not apply to town, or village elections.]~~

Taxation And Finance Powers

The State should study rationalizing the tax and debt limits that currently apply differentially to counties, cities, villages, towns, and school districts.



The state constitutional finance provisions primarily limit property tax levies and impose debt limits, and both tax and debt limits apply differently depending upon the class of government. Debt limits are stated as a percentage of the full value of taxable property (with certain portions of local debt excluded, such as water and, under certain circumstances, sewer debt). As the differences between types or classes of municipality has become outdated and in some ways obsolete, the tax limits, especially their differential application to municipal classes ought to be reconsidered. In the same vein, debt limits should be examined and perhaps amended, so that the base for calculating the limit is the entire local revenue base, not just assessed valuation. This issue will require further study before specific changes can be proposed. A staff brief on [modernizing and rationalizing tax and finance powers](#) provides further information on this topic.