

THE EVOLUTION OF NEW YORK STATE'S LOCAL GOVERNMENT SYSTEM

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October 1990

Prepared for
Local Government Restructuring Project
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Albany, New York

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New York state's current pattern of local government is the result of over four centuries of incremental, evolutionary development. Rooted in English and Dutch practice and precedent, the forms and functions of local government in New York were regularly altered by state and local leaders in response to the forces that worked to fundamentally change the state itself: the growth and spread of population, increased population diversity, industrialization and urbanization. As New York developed into the Empire State over the course of the nineteenth and twentieth centuries, and often after considerable political battling, the range of functions permitted local governments grew, as did localities' autonomy to decide upon their own governmental forms. Periodically over the state's history, there was major structural reform within categories of local government, but never of the entire local government system. In rural areas, direct democracy gave way to representative systems. In urban and suburban areas, the tendency emerged to separate executive from legislative functions, emulating the separation of powers model of government prevalent at the national and state levels.

Starting from scratch, no expert or group of experts would design for a state the "system" of local government operating in New York State today. New York is one of eleven states with large portions of its rural and suburban population within the jurisdiction of three separate general purpose governments. Under contemporary circumstances, in which, as detailed below, the powers of local governments have become so similar, it is difficult to imagine a rationale for such a system. In fact, these governance arrangements are sustained by the inertia always attendant to the status quo; by the stake large number of elected local officials have in them; by sentimental attachment in local populations to governmental entities that may well no longer be needed; and by patterns of state aid to localities based upon traditional legal categories rather than more appropriate criteria.

Though New York law creates four distinct categories of general purpose local governments - counties, towns, cities and villages - the similarities among these entities are far more striking than their differences.

- Conventional wisdom suggests that counties are larger in land area than towns, yet the town of Webb in Herkimer County, with 457.2 square miles, is bigger than sixteen of New York State's counties.

- Conventional wisdom also suggests that cities are more populous than towns or villages. The 1980 census showed, however, that the city of Sherrill in Oneida County, with 2,830 people, was far less populous than large numbers of villages and towns.

- According to the same census, the village of Freeport on Long Island had more people than three quarters of the state's sixty-two cities, and the town of Hempstead, also on Long Island, was bigger in population than any city in the state except New York City.

Additionally, as will be detailed below, cities are not substantially distinct from counties in the degree of home rule they can exercise or functions that they can perform. And there is virtually nothing that villages can do that towns cannot, either directly or through the use of special purpose districts.

Just as there are distinctions without differences between categories of general purpose local governments, there are distinctions without differences within two of the four categories, as well. Cities are divided in law into three classes: first class cities, with 250,000 people or more; second class cities, with more than 50,000 but less than 250,000 people; and third class cities, with fewer than 50,000 people. Towns are similarly divided into three classes, two based upon population (greater than or fewer than 10,000 people)

and one, Suburban Towns, based upon either size alone or size in combination with proximity to a major city and unusual rates of growth. But according to those most familiar with their daily operation, these distinctions within categories, like those between categories, make little practical difference in what these governments actually are permitted to do. (See New York State Legislative Commission on State-Local Relations. New York's State-Local Service Delivery System (1987) pp.8-10).

Though the distinctions between and within local government categories may define no differences now, they did indeed do so when the categories were first created and for a substantial period thereafter. At first, cities and villages were each chartered in response to local initiative by unique state action. Change in these charters could be accomplished only by the passage in each instance of special state law. Because of the burden placed upon the legislature by the need to provide charters and charter changes for each local jurisdiction individually, and because of their own demands for ever greater local power and autonomy, first villages and then cities came more and more to be treated by the state, as counties and towns classically were, in general categories with general delegations of power. By the end of the nineteenth century villages' governmental structure and functions were prescribed in

general law, and these entities could be created entirely through local action, without the involvement of the state legislature.

Cities were more controversial, if only because acting generally with regard to them might limit the state's capacity to enter preemptively into New York City affairs. The twin objectives of the "home rule" movement for cities in nineteenth and early twentieth century New York, championed largely but not entirely by New York City leaders, were to define a sphere of municipal autonomy of action, and to limit state involvement in municipal affairs without local consent or request. Both an initial classification scheme for cities and a limit on special state legislation for single jurisdictions were accomplished at the 1894 constitutional convention. General laws and additional constitutional provisions making available alternative structures for cities, defining municipal powers and duties and further limiting the state were not passed until well into the twentieth century. (Despite all reform efforts, the state government has, of course, retained its capacity to this day to act autonomously with regard to the affairs of New York City.)

Counties and towns were originally created by the state at its own initiative for the purposes of local administration, with the necessary minimum of powers to facilitate governance in New York's rural hinterlands.

Their structure, officers, duties and responsibilities were prescribed in general state law, and officials in them were regarded as local agents of the state government. Their evolution over the course of the nineteenth century, especially in "suburban" areas, was toward broader powers and greater autonomy in law, that is, towards status as municipal corporations. This was achieved in the final decade of that century.

During the twentieth century, somewhat later than cities, counties achieved considerable capacity to define their own governmental structure through the adoption of charters, and came to exercise more extensive powers. Though the structure of town governments is still prescribed in state law, their powers were extended too during this century through changes in general law and through constitutional change. The passage in 1963 of a new local governments article (Article IX) for the state constitution completed the process of making largely irrelevant not only the distinctions between classes of local governments, but the distinctions within classes.

The Origins of New York's General Purpose Local Governments

Three of New York state's four categories of general purpose local governments - counties, towns and cities - antedate the establishment of the State of New York; their ongoing operations are assumed in the

constitution of 1777. Incorporated villages, not addressed in this document, first came to be created in the last decade of the eighteenth century.

As entities created by the state for its own administrative convenience, counties and towns were not originally regarded as municipal corporations in New York. Thus, they had "governmental or public powers," but not "corporate or proprietary powers to provide local necessities or conveniences." (Con. Con. Commission, [1967] Vol. 13, p. 25) That is, they were less autonomous and had a narrower scope of action than were cities and villages, which were chartered.

Evidence of counties' lack of autonomy was that countywide positions were at first staffed by state appointees. Under the 1777 constitution, though town supervisors were locally elected, and therefore county Boards of Supervisors were comprised of locally elected officials, such countywide positions as Sheriff, Clerk and Treasurer were filled by the Council of Appointment in Albany. These did not become elected offices until the adoption of the second state constitution, in 1821, and even then the right of removal was retained for the government. This pattern was retained and extended to the countywide offices of District Attorney and Coroner in the Constitution of 1846.

As for towns, according to mid-nineteenth century New York Law, they were corporations for certain special

and very limited purposes, for example holding land for the use of inhabitants, owning the necessary personal property to meet their responsibilities, and making contracts. But "[i]n all other respects; for instance, in every thing which concerns the administration of civil or criminal justice, the preservation of the public health and morals, the conservation of highways, roads and bridges, the relief of the poor, and the assessment and collection of taxes, the several towns ...[were]... political divisions, organized for the convenient exercise of portions of the political power of the state; and ...[were]... no more corporations than the judicial, or the senate and assembly districts." (Lorillard v. Town of Monroe 11 N.Y. 392, at 394 [1854]) Under this concept, the role of town officials, even if elected, would be most analogous to that today of state officials in regional offices of agencies headquartered in Albany. They were local agents of "...the same system which is managed by the state officers residing at the seat of the government..." (Lorillard..., p. 394).

Change came under the pressures of growth in the post-Civil War period, at first by evolution of legal thinking, and then by formal legislative action. In a special message on local government in 1875, Governor Tilden referred to counties and towns as "quasi-corporations." (Public Papers, Vol. VI, P. 834) According to a legal encyclopedia of the time, such an

entity was "...a municipal society or body of men, who, though not vested with the general powers of a corporation by any express law, are yet recognized by statute or immemorial usage, and the body they compose is a person or an aggregate corporation, with powers and duties which may be enforced, and privileges which may be maintained by suits at law." (Daniel A. Gleason. Bouviere's Institute on American Law, 2nd ed. [Philadelphia: George W. Childs; 1870] p. 43)

Just five years after Tilden wrote, Chief Judge Folger of the Court of Appeals observed that "...the legislature of the last two decades of years, wise or otherwise, has affected, I must say has changed, the character and capacity of the simple township of former days. The legislature has imposed liabilities and obligations and corresponding duties upon it, that have made it something different from a mere political subdivision of the state, brought it in character and capacity nearer to a municipal corporation. (Horn v. Town of New Lots 83 N.Y. 101, at 106 (1880); cited in Wagner, Vol. 1, p. 26)

The process was finally completed at the beginning of the last decade of the nineteenth century. In 1890 the legislature formally defined towns as municipal corporations in a newly consolidated general law. Two years later it did the same for counties in the new county law. (Ch. 569, L. of 1890, section 2; Ch. 686,

L. of 1892, section 2) Also in 1892, the first General Municipal Law was placed on the books. "The term municipal corporation, as used in this chapter," it began, "includes only county, town, city and village." (Chapter 685, Laws of 1892, section 1) The distinction in law between counties and towns on the one hand and cities and villages on the other was thus eliminated.

The Municipal Home Rule Amendment to the state constitution and the Municipal Home Rule Law, both passed in 1963, may thus be seen as the further fruition of a trend to treat all local governments in New York in as fundamentally similar entities that began in the late nineteenth century. It is interesting, for example that the Municipal Home Rule Law replaced portions of the City Home Rule Law, the County Law, the Village Home Rule Law and the county law. These constitutional and statutory provisions affirm the power of all general purpose local governments, regardless of type, to pass local laws concerning their "property affairs or government," and laws in other specified areas of policy, as well, subject to constitutional and some state legislative limits. (See the discussion of Home Rule, below, and accompanying citations) Though certain powers are separately specified in the 1963 legislation for specific types of government, most are shared by all types, as are the procedures for the adoption of local laws. (Chapter 843, Laws of 1963) Legislation

generalizing procedures for altering local government boundaries through annexation, also passed in 1963, is additional evidence of the state effort to treat all types of local governments similarly. (Chapter 844, Laws of 1963)

Counties

New York's twelve original counties were established in 1683, succeeding the ridings into which the British colony had been divided nineteen years earlier. The basis for Assembly representation and the local administration of justice, the original counties included all the state's territory. All of the 62 current counties are carved out of the area that was within ten of these twelve original counties (some land area was lost to Massachusetts and Vermont in the late eighteenth century).

Counties were created as fast as the population of a territory reached a thousand, their number grew rapidly in the immediate post revolutionary period. At the adoption of the first New York constitution in 1777 there were fourteen counties. Eleven years later, the first state law passed applying to all counties named sixteen. By 1802 there were thirty counties, and by 1834, sixty. County boundaries were first officially surveyed in 1838. (For historical development see generally Temporary State Commission to Study, Codify, Revise and Make Uniform, so far as Practicable, Existing

Laws Relating to Counties, Eighth Report, Legislative Document 68 of 1952)

Under the constitution of 1821, counties remained the basis of representation in the Assembly and each county (except Hamilton) was guaranteed an Assembly member. Efforts to create new counties were linked both to local leaders' ambitions to be sent to Albany, and to hopes that the towns chosen to be new county seats would experience a development boom. But the creation of new counties was discouraged by constitutional prohibitions against reducing the ratio of an existing county's population to that of the state below the ratio of a single Assembly seat to 128, the total number in the Assembly, and the creation of new counties without full population ratios. An effort to divide Steuben County into three was vetoed in 1860 by Governor Edwin Morgan on the grounds that it violated these provisions. (Messages From the Governors, Vol. 5, pp. 223-230)

The sixty-first county, Nassau, was formed in 1899 out of that portion of Queens not included in the newly consolidated City of New York. The Bronx, created in 1914 out of part of New York County so as to conform the state county structure to the local borough structure of the consolidated city, was last of the state's 62 counties to be established. An unsuccessful effort to reduce the number of counties for the classic reasons of economy and efficiency was mounted by Governor Al Smith

in 1926. Most recently, there have been efforts to create a new county, Peconic County, out of the more rural parts of Suffolk on Long Island. The separation of Staten Island from New York City would not, of course, create a new county, though it would most probably result in the establishment of a new county government.

Though created by specific legislative action, counties and towns have long operated under general provisions of state law. The first general act relating to counties, providing a means for them to defray their "public and necessary charges" was passed in 1778. (Chapter 65) First appointed, then elected, countywide officials - for example, the Sheriff, the District Attorney, the Clerk - were agents of Albany in performing the governmental functions essential for the mostly rural state. One famous New Yorker, George Clinton, used the fees he collected as the Ulster County Clerk - a post he held for fifty-nine years before and after American independence, and simultaneous with his service as governor and vice president - to provide the financial underpinning for a statewide and national political career. (Gerald Benjamin. "George Clinton: Political Professional in the New York Governorship," typescript (1989), p. 2)

Through a series of laws passed over much of the nineteenth century, "...the County Board was gradually

developed into a local governing body with legislative and administrative functions." (Moore, 1933, p. xiii) Especially important was the vesting during this period in the counties of increased responsibility for such functions as poor relief, highway construction and maintenance and bridge construction, and the substitution of a salary for a fee based system of compensation for some county officials. (Eighth Interim Report, 1952, pp. 28 - 33)

Failed nineteenth century efforts, as well as successful ones, are revealing of the hopes held by reformers for county government. For example, the Brooks Resolution at the 1867 constitutional convention, the first to use the term "county legislature," suggested the shifting from the state to the counties of powers to pass laws and ordinances concerning the creation of villages, the authorization of town and village borrowing, the operation of ferries and horse railroads, the changing of peoples' names, the legislation of the actions of local boards and officers on the recommendation of the county court, and the establishment of the pay of local officials. (Temporary State Commission... Third Interim Report (1947) Document # 37.)

The Consolidated County Law, still the basis for government in non-charter counties, was adopted in 1892. (Chapter 686) Under this law county governments remained relatively limited in their own areas of direct governmental responsibility. The Board of Supervisors, headed by a chairman chosen by its members from their number, met annually, at the call of the clerk or upon a request from the majority of its members. Rates of compensation for members of the Board, and for their travel expenses, were fixed in law. Aided by a legislative clerk and one or more assistants, the board received and audited the reports of all county-wide officials, elected and appointed, held them accountable and fixed their salaries and hours of work. This allowed a determination of what level of taxation and borrowing was needed (within statutory limits), two critical areas of decision making for county leaders. Under the general county law the Supervisors might also: buy or lease property, eliminate noxious weeds or animals, license and regulate dogs, protect and preserve wild animals, aid with the costs of majority highway and bridged construction, and establish jury districts and court terms. In a strikingly modern provision, the law allowed one county to contract with another for the incarceration of persons other than felons.

The duties of elected county-wide officials, serving for three year terms, were detailed in separate

chapters of the first General County Law. These included the Treasurer, the chief fiscal officer; the Clerk, custodian of official records; the Sheriff, in charge of law enforcement and the jail; the District Attorney, the prosecutor; and several judges. Additionally, each county was served by one or more Coroners, Superintendents of the Poor and Highway Commissioners.

Counties in the late nineteenth century had a major role in overseeing town government. Towns did not raise their own money. Fiscal needs were certified to the county, which levied the necessary taxes in the town. County authorization was required for town borrowing. Additionally, the county could, upon application of twelve freeholders of each of the effected towns, and after proper notice, erect new towns or alter town boundaries by a two thirds vote of the board of supervisors, without a local referendum. (Chapter 686, Laws of 1892, section 34) In fact, under some circumstances counties could create new school districts, as well.

Movements for greater power and autonomy for county government, and for reform of county governmental structure, especially in the more populous counties, paralleled efforts to achieve home rule for cities and reform city government structures in the late nineteenth and early twentieth centuries. Uniform state laws

providing rural governmental structures with relatively limited powers were inadequate to meet the needs of burgeoning suburban areas. The resultant demand for special legislation from individual counties placed an increased burden the state legislature. Yet systematic change was resisted by entrenched interests.

In 1903, two efforts to classify county governments and to provide different powers for each class failed in the legislature. A 1909 recodification made few substantive changes in the county law. The 1915 state constitutional convention was successful in including in its draft constitution provisions that allowed the Legislature to classify counties and provide different governmental forms and powers to each class, though it prevented structural change without local approval. The convention also provided that any law affecting a county be passed by the legislature only upon its request. These provisions failed, however, when the entire constitution was defeated at the polls. (Alfred E. Smith. Message Relating to the Organization of County Government, March 15, 1926, Legislative Document # 80 of 1926)

Following this effort, general legislation that allowed optional forms of county government made little headway in the legislature. Writing in 1926, Governor Alfred E. Smith was extremely critical of the failure to achieve reform of the state's "...wasteful and obsolete..."

system of county, town and village government in the preceding decade, despite the work of the constitutional convention and the Joint Committee on Taxation and Retrenchment of the Legislature. Especially for suburban areas, Smith favored: reduction in the number of local elected officials; professionalization and reform of property tax assessment; establishment of strong county planning function; elimination of the justice of peace system; greater county responsibility for highways; and the transfer of the public health function from the town to the county. (1926 Message, Passim)

Al Smith's prescriptions for reform of the structure of county government, written two-thirds of a century ago, are so startlingly modern that they deserve to be quoted in detail. "Every student who has ever given this problem any consideration at all," the governor wrote, "agrees that there must be some kind of proper county executive, whether it be an elected county president, or a county manager serving under a small county board. The county boards of supervisors in this state in most cases have entirely too many members...[Moreover, t]he county supervisors are elected from towns and wards and none of them represent the county as a whole. The mixing up of legislative and executive functions has never been successful anywhere. It is agreed that many town functions may be transferred

to the county and that a reasonably long term for the executive should be established. It is also agreed that the same changes which are now being made in the State government looking to the consolidation of departments, appointment of department heads by the county executive, reduction in the number of elective offices and a real county budget system are essential in all of the large and growing counties of the state." (1926 Message, p. 7)

Governor Smith, a Democrat, wanted to turn over the task of local government reform to the commission headed by former Republican governor Charles Evans Hughes that had been his vehicle for fundamentally altering the structure of state government. When the legislature failed to go along, attention returned to meeting the specific needs of what both Democrats and Republicans agreed were the most pressed jurisdictions. (Alfred E. Smith. Message Relating to the Reorganization of County Government and Recommending the Adoption of Amendments to the Constitution Affecting Westchester and Nassau Counties, March 16, 1927, Legislative Document # 82 of 1927; Eighth Interim Report, 1952, pp. 33 - 34.) A constitutional amendment passed in 1921 allowed the legislature to establish alternative governmental forms for Nassau and Westchester counties, the suburban counties of New York City. Any legislative action was subject to local referendum in the affected county, but even after a successful referendum the legislature could

still modify or alter the plan. (Laws of 1922, p. 1849)
Under these conditions, the necessary combination of legislative action, gubernatorial acquiescence and local approval at referendum could not be obtained for charger adoption in Nassau and Suffolk.

Consequently a second constitutional amendment was passed in 1927, removing the legislature's post-referendum power to alter the adopted county plan of government should either Nassau or Suffolk adopt a charter. Constitutional guarantees were added, too, to assure that special laws affecting these two counties could not easily be passed in Albany over local wishes. (Laws of 1927, p. 1781)

In 1935 the legislature passed and the people of Nassau County approved in a single county-wide referendum the first county charter in New York State history. Separation of powers appeared in county government for the first time, with much of the structure reminiscent of that of the state government. Nassau retained its Board of Supervisors to perform the legislative function, but vested executive power in a countywide elected position of county President, who prepared the budget and appointed nonelected department heads with the advice and consent of the board. Two other new countywide elected positions were vice president and comptroller. Innovative features of the Nassau charter included the unification of town and

county finances in a single budget and the creation of a countywide police department. (Towns could opt in. The position of Sheriff was abolished.) (Laws of 1935, Chapter 938)

Westchester followed a much more difficult procedure in adopting its charter in 1937, evidence of the tough political bargaining that must have occurred to get the charter bill through the legislature. After the necessary legislation was passed in Albany, it had to be approved by three concurrent local majorities, in Yonkers, the rest of the county's cities as a unit, and the rest of the county as a unit. And if the charter was adopted, additional questions were to be put as to whether the Board of Supervisors was to be replaced by a legislature, whether a Department of Assessment was to be created, and whether there would be a bipartisan County Debt Commission to review the debt of all issuing jurisdictions in the county before borrowing could occur.

Somewhat miraculously, the Westchester charter passed all these hurdles. The elected offices of county Register, Comptroller and Treasurer were abolished, and the elected Coroner was replaced by an appointed Medical Examiner, but unlike in Nassau the Sheriff was retained. The executive functions were given to a full-time county executive - the first use of this title in the state - who had a four year term, was responsible for the budget

and appointed all department heads (though removal of the budget director required the acquiescence of two thirds of the legislature). And the legislative functions were to reside in a ten to twelve person county legislature, the first example of such a body in New York operating entirely separately from town government. (Laws of 1937, Chapter 617)

Still another constitutional amendment, passed in the same year that the Nassau County charter was adopted, required that the legislature provide alternative county governmental forms. Sixteen were offered in four separate laws. However, only Monroe County was able to achieve the three separate majorities - in the entire county, its cities collectively and its towns collectively - constitutionally required for the change of its governmental structure. Tries in both Erie and Schenectady failed.

In 1943, his first year in office, Governor Thomas E. Dewey called for a complete recodification of the county law, and asked that "...extended powers of home rule be given to counties to obviate special legislation..." (Temporary State Commission...Fourth Interim Report (1948) Legislative Document # 15, p. 5) After five years of study and effort, the Temporary Legislative Commission created for this purpose achieved the passage of a new County law. (Chapter 691, Laws of

1950) Department from the approach used earlier in the century, this commission declined to classify counties according to population or assessed valuation and assign different powers to each class, for it believed "...no logical classification could be made without denying home rule." Instead it sought to make powers previously given to individual counties general, and to leave to each jurisdiction whether to use them. "Every power is like a pushcart standing idle until duty pushes it," the commission wrote. "Whether it ever moves, its speed, or whether it reaches to right destination depends on the public officer and employee." (Fourth Interim Report (1948), pp. 27-8)

The 1950 revision moved much material concerning specific functions and procedures (or individual jurisdictions) out of the county law and into other chapters. Among other changes, it broadened the powers of the Board of Supervisors and made its chairman, who might be given "...the same additional powers and duties as the executive head may be given under any optional form, except the power to appoint and remove personnel...", the administrative head of the county government. The calendar year was made the fiscal year for all counties, and a general county budget process was detailed. Subject to permissive referendum the local board was given the authority to abolish the position of coroner. (Fourth Interim Report, pp. 28-31)

Not in the commission's original draft, but added after further public hearings, were powers for counties, similar to those of Cities and Villages, to act by local law as well as by resolution and to amend or supersede the state legislature's acts on purely local matters. (Temporary State Commission...Fifth Interim Report (1949), pp. 5 and 6)

Following this success, the commission held hearings in 1951 on a revised Alternative County Government Law, which was passed by the legislature in 1952. Its purpose, the commission said, was to "...simplify and present in an orderly manner diversified forms... [of county government]...to cover proposals from various parts of the state and different sizes and types of counties." But a clear objective remained for them, as for Al Smith, the encouragement of the development of a full-time executive to oversee the day to day workings of county government.

The four options offered in the law were: the Administrator form, with an executive appointed for its term by the Board of Supervisors, who might be its chairman; the County Manager form, with an appointed executive who served at the pleasure of the Supervisors for an indefinite term; the County Director Form, with an executive appointed by the Board for a four year term; the County President Form, with an elected executive, to serve coterminously with the board and

exercise a veto over its actions. "In all forms," the commission wrote, "the County Executive shall appoint all department heads except those who may be elected and all such appointments must be approved by the Board of Supervisors excepting in the Manager Form such approval is not required." (Temporary State Commission. Eighth Interim Report Legislative Document #68 of 1952, pp.6-7)

Adoption of an alternative form under the 1952 law required a referendum, initiated either by the Board of Supervisors or upon petition by at least ten percent of the number of people voting in the last gubernatorial election. Majorities for the proposal had to be obtained from the voters in the cities of the county as a unit and the towns as a unit. Perhaps because of these requirements, these provisions were never used.

Currently, the eleven most populous New York counties operate with a charter form of government. Suffolk became a charter county by special law in 1958. In 1959 counties were authorized by constitutional amendment to devise their own governmental forms. By 1961, Erie, Oneida and Onondaga had done so. After the adoption of the Municipal Home Rule Law in 1963, twelve additional counties adopted charters. All but three of these have an elected executive. Schenectady has an appointed manager, and Tompkins an appointed administrator. The Herkimer county charter provides for no separate executive.

Legislative reform in the counties came in the mid-1960's as a result of the one person-one-vote decisions of the U.S. Supreme Court. The traditional arrangement of equal voting power for each Supervisor on the Board clearly violated this principle. Thirty-eight counties responded by creating legislatures elected from single or multi-member districts, or a mixture of both, thus decisively severing town from county government. There have been negative consequences of this change for intergovernmental cooperation and communication at the local level. The remaining twenty counties retained the Board of Supervisors but adopted weighted voting schemes. These are suspect under the 1989 decision of the Supreme Court finding unconstitutional the electoral scheme for the New York City Board of Estimate. (Morris v. Board of Estimate, #87-1022 and #87-1112 (1989))

The structure of modern New York county government follows one of three patterns, as illustrated in the attached charts: the legislative form, the county executive form, and the county manager form. (See attached charts, Department of State. Local Government Handbook, (1987) pp. 72, 74-75) Acting on their own constitutional or statutory authority within limits defined by the Court of Appeals, or in their traditional role as agents of the state, "[c]ounties have evolved into regional municipal corporations with specified powers, functions, and responsibilities for service

provision in a wide range of areas." (New York State Legislative Commission on State-Local Relations. New York's State-Local Service Delivery System, p. 6) Either formally or informally, they have assumed responsibility for many activities - solid waste disposal is a good example - formerly undertaken by towns, villages or cities. "The county system within New York State continues to evolve as a major service provider as the populations and the demand for services shifts from the urban to the suburban and rural areas of the state," the Legislative Commission on State-Local Relations concluded in 1987. "Further," they went on, "it has been argued that the relative size of counties often leads to their providing a better economy of scale for service delivery than the other, smaller general purpose units." (New York's State-Local Service Delivery System, p. 19.)

Towns

Dutch towns began to emerge in New Netherlands after the issuance of a revised Charter of Freedom and Exemptions by the Dutch West India Company in 1640, but they exercised little self rule. Simultaneously, English towns settled from Connecticut and Massachusetts and governed through town meetings, were organized on Long Island. In 1665, the year after the capitulation of the Dutch, town boundaries were fixed, and freeholders in seventeen English towns on Long Island

were given the right under the "Duke's Laws" to elect some local officials. Within the limited scope of their powers, towns acted through meetings of freeholders. The elected position of Town Supervisor, derived from that of Town Treasurer created twenty years earlier, was established in 1703. (JLC to Recodify the Town Law. Final Report, Legislative Document, #91, 1932, pp.18-21)

In general, however, after American independence towns in New York State, like counties, were involuntary (that is, created without local request or action) and universal. In 1788 there were already 119 towns in New York's sixteen counties. The legislature divided all territory in counties outside cities and Indian reservations into towns under provision of the state constitution as new counties were created. In 1830 counties were given the power to create towns and later, to alter their boundaries.

As was the case with counties, a general law defining the powers of town meetings in New York was first adopted in 1788 placing "full authority" in freeholders and inhabitants qualified to vote. (Chapter 64; Lincoln, Vol. III. P. 622) Towns were to have a Supervisor, a Clerk, three to seven Assessors, one or more Collectors, two Overseers of the Poor and three Commissioners of Highways, all freeholders and inhabitants and all elected for one year. The jobs were

apparently not treasured. As an incentive, fines were levied for failure to serve.

The general powers of town government reflect their rural preoccupations. They could improve common land and regulate its use; erect and maintain fences and oversee fences built and maintained by private citizens; provide animal pounds and regulate animals at large; destroy noxious animals and birds; and "prosecute or defend the common rights of such town."

Five separate statutes passed in 1801 further defined and structured town government. (Chapters 70, 78, 178, 184; JLC to Recodify Town Law, Final Report, 1932, p. 24) Laws affecting towns were grouped together in the first edition of the revised statutes, passed in 1828; further revisions made over the next half century reflected incremental growth in the responsibilities of town government. In 1875 the first provisions in the consolidated laws appeared that were applicable only to towns in counties with populations larger than 300,000. The creation of sub-classes within categories of local governments was a harbinger of a legislative approach that came to be widely used in the late nineteenth and early twentieth centuries.

In 1890 town law was recodified and made generally applicable to all towns, with the exception of towns in the most populous counties. The general town and county laws, along with the general highway law, all passed at

about this time, were designed to "...create systems intended to be complete for the government of towns and counties..." (Con. Con. Of 1894. Revised Record., Vol. V, p. 534) This did not mean, however, that the powers exercised municipalities across classes became equal, or that late nineteenth century leaders in New York thought they ought to be. Governor David Hill, for example, regularly blocked special legislation for extending the powers of individual "country towns" in Kings County, outside the City of Brooklyn, both because he disliked "...the Legislature of the State of New York acting...as a sort of common council...", and because he thought "town governments are not safe or proper repositories for the exercise of municipal powers." (Public Papers, Vol. VII, pp. 111, 1097)

In vetoing a law giving the Town of Flatbush the authority to expand its police department in the year after the adoption of the first general town law, Governor Hill further detailed his point of view about the distinctions between different classes of local governments: "Towns should be governed by general legislation applicable to all towns in the state," he wrote. "When towns become so populous that they have outgrown the simple form of town government applicable to all towns, then they should be incorporated as villages, and when villages have become so large that they require more extension municipal powers and

privileges than are needed by villages generally, then they should be incorporated as cities." (Public Papers, Vol. 8, p. 1110)

The governor's views notwithstanding, as the population in towns proximate to cities grew, the pressure continued for extending the powers of town government. Under the 1890 statute, town government was minimal government. The town meeting form was retained. It was in this annual meeting, usually held in the late winter or early spring, that local officials were elected (except in counties with more than 300,000 people, where town officials were selected at the general election) and key decisions made. And there were many elected positions prescribed, especially considering the small populations of many rural towns. They included a Supervisor, a Clerk, an Inspector of Elections and a Constable, all elected for one year term; four Justices of the Peace each elected for four years; and three Assessors and three Commissioners of Excise, each with three year terms. Towns could choose to have one highway commissioner serving for a single year, or three serving staggered three year terms. Similarly, they might have one overseer of the poor serving for a year, or two on staggered two year terms.

There was a town board with minimal responsibilities comprised of the Supervisor, the Clerk and two Justices of the Peace. The legislative,

executive and judicial functions were thus commingled. Clearly, the town board was not conceived as a legislative body. There were no councilmen, and thus no members whose functions were solely "legislative." And the Supervisor certainly was not a chief executive; the law even prescribed that one or another of the town justices preside at the town meeting.

Town officials acted largely as agents for the town meeting and were regularly accountable to it. They were paid only for the few days they performed public business, and at a rate set in state law. By a relatively simple procedure, their functions could be suspended by the town meeting and a Board of Auditors appointed to manage the town. The powers given the town meeting itself were limited. It could provide for animal pounds, direct the abatement of public nuisances, determine the number of constables and pound masters, eliminate noxious weeds and animals, acquire and maintain public property (including a "town house"), make sure that private fences were maintained, provide for the poor (if it wished to do so), build a lock-up, appoint cemetery trustees and act to protect the corporate and collective interests of the community. (Chapter 569, Laws of 1890, section 24, 190, 192, 194)

In fact, in the very year that the new general town law was passed, another general statute was enacted allowing the supervisor, clerk, or justices in any town

of at least three thousand people to license and regulate "public hacks, vehicles, vendors, shows, concerts, public amusements, merry-go-rounds, carrousel, toboggan slides, ferris wheels, rope dancing, loop-the-loop, public gardens, tragedy, comedy, opera, ballet, play, farce, minstrelsy, or dancing, or any other entertainment of the stage, or any part or parts thereof, or any equestrian, circus or dramatic performance, or any performance of jugglers or acrobats." (Laws of 1890, Chapter 332) In 1892 towns were authorized to create lighting districts. (Chapter 255) In 1894 towns with populations greater than 10,000 were empowered to provide for garbage disposal. (Chapter 666) In 1898 the power was given towns to buy water works. (Chapter 554) In 1900, the enabling legislation for the creation of water districts was passed. (Chapter 451) And in 1901 a similar law allowed the creation of sewer districts. (Chapter 348) In 1895 a law general in language but specific in effect added the highway commissioners to the extant town board (comprised of the Supervisor, the Clerk and two Justices of the Peace) to create a town board for towns of at least 4,000 people in counties of 300,000 or more (but not Kings, or New York) adjoining a city with 250,000 or more people. The sole towns in this class were Amherst and Tonawanda in Erie County. This new board was authorized to exercise the powers of the town board, the

highway commissioners and the board of health in any other town, and additionally was given powers to make public improvements and pass ordinances that were fully comparable to those given villages. (Laws of 1895, Chapter 816) This was a harbinger of the future.

During the turn of the century decades, many of New York State's more heavily settled areas were still opting to become villages. But under the pressures of growth the powers of towns, especially the more populated towns were approaching those of villages, and ways were being found to provide village-like services to portions of towns. The structure of town government was changing, too, with the powers of the town meeting diminishing and those of the Supervisor and the Board growing. The laws extending town powers passed after 1890 vested authority in the Supervisor or the Board, not the town meeting. In 1898 the town meeting was made biennial, the town officials formerly elected for one year were given two year terms. (Chapter 363) And in more and more counties, especially the larger ones, town elections were scheduled for the general election day, and town meetings were held on that day, and indication of the transition from a participatory to a representative system of governance. (Laws of 1897, Chapter 439; Laws of 1898, Chapter 594; Laws of 1900, Chapters 174, 239; Laws of 1901, Chapter 34; Laws of 1902, Chapter 10; Laws of 1903, Chapter 66)

Under the fiscal pressures of the early 1920's, the state legislature turned to restructuring local government as a source of potential economies. Relying upon the expertise of reformers at Columbia University and the Institute for Public Administration, the Special Joint Committee on Taxation and Retrenchment called for separating town from county government, making distinct the executive, legislative and judicial functions at the town level, regularizing and systematizing budgeting and auditing practices, and transferring functions to the county. The town clerk should, the committee said, be an appointed town administrator, while the Supervisor became the town representative to the County Board. It recommended removing Justices of the Peace from the town board, and having fewer of them. Highway Superintendents, Constables and Assessors, it said, required special expertise and should be appointed. The Committee also suggested that: town overseers of the poor be abolished; special districts be consolidated; town bridge and highway construction and maintenance be "administered under strict county control;" and that the taxation and health functions be performed entirely at the county level. (Report, Legislative Document # 55, 1923, pp. 26-27, 43) Two-thirds of a century later, elements of this reform agenda are still being debated, an indication of the tenacity of established institutions and practices.

But there were changes. In 1926, three years after villages gained planning and zoning authority, towns were given land use control power over land within their boundaries outside villages and cities. (Chapter 715, Laws of 1926) Then, in 1927, the Joint Legislative Committee to Recodify the Town Law was appointed. This committee found town law to be "almost hopelessly confused because of duplications and conflicting statutes, honeycombed with special legislation for the benefit of the larger towns." (Moore, 1933, p. xiv) The burgeoning populations of the suburban towns in Nassau, Westchester, Suffolk and Erie Counties, the committee reported, "...had become accustomed to all of the conveniences of city life..." Consequently, town governments "...sought and obtained, through the medium of special legislation, statutes enabling their towns to operate as urban communities rather than rural." (JLC, 1932, pp. 26-27)

After a series of hearings throughout the state, the Joint Legislative Committee recommended a recodification of town law. But under the guise of recodification, accomplished in 1932, the committee fundamentally altered town government. (Chapter 642) The technique used to achieve major change in the town law was to have the reforms become effective, in almost all instances, subject to permissive referendum at the local level. Local leaders thus had to mobilize

opposition to retain the status quo; this reversed the ordinary effect of non-action, making it supportive of change, while retaining the opportunity for local choice, and even more importantly, the opportunity to argue that local choice was being preserved.

As one consequence of the 1932 changes, the town meeting, described as "...actually abolished in practice by the substitution of town elections...", was abandoned, and governmental power was centered in town boards. Here again the permissive referendum was used, this time to ease the transition from direct to representative democracy. Retaining a sort of "popular veto" on the representative body, the new town law left with citizens the power to petition to overturn town board action in a broad array of circumstances.

Additionally, the 1932 reforms created two classes of towns based upon population, to allow general treatment of the distinctions that "...should exist between the necessary powers of local government required by larger communities as contrasted with those essential to the smaller towns. (JLC, 1932, p. 30) All towns with populations greater than 10,000 except those in Broome and Suffolk Counties were classified as towns of the first class. Towns of at least 5,000 people, or with \$10,000,000 in assessed valuation, or adjoining the City of Rochester, could opt by board action subject to permissive referendum or by petition and referendum to

become towns of the first class. Such towns were to be governed by a board comprised of a supervisor and four to six councilmen. Persons serving as local legislators thus appeared in the town government structure for the first time.

With their town board role ended, the number of justices of the peace in larger towns was reduced to two. All local officials were placed on salary, thus ending the long established fee system. A budget system was required. Control of almost all special improvement districts were assumed by the town board, and district commissions abolished, again subject to permissive referendum, making the creation of such districts simpler.

The powers of first class towns were as extensive as those of villages. They regulated land use, prescribed construction codes, regulated all sorts of public behavior, provided police and fire protection, built and maintained public highways and sidewalks, and licensed a broad array of commercial activities. A general provision of law allowed them to promote "...the health, safety, morals and general welfare of the community, including the protection and preservation of the property of the town and its inhabitants, and of peace and good order, the benefit of trade and all other matters relating thereto, insofar as such shall not be

inconsistent with existing law." (Laws of 1932, Ch. 634, section 130).

For smaller towns, the town board was to be comprised of the superintendent and four justices of the peace. The town clerk was removed from this role, though unlike in larger towns, it remained an elected office. Collection of fees by the supervisor was still permitted up to a specified limit, unless a budget system, optional for small towns, was voluntarily adopted. Ordinance powers, though limited, could be extended to equal those of first class towns by action of the town board, subject to permissive referendum.

A state law passed in 1937 required the consent at referendum of both the dissolving town and the annexing one before a town could go out of existence, and in 1950 the authorization for counties to create towns was removed from the county law, but apart from these changes, three decades passed before further major developments occurred in town government in New York. In 1963 the Constitutional Home Rule Amendment passed, extending home rule to towns for the first time. Also in that year, provisions were made in the Suburban Town Law for alternative governmental structures, to be taken up at local option, for all towns with populations of 25,000 or more, and some smaller ones near large cities that had experienced rapid growth over the previous one or two decades.

Under the provisions of this statute suburban towns were given the power to dissolve or consolidate all special districts and to create special assessment areas or make town wide improvements without establishing improvement districts. Additionally, a hesitant step was taken toward separating the executive from the legislative function in town government. Most governmental power remained with the town board, including the authority to appoint department heads. But the Town Supervisor was recognized as the Chief Executive Officer, with authority to prepare a budget, appoint a finance officer, and initiate proceedings to remove a department head. (The final decision was still with the board.) (Chapter 1009, Laws of 1962) By the early 1970's, 50 of the 81 towns eligible for suburban town status had opted for it. (Office of Local Government. Local Government in New York State (1973), p. 3.)

Recodification of the town law had been studied intermittently in the 1950's and 1960's, but unlike for villages, a complete recodification was not accomplished. Significant changes in the town law, did, however, occur in the 1970's. By state law passed in 1970, all assessors were made appointed except in those towns that acted by April 30 of 1971 to retain the elected system. About half did so. Six years later, Justices of the Peace were removed from town boards in

the smaller towns, completing the separation between judicial and the legislative functions that had been sought by reformers in rural local government in New York for almost a century. (Chapter 739, Laws of 1976)

Also in 1976 general provision was made for towns to adopt a manager system of government, four years after the Town of Fallsburg in Sullivan County received special authority to do so. (Laws of 1976, Chapter 367) Actually, a law was passed in 1938 permitting the town manager form of government for towns. It was never used, and was repealed in 1957. (Secretary of State. Local Government Handbook 4th ed. (1987)p. 104)

Currently, New York state has had 932 town governments. The number has been constant throughout the twentieth century. In recent history two dissolutions - Elko in Cattaraugus County (1965) and High Market in Lewis County (1973) - were balanced by the creation of two new towns to establish coterminous town/village governments - Mt. Kisco in Westchester (1977) and East Rochester in Monroe (1981).

Cities

Cities are public corporations created on the British model by the state in response to local request to meet special local needs. They were first established because the citizens of a specific more densely settled place required services and other

privileges of corporate status that could not be provided by counties or towns under general laws. According to one authority, in this early period "Commerce was the organizing principle of the municipality's government, and its offices suffrage requirements, ordinances and pageantry all reflected the economic practicalities underlying its existence." (John C. Teaford. The Municipal Revolution in America (Chicago: University of Chicago Press, 1975) p. 4.)

Apart from New York City (1653) and Albany (1686), both chartered under British law before the creation of New York state and thus its legislature, the powers of each city derived from a unique statute passed especially for it by the state legislature. These charters were, until the second decade of the nineteenth century, regarded as inviolable, and a formidable barrier against state intrusion in local affairs. (Gerald Benjamin. "The Political Relationship," in Benjamin and Brecher (eds.) The Two New Yorks (New York: Russell Sage, 1988, p. 115) Cities thus initially were far more than mere administrative organs of the state government; they enjoyed a special legal status that was not shared by counties and towns.

Hudson, chartered in 1785, was the first city created by the state legislature. Only twelve New York cities (including Brooklyn), most of which had at first been villages, were chartered prior to the civil war.

The great era for the creation of cities came at the turn of the nineteenth century; almost half were established in the thirty years between 1890 and 1920. During the same period, however, Brooklyn, Williamsburgh and Long Island City were absorbed into greater New York, chartered in 1898.

As the capacity of other forms of local government to act was enhanced, however, the attractiveness of the city form began to wane. Only three cities have been created since 1920. Rye, incorporated in 1942, was the last of sixty-two cities established in New York state. Some areas, seeking the advantage in the state local aid formula given cities (an advantage they probably could not enjoy as new cities, given restrictions in the Finance Law), still occasionally give consideration to becoming cities. The most serious recent effort occurred in 1988, when a city charter was passed in the legislature for the Village of Newark in the town of Arcadia in Wayne County. The bill was vetoed by Governor Cuomo on technical grounds. Following this setback, local advocates did not pursue the effort in later sessions.

Because there were so few cities during New York state's early history, the need to alter city charters by special law was far less demanding upon the legislature than the need for similar actions from the far more numerous villages. This, and the desire in

Albany to retain a grip upon the richest and most populous areas of the state, are two important reasons why a general statute allowing incorporation of villages solely by local action was passed far earlier than a similar statute for cities.

The battle for "home rule" for cities, the authority to locally define local governmental structures and for cities to act autonomously within a broad sphere of local concern, has nevertheless been a persistent theme in state constitutional politics at least since the middle of the nineteenth century. Advocates had three major goals: broad constitutional limits on state involvement in city affairs; broad constitutional authority for cities to act in their areas of concern without seeking special state permission; and general authority for cities to define their own forms of governance.

Limits on the Legislature and General Authority for Cities. Requiring the state to act through general laws, and not through specific acts applicable to particular cities, was one technique for limiting legislative involvement in city affairs. Though not constitutionally required, the first law applicable to cities in general was passed in New York in 1835. It provided that firemen who moved from one city to another would receive credit for their service when they worked as firemen in their new city of residence. (Laws of

1835, Chapter 243) In 1860, Chapter 30) These and a number of other provisions passed later and applicable to all cities or to classes of cities - for example, limiting supervisors from cities to two year terms, creating a uniform public hearing process for local legislation, establishing a process of licensing plumbers, providing power to regulate lodging houses - were gathered in 1900 the first General City Law. (Laws of 1900, Chapter 327)

At the constitutional level, an 1874 amendment foreclosed local bills and required general laws in some areas of concern to cities. Twenty years later, a landmark constitutional provision gave mayors a suspensive veto over local laws passed in Albany that affected their jurisdictions and otherwise required the legislature to act by general law "in relation to the property, affairs or government" of any city.

The general city law was extended in 1913 to empower each city in New York "... to regulate, manage and control its property and local affairs." Additionally the law detailed twenty three wide ranging powers of cities, to obtain resources, build and maintain public works, provide for public safety and welfare, regulate economic activities, care for those in need, and conduct its own business. Among these was authority, modeled after that in the U.S. constitution, to "... exercise all power necessary and proper for carrying into executive

the powers granted to the city." (Laws of 1913, Chapter 247) Four years later, in 1917, the authority to regulate land use was added to the panoply of city powers. (Laws of 1917, Chapter 483)

Building upon these statutory developments, new constitutional home rule provisions were adopted in the 1915 constitution, but were lost when that entire document failed at the polls. But in 1923 a home rule amendment was adopted, making laws local in "terms or affect" more difficult to pass at the state level, and allowing cities to roll back by their own actions some special local legislation already enacted into law. Additionally, this amendment gave a constitutional base to affirmative powers given cities in the home rule statute of 1913 to act with regard to their own property, affairs or government. These powers were further detailed in the Municipal Home Rule Law passed in 1924 to implement the 1923 constitutional amendment, which in turn became the basis for the 1963 Municipal Home Rule Law. (Local Government Handbook (1987), p.84) And in 1938 another Constitutional amendment was passed, requiring a local request in writing by the mayor and council, or two thirds of the council alone, before, before special legislation applying to one city could be passed.

Judicial decisions, however, were severely constraining upon these efforts to limit the State in

its relationship with its cities, and to carve out a sphere of autonomy for cities, making home rule, in the phrase of former New York City Corporation Counsel Bernard Richland, "a pleasant myth." ("Constitutional City Home Rule in New York," Columbia Law Review Vol. 54 (March, 1954) p. 326.) Constitutional limits on special legislation could be overcome by laws general in form but specific in effect. The sphere of autonomous city action was given a narrow "Court of Appeals definition, not that of Webster's dictionary." (Judge Crane, city in Richland, p. 333) And in the case of Adler v. Deegan the "state concern" doctrine was articulated, creating a broad scope of action for state government in matters concerning cities (and later, when home rule was extended to them, those of interest to counties, towns and villages). "... [I]f the subject... [of a law]... be in substantial degree a matter of state concern," Justice Benjamin Cardozo wrote, "the legislature may act, though intermingled with it are concerns of the locality." (Adler v. Deegan 251 NYS 467 (1929)) Several efforts since the 1930's to alter the language in the state constitution applying to cities to bypass the limits upon home rule created by the Court of Appeals were uniformly unsuccessful. (The preceding two paragraphs are paraphrased from Benjamin. "The Political Relationship," (1989) p. 117).

City Autonomy in Structuring Local Government. The chartering of cities under general law was repeatedly recommended and rejected through much of the nineteenth century. (Lincoln, Vol. III, pp. 627-28. See also the discussion of the debate in the 1846 Constitutional Convention in the section on Villages, below). Because achieving a single law to cover the powers and government structure of all cities, including New York City, proved politically impossible, reformers sought to create a classification scheme, with the intent of acting generally with regard to cities within each class. The first classification of cities, into three classes, was achieved at the 1894 constitutional convention. Cities with a quarter of a million people or more were placed in the first class; those with between 50,000 and 250,000 in the second class; and those with fewer than 50,000 in the third class. (1894 Constitution, Article XII, Section 2) Later, as noted elsewhere in this paper, similar schemes were used for villages, counties and towns as well. The classification of cities was abolished by the 1924 Home Rule Amendment, except as it applied to second class cities then in existence. References remaining in the law to these classifications, however, dating from both before and after 1924, remain a source of confusion. (Local Government Handbook (1987), p. 84).

Commissions to draft legislation for second and third class cities were created in 1895, in accord with the provisions of the new state constitution in the year after its adoption. (Laws of 1895, Chapters 548 and 1011) The commission for third class cities never produced a result. The statute establishing it was repealed in connection with the passage of the first general city law, mentioned above.

However, a second class city law defining a strong mayor form of government for all cities in this category was adopted in 1898. Under the structure set out in this statute, a president elected at large for two years chaired a common council with members elected to two year terms from wards. The mayor, also elected for two years, was given a broad array of powers, including the authority to appoint and remove most department heads, veto legislation and item veto appropriations. He could be overridden, but only by a three-quarters majority of the council. Key functions were consolidated in a few departments: public works (streets, water parks, sewers; public safety (police, fire, health); public instruction (with a superintendent of schools appointed by a board, not the mayor); and charities and corrections. Fiscal power was in the hands of a Board of Estimate and Apportionment, but a majority of those on it were mayoral appointees. Other citywide elected officials were the Comptroller, the Treasurer, four

Assessors, and a number of judges. Supervisors were elected too, to represent the city on the county board. (Laws of 1898, Chapter 182) The second class cities law is still operative for places that were in this category on December 31, 1923. (Local Government Handbook (1987), p. 83)

Until 1914, when optional home rule for second and third class cities was adopted (New York City was excluded), the state legislature could grant charters "with or without the wish of the local populace." (Chapter 444, Laws of 1914; DiPrima v. Wagner 14 A.D. 2d. 36 (1961)) The 1914 law defined a range of governmental forms that might be adopted by cities upon petition by a specified number of citizens, and contingent upon a popular referendum held during either a general or a special election at which a single question concerning the adoption of that form of government would be asked. This procedure was found by the Court of Appeals to be constitutional in the case of Cleveland v. City of Watertown. (222 N.Y. 159)

The optional home rule law offered seven alternative city government structures to second and third class cities, labeled A thru G, in three categories: "government by limited council;" "separate executive and legislative departments;" and the second class city form, described above, available to third class cities. In all forms the council was elected for

four year staggered terms. Where there was no separate executive, a city with a council elected at large could opt for a manager form, a form with no manager, or the equivalent of the commission form, with individual council members supervising particular departments. If it opted for an elected mayor with strong executive powers a city could choose a small (three to five members) or a large (up to nine member) council elected at large, or a ward election of council members. (Laws of 1914, Chapter 444). The optional home rule law was repealed in 1939. (Local Government Handbook, (1987), p. 84)

The 1924 Home Rule Law, implementing the Home Rule Amendment of 1923, provided for the local drafting and adoption of charters. This, however, did not preclude the classic course, state action to charter cities. The charters of the last two cities created in New York, Peekskill and Rye, were both adopted by state law, though these laws allowed for a local referendum. (Richard Briffault. "New York Law and Its Impact on Cooperation, Consolidation and Coordination," (1990) p. 5)

Under the 1924 Home Rule provision, the city legislature by local law could ask the electorate at a general election, "Shall there be a commission to draft a new city charter?" If the charter commission was authorized, it would proceed and then the results of its

work were to be submitted to the voters with the question, "Shall the charter proposed by the charter commission be adopted?" (Chapter 363, Laws of 1924, Sections 20.1 and 20.2.) Later, as a result of a battle in New York City over charter change in 1961, general state law was altered to permit mayors acting alone to appoint charter commissions. This was the legal basis for the appointment of the Ravitch and Schwarz Commissions in the latest round of charter revision in New York City. (Benjamin and Mauro. "Reemergence of Municipal Reform," (1989))

In sum, of the three objectives of home rule in New York State - limiting the power of the state in its relationship with cities, broadly empowering cities to act within their own sphere, and allowing cities to decide upon their own governance forms - it is the third that has been most fully achieved. "...[T]here is little dispute," one authority has concluded, "about the liberality with which municipalities have been given the power to devise their governmental structure and to provide for the allocation of the responsibility for the discharge of governmental functions." (J.D. Hyman "Home Rule in New York: Retrospect and Prospect," Buffalo Law Review Vol 15 *(1965) p. 338, quoted in Richard Briffault. "Taking Home Rule Seriously," in Mauro and Benjamin (eds.) p. 36.) As a consequence of this, and because each original cities charter was in some measure

unique, generalization about city government forms in New York is more difficult than for other categories of general purpose local government.

Forty-one New York cities have mayor-council systems of government. Among them are five of the six cities with populations in excess of 100,000 (including New York City), and five of the seven with populations between 50,000 and 100,000 in 1980. Of the remaining twenty-one cities in the state, eighteen use the council-manager plan, and three the commission plan. The three largest cities with the manager form - Yonkers, New Rochelle and Mount Vernon - are all in Westchester County. Cities employing the commission form are Beacon, Saratoga Springs and Mechanicville.

Since even where the commission plan is employed the commissioners sitting together constitute a council, all New York cities have councils, some with members elected at large, some with election in wards, and others with a combined system. Most cities have mayors, some popularly elected, others selected by the council. Mayors in Council-manager and commission cities preside at meetings but, in general, exercise powers equal to those of other council members; mayoral duties in these jurisdictions are largely ceremonial. The powers of mayors in mayor-council cities vary considerably on a continuum from "strong" to "weak," depending upon charter provisions. Elected mayors are more common and

appointed managers less common in New York than in the nation at large. But in general, the trend in the state in recent years has been toward separation of powers and strong executive systems, whether chief executive is elected or appointed. (This summary is taken largely from Handbook of Local Government (1987) pp. 85 - 88)

Villages

Lansingburgh in Rensselaer County was the first incorporated village in the state. Acknowledging "...a considerable number of houses...already erected, and occupied by merchants, mechanics and others..." there, the state legislature in 1790 named seven men trustees of that portion of the town of Rensselaerwyck "...in order to enable them to regulate their internal police, and to secure the benefits of certain commonable lands." The trustees were empowered in the law to hold land for the community. The legislature further provided for future elections of trustees by the freeholders, and gave the freeholders the right to pass rules governing the use of public land, cutting wood, the repair of roads and highways, and especially, fire protection. (Laws of 1790, Chapter 49)

The word "village," however, never appeared in this 1790 statute, fueling a dispute about which locality was indeed New York's first village. A similar law was passed for Waterford in the town of Half Moon in 1794; in that statute's final section, as almost an

afterthought, its provisions were also made applicable to the "village of Troy." (Laws of 1794, Chapter 36, Section 7) Frequently thereafter in the early statutes the use of the term "village" appears in reference to a specific place without any act of incorporation actually having been passed, especially in connection with provisions allowing relatively densely populated places within towns to organize for fire prevention. Finally, in 1798 the legislature, finding that "the existing laws made in their behalf are too uncertain and restricting to answer the end of enabling them to regulate their interior police," clearly incorporated Lansingburgh and Troy as villages. (Chapter 14, Laws of 1798)

In each of these new villages the freeholders at an annual meeting were to elect five trustees, who in turn would select a president to "attend to...[the village's]... more immediate concerns." Those who were elected and refused to serve could be fined. Other officials were three assessors, a collector and a treasurer.

The powers of the first village governments were far more extensive than for town meetings of the time. In fact, a comparison of them with the city charter of Schenectady, also passed in 1798, indicates that the first villages had powers as extensive as those of early cities, though the structure of government differed. (Chapter 50, Laws of 1798) The Trustees of Lansingburgh and Troy could regulate public markets (though not

control prices) and slaughterhouses; legislate concerning streets alleys and highways; establish a fire company and a night watch; provide street lights; license premises serving alcoholic beverages; require the restraint of animals; improve common land; and finally, do "any thing whatsoever that may concern the police and good government of the said village."

It may be because villages did not exist when the original 1777 New York Constitution was passed, while cities and towns did, that towns and cities today do not overlap in their jurisdictions within counties (with the exception of the City of Sherrill which is in the town of Vernon, Oneida County), while villages and towns do so overlap. It appears that because cities existed before the comprehensive town substructure within counties was created, they were accommodated as exceptions in the design of the town system. In contrast villages were imposed later, at local request, to meet special local needs, upon a governmental design that was already comprehensive and inclusive, at least in concept. Thus in New York State today a resident of a city does not simultaneously reside in a town, but a resident in a village does, and is taxed by both the village and the town.

The creation of a general law under which villages might be chartered was a reform of the mid-19th century. At the 1846 state Constitutional Convention, Henry C.

Murphy, a Brooklyn lawyer, pressed for a prohibition upon special acts incorporating cities and villages and the adoption of a requirement for a general provision under which such incorporations would occur. Murphy argued for the desirability of "... a uniform organization of cities...and...every other species of municipality," and against "... opposite and dangerous principles...put in the statute book..." when the legislature adopted locally prepared charters without careful review. (Con.Con. Proceedings, pp. 738-39) Though the convention seemed at first to respond to these arguments, later compromises in preparing the constitution's provision requiring that corporations be formed under general law and not by special act inserted an exception for municipal corporations (Article VII, section I).

Putting aside the traditionally more controversial issue of its specific control over cities and their charters, the state legislature in the year following this convention passed a general law providing for the incorporation of villages (Chapter 426, Laws of 1847). This law provided for the creation of villages from any part of town or towns not already in a village containing at least three hundred persons or, if larger than one square mile, a population density of 300 per square mile. Any number of local residents, after meeting requirements for mapping the area, taking a census and publicizing their intentions, might petition

for a referendum on this question, at which all residents eligible to vote in town elections might vote. If the village was created it was required to have five trustees elected for a one year term who would select a president from among their number. Other officials included a clerk, three assessors, a collector, a treasurer, a poundmaster, up to five fire marshals and up to three street commissioners.

Additionally, the law created a process for a referendum on village dissolution upon petition of one quarter of the eligible voters. But this statute did not prohibit special legislation to create villages, nor did it address the regular need for legislation to alter the charters of villages already in existence.

The powers given villages in this first general law were quite limited, even in comparison to the very first village charters, mentioned above, passed on special laws. The town meeting format for local governance, prevalent in New York at the time, was at first preserved for villages, as well. Each budget item paid for from the property tax level was subject to a separate popular vote at a village meeting. Substantive responsibilities focused largely on fire protection, dealing with stray animals, the provision of cemeteries, building sidewalks and keeping them clear, protecting public health through requiring the removal of dead animals and stagnant water, and, if the village wished

to assume responsibility from the town, the provision and maintenance of roads. Villages could also, under this statute, prohibit "flying kites, rolling hoops and playing ball in the streets."

Perhaps because of these limits in the structure and powers of village governments created under general law, frequent demands upon the state government for special legislation creating or amending village charters continued. In his 1862 address to the legislature Governor Edward D. Morgan remarked that "...ill digested, and...extremely unnecessary" special amendments to city and village charters took up forty percent of the space in the laws of 1861. Morgan renewed his call, made in 1860, for a "policy of general laws." (Messages and Papers, Vol. V. pp. 387, 294) The governor's object was not only uniformity in the law, but the focus of the legislature's attention on matters of statewide as opposed to local concern.

Some of the political reasons for the resistance to the adoption of general laws establishing the powers, duties and responsibilities of local governments, despite the best efforts of reformers, were set out in the report of the Committee on Town and County Officers of the 1867 State Constitutional Convention. "Members are more naturally interested in the affairs of their immediate constituents who made them," the committee wrote, "than in the interests of the State at large; and

hence general legislation is pushed aside to give place to local and private schemes. It often happens that the merits of these schemes are known only to the local members who have them in charge, and who, perhaps, are employed as attorneys or agents to engineer them through the Legislature for consideration. Moreover, these private and local schemes are occasion for the exercise of that peculiar species of legislative tactics known as "log rolling." Worse than all, they give employment to that class of venal go-betweens known as "lobbyists" who annually infest the legislature and ply their vocation with a skill perseverance and success worthy of a better cause." (New York State Constitutional Convention. Documents Vol. 3, No. 61, p. 8 [Albany: Weed Parsons and Co, 1868])

Little wonder that a decade after Governor Morgan wrote, Governor John T. Hoffman echoed his reform goals. Hoffman observed that 152 acts to adopt or amend village charters were passed between 1867 and 1869. (Messages and Papers, Vol. VI, pp. 120, 145) Amendments were often sought, he noted, as soon as the year after a charter was passed. As an example of the difficulty in finding and understanding the law that special legislation to adopt or amend village charters caused, the governor cited the charter of the village of Owego, the subject of fourteen different statutes passed in fourteen

different statutes passed in fourteen different legislative sessions.

The policy response to this problem was to make it easier and more attractive to create villages under general law, while at the same time making it harder to do this by special act. The general law of 1870 (Chapter 291, Laws of 1870) required greater population, at least 500 within one square mile or a density of 300 per square mile, to create a village, but simplified the process considerably by eliminating the mediating role of the county court. Twenty local electors, if unchallenged, could produce a referendum on the creation of a village.

If a village was created its elected officials, still serving a term of one year, were to include a president, now directly elected, at least three trustees, a treasurer and a collector. An additional trustee could be added for each increment of 500 people over 2,000, up to a maximum of nine. A clerk and a street commissioner had to be appointed. A chief fire engineer, fire wardens, police constables and a sealer of weights and measures were all optional. Office holders were required to be residents and property owners. Though not every item in the budget now had to be voted upon in public meeting, "extraordinary items" did, and voters in these meetings had to meet property qualifications, as well.

Under the 1870 law, the functions and powers of village government were extended significantly. Much greater stress was placed on the police power. In addition to their initial powers, villages were now authorized to "prevent vice and immorality," preserve peace and order, apprehend and punish "common prostitutes, vagrants and disorderly persons," regulate acts "endangering property and persons," "compel the abandonment of public nuisances," and "regulate the discharge of firearms." To services they could earlier provide were added lighting and reservoirs, though the latter seemed linked more to fire protection than to meeting needs of daily consumption. Health commissioners could be appointed, who could establish quarantines for public health purposes. Villages were also given the power to prevent immoderate riding and driving; regulate markets, slaughterhouses and the storage of gunpowder; engage in dog control; restrain hawking and license auctions; regulate exhibits; and regulate watercourses. Building and maintaining roads, formerly optional, now became one of the powers village automatically assumed upon coming into existence.

The 1870 law had no provision for village dissolution. Existing villages could reorganize under the act, but were not required to do so. They could continue to function under their old charters, or under the provisions of the 1847 law. However, new villages

could not be created under the earlier law. And, upon the recommendation of a Constitutional Commission appointed by Governor Hoffman in 1872, the legislature passed twice and the people ratified in 1874 a constitutional bar to special legislation incorporating villages. (Article 3, section 18 [now section 17]).

In some circumstances artful bill drafters were still able to avoid this constitutional limitation. Governor Lucius Robinson observed in 1875 that some amendments offered to old charters were really "...new special charter[s] under the guise of amendments,...means more or less unworthy to gain local advantage at the expense of general policy" (Public Papers, Vol. VII, pp. 159-160). Less than a decade later, Governor Grover Cleveland, in vetoing a charter change for the village of Lyons in Wayne County, described it and measures like it as "...a mass of impracticable inconsistencies and incongruities and useless crudities, which, if allowed to go upon our statute books, would be a disgrace to the state the law making power" (Messages and Papers, Vol. VII, p. 879). Cleveland argued that villages that chafed under their charter provisions should simply reorganize under the provisions of general law. If the powers provided there were inadequate, the governor said, special exceptions should not be sought, but the general law changed.

The general village law of 1897 was thus the culmination of a half century of reform efforts (Chapter 414, Laws of 1897). Ninety-seven pages long, it was more than five times the size of the 1847 law, and over three times as long as the one passed in 1870. Reflecting an approach used for cities, and later for towns and counties, villages were divided into four classes, depending upon their population, with different sized boards, the largest still nine in number, authorized for each class. Those qualified to vote in the town could vote in the village, though property qualifications remained for voting to form a village or on propositions, and for holding village office. (Men could vote if their wives held sufficient property. By special provision of the law, women could serve as town clerks.) Most terms remained one year but the term of trustees increased to two years. Probably to assure greater independence, police justices served for four years. Most elections were at large, though in more populous places ward elections for half the board was permitted at local option.

The powers of villages were extended in the 1897 law to reflect technological changes of the era. They now could regulate not only animals-at-large but polls and wires and railroad crossings. Financial procedures were detailed, and tax and borrowing limits delineated. And separate articles appeared to deal in detail with

the principal local services: streets and roads, police, fire protection, water, light, sewers and cemeteries.

Villages were subject to the 1897 general village law insofar as it was not inconsistent with their charters, and could voluntarily reincorporate under its provisions. Over time, most did so. Thus in 1986, almost a century later, there were only twelve villages operating under unique charters: Alexander, Carthage, Catskill, Cooperstown, Deposit, Fredonia, Ilion, Mohawk, Ossining, Owego, Port Chester, and Waterford. (Local Government Handbook (1987), p. 115)

The recodification of 1909 reflected few substantive changes in the decade since the previous overhaul of the village law was accomplished. Some additional powers were vested in villages during this period, for example, the right (already held by towns) to contract for garbage removal. (Laws of 1894, Chapter 666). Additionally, several statutes were passed affecting the requirements for the combination of villages, their dissolution and the adjustment of boundaries. In 1899 the requirement was passed that a majority in each place be achieved before two villages be consolidated. (Chapter 56, Laws of 1899) Four years later a petition procedure was established that allowed Village Trustees to put to vote the diminishing of a village's size, if such a step did not change the class

in which the village was placed by law. (Chapter 666, Laws of 1903) And in 1907 limits were placed upon the frequency with which repeated attempts to dissolve a village could be placed on the ballot. (Chapter 607, Laws of 1907)

The 1922 study of the Joint Committee on Taxation and Retrenchment found considerable flexibility in the law under which village governments were organized, but in accord with its general philosophy recommended reducing the number of village elected officials and vesting greater executive authority in the Village president, including appointing power to most key posts. (Report, (1922) p. 45) Only a year later, the powers of villages was extended significantly when, following the provisions of earlier legislation passed for cities, they gained authority to regulate land use within their boundaries. (Chapter 561, Laws of 1923)

In 1938, on the recommendation of the constitutional convention held in that year, the voters approved an amendment, modeled after one earlier adopted for cities, that established home rule for villages with more than 5,000 inhabitants (there were 54 such villages in the state at this time). Following this, in 1940, a Joint Legislative Committee recommended and the legislature adopted a home rule law, again modeled after that for cities, that set out the manner by which villages could adopt local law. (JLC on Home Rule for

Villages of Over 5,000 Inhabitants, Legislative Document # 78, 1940)

Home rule was extended to smaller villages as a part of the general constitutional changes concerning local government adopted in 1963. In the 1960's, too, several attempts, some partially successful, were made to recodify the Village Law. Overall change was finally achieved in 1972, by the Joint Legislative Committee on Laws Affecting Local Governments, under the chairmanship of Assemblyman George J. Farrell of Mineola in Nassau County. Hearings by the committee indicated that village officials felt that many provisions of the law were "...cumbersome, confusing and too rigid to accommodate the needs and aspirations of many villages throughout the state." (Final Report, Legislative Document # 19 (1972) p. 9)

In response to these problems the committee sought to create a "skeletal outline" in the law that applied to all villages, but that could be "implemented through local legislation" to meet local needs. A principal step taken to accomplish this end, and to overcome restrictive court interpretations of village powers, was to substitute a general grant of authority for village trustees for the long list of specific powers granted at the turn of the century and enhanced incrementally since that time. In this revision, the village mayor was given the appointing power, subject to the advice and

consent of the trustees. Additionally, the committee excised from the law the classification of villages by their populations; removed archaic provisions and language - including the use of the title "president" for village chief executive; and moved some provisions to other laws where it thought they more appropriately fit. Finally, a uniform procedure was established for action by ordinance and local law, removing a considerable source of confusion in village government. (Final Report (1972) pp. 113-115)

Most New York villages were chartered in the half century between the close of the Civil War and the beginning of World War I, a time during which the powers of villages and cities were far more extensive than those of towns and counties. After the recodification of the town law in the early 1930's, the rate of creation of villages declined precipitously. Since 1940, twenty villages have been established and thirteen dissolved (Table VI). Additionally, the villages of Pelham and North Pelham joined to form one entity in 1975.

There are currently 556 villages in New York State. Sixty-one have fewer than 500 people, and thus would not qualify to apply for village status under current law. The smallest villages in 1980 was Dering Harbor, with 16 people, and the largest was Hempstead, with a population, as noted above, of 40,404. Most villages

have fewer than 2,500 people, though the 1980 census showed 21 with populations between 10,000 and 20,000 and 12 with over 20,000 inhabitants. Seventy-two villages are in two or more towns. Seven are in two counties. (Local Government Handbook (1987), p. 115)

Recent village dissolutions have largely been a lightly populated rural area - Prattsburg in Steuben County (1972), Fort Covington in Franklin County (1975), Elizabethtown in Essex County (1980) - to name just three examples. The most recently formed village, Pine Valley, created in Suffolk County in 1988, is now considering dissolution.

In Rosendale in Ulster County, dissolved in 1977, the spark for change was an out of town entrepreneur, Raivo Puusamp, who purchased substantial real estate holdings, and then discovered that his taxes were higher inside the village. The town and the village both maintained highway, building and police departments, and there was considerable quarreling between the two boards. Puusamp ran for mayor on a platform calling for the dissolution of the village to lower taxes, won, and then went on to lead the dissolution movement. The situation was relatively uncomplicated because the village of Rosendale offered few services. Nevertheless, there was opposition, based upon a desire for local control among village residents and sentimental attachment to it. For Rosendale, the

dissolution process took two years to complete. The village complicated matters by turning over its assets to the fire department, while leaving the town with its debts. The Supervisor later reported that it took a decade for the town of Rosendale to overcome the financial burdens left it by the village dissolution. (Huguenot Herald, August 2, 1990, p. 6; Interview with Kathleen Mihm, July 29, 1990)

The village is the only general purpose government that can be created entirely by local action under state law, a result, as noted above, of policy choices made in the nineteenth century. Currently an area must have at least 500 people within an unincorporated territory of five square miles to begin the petition, hearing and referendum process for becoming a village. (The land area may be larger if coterminous with the boundaries of a town, school, fire, or improvement district). Most recent village incorporations have been classic examples of "forum shifting," the result of the efforts of disaffected residents of suburban communities - mostly in Suffolk, Westchester and Rockland Counties - to take control of land use and service delivery from a town board serving a larger area, sometimes with the additional hope of lowering local taxes.

These were the reasons that Pt. Jefferson in the town of Brookhaven opted for incorporation in 1963, the first of several communities in rapidly growing Suffolk

County to do so in the last several decades. Here an added attraction was that a long Island Lighting Company plant within its limits would provide 70% of the new village's tax base. (New York Times Oct. 6, 1963, p. 116) Later, several villages were formed in the Town of Ramapo in Rockland County to avoid very severe town land use restrictions designed to control growth. An effort by the town to intervene to prevent the formation of these villages was blocked in the courts. (Marcus v Baron 57 N.Y. 2d 862 (1982))

In another example, twice in the late 1960's and early 1970's residents of the hamlet of Purchase in Westchester sought to incorporate as a village in reaction to decisions by the town of Harrison to encourage their area's development as a corporate headquarters center. On the second occasion in 1975, the entire town of Harrison incorporated itself as a village preemptively, to block Purchase's effort. (State law prevents the incorporation of a village within an already incorporated village.) (New York Times May 11, 1974, p. 17; September 13, 1974)

Other coterminous town/villages are Mt. Kisco, also in Westchester, created in 1977, and East Rochester, in Monroe County, established in 1981. For much of the 1970's and 1980's, an advantage of coterminality, according to the Secretary of State's office, was that "...federal revenue sharing aid and state per capita

aid...[could]...be collected as if there were two separate units of government, a town and a village, in existence." With the end of the federal revenue sharing program, of course, a part of this advantage disappeared. A disadvantage identified in the same report was the absence of a "...method clearly defined in law through which a village and a town...[could] merge all their activities by simply becoming coterminous." (Division of Community Affairs. Thinking About Consolidation (1977) p. 13)

The Legacy of History

New York's four types of general purpose local governments converged incrementally in their structure and powers in several overlapping stages during the period since the civil war. Villages came to be treated, like towns as counties, through general rather than special laws. The unique legal status of cities and villages as "municipal corporations" was eroded, and then, toward the close of the nineteenth century, disappeared. As cities grew, and technological change altered city life, the powers of city governments grew apace. Villages, proliferating and also growing, also sought and gained broader powers. Under the pressure of population change and out migration from cities, towns in their vicinity gained powers similar to villages, and over time, all towns followed.

Counties were the most resistant to change, but by the second quarter of the twentieth century the pressures of suburbanization ultimately affected them too. First following the model for cities, individual counties gained charters extending their powers and autonomy. Ultimately, through constitutional change and general law, the charter option was extended to all counties.

With regard to structure, the dominant themes in the history of New York local government are the movement from participatory to representative democracy, and the spread of the separation of powers, an idea that had no currency in the early history of the state. Representative government in rural areas is a relatively recently adopted idea in New York. The town meeting, now universally regarded as a New England phenomenon, was the principal method of town governance in New York until the early twentieth century. In villages too, during much of New York's past, most major decisions had to be put to popular vote.

Modeling the structure of local government after that adopted for the state and nation was first tried in cities. Though the pattern of power sharing differs substantially from place to place, and the executive is sometimes appointed rather than elected, the idea of a separate executive is now almost universal in New York

cities. (There remain three that use the commission form.)

The emergence of a separate executive function on the city model, though less developed, is nevertheless evident in New York village government. In the state's counties, unique charters, locally adopted but similar to those classically passed by the state for cities, provide for the separation of the executive and legislative functions. Even in non-charter counties, appointed administrators separately exercise executive power under authority of local law.

It is in towns that the evolution of the structure of government in accord with the separation of powers model has been least complete. The town judicial function was severed from the executive and the legislative only recently. Additionally some small steps have been taken to vest executive powers in supervisors. But perhaps the most important recent change in state law encouraging separation of powers in towns is the general provision for the adoption of a town manager form of government.

The growth of the structure autonomy and substantive power of local governments in New York, and the convergence of their powers and structures, is manifest in their general treatment without regard to type in the 1963 Municipal Home Rule Amendment to the state constitution. But this amendment also requires

local popular consent at referendum, and action by local boards subject to review by the Supreme Court, if a local government or any part of its territory is annexed to another. Thus, the same provision that treats these entities uniformly blocks their rationalization into a single and coherent system, perpetuating the pattern of "distinctions without differences."

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