for an extended period will suffer a decrease in their real salaries over time. In addition, such a ban will have the effect of establishing different salaries for judges on a single court, depending on when they ascend the bench. It is appropriate that judges of equivalent rank should receive equal pay.

A distinctive provision in the California Constitution authorizes withholding the salary of judges who do not promptly make decisions after cases are submitted to them.[55] In order to receive their paychecks, judges must submit an affidavit under penalty of perjury that they do not have any submitted matters that have been pending for more than ninety days. Judges have regularly been subject to disciplinary proceedings in those rare instances in which they have submitted false affidavits. However, there may be more effective means of ensuring efficient case management, measures that do not require enshrinement in state constitutions.

## Judicial Discipline, Retirement, and Removal

Ensuring the quality and integrity of the state bench is a paramount constitutional aim. This goal might be achieved by allowing those outside the judiciary to assess the fitness and performance of sitting judges. The legislature might remove judges by impeachment, and the citizenry might do so either by defeat at the polls or (as in nine states) by the recall of judges. However, there are problems with each of these mechanisms. Impeachment has proved too slow and cumbersome to be an effective check on judicial misconduct. Recall is both cumbersome and susceptible to use against judges who announce unpopular but legally defensible rulings, thus jeopardizing judicial independence. Accountability during reelection campaigns shares the recall's susceptibility to abuse and is only periodically available, given the lengthy terms of office of most judges. Perhaps equally important, all these mechanisms employ the ultimate sanction of removal from office, whereas a range of sanctions, proportionate to judicial transgressions, might be more appropriate.

The limitations of these weapons against judicial misconduct are not necessarily a justification for their elimination. Impeachment in particular is a time-honored, even if rarely employed, check on judicial abuses of office. Nevertheless, the deficiencies of these weapons, plus the judicial branch's concern to police its own personnel, has led to the creation in all states of commissions within the judicial branch for the discipline of sitting judges. These commissions have the authority to receive complaints about judges, to investigate those complaints (or when necessary to initiate their own investigations), to file and prosecute formal charges, and either to recommend sanctions to the state's highest court or to impose sanctions themselves. These sanctions might include: (1) private admonition, reprimand, or censure; (2) public reprimand or censure; (3) suspension; or (4) removal from office. Typically, judicial disciplinary commissions also have authority to recommend the retirement of judges who are incapacitated.

Forty-one states employ a "one-tier" model, under which prosecutorial and adjudicative functions are combined, thereby avoiding duplicative work and promoting a speedier disposition of cases.[56] In such systems, the final disposition of cases rests in the hands of the state supreme court, which has administrative authority over the judicial branch. When a case involves a member of the supreme court, a special tribunal is constituted. Nine states employ a "two-tier" system, under which the prosecutorial and adjudicative functions are separated in order to avoid biased decision-making.[57] Because commissions typically include public members who are neither judges nor lawyers, the "two-tier" system allows the public to be represented in the final disposition of cases. The American Bar Association's Model Judicial Article endorses the "one-tier" model.

State constitution makers may decide whether the constitution should prescribe the one-tier model or the two-tier model. Alternatively, they may merely create the Judicial Discipline Commission and leave the selection, structure, and operation of the Commission to implementing legislation, as does the Kansas Constitution.[58] State constitution makers must also determine what role the public should play in the discipline process. The movement over time seems to be to provide for greater representation for nonlawyers on the Judicial Discipline Commission, although in no state do nonlawyers comprise a majority of members.

## CONCLUSION

It is important to emphasize that this chapter confines itself to the problems confronting state judiciaries that can be dealt with through constitutional prescriptions. There are a host of other problems confronting state judiciaries, including ensuring timely and affordable access to justice for all citizens, promoting an even-handed administration of justice, and making courts more responsive to the needs of the community. These problems are important, but they must be dealt with outside the constitution. What the state constitution can seek to provide is a structure that facilitates addressing these problems and a system of judicial selection and discipline that ensures the judicial branch is staffed by highly qualified and committed personnel. This is hardly a negligible contribution in the effort to secure equal justice under law.

## NOTES

1. Pound's speech is reproduced in 35 F.R.D. 241 (1964).

2. On the spread of court reform, *see* Larry Berkson and Susan Carbon, *Court Unification: History, Politics, and Implementation* (1978); Frank Munger, "Movements for

Court Reform: A Preliminary Interpretation," in *The Politics of Judicial Reform* (ed. Philip E. Dubois, 1982); and Robert W. Tobin, *Creating the Judicial Branch: The Unfinished Revolution* (1999).

3. Whereas in 1960 only three states—Alaska, Kansas, and Missouri—employed merit selection in choosing state supreme court justices, by 1980 eighteen did. *See* Joan Goldschmidt, "Merit Selection: Current Status, Procedures, and Issues," 49 *U. Miami L. Rev.* 1, app. A, at 79 (1994). However, since 1998 only Rhode Island has adopted merit selection, and a number of states have considered merit selection only to reject it. Moreover, there is reason to doubt that merit selection will indeed ensure judicial independence, as proclaimed by its proponents, given changes in the political context for even nonpartisan and retention election campaigns. See G. Alan Tarr, "Rethinking the Selection of State Supreme Court Justices," 39 *Willamette L. Rev.* 1445 (2003).

4. The importance of judicial independence has been recognized by Americans since the Founding. In the Declaration of Independence, one charge against King George III was his interference with judicial independence. Article XIX of the Declaration of Rights of the Massachusetts Constitution states: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character; that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit." For reports focusing on how judicial independence can be secured in the current era, *see* American Bar Association, Division for Public Education, *Judicial Independence* (1999), and American Bar Association, Report of the Commission on the Twenty-First Century Judiciary, *Justice in Jeopardy* (2003). For a valuable comparative perspective, *see Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (eds. Peter H. Russell and David M. O'Brien, 2001).

5. For skeptical perspectives and alternative proposals, *see* Carl Baar and Thomas Henderson, "Alternative Models for the Organization of State-Court Systems," in *The Analysis of Judicial Reform* (ed. Philip Dubois, 1982), and Geoff Gallas, "The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach," 2 *Just. Sys. J.* 35 (1976).

6. For helpful analyses of the assumptions underlying these approaches, *see* Symposium, "The Changing Face of Justice: The Evolution of Problem Solving," 29 *Fordham Urb. L.J.* 1790 (2002); James L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement* (2001), and Peggy F. Hora, William G. Schma, and John T. A. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," 74 *Notre Dame L. Rev.* 439 (1999).

7. Me. Const., art. VI, § 1.

8. Ariz. Const., art. VI, §1.

9. Conn. Const., art. V, § 1.

10. Mich. Const., art. VI, § 1.

11. Fla. Const., art. V, § 1, and Ga. Const., art. VI, § 1.

12. Mich. Const., art. VI, § 1.

13. Ind. Const., art. VII, § 1.

14. Alas. Const., art. IV, §1.

15. La. Const., art. V, § 5.

16. These states include Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota. Alabama and Delaware provide for advisory opinions by statute, and North Carolina by court decision. *See* Note, "The State Advisory Opinion in Perspective," 44 *Fordham L. Rev.* 81 (1975).

17. *See* Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges* (2002).

18. For a listing of states, see the web site of the Initiative and Referendum Institute at www.iandrinstitute.org. *See also* Gerald Benjamin, "Constitutional Amendment and Revision," in this volume.

19. *See,* for example, *Adams v. Gunter,* 238 So.2d 824 (Fla., 1970), and In re Initiative Petition No. 344, 797 P.2d 326 (Okla., 1990).

20. *See,* for example, *Amalgamated Transit Union Local 587 v. State of Washington,* 11 P.3d 762 (Wash., 2000); *Armatta v. Kitzhaber,* 959 P.2d 49 (Ore., 1998), and *Evans v. Firestone,* 457 So.2d 1351 (Fla., 1984).

21. This was done in Florida following *Adams v. Gunter,* supra note 19. *See Weber v. Smathers,* 338 So.2d 819, 822–23 (Fla., 1976).

22. Ibid. Const., art. V, § 13.

23. For description and evaluation of these efforts to achieve administrative unification, *see* Berkson and Carbon, supra note 4; Tobin, supra note 4; Baar and Henderson, supra note 7, and Gallas, supra note 7. A cautionary note has been voiced by Donald Dahlin: "To fulfill their role in our society, courts must have considerable administrative independence from coordinate branches of government; that to achieve such independence, courts must develop their own administrative capacity and that capacity must be structured in such a way as to provide a strong central authority; but an authority that encourages widespread participation in the making of major decisions and widespread decentralization and delegation in the operation of the court system." *See* Donald C. Dahlin, *Models of Court Management* (1986) 101.

24. Kans. Const., art. III, § 1.

25. *See,* for example, Alas. Const., art. IV, § 16.

26. Calif. Const., art. VI, § 6. The Institute for Court Management has endorsed this approach: "Because of the perceived isolation of the Supreme Court from the problems and dynamics of trial court operation, the preferred vehicle for developing state court policy is a judicial council which represents judges from all levels. Dahlin, supra note 24, at 47.

27. American Bar Ass'n. Commission on Standards of Judicial Administration, *Standards Relating to Court Organization,* Standard 12 (1974).

28. Alas. Const., art. IV, §§ 9–10.

29. Geo. Const., art. VI, § 9.

30. Mich. Const., art. VI, § 5.

31. Ala. Const., art. VI, § 11.

32. La. Const., art. V, § 5.

33. Fla. Const., art. V, § 2.

34. For a review of state court funding and the issues associated with it, *see* Robert W. Tobin, *Funding the State Courts: Issues and Approaches* (1996). According to Tobin (p. 37), as of 1995, thirty-one state court systems were funded primarily from the state general fund.

35. Ibid.

36. Institute for Court Management, Courts and the Public Interest: A Call for Sustainable Resources (May 2002).

37. Ala. Const., § 6.10.

38. *See* Carl Baar, "Judicial Activism in State Courts: The Inherent-Powers Doctrine," in *State Supreme Courts: Policymakers in the Federal System* (eds. Mary Cornelia Porter and G. Alan Tarr, 1982).

39. *See generally* James W. Douglas and Roger E. Hartley, "The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?" 63 *Public Admin. Rev.* 441 (2003); James W. Douglas and Roger E. Hartley, "State Court Budgeting and Judicial Independence: Clues from Oklahoma and Virginia," 33 *Admin. & Society* 54 (2001); and Carl Baar, *Separate but Subservient: Court Budgeting in the United States* (1975).

40. N.Y. Const., art. VII, § 1.

41. For a state-by-state listing of qualifications for judicial office, see *Book of the States* 2000–01, at 135–36, tbl. 4.3.

42. Fla. Const., art. V, § 13.

43. Mich. Const., art. VI, § 21.

44. The only states that award tenure during good behavior are Massachusetts, New Hampshire, and Connecticut. For a summary listing of the tenure of state judges, *see* Roy A. Schotland, "Comment," *Law and Contemporary Problems* 61 (1998): 154–55. For state-by-state listings, *see Book of the States,* supra note 41, at 203–04, tbl. 5.1.

45. National Summit on Improving Judicial Selection, *Call to Action: Statement of the National Summit on Improving Judicial Selection* (expanded ed., with commentary 2002).

46. The case for merit selection and against election of judges can be found in Larry W. Yackle, "Choosing Judges the Democratic Way," 69 *B.U. L. Rev.* 273; in Jona Goldschmidt, "Merit Selection: Current Status, Procedures, and Issues," 49 *U. Miami L. Rev.* 1 (1994); and in Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *U. Chicago L. Rev.* 689 (1995).

47. The case against merit selection and for election of judges can be found in Judith L. Maute, "Selecting Justice in State Courts: The Ballot Box or the Backroom," 41 *S. Tex. L. Rev.* 1197 (2000), and in Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (1980). The classic study documenting the operation of political factors in the work of a merit commission is Richard A. Watson and Rondal G. Downing, *The Politics of Bench and Bar: Judicial Selection Under the Missouri Non-Partisan Court Plan* (1969).

48. *See* Tarr, supra note 3, at 1449–60.

49. Roy Schotland, "Financing Judicial Elections, 2000: Change and Challenge," 2001 *L. Rev. Mich. St. U. Det. C. L.* 849 (2001).

50. *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002).

51. The terms of office for judges in each state are listed in *Book of the States,* supra note 41, at 203–04, tbl. 5.1.

52. American Bar Association, *Justice in Jeopardy*, supra note 5, appendix A, p. 4.

53. *See* Schotland, supra note 44, and American Bar Association, *Justice in Jeopardy*, supra note 5, for presentations of the case for longer terms.

54. For elaboration of the European model and its possible implications for judicial selection in the United States, *see* Tarr, supra note 3.

55. Calif. Const., art. VI, § 19.

56. For a sample provision, *see* Mich. Const., art. VI, § 30.

57. *See* Kans.Const., art. III, § 15.

58. Ibid.

# Chapter Five

# Local Government

Michael E. Libonati

## Introduction

Local government in the United States has a rich history of variety, both in type and form. Cities, counties, towns, townships, boroughs, villages, school districts, and a host of special-purpose districts, authorities, and commissions make up the 87,849 distinct units of local government counted in the 2002 Census of Governments. These local units of government have many different forms and organizational structures. Variations in the numbers and forms of local government reflect the unique political cultures and forces that created and shaped local self-government in each state.

Experience with local government, which is shared by all Americans, has rarely given rise to sustained and systematic reflection about the relationship between local government and state government. Instead, the desire for local self-government has been institutionalized in thousands of compacts, charters, special acts, statutes, constitutional provisions, resolutions, ordinances, administrative rulings, and court decisions since the earliest dates of settlement of this country. Among these enactments, state constitutional provisions are singled out for special attention in this chapter. Given this diversity, there is no single model of constitutional arrangements dealing with local government that is appropriate for all states. Nonetheless, the key issue remains the same from state to state, namely, the level of autonomy to be accorded to local governments in the state constitution.

Increasing fiscal pressures on government and rising service expectations by the citizenry make continued controversy and debate over state constitutional treatment of local governments inevitable. As policy makers evaluate proposals for state constitutional change, they should consider six guiding issues before altering the state-local relationship embodied in their state's constitution:

1. Is it desirable to increase or decrease the restrictions, if any, imposed on the power of the state to regulate local government?
2. What degree of autonomy, however defined in the minds of the citizens of a particular state, should be granted to local governments?
3. To what extent should the local electorate have a choice as to the form of local government and its policies?
4. Should all local government units be eligible for local autonomy?
5. To what extent should local governments be authorized to engage in intergovernmental cooperation?
6. What role should courts have in determining issues of local autonomy?

## DEFINING LOCAL GOVERNMENT AUTONOMY

This section examines the range of state constitutional definitions of local government autonomy. One of the most useful classifications of local self-government is Gordon Clark's principles of autonomy. These principles distinguish between a local government's power of initiative and its power of immunity. By initiative, Clark means the power of local government to act in a "purposeful goal-oriented" fashion, without the need for a specific grant of power from the legislature. By immunity, he means "the power of localities to act without fear of the oversight authority of higher tiers of the state."[1] There are four variations in the exercise of these two components to autonomy: (1) powers of both initiative and immunity; (2) power of initiative but not immunity; (3) power of immunity but no initiative; and (4) neither power of initiative nor immunity.

### Powers of Both Initiative and Immunity

Initiative and immunity powers as expressed in state constitutions vary considerably from one state to another. The Colorado Constitution, for example, confers both initiative ("the people of each city and town of this state . . . are hereby vested with, and they shall always have, power to make, amend, add to, or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters") and immunity ("such charters and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith").[2] These texts both empower the home rule unit to exercise initiative as to all local and municipal matters and immunize the home rule unit from state legislative interference in all local and municipal matters.

## Power of Initiative but Not Immunity

Pennsylvania's home rule provision exemplifies how states afford a charter unit the authority to "exercise any power or perform any function not denied by this Constitution, by its home rule charter, or by the General Assembly at any time."[3] It grants initiative but not immunity In this formulation, known as the Fordham-Model State Constitution devolution-of-powers approach to local governance,[4] the state legislature has a free hand in defining and limiting the scope of local initiative.

## Power of Immunity but Not Initiative

State constitutions contain several types of provisions conferring immunity, but not initiative, on local government. For example, the Utah Constitution prohibits the legislature from passing any law granting the right to construct and operate a street railroad, telegraph, telephone, or electric light plant within any city or incorporated town "without the consent of local authorities."[5] Thus, a Utah municipality cannot be forced to accommodate certain state-franchised utilities, but may not otherwise have any affirmative regulatory authority initiative over these enterprises.

Virginia's prohibition of state taxation for local purposes does not, for example, provide its political subdivisions with affirmative taxing authority.[6] In several states, the Constitution forbids the legislature from delegating "to any special commission, private corporation, or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects . . . or to levy taxes or perform any municipal function whatsoever" without conferring on protected municipalities any correlative power to initiate action in any of the enumerated policy areas.[7] Also, state constitutional prohibitions against special or local laws are aimed at conferring immunity, but not initiative, on local governments.

## Neither Power of Initiative Nor Immunity

The Connecticut Constitution illustrates the strict control by the state over its political subdivisions. It states: "The General Assembly shall . . . delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs relative to the powers, organization, and form of government of such political subdivisions."[8] The apparent utility of this type of provision is to defeat challenges to a broad allocation of authority to local governments based on a delegation doctrine or due process claims.

Finally, some state constitutions, such as New Jersey's, are silent on the issue of local government autonomy, leaving the matter to the legislature.

## Beyond the Immunity and Initiative Concepts: Preemption, Intergovernmental Cooperation, and Privatization

Clark's classification of these concepts provides a good starting point for understanding local legal autonomy, but state constitution makers face further significant issues in creating a local government provision. Sho Sato and Arvo Van Alstyne point out these interrelated issues, using the example of the practical, everyday problems of those who gave legal advice about the scope of local government powers:

> From the viewpoint of the attorney—whether he represents a public agency or a private client—the significant issues relating to home rule ordinarily cluster around three distinguishable problems: (1) to what extent is the local entity insulated from state legislative control; (2) to what extent in the particular jurisdiction does the city (and in some states the county) have home rule power to initiate legislative action in the absence of express statutory authorization from the state legislature; and (3) to what extent are local home rule powers limited, in dealing with a particular subject, by the existence of state statutes relating to the same subject?[9]

It is this third aspect of home rule, the preemption question that is equally important in determining the true scope of local government autonomy. For example, in states like Pennsylvania that have adopted the previously mentioned Model State Constitution approach, a home rule unit has the power to act concurrently with the state legislature "unless the power has been specifically denied.[10] The Illinois Constitution speaks directly to this preemption issue when it asserts that "home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."[11]

One other question that initiative and immunity models of local government autonomy do not address is the capacity to contract intergovernmentally (among federal, state, and local governments), interjurisdictionally (among counties, cities, and special districts), and with the private sector. The collaborative perspective has undoubtedly influenced the entrenchment of rules concerning interlocal cooperation and transfer of functions in state constitutions. Thus, Article 7, section 10(a) of the Illinois Constitution provides that:

> Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

## Analyzing Local Government Autonomy

The task of conferring "discretionary authority" on local governments requires a careful analysis of the components of local government authority. A report of the U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Measuring Local Discretionary Authority* (1981), will assist state constitution makers in addressing the range of issues involved. In this report, ACIR defined local discretionary authority as

> the power of a local government to conduct its own affairs—including specifically the power to determine its own organization, the functions it performs, its taxing and borrowing authority, and the numbers and employment conditions of its personnel.[12]

Examining these four dimensions of local government discretionary authority—structure, function, fiscal, and personnel—helps citizens and public officials get a clearer picture of local government autonomy and the trends affecting it. It enables the observer—whether trained in law, public administration, or political science-to organize and synthesize the otherwise unwieldy universe of state constitutional provisions, and court cases interpreting them, that bear on the question of local autonomy. The four categories of discretionary authority described in the ACIR report are reviewed in this section to determine their fruitfulness in serving as the basis for structuring the local government article of a state constitution.

### Structural Autonomy

There are several elements that affect the degree of structural autonomy provided to local governments.