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“NEITHER PEACE NOR UNIFORMITY”:¹ LOCAL GOVERNMENT IN THE WISCONSIN CONSTITUTION

MICHAEL E. LIBONATI*

I. INTRODUCTION

This conference exemplifies the “Wisconsin Idea”—that scholars can be of service to state decision makers.²

Framers of a Badger State Constitution for the twenty-first century can draw upon several excellent monographs in the Wisconsin Blue Book amply documenting the history and function of local government.³ Academics and practitioners in the fields of public policy and public administration have produced Wisconsin-specific reports thoroughly canvassing contemporary issues in state-local relations.⁴

Making institutional policy is a complex and difficult task requiring interdisciplinary skills⁵ and sound political judgment.⁶ This Article,

1. State *ex rel.* Mueller v. Thompson, 149 Wis. 488, 517, 137 N.W. 20, 31 (1912) (Timlin, J., concurring).

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2. See generally Jack Stark, *The Wisconsin Idea: The University's Service to the State*, in WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1995–1996 BLUE BOOK 101 (1995).

3. See James R. Donoghue, *The Local Government System of Wisconsin*, in WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1968 BLUE BOOK 69–281; James R. Donoghue, *Local Government in Wisconsin*, in WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1979–1980 BLUE BOOK 96–310 (1979); Susan C. Paddock, *The Changing World of Wisconsin Local Government*, in WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN 1997–1998 BLUE BOOK 100–171 (1997); M.G. Toepel, *The Community of Governments in Wisconsin*, in WIS. LEGISLATIVE REFERENCE LIBRARY, STATE OF WISCONSIN 1952 BLUE BOOK 75–172.

4. See generally WIS. BLUE RIBBON COMM'N ON STATE-LOCAL P'SHIPS FOR THE 21ST CENTURY, REPORT (2001); TIM SHEEHY, STATE OF WIS. TASK FORCE ON STATE & LOCAL GOV'T, FINAL REPORT AND RECOMMENDATIONS (2003); Don Dyke, *Municipal and County Government*, in WIS. LEGISLATIVE COUNCIL, WISCONSIN LEGISLATOR BRIEFING BOOK 2005–2006 L-1 (2005).

5. See generally ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005).

drawing on previous work,⁷ offers Wisconsin policy-makers a perspective on the job of framing constitutional choices concerning state-local relations drawn from a comparative analysis of other state constitutions.

The Article is divided into three parts. First, a discussion of the types of local government and an analysis of the components of local government autonomy is presented. Second, a broad overview of the constitutional texts and judicial decisions that have shaped current Wisconsin law is set forth. Third, a survey of alternative models of state-local relations found in other state constitutions is reviewed.

II. WISCONSIN LOCAL GOVERNMENT: DEFINITION AND ANALYSIS

The U.S. Census Bureau's 2002 Census of Governments provides a straightforward description of the types of Wisconsin local government. Wisconsin has three types of general purpose government:

1. county governments (72);
2. municipal governments including cities and villages (585); and
3. town governments (1265).⁸

And Wisconsin has two types of special purpose government:

1. public school systems (446); and
2. special district governments (684).⁹

The Wisconsin Constitution mentions counties, cities, villages, towns, and district schools, but not special districts. But it does not

6. ELMER GERTZ & JOSEPH P. PISCIOFFE, CHARTER FOR A NEW AGE 248–60 (1980) (discussing significance of the home rule provision in assuring political support for voter ratification of the Illinois Constitution); JOHN P. WHEELER, JR. & MELISSA KINSEY, MAGNIFICENT FAILURE—THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967–1968, at 203 (1970) (attributing failure of voters to ratify proposed constitution to provision abolishing county row offices).

7. See generally U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LOCAL GOVERNMENT AUTONOMY (1993); Michael E. Libonati, *Local Government*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 109 (G. Alan Tarr & Robert F. Williams eds., 2006).

8. 1 U.S. CENSUS BUREAU, U.S. DEPT' OF COMMERCE, 2002 CENSUS OF GOVERNMENTS NO. 2, INDIVIDUAL STATE DESCRIPTIONS 305 (2005), available at <http://www.census.gov/govs/www/cog2002.html>.

9. *Id.* at 304–07.

define these terms. The Wisconsin legislature has created a complex body of law that sorts counties, four classes of cities, and four classes of school districts by population.¹⁰ But the legislature's power to classify is qualified by three partially overlapping provisions dealing with special and private laws¹¹ and by three provisions concerned with uniformity.¹² The legislature's capacity to make institutional policy is further curbed by the Wisconsin Supreme Court's occasional commitment to text-focused originalism. For example, the legislature defined the term "village" by criteria based on population and density. The court, however, held that the term "village" has a meaning historically fixed as of the time of the constitution's adoption.¹³ The petition to incorporate the proposed village was dismissed since it did not allege facts sufficient to show that the proposed village was "a political, sociological, and geographic unit."¹⁴ Similarly, statutory law cannot limit a county sheriff's historically grounded powers of "maintaining law and order" and "preserving the peace."¹⁵ As the court explained in a decision striking down a statute establishing a state Department of Education that impinged on the powers of the state Superintendent of Public Instruction:

In interpreting a constitutional provision, the court turns to three sources in determining the provision's meaning: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption.¹⁶

Twenty-first century framers need a way to talk about state-local relations that reflects the collective understanding of that issue in state constitution-making. To that end, the terms "initiative" and

10. Paddock, *supra* note 3, at 110–11, 119, 135.

11. WIS. CONST. art. IV, §§ 18, 31, 32.

12. *Id.* arts. IV, § 23 (towns), XI, § 3(1) (home rule cities and villages), X, § 3 (school districts).

13. *In re Incorporation of Oconomowoc Lake v. Town of Summit*, 270 Wis. 530, 535–36, 72 N.W.2d 544, 544–47 (1955).

14. *Id.* at 535–38, 72 N.W.2d at 547–48.

15. *Heitkemper v. Wirsing*, 194 Wis. 2d 182, 191, 533 N.W.2d 770, 774 (1995) (quoting *Manitowoc County v. Local 986B*, 168 Wis. 2d 819, 830, 484 N.W.2d 534 (1992)).

16. *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123, 127 (1996) (citations omitted).

“immunity” are useful. Initiative refers to state constitutional provisions that empower local governments.¹⁷ Immunity refers to state constitutional provisions that limit the legislature’s power over local governments.¹⁸ Local government discretionary authority is made up of degrees of initiative and immunity given by the state constitution.¹⁹ Analysis of the policy issues confronting state constitution-makers is further sharpened by focusing on the degree of local discretionary authority in four areas:

1. structure—determining their form of government and internal organization;
2. function—choosing the functions they perform;
3. fiscal—raising revenue, borrowing, and spending; and
4. personnel—fixing the numbers, types, and employment conditions of their employees.²⁰

Each of these terms, initiative, immunity, structure, function, fiscal, and personnel aim at easing the twenty-first century framers’ job of “establishing good government from reflection and choice.”²¹

III. LOCAL GOVERNMENT IN THE WISCONSIN CONSTITUTION: A HISTORICAL OVERVIEW

The Wisconsin State Constitution, like other state constitutions,²² is a document limiting the otherwise plenary powers of the legislative branch.²³ The plenary power principle impacts on the interpretive practice of the Wisconsin judiciary. Each validly enacted statute benefits from a presumption of constitutionality and an interlinked judicial policy of deference to the legislature’s judgment.²⁴ The

17. See U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 7, at 1.

18. *See id.*

19. *City of New Orleans v. Bd. of Comm’rs*, 640 So. 2d 237, 242 (La. 1994).

20. U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 7, at 1.

21. THE FEDERALIST NO. 1 (Alexander Hamilton).

22. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 7–9 (1998). *But see* Richard B. Sanders & Barbara Mahoney, *Restoration of Limited State Constitutional Government: A Dissenter’s View*, 59 N.Y.U. ANN. SURV. AM. L. 269, 269–70 (2003).

23. *Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424, 430 (1996).

24. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 911–14, 426 N.W.2d 591, 598–600 (1998) (discussing whether legislation empowering a special district

following brief summary of the constitutional fate of local government in Wisconsin calls attention to the role played by the judiciary in shaping institutional policy.

A. From the Northwest Ordinance to Statehood (1787–1847)

The Northwest Ordinance of 1787 fixed responsibility for regulating and defining the powers of civil officers in each county or township upon the territorial legislature.²⁵ The 1836 statute establishing the Wisconsin Territorial Government mandated the election of township and county officers but specified appointment of “judicial officers, justices of the peace, sheriffs, and clerks of court.”²⁶ The 1846 Wisconsin Enabling Act left all governance issues to the framers of the state constitution with one fiscal and functional exception. One section of public land in every township was set aside and the proceeds from its sale were earmarked for the use of schools.²⁷

B. Local Government in the 1848 Wisconsin Constitution

Constitutional provisions pertinent to local government in Wisconsin are not organized by topic. The constitution does not have the general local government article found in modern state constitutions.²⁸ It does not even have the entity-specific article found in the contemporary state Constitutions of Ohio and Michigan.²⁹ Instead, relevant constitutional provisions must be pieced together from article IV (Legislative), article VIII (Finance), article IX (State Property), article X (Public Education), article XI (Corporations), and article XIII (Miscellaneous).

State framers, then and now, face two hard institutional policy issues.³⁰ The first issue is how to allocate decision making power at the state level. The 1848 framers adopted the usual separation of powers model creating executive, legislative, and judicial branches of state

violates WIS. CONST. art. IV, §§ 18, 31, 32); *Van Gilder v. City of Madison*, 222 Wis. 58, 73–74, 267 N.W. 25, 31–32 (1936) (discussing deference due to legislature’s determination of what is a matter of state-wide concern, WIS. CONST. art. XI, § 3 (1)).

25. Northwest Ordinance § 7, Act of Congress, July 13, 1787, U.S. Rev. Stat. 13 (2d ed. 1878).

26. Wisconsin Territory § 7, Act of Congress, April 20, 1836, 5 Stat. 10.

27. Enabling Act § 7 (1), Act of Congress, August 6, 1846, 9 Stat. 56.

28. See, e.g., PA. CONST. art. IX.

29. MICH. CONST. arts. X (counties), XI (townships) (1850); OHIO CONST. art. X (county and township organization) (1851).

30. Arthur Maass, *Division of Powers: An Areal Analysis*, in AREA AND POWER 10, 14–18 (Arthur Maass ed., 1959) (distinguishing between capital and areal division of power).

government. The next issue is deciding what role, if any, the three branches ought to play in framing local government. The 1848 framers put most of the burden on the state legislature. But the legislature's power was both limited and qualified, as the subsequent discussion points out.

The legislature has the "duty" and is "empowered[] to provide for the organization of cities and incorporated villages."³¹ But the legislature is admonished "to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."³² This provision more nearly reflects the experience of New York State,³³ from whose constitution the provision was taken, than that of frontier Wisconsin. The provision anticipates the story of municipal fiscal corruption but leaves preventive measures to the legislature's discretion.

The legislature is also expressly authorized to confer, in its discretion, upon county boards of supervisors "such powers of a local, legislative and administrative character as they shall from time to time prescribe."³⁴ This provision, again taken from New York,³⁵ seems puzzling since it neither empowers counties nor shields them from state legislative action. It seems drafted to forestall an objection based on the non-delegation doctrine.³⁶ "The constitutional basis for the non-delegation doctrine is the clause vesting the legislative power in the state legislature."³⁷ That constitutional assignment of legislative power to the legislature is interpreted by the judiciary to bar the legislature from delegating legislative powers to others, including local governments.

This judge-made rule has played a big role in two important Wisconsin cases. A statute giving a county board a voice on dam construction was struck down on the grounds that it unconstitutionally delegated power over a matter of statewide concern.³⁸ And a statute granting broad powers of local self-government to the City of

31. WIS. CONST. art. XI, § 3 (amended 1912).

32. *Id.*

33. N.Y. CONST. of 1846, art. III, § 17.

34. WIS. CONST. art. IV, § 22.

35. N.Y. CONST. of 1846, art. III, § 17.

36. The non-delegation doctrine is discussed in Libonati, *supra* note 7, at 39.

37. *Id.*

38. *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 55 N.W.2d 40 (1952).

Milwaukee was struck down on the same grounds.³⁹ The latter case led to a reform of the state constitution when the Home Rule Amendment was adopted.

The 1848 constitution contains a process constraint on the legislature. Local laws are not valid unless they embrace one subject, and that subject must be signposted in the title.⁴⁰ This provision, also taken from the 1846 New York Constitution,⁴¹ is linked in the current constitution to provisions concerning local laws that were adopted in 1872 and will be discussed *infra*.

The principle of uniformity is woven through various provisions of the 1848 constitution as a limitation on legislative power. Thus, the legislature's power to choose the structure of town and county government is hedged by the requirement that the system "shall be as nearly uniform as practicable."⁴² And district schools "shall be as nearly uniform as practicable."⁴³ These provisions are good examples of the inclusion of "enigmatic"⁴⁴ language in the Wisconsin Constitution. Enigmatic provisions pose interpretive problems and invite litigation. And, predictably, litigation has occurred.⁴⁵ In 1972, a piecemeal amendment deleted the requirement that "county government be uniform."⁴⁶ And the school district uniformity requirement did not bar the legislature from enacting a successful program of school district consolidation.⁴⁷ But twenty-first century framers should bear in mind that enigmatic language has the two-fold effect of generating significant litigation-related transaction costs that act as a barrier to legislative reform and of giving courts the last word on the validity of structural reform.

The 1848 constitution addresses the issue of citizen choice in structural policy-making. Citizen choice is expanded by filling some county offices (sheriff, coroner, register of deeds, and district attorney)

39. State *ex rel.* Mueller v. Thompson, 149 Wis. 488, 489, 494, 497, 137 N.W. 20, 21, 23, 24 (1912).

40. WIS. CONST. art. IV, § 18.

41. N.Y. CONST. of 1846, art. III, § 16.

42. WIS. CONST. art. IV, § 23 (amended 1962).

43. *Id.* art. X, § 3.

44. See generally Jack Stark, *Enigmatic Grants of Law-Making Rights and Responsibilities in the Wisconsin Constitution*, 81 MARQ. L. REV. 961 (1998).

45. JACK STARK, THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE 99-101 (1997) (Reference Guides to the State Constitutions of the United States, No. 28, G. Alan Tarr series ed., 1997) (discussing case law).

46. *Id.* at 99.

47. *Id.* at 187.

by election rather than by appointment.⁴⁸ And the local electorate, not the legislature, chooses whether small county boundaries shall be divided or detached⁴⁹ and whether the location of the county seat shall be changed.⁵⁰

The 1848 constitution both authorizes the decentralization of the education function by requiring the legislature to establish district schools and provides for a degree of centralized state control by creating the elected state Office of Superintendent of Public Instruction.⁵¹ The policy of joint state and local responsibility for the provision of free educational services is reinforced by a provision requiring city and town tax efforts in support of public education.⁵² Default in this obligation triggered a withholding of state school fund appropriations.⁵³

The uniformity theme re-emerges in the arena of fiscal policy. The Finance Article mandates a rule of tax uniformity.⁵⁴ The voluminously litigated and much-amended Tax Uniformity Clause screens legislation aiming at fiscal reform through a less-than-transparent, judge-made, six-part test⁵⁵ that is viewed by an expert on the Wisconsin Constitution as

48. WIS. CONST. art. VI, § 4.

49. *Id.* art. XIII, § 7.

50. *Id.* art. XIII, § 8.

51. *Id.* art. X, §§ 1, 3.

52. *Id.* art. X, § 4.

53. *Id.* art. X, § 5.

54. *Id.* art. VIII, § 1.

55. The Wisconsin Supreme Court described the six-part test in *Gottlieb v. City of Milwaukee*:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

33 Wis. 2d 408, 424, 147 N.W.2d 633, 641-42 (1967).

incomplete, contradicted by other cases, and inconsistently applied.⁵⁶ Twenty-first century framers should reexamine whether the Tax Uniformity Clause should continue to serve as “the foundation of the state’s tax policy.”⁵⁷

C. Immunity But Not Initiative: 1872 Amendments Curbing “Special” Laws Affecting Local Governments

In 1871, a provision dealing with “special” legislation⁵⁸ was added to the Wisconsin Constitution’s existing subject-title requirement for “local” bills.⁵⁹ The rationale for its adoption in Wisconsin was well-expressed by Chief Justice Ryan in an 1877 opinion:

And in all instances relating to things *publici juris*, they [the legislature] broke the uniformity and harmony of law so essential to good government; substituting special for general rules, and rendering a large body of the municipal law fragmentary in character, and different by locality. After long endurance of such excesses of legislation, the amendment of 1871 was adopted; in order, so far as it went, to confine legislation to its legitimate objects, to substitute general for special enactments, and to restore order and uniformity to municipal law.⁶⁰

But the Wisconsin Supreme Court ruled that the amendment did not strip the legislature of its power to classify,⁶¹ and the court often defers to the legislature’s judgment that population size is a proper basis for classification.⁶² And so, for example, there are four classes of cities in Wisconsin defined by population size whose structure and function are partly fixed by the city’s class.⁶³

56. STARK, *supra* note 45, at 159.

57. *Id.* at 155.

58. WIS. CONST. art. IV, §§ 31–32.

59. *Id.* art. IV, § 18.

60. Kimball v. Town of Rosendale, 42 Wis. 407, 415 (1877).

61. Johnson v. City of Milwaukee, 88 Wis. 383, 388–40, 60 N.W. 270, 271 (1894).

62. State *ex rel.* Busacker v. Groth, 132 Wis. 283, 305–06, 112 N.W. 431, 437–39 (1907); State *ex rel.* Risch v. Bd. of Tr. of Policemen’s Pension Fund, 121 Wis. 44, 51–54, 98 N.W. 954, 956–58 (1904).

63. Stephen E. C. Hintz, *Wisconsin*, in DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA 453, 454 (2001).

In 1988, the Wisconsin Supreme Court attempted to clear up the unsettled state of the law. Several municipalities disputed the validity of a statute giving fiscal powers impacting on their capital budgets to a special purpose district classified by population.⁶⁴ The court majority described the clashing arguments shaping constitutional discourse about the meaning of the provisions governing local or special laws. In particular, the court observed that:

Those cases in which the challenge is brought under sec. 31 invariably have followed the same patterns. A certain legislative provision is challenged as being one of the prohibited areas of legislation enumerated in sec. 31. The proponents of the legislation rely on sec. 32, claiming that the challenged legislation is a general law which is uniform in application throughout the state.⁶⁵

The court majority sought to limit the century-old debate by linking classification case law developed under sections 31 and 32 to subject-title provision analysis by way of a “sophisticated multirule test to determine whether legislation which is general on its face is impermissibly local or private.”⁶⁶ The challenged statute did not pass subject-title muster under the six-part test⁶⁷ applied by the court.⁶⁸ The dissent criticized the majority both for its failure to require the challenger to prove the law’s unconstitutionality beyond a reasonable doubt and to defer to the legislature’s judgment concerning the soundness and germaneness of the classification.⁶⁹

The dissent raised a significant issue for twenty-first century framers—an issue that caused Virginia local governments to oppose the insertion of a provision banning local or special laws in the Virginia Constitution.⁷⁰ In Virginia, the framers believed that the General Assembly’s authority to devolve powers on local government by special act was “an essential means for ensuring flexibility and adoptability.”⁷¹

64. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 898, 426 N.W.2d 591, 593 (1988).

65. *Id.* at 906, 426 N.W.2d at 596.

66. *Id.* at 914, 426 N.W.2d at 600.

67. *Id.* at 907–08, 426 N.W.2d at 597.

68. *Id.* at 916–18, 426 N.W.2d at 600–02.

69. *Id.* at 928–29, 426 N.W.2d at 605–06 (Abrahamson, J., dissenting).

70. COMM’N ON CONSTITUTIONAL REVISION, *THE CONSTITUTION OF VIRGINIA* 228–29 (1969).

71. *Id.*

In Wisconsin, however, that debate may be short-circuited by a 1993 amendment to section 32 stating that “[s]ubject to reasonable classification, such laws shall be uniform in their operation throughout the state.”⁷² This amendment underscores the legislature’s power to classify while continuing to subject its work product to judicial review for the reasonableness of the classifications adopted. In any event, the three existing provisions shield Wisconsin local government from some state statutes but do not give them additional authority to make policy.

D. Prelude to the Home Rule Amendment

The most important change in Wisconsin policy toward local government between 1871 and the 1924 Home Rule Amendment came in 1874. The constitution was amended to entrench precise rules of fiscal policy by specifying debt limits, providing for the collection of taxes to pay off the debt, and requiring repayment of the borrowed principal within twenty years.⁷³ This provision applied to every county, city, town, village, school district, or other municipal corporation.⁷⁴

But the development of three doctrines limiting legislative choice over a range of policy issues, including policies concerning local governments, was animated by the nineteenth century Wisconsin judiciary. These doctrines, at best, lightly tethered to the text and legislative history of the 1848 constitution are the following: the public trust doctrine,⁷⁵ the public purpose doctrine,⁷⁶ and the non-delegation doctrine.⁷⁷ Each of these doctrines, as the subsequent discussion points out, continues to have an effect upon current state-local relations. Whether and to what extent these doctrines ought to be curbed, qualified, or adjusted is an issue for twenty-first century framers. But no change in state constitutional policy can be effected without careful consideration of the impact of these doctrines on local autonomy.

The “public trust” doctrine bars the legislature from pursuing a policy of decentralized decision making over the domain subject to the public trust. Pertinent cases involving local government have to do with local legislative jurisdiction over navigable waters. The public trust over

72. WIS. CONST. art. IV, § 32.

73. The original text of the amendment to Wisconsin Constitution article XI, section 3, is reprinted in 7 FRANCIS NEWTON THORPE, FEDERAL AND STATE CONSTITUTIONS 4103 (Francis Newton Thorpe ed. 1909).

74. WIS. CONST. art. XI, § 3.

75. See STARK, *supra* note 45, at 176–80.

76. See *id.* at 219–24.

77. See *id.* at 82–83.

navigable waters is viewed by the courts as mandating state centralized control over the location of dams,⁷⁸ over local government public works projects,⁷⁹ and over licensing of boats.⁸⁰ The doctrine applies with equal force to home rule units because the matter in question is of state wide concern.⁸¹ Twenty-first century framers will most likely deal with these state-local relations questions as part of a larger deliberation and debate about the contents of a revised and modernized article on the subject of the environment and natural resources.⁸²

The public purpose doctrine sprang to life in Wisconsin in the context of challenges to enactments authorizing local governments to build public works⁸³ and to raise money by taxation to pay bounties to Civil War enlistees.⁸⁴ Although these enactments were sustained, the doctrine has been an obstacle to legislation impacting on intergovernmental fiscal arrangements. For example, a statute authorizing counties and municipalities to contract with one another and with local landowners to perform construction and repair work on private roads flunked the amorphous public purpose test.⁸⁵ More notably, the Wisconsin Supreme Court in *Buse v. Smith*⁸⁶ immunized school districts from a fiscal mandate requiring wealthier school districts to share their tax revenues with poorer districts. The court ruled not only that a “tax must be for a public—not a private—purpose” but also that “[t]he purpose of the tax must be one which pertains to the public purpose of the [taxing] district within which the tax is to be levied and raised.”⁸⁷ This decision, with its clear localist tilt, will impact upon the framing of the Education Article⁸⁸ of the twenty-first century Wisconsin Constitution. And, because the decision on its face would bar any legislative policy commanding own-source revenue-sharing, *Buse v.*

78. *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 55 N.W.2d 40 (1952).

79. *Vill. of Menomonee Falls v. Dep't of Natural Res.*, 140 Wis. 2d 579, 603–04, 412 N.W.2d 505, 515–16 (Ct. App. 1987).

80. *City of Madison v. Tolzmann*, 7 Wis. 2d 570, 575–76, 97 N.W.2d 513, 517 (1959).

81. *Id.*

82. See generally Barton H. Thompson Jr., *The Environment and Natural Resources*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 7, at 307–39; Jason J. Czarnecki, *Environmentalism and the Wisconsin Constitution*, 90 MARQ. L. REV. 465 (2007).

83. *Soens v. City of Racine*, 10 Wis. 214 (1860).

84. *Brodhead v. City of Milwaukee*, 19 Wis. 658 (1865).

85. *Heimerl v. Ozaukee County*, 256 Wis. 151, 160–61, 40 N.W.2d 564, 568–69 (1949).

86. 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

87. *Id.* at 590, 247 N.W.2d at 160.

88. See generally Paul L. Tractenberg, *Education*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 7, at 241.

Smith must be taken into account in any revision of constitutional provisions pertinent to state and local finance.⁸⁹ The interdependent nature of these policy issues is put in bold relief in the long title of a recent book by William Fischel—*The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies*.⁹⁰

The non-delegation doctrine is another nineteenth century barrier that obstructs legislative delegation of authority to local government.⁹¹ The doctrine has led twentieth century Wisconsin courts down the path of narrow construction of the language in the 1848 constitution expressly authorizing the legislature to give counties “powers of a local, legislative and administrative character.”⁹² And so, a local option statute empowering counties to declare an ordinance violation to be a crime and to provide for imprisonment as a punishment “is void as an attempt to confer sovereignty upon the counties.”⁹³ In a sweeping ruling five years later, the court held that the legislature is barred from devolving matters of “paramount [state] interest” on counties, such as questions concerning dam construction on a navigable waterway.⁹⁴ On the fiscal front, a law granting counties the power to grant tax exemptions is invalid because that power is “the exclusive prerogative of the legislature.”⁹⁵

The most influential discussion of the linkage between the non-delegation doctrine and legislative sovereignty is found in the majority and concurring opinions in the leading case *State ex rel. Mueller v. Thompson*.⁹⁶

The Home Rule Act of 1911 granted cities both broad authority to change their charters and “all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the constitution or laws, operative

89. See generally Richard Briffault, *State and Local Finance*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 7, at 211.

90. See generally WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* (2001).

91. Libonati, *supra* note 7, at 39. The basis for the doctrine is discussed in the text *supra* notes 36–38.

92. WIS. CONST. art. IV, § 22.

93. *State ex rel. Keefe v. Schmiede*, 251 Wis. 79, 85, 28 N.W.2d 345, 348 (1947).

94. *Muench v. Publ. Serv. Comm'n*, 261 Wis. 492, 515 f–g, 55 N.W.2d 40, 43 (1952).

95. *Univ. of Wis. La Crosse Found., Inc. v. Town of Washington*, 182 Wis. 2d 490, 497, 513 N.W.2d 417, 420 (Ct. App. 1994).

96. 149 Wis. 488, 498, 137 N.W. 20, 24 (1912).

generally throughout the state.”⁹⁷ The challenged charter amendment enacted pursuant to this statutory grant put socialist-governed Milwaukee in the business of manufacturing and selling ice to its citizens.⁹⁸

The opinion of the court by Justice Marshall teaches two lessons to twenty-first century Wisconsin framers. First, any express grant of power to the legislature to make institutional policy is likely to be interpreted as an implied restraint. Thus, the legislature’s 1848 duty and power “to provide for the organization of cities”⁹⁹ reserved to the legislature an “exclusive authority . . . of granting, amending, and repealing municipal charters” that cannot be devolved upon Milwaukee’s citizens.¹⁰⁰ Second, the non-delegation doctrine is a principle that normally cannot be overridden without an express constitutional amendment.¹⁰¹

However, it is the concurring opinion by Justice Timlin, not that of the majority, which most strongly affected the fate of the project of local self-government in Wisconsin. In that opinion, Justice Timlin reviewed the efforts of other states to entrench an areal division of powers—affording home rule entities initiative as to “municipal” matters or affairs and promising immunity from legislative interference in “municipal” matters or affairs.¹⁰² He predicted that any constitutional reform using the term “municipal” would lead either to continuous judicial interference¹⁰³ or to continued legislative interference.¹⁰⁴ Judicial interference develops “because of the constantly recurring necessity for construction to determine what subjects are within and what without the local power.”¹⁰⁵ Any attempt to confer immunity on home rule units further encourages judicial interference because “every section of the charter and every ordinance must in time come before the courts in order to ascertain whether it is a municipal affair only, and so

97. *Id.* at 490, 494, 137 N.W. at 22, 24.

98. *Id.* at 499, 137 N.W. at 25 (Timlin, J., concurring).

99. WIS. CONST. art. XI, § 3.

100. *Mueller*, 149 Wis. 488, 493, 137 N.W. 20, 23.

101. *Id.* at 497–98, 137 N.W. at 24.

102. *Id.* at 499, 504–515, 137 N.W. at 25, 26–30 (Timlin, J., concurring) (discussing home rule provisions in Oregon, California, Missouri, Washington, Minnesota, and Michigan constitutions).

103. *Id.* at 510, 515, 517–18, 137 N.W. at 26, 28, 31.

104. *Id.* at 517, 137 N.W. at 31.

105. *Id.* at 510, 137 N.W. at 29.

whether subject to repeal or amendment by the state legislature.”¹⁰⁶ But any constitutional grant of “municipal” powers that does not curb the legislature leaves intact the legislature’s sovereign authority to define and redefine what matters are exclusively for the state or for the municipality “as it deems wisest or most expedient.”¹⁰⁷ And so, the language of a proposed home rule constitutional amendment then pending in the legislature could deliver neither the peace nor the uniformity sought by its proponents.¹⁰⁸

E. The Home Rule Amendment: Interpretation and Implementation

No Wisconsin framer should ignore the role that educating the state judiciary plays in shaping institutional policy. The framers of the 1924 Home Rule Amendment apparently provided little by way of formal legislative history to guide Wisconsin courts in their interpretive task. In the leading case, *Van Gilder v. City of Madison*, Chief Justice Rosenberry made use of a grab bag of sources in order to make sense of the enacted text. These sources included Justice Timlin’s 1912 concurrence, a 1916 treatise on municipal home rule, the 1918 legislative history of a proposed home rule amendment in Massachusetts, and the 1929 concurring opinions of Justices Cardozo and Pound in a leading New York decision.¹⁰⁹

The *Van Gilder* case involved a conflict between a home rule city seeking to retrench pay levels of police officers and a statutorily created board of police and fire commissioners. A 1935 provision, although applicable only to cities of the second through fifth classes, expressly provided that it was enacted “for the purpose of providing a uniform regulation of police and fire departments.”¹¹⁰ The statute gave the final say on salary decreases to the board. Madison passed a charter ordinance grounded on the constitutional grant of the powers to determine its “local affairs and government.”¹¹¹ The board contended that the home rule power is subject to “enactment of statewide concern as with uniformity shall affect every city or every village.”¹¹² The court resolved the matter in favor of the special district board finding that the

106. *Id.* at 517–18, 137 N.W. at 31–32.

107. *Id.* at 516, 137 N.W. at 31.

108. *Id.* at 517, 137 N.W. at 31.

109. *Van Gilder v. City of Madison*, 222 Wis. 58, 64–66, 81–83, 267 N.W. 25, 27–28, 34–35 (1936).

110. *Id.* at 74, 267 N.W. at 31.

111. WIS. CONST. art. XI, § 3(1).

112. *Id.*

law enforcement function is a matter of statewide concern.¹¹³ Hence, the home rule city's attempt to make fiscal policy by cutting police personnel salaries did not succeed.

The *Van Gilder* case contains important caveats for twenty-first century framers.

First, reinforcing Justice Timlin's warnings, the court observed that phrases like "local affairs" and "statewide concern" are "practically indefinable."¹¹⁴ And enigmatic phrases breed uncertainty across the board—for citizens and interest groups seeking or opposing municipal legislation, for municipal officials wondering whether they are free to respond to those demands, for attorneys advising municipal officials, for the attorney general issuing advisory opinions, as well as for the courts.

Second, entrenching a strong split between "local affairs" and "statewide concern" did not reflect "the fact that the functions of state and local governments necessarily overlap"¹¹⁵ seventy years ago, nor does it match today's realities.

Third, the home-rule amendment imposes the "heavy burden of developing the lines of this big problem of policy upon the judicial branch of the government."¹¹⁶ Accordingly, the *Van Gilder* court stated the rationale for a strong principle of judicial deference to the legislature's judgment:

In the first instance the determination of what is a "local affair" and what is a "matter of state-wide concern" would seem to be for the Legislature for the reason that such a determination must involve large considerations of public policy. Even though the determination made by it should be held not to be absolutely controlling, nevertheless it is entitled to great weight because matters of public policy are primarily for the Legislature.¹¹⁷

This view shaped Wisconsin case law. For example, the principle of judicial deference was invoked in the *Brelsford* case challenging a statute that inverted the *Van Gilder* court's holding that police

113. *Van Gilder*, 222 Wis. at 83–84, 267 N.W. at 35.

114. *Id.* at 73, 267 N.W. at 31.

115. *Id.* at 64, 267 N.W. at 27.

116. *Id.* at 73, 267 N.W. at 31.

117. *Id.* at 73–74, 267 N.W. at 31.

regulation is primarily a matter of state-wide concern.¹¹⁸ That statute expressly declared that police pension benefits in cities of the first-class “are matters of local affairs and government and shall not be construed as an enactment of state wide concern.”¹¹⁹ The court, in upholding Milwaukee’s charter ordinance, reminded the puzzled reader that *Van Gilder* is still good law.¹²⁰ *Van Gilder* deferred to the legislature’s express judgment that, in cities of the second through fourth classes, matters involving police personnel are of state wide concern. Likewise the *Brelsford* court deferred to the legislature’s express judgment that some police personnel matters are predominantly a local affair in cities of the first class (Milwaukee). The Wisconsin Supreme Court’s principle of deference to the legislature avoids the problems foreseen by Justice Timlin and by Chief Justice Rosenberry as to judicial interference in big policy questions. But the court’s approach effectively deprives home rule units of whatever shield against legislative interference the 1924 amendment seemed to promise.¹²¹

The deference principle’s most far-reaching effects on the functional powers of home rule units are found in the Wisconsin Supreme Court’s preemption case law. To make a long story short, the Wisconsin Supreme Court currently applies a four-part test to determine whether a municipal enactment is trumped by a state statute:

A municipal ordinance is preempted if (1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation. Should any one of these tests be met, the municipal ordinance is void.¹²²

The first two criteria are unavoidable, given that the deference principle makes Wisconsin courts quite unreceptive to claims that the statute expressly limiting municipal initiative trenches on a constitutionally immunized “local affair.” A more robust reading of

118. *State ex rel. Brelsford v. Ret. Bd. of Policemen’s Annuity & Benefit Fund*, 41 Wis. 2d 77, 82–83, 163 N.W.2d 153, 155 (1968).

119. Act of July 19, 1951, ch. 705, § 3, 1951 Wis. Sess. Laws 523, 523–24.

120. *Brelsford*, 41 Wis. 2d at 86, 163 N.W.2d at 157.

121. *Van Gilder*, 222 Wis. at 80–81, 267 N.W. at 34–35.

122. *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651–52, 547 N.W.2d 770, 773 (1996) (citations omitted); *see also* *Anchor Savings & Loan Ass’n v. Equal Opportunities Comm’n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234, 237 (1984) (leading case).

“local affair” immunity would make every preemption question an issue of constitutional dimension. And when the legislature expressly declares its purpose, as it did in *Van Gilder*, to compel uniformity, the judiciary is bound to defer. The danger of judicial interference masked as legislative deference is most acute when the legislature has not addressed the issue either expressly or in an unambiguous purpose clause. A broad implied preemption doctrine not firmly tied to choices made by the legislature in the statutory text¹²³ leaves less room for governance by elected local government officials and more room for governance by unelected civil servants at the state capitol. The preemption issue ought to be addressed by twenty-first century framers in view of the emergence and proliferation of specialized state administrative agencies with broad rule-making authority.

If, as Justice Timlin observed in 1912, home rule is not a policy “worth considering without the power of taxation on the part of the city for city purposes,”¹²⁴ then the Home Rule Amendment, as interpreted, needs rethinking by contemporary framers. For Wisconsin courts uniformly deny that the home rule power over “local affairs” includes any grant of taxing authority.¹²⁵ These cases pursue a policy, as do the preemption cases, of reading “local affairs” as language limiting rather than granting powers to home rule units.

This historic overview of the constitutional face of state-local relations in Wisconsin shows that the current document lacks focus, invites disjointed interpretation by the legislature and the courts by using enigmatic phrases, and embraces the plural values of uniformity and diversity without providing a standard by which to measure the trade-offs between these competing values.

The question of the day, whether the Wisconsin Constitution is obsolete, cannot be answered by looking at the current document in isolation from the models of state-local relations in other states. The final section sketches the choices that other state framers have made in light of the following issues posed by the U.S. Advisory Commission on Intergovernmental Relations:

123. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 366–68 (2d ed. 2005) (discussing policy issues underlying federal preemption doctrine).

124. State *ex rel.* Mueller v. Thompson, 149 Wis. 488, 516, 123 N.W. 20, 31 (1912) (Timlin, J., concurring).

125. City of Plymouth v. Elsner, 28 Wis. 2d 102, 107, 135 N.W.2d 799, 802 (1965); State *ex rel.* Thomson v. Giessel, 265 Wis. 207, 213, 60 N.W.2d 763, 766 (1953).

1. Is it desirable to increase or decrease the restrictions imposed on the power of the state to regulate local government?
2. What degree of autonomy, however defined, should be granted to local government?
3. To what extent should the local electorate have a choice as to the form of local government?
4. Should all local governments be eligible for local autonomy?
5. To what extent should local governments be authorized to engage in intergovernmental cooperation?
6. To what extent should local governments be authorized to contract and otherwise associate with the private sector?
7. To what extent should local autonomy be limited, in dealing with a particular subject, by the existence of state statutes relating to the same subject?
8. What role should courts have in determining issues of local autonomy?¹²⁶

IV. SISTER STATE MODELS OF STATE-LOCAL RELATIONS

A comparative volume can and has been written on this topic.¹²⁷ This section is limited to the discussion of state constitutional reforms enacted since 1960.

A. Constitutional Minimalism

The 1969 Connecticut constitutional provision is notably laconic. It makes clear that the legislature can delegate legislative authority to local governments but leaves the scope of powers entirely to the discretion of the state legislature.¹²⁸

The 1972 Virginia Constitution also emphasizes legislative supremacy by permitting special legislation by a two-thirds affirmative vote of the legislature.¹²⁹ The constitution also includes a provision defining the terms county, city, town, regional government, general law,

126. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 7, at 15.

127. See generally KRANE, RIGOS & HILL, JR., *supra* note 63.

128. CONN. CONST. art. X, § 1.

129. VA. CONST. art. VII, §§ 1, 2.

and special act¹³⁰ that, if emulated in Wisconsin, could tidy up some loose ends in the Badger State constitution.

B. Wisconsin Plus

It is hard to say that the Wisconsin home rule formula is obsolete when Kansas, Iowa, and Wyoming have adopted its "local affairs and government" phraseology since 1960.

The 1960 Kansas Constitution adds an express grant of the power to levy "taxes, excises, fees, charges and other exaction."¹³¹ The 1968 provision of the Iowa Constitution also uses the "local affairs and government" formula¹³² but inserts a cleaner preemption rule,¹³³ a disavowal of strict construction of grants of municipal power,¹³⁴ and a clear statement that the legislature alone can authorize taxes.¹³⁵ A 1972 Wyoming provision also adopts the "local affairs and government" formula expressly excepting statutes uniformly applicable to all cities and towns and statutes prescribing debt limits.¹³⁶ Again, the legislature expressly retains authority over the levying of taxes, excises, fees or any other charges.¹³⁷ And Wyoming adds a rule that grants of home rule power and authority "shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns."¹³⁸

C. The Devolution of Powers Model

The 1968 Pennsylvania home rule provision typifies the devolution of powers model: "A municipality which has a home rule charter may 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."¹³⁹

This language aims at minimizing judicial interference by using the indefinite article "any" rather than "local," "municipal," or "state wide"—terms that invite lawyerly ingenuity in interpretation. The "not

130. *Id.* art. VII, § 1.

131. KAN. CONST. art. 12, § 5(b).

132. IOWA CONST. art. III, § 38A.

133. Home rule power and authority must not be "inconsistent with the laws of the general assembly." *Id.*

134. *Id.*

135. *Id.*

136. WYO. CONST. art. 13, § 1(b).

137. *Id.*

138. *Id.* art. 13, § 1(d).

139. PA. CONST. art. IX, § 2.

denied by” language lays down a preemption rule framed by state constitution makers, not by judges. The Pennsylvania Constitution also contains a definition section that inclusively defines “municipality” to mean a county, city, or any similar general purpose unit of government thus making each of these entities eligible for home rule status.¹⁴⁰

In addition, the Pennsylvania local government article addresses a vexed issue in Wisconsin—an action-forcing provision requiring the legislature to establish uniform “procedure[s] for consolidation, merger, or change of the boundaries of municipalities.”¹⁴¹

Other provisions that may be of interest in Wisconsin include a concise and flexible statement of the public purpose limitation as it applies to local government expenditures,¹⁴² as well as a carefully crafted local government debt limit linked to total revenue.¹⁴³

*D. The Illinois Model*¹⁴⁴

Article VII of the Illinois Constitution illustrates the complex kind of decision rules that must be supplied if the goal of entrenching the rights of local governments and local citizens is to be realized. These decision rules include:

1. the definition of entities eligible for home rule status;
2. the scope of powers afforded these home rule entities;
3. the interpretation of powers granted to them;
4. the basis for dealing with interlocal conflict and collaboration;
and
5. the extent of state legislative control over the scope of home rule powers.

Woven throughout the fabric of the article are requirements for local citizen choice.

The complexity of these rules reflects the difficulty of coming to terms with the multifaceted roles that local governments play in the division of governmental responsibilities in a modern society. Counties, cities, villages, and incorporated towns in Illinois are eligible for home

140. *Id.* art. IX, § 14.

141. *Id.* art. IX, § 8.

142. *Id.* art. IX, § 9.

143. *Id.* art. IX, § 10.

144. This section is drawn from Libonati, *supra* note 7, at 132–33.

rule status. A self-executing grant of home rule powers to certain counties and to municipalities with a population of more than 25,000 is subject to repeal by referendum. Otherwise, home rule status can be acquired only by referendum.¹⁴⁵

In contrast to devolution-of-powers constitutions, the Illinois article distinguishes between several kinds of local autonomy: form of government and office holding, functional, and fiscal matters. A home rule unit can adopt, alter, or repeal its currently prescribed form of government subject to referendum approval. Home rule municipalities and home rule counties possess diverse powers with respect to the creation, manner of selection, and terms of office of local officials.¹⁴⁶ Under this article, "a home rule unit may exercise any power and perform any function pertaining to its government and affairs."¹⁴⁷ What is pertinent to its government and affairs is defined expressly to include a copious grant of the police power "to regulate for the protection of the public health, safety, morals and welfare" and "to license."¹⁴⁸ This grant of power expressly includes the power to tax and to incur debt, attributes of fiscal autonomy without which home rule would be straitjacketed in practice.¹⁴⁹

The Illinois Constitution also addresses and resolves the problem created by Dillon's Rule.¹⁵⁰ How are decision makers to read the empowering text? The blunt answer is that "[p]owers and functions of home rule units shall be construed liberally."¹⁵¹ "Counties and municipalities which are not home rule units shall have only powers granted to them by law" plus expressly granted constitutional powers over form of government and office-holding, fiscal matters, and providing for local improvements and services.¹⁵² Limited purpose units of local government, such as townships, school districts, and special districts, "shall have only powers granted by law."¹⁵³ In addition, the article prescribes rules for resolving conflicts between legislative

145. See ILL. CONST. art. VII, §§ 4(a), 6(a)-(b).

146. See *id.* art. VII, § 6(a), (f).

147. *Id.* art. VII, § 6(a).

148. *Id.*

149. *Id.* See generally Rubin G. Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27 (1957).

150. Dillon's Rule "holds that the political subdivisions of a state owe their existence to grants of power from the state." U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 7, at 1.

151. ILL. CONST. art. VII, § 6(m).

152. *Id.* art. VII, § 7.

153. *Id.* art. VII, § 8.

enactments of home rule cities and home rule counties.¹⁵⁴ It also is sprinkled with provisions aimed at facilitating interlocal cooperation by contract and power sharing.¹⁵⁵

Finally, the article speaks to the neglected but pervasive question of state preemption of home rule powers. The Illinois home rule provision makes crystal clear that “[h]ome rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.”¹⁵⁶ There is no room for a doctrine of implied preemption in this language.

The express preemption question is dealt with generally as follows: “The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit”¹⁵⁷ When the state chooses to assert a monopoly, a three-fifths supermajority is required to deny or limit a home rule entity’s fiscal and other powers.¹⁵⁸ Significantly, only two areas of home rule autonomy are protected against legislative limitation or denial: the power to add to the stock of local capital improvements by special assessment and the power to finance the provision of special services.¹⁵⁹

The Illinois model offers a benchmark to twenty-first century framers for systematic disciplined debate and deliberation of the policy issues that confront them.

E. State Mandates

The most noteworthy constitutional reform in state-local relations in the past thirty years deals with the subject of unfunded state mandates.¹⁶⁰ Wisconsin courts accept that state funding of existing and enhanced programs is a matter of legislative grace.¹⁶¹ At least eleven state constitutions now accept the need for modifying the principle of state legislative supremacy in view of its impact on local government

154. *Id.* art. VII, § 6(c).

155. *Id.* art. VII, § 10.

156. *Id.* art. VII, § 6(i).

157. *Id.* art. VII, § 6(h).

158. *Id.* art. VII, § 6(g).

159. *Id.* art. VII, § 6(l).

160. See Robert M. Shaffer, Comment, *Unfunded State Mandates and Local Governments*, 64 U. CIN. L. REV. 1057, 1068–74 (1996).

161. *In re D.E.R.*, 155 Wis. 2d 240, 254, 455 N.W.2d 239, 245 (1990).

budgetary and taxing policy.¹⁶² Twenty-first century constitution-makers are well advised to confront this policy issue in their deliberations.¹⁶³

V. CONCLUSION

The following non-exclusive checklist is offered as a guide to potential reform of the constitutional structure of state-local relations in Wisconsin. However, it must be borne in mind that any project of reform ought to be preceded by and draw upon a careful multi-disciplinary study of local government in action.¹⁶⁴ Otherwise the project of determining the fate of government from the bottom-up runs the risk of being viewed from the top-down.

1. A Single Article

To reduce complexity and to clear the way for a thorough debate about the soundness of existing distinctions between and among county, city, village, town, school district, and special purpose governments, there should be a single local government article.

2. Rethinking the Role of the State Legislature

The current Wisconsin Constitution contains a variety of provisions aimed at narrowing the choices available to the legislature, including the following: restricting local or special laws, prescribing both uniformity in town and school district government and uniformity in taxation, and limiting the scope of powers that may be granted to county governments. In addition to text-based constraints, the legislature must reckon with judge-made public purpose, public trust, and non-delegation doctrines. The transaction costs imposed by varied and variable rules on the pulling and hauling inherent in legislation addressing state-local relations have not been investigated. Possible transaction costs span: (1) “search and information costs” to discover

162. CAL. CONST. art. XIII B, § 6; COLO. CONST. art. X, § 20(9); FLA. CONST. art. VII, § 18; HAW. CONST. art. VIII, § 5; LA. CONST. art. VI, § 14; MICH. CONST. art. IX, § 29; MO. CONST. art. X, § 21; N.H. CONST. pt. I, art. 28-a; N.J. CONST. art. VIII, § 2, para. 5; N.M. CONST. art. X, § 8; TENN. CONST. art. II, § 24.

163. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 267-68 (2004).

164. An important study worthy of emulation in this regard is DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, *DISPELLING THE MYTH OF HOME RULE* (2004).

the extent to which the legislature is permitted to make policy concerning local government structure, function, fiscal, and personnel matters; (2) “bargaining and decision costs” in enacting legislation pertinent to local government; and (3) “policing and enforcements costs” associated with implementing that legislation through judicial or administrative implementation.¹⁶⁵

State framers must then weigh whether the benefits flowing from constitutional constraints are fit for twenty-first century purposes. And, then, they must take up the job of deciding whether the benefits flowing from entrenching rules drawn from the current constitution as interpreted outweigh the costs.

3. Rethink Entrenching the State/Local Dichotomy in the Constitution

Strong judicial deference to the legislature yields no practical immunity even to home rule units.¹⁶⁶ And the home rule statute is liberally interpreted to give a lot of functional policy-making initiative even to towns.¹⁶⁷

4. Rethink Entrenching Uniformity Principles in the Constitution

Local government is about diversity and experimentation. Constitutional constraints that invalidate local option legislation merit skepticism.¹⁶⁸ Consider letting contending proponents of centralization versus decentralization slug it out issue by issue in the legislature.¹⁶⁹

5. Recognize the Collaborative Dimension of Intergovernmental Relations

165. Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979); see also R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 6 (1988).

166. See LEAGUE OF WIS. MUNICIPALITIES, *HANDBOOK FOR WISCONSIN MUNICIPAL OFFICIALS* 12–14 (2002); STARK, *supra* note 45, at 197.

167. See, e.g., *Town of Beloit v. County of Rock*, 2003 WI 8, ¶¶ 24, 30, 259 Wis. 2d 37, ¶¶ 24, 30, 657 N.W.2d 344, ¶¶ 24, 30.

168. See, e.g., *Thompson v. Kenosha County*, 64 Wis. 2d 673, 681–88, 221 N.W.2d 845, 850–53 (1974).

169. See generally Peter F. Nardulli, *Geo-Political Cleavages, Conflict, and the American States*, in *DIVERSITY, CONFLICT, AND STATE POLITICS* 3–27 (Peter F. Nardulli ed., 1989); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 684 (2001).

The constitutional design of the current document skews toward conflicts resolvable only through litigation. The 1971 amendments to the Missouri Constitution point in another direction. The Missouri Constitution now contains provisions relating to dissolution and annexation, consolidation and separation, joint participation in common undertakings, and interlocal cooperation.¹⁷⁰ The Pennsylvania Constitution makes room for regional government.¹⁷¹

Wisconsin's preemption doctrine is also a significant barrier to power sharing between state and local government, particularly in the sphere of regulatory policy-making.¹⁷² Twenty-first century framers should squarely address the preemption issue rather than leaving it to the judiciary.¹⁷³

6. Clarify Fiscal Policy

The current constitution, as interpreted, sounds an uncertain trumpet. On the one hand, local governments are immune from forced redistribution of own-source tax revenue. On the other hand, they are subject to unlimited unfunded state mandates.

Furthermore, the home rule provision confers zero taxing initiative. Home rule entities are utterly dependent on an express legislative grant of taxing power. Statutory levy limits are also in place. And the proposed Taxpayer Protection Constitutional Amendment would create a comprehensive revenue limit applicable to both the state and to every type of local government unit.¹⁷⁴

Local government borrowing capacity is tied to a percentage of taxable property—a measure that does not reflect the revenue stream flowing from non-property tax revenue. The Taxpayer Protection Amendment, if adopted, would subject taxes and most other revenues pledged for debt service to revenue limits.¹⁷⁵

Wisconsin constitution-makers operating within the framework of a convention are in a better position to assess future trade-offs required

170. MO. CONST. art. VI, §§ 5, 14, 16, 30(a).

171. PA. CONST. art. IX, §§ 6–7.

172. LEAGUE OF WIS. MUNICIPALITIES, *supra* note 166, at 16–18.

173. Briffault, *supra* note 163, at 263–64.

174. *See, e.g.*, S.J. Res. 63, 97th Leg., Reg. Sess. (Wis. 2005) (failing to pass the Senate, May 4, 2006); Assemb. J. Res. 77, 97th Leg., Reg. Sess. (Wis. 2005) (expiring at adjournment).

175. *See* MILWAUKEE COUNTY, WIS., PRELIMINARY OFFICIAL STATEMENT DATED MARCH 1, 2006, 37–38 (relating to debt issuance and general corporate purpose bonds).

for fiscal policy-making than proponents of piecemeal constitutional reform.

* * *