SPRING 2001 | VOLUME 3 | NO. 1

NYSBA
Government, Law and Policy Journal

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# Message from the Chair

## NYSBA's Fundamental Concepts Concerning Government Lawyers and Government Interests

By Henry M. Greenberg

On January 26, 2001, the governing body of the New York State Bar Association, the House of Delegates, approved a document entitled, "Fundamental Concepts Concerning Government Lawyers and Government Interests." Though only a few pages long, the Fundamental Concepts speak volumes about NYSBA's commitment to the public bar.

What are the Fundamental Concepts? There are five of them and they may be succinctly stated as follows:

**Concept one:** It is in the interest of the government that lawyers participate in activities sponsored by bar associations.

**Concept two:** Government lawyers may serve in leadership positions within professional organizations.

**Concept three**: Government lawyers may use indirect support services for professional association activities that have been deemed to be in the government interest.

**Concept four**: Government lawyers may encourage colleagues to join professional associations and to participate in professional activities.

**Concept five:** Government lawyers may accept discounts in dues, meeting and member benefits, and CLE course fee waivers or discounts.

These concepts probably seem self-evident for most government lawyers who already participate in bar association activities. But the story of how NYSBA came to endorse the Fundamental Concepts shows why they were needed and why they represent a significant advancement for government lawyers in the organized bar.

The story begins in 1997—the year when NYSBA's leadership came to grips with the fact that a remarkably high number of attorneys in public service did not belong to any bar association. This under-represented and therefore under-served attorney group posed dilemmas for NYSBA and public service attorneys alike. NYSBA is unable to fully represent the wide spectrum of the legal profession if public service attorneys, with their unique perspectives, go largely unheard, their talents untapped, and their needs unmet. The problem is all the more significant because public service attorneys represent about 15% of the lawyer population in New York State—roughly 18,000 attorneys!

To address the problem, NYSBA assembled a Task Force to study the needs and interests of public service attorneys. In surveying government lawyers, the Task Force discovered that managers of government law offices often discouraged their attorneys from participating in bar association activities. All too often, the Task Force learned, government lawyers were warned that bar association participation was not in the government's best interest or ethically problematic.

In 1998, based on the Task Force's recommendation, NYSBA approved the formation of the Committee on Attorneys in Public Service. The Committee's mission, pure and simple, was (and is) to advance the interests of the public bar. In just a few years, the Committee accomplished an enormous amount. For example, it created the *Government, Law and Policy Journal*, sponsored numerous CLE seminars, established the "Award for Excellence in Public Service," and developed a Web site accessible through NYSBA's home page.

At the same time, the Committee has explored ways to overcome the barrier to government lawyer participation identified by the 1997 Task Force. One approach that impressed the Committee was a set of principles of professional development identified by the American Bar Association to dispel the notion that government attorneys should not participate in bar association activities.

Inspired by the ABA's example, the Committee developed the Fundamental Concepts. To ensure that these Concepts met and articulated the highest ethical standards, the Committee consulted with the New York State Ethics Commission, which administers New York's ethics law for employees in the Executive Branch of State government as well as in public authorities and the public university system.

The Ethics Commission reviewed the Fundamental Concepts and advised the Committee that "government lawyers can contribute greatly to professional associations and that their participation in such associations should be encouraged. Nothing in the State's Ethics Law stands as an impediment to such participation."

Shortly thereafter, the Committee took the Fundamental Concepts to NYSBA's Executive Committee and House of Delegates. To be frank, the Committee was unsure what the response would be. Well, the verdict is in now and it's unanimous: the Fundamental Concepts are official NYSBA policy. Moreover, NYSBA is committed to distributing the Fundamental Concepts to as wide an audience of government lawyers as possible. In particular, the intention is to reach those managers of government law offices who fail to appreciate that government lawyers—no less than their counterparts in the private sector—have an "ethical obligation to assist in improving the legal profession and should do so by participating in bar association activities intended to advance the quality and standards of members of the profession." Code of Professional Responsibility, Cannon 6, Ethical Consideration 6-2.

*"The Ethics Commission reviewed the Fundamental Concepts and advised the Committee that 'government lawyers can contribute greatly to professional associations and that their participation in such associations should be encouraged. Nothing in the State's Ethics Law stands as an impediment to such participation.'"*

And so, the stature of public service attorneys has grown by leaps and bounds within NYSBA. Few would have predicted in 1997 that in 2001 the Association would embrace a vision of government lawyers as full partners in its efforts to improve the administration of justice.

But perhaps the best evidence yet of how far government attorneys have come is the recent appointment of Patricia K. Bucklin, the Committee's extraordinary Vice-Chair, to the position of NYSBA Executive Director. Pat is a career government lawyer, with over two decades of experience at the highest levels of the judicial and executive branches of State government. Those experiences make her eminently qualified to serve as the top administrator of the nation's largest voluntary state bar association—a fact everyone who has ever served in government knows. What is truly a cause for celebration is that NYSBA now knows it too!

**Henry M. Greenberg is Chair of the New York State Bar Association's Committee on Attorneys in Public Service. Government posts in which he has served include General Counsel to the New York State Department of Health, Assistant United States Attorney and law clerk to Judge (now Chief Judge) Judith S. Kaye of the New York State Court of Appeals.**

# Bucklin to Serve as Executive Director of New York State Bar Association

Patricia K. Bucklin, Vice-Chair of NYSBA's Committee on Attorneys in Public Service, was recently selected as the new Executive Director of the New York State Bar Association. Ms. Bucklin succeeds William J. Carroll, who will retire on June 1st after 25 years with the Association.

Ms. Bucklin will be leaving her position as Director of Public Affairs for the NYS Office of Court Administration, a position she has held since 1998. Prior to her current Public Affairs position, Ms. Bucklin worked for OCA as Special Counsel to the Chief Administrator and Intergovernmental Affairs Counsel. Before joining OCA, Ms. Bucklin held the position of First Assistant Counsel to Governor Mario M. Cuomo and before that was Assistant Counsel to the Governor. Prior to joining the governor's office, she was Deputy Consultation Clerk to the New York State Court of Appeals. Ms. Bucklin received her J.D. from Syracuse University College of Law and a B.A. from Niagara University.

On behalf of the Committee on Attorneys in Public Service, we congratulate Pat Bucklin on this tremendous professional achievement, and wish her good luck in her new position at the NYSBA.

## *Fundamental Concepts Concerning Government Lawyers and Government Interests*

Approved by the New York State Bar Association, House of Delegates, January 26, 2001

### CONCEPT ONE: IT IS IN THE INTEREST OF THE GOVERNMENT THAT ITS LAWYERS PARTICIPATE IN ACTIVITIES SPONSORED BY BAR ASSOCIATIONS.

*Commentary*: The obligation of professionals to participate in the professional and scholarly activities of their profession can be viewed as inherent to the nature of being a professional. This is especially true for lawyers. Professional organizations determine standards for the profession, provide vehicles for the improvement of the law, and are a forum for educational programs to maintain and improve the legal skills and talents required to function in the profession. Government lawyers—like other members of the profession—benefit from the continuing legal education activities of professional associations. All lawyers need ongoing exposure to new developments in the law. As professional legal associations work to address such changes and developments in the law, it is critical that the government's perspective be communicated within those professional forums so that a complete airing of views may occur. Accordingly, it is in the government's interest for its lawyers to participate actively in such bar association activities whether they be sponsored by the New York State Bar Association, local bar associations or other professional legal associations. If government lawyers are not included within regular bar association dialogues that help promote improvements in the law, the recommendations emerging from such deliberations will fail to reflect the views of a critical segment of our profession. If the NYSBA is truly to be the voice for the legal profession, its standards, its policy positions, and its public statements on legal issues should be arrived at only after due consideration of the views of government lawyers as well as private sector lawyers.

### CONCEPT TWO: GOVERNMENT LAWYERS MAY SERVE IN LEADERSHIP POSITIONS WITHIN PROFESSIONAL ORGANIZATIONS.

*Commentary:* Government lawyers are not prohibited from serving in leadership positions within professional associations solely by reason of government employment. Under a particular fact situation where there is a conflict or an appearance of conflict, lawyers—corporate, private or government—may have to recuse themselves from voting, from serving on a committee or from participating in a particular bar association activity. Decisions regarding recusal should be on a case-by-case basis and should be dependent on the facts of each situation: there should not be a presumption of conflict simply by reason of the lawyer's government employment. It is in the government's interest and the bar association's interest for that lawyer to consult with his or her employer prior to assuming the leadership post or first engaging in the activity. If that lawyer simply makes an individual judgment that assuming the post or participating in the activity creates no appearance of conflict and is later overruled by the lawyer's employer, all parties may be embarrassed. Once the issue has been raised, it is better to seek a determination in advance to avoid frustration and embarrassment. In making such determinations government should weigh its interests in having its lawyers involved actively in bar associations against its concerns about conflicts or appearances of conflicts.

### CONCEPT THREE: GOVERNMENT LAWYERS MAY USE INDIRECT SUPPORT SERVICES FOR PROFESSIONAL ASSOCIATION ACTIVITIES THAT HAVE BEEN DEEMED TO BE IN THE GOVERNMENT'S INTEREST.

*Commentary:* Once the employing government agency makes an official determination that a government lawyer's professional association work is in the government's interest, and, if job-related, may be viewed as part of the government lawyer's job duties, then that lawyer may pursue such work during official business hours, utilize a reasonable amount of office resources, and attend appropriate meetings and programs without taking personal leave time.

### CONCEPT FOUR: GOVERNMENT LAWYERS MAY ENCOURAGE COLLEAGUES TO JOIN PROFESSIONAL ASSOCIATIONS AND TO PARTICIPATE IN PROFESSIONAL ASSOCIATION ACTIVITIES.

*Commentary:* Lawyers may encourage colleagues to join professional associations, including the NYSBA, and to attend and participate in professional association programs, regardless of the policy positions to be taken by any participants in the programs. They may also advocate that agencies take steps to encourage employee participation in professional associations including the NYSBA.

### CONCEPT FIVE: GOVERNMENT LAWYERS MAY ACCEPT DISCOUNTS ON DUES, MEETING AND MEMBER BENEFITS, AND CLE COURSE FEE WAIVERS OR DISCOUNTS.

*Commentary*: Government lawyers who participate in professional associations may accept discounts on dues, member benefits, and CLE course fee waivers or discounts if they are generally available to similarly situated lawyers. Upon finding a government purpose, government agencies may pay for CLE courses for their lawyers.

# Editor's Foreword

Vincent M. Bonventre

Intergovernmental relations: the push and the pull; the conflicts and the cooperation; the institutions, the interests and the intricacies; the many ingredients that generate the dynamics between the different levels of government. This is the focus of the current issue.

Intergovernmental relations have always been a critical component of the American brand of federalism, and of the nature of our municipalities as corporate entities of the state. Whether the relations are between federal and state governments, state and local, or federal and local, the issues that arise are often fundamental, and the resolutions and their ramifications often profound and enduring.

The articles here touch on a wide variety of concerns and specific problems, both recent and longstanding, that emerge from and affect the sometimes complex and confounding weave and web that characterize intergovernmental relations in this country and in New York State.

Martha Davis examines the ongoing transfer of power and responsibility from the federal government to the states. This "devolution" effected by Congress and the Supreme Court has touched many areas of public policy, but perhaps none more critical than civil rights and liberties. While Davis sees opportunity for the nation in sharing the insights of the different states, she also finds that the latitude given the states for experimentation undermines the historically national concern for individual rights.

No intergovernmental dynamics have captured the recent attention of the American people, both in and out of the legal community, more than that between the federal Supreme Court and the Florida Supreme Court in the past presidential election. Stephen Clark takes a critical look at the decisions of both those tribunals, as well as the unmistakable tension and competing interests that were present in the court-to-court interaction. As a former law clerk to a state chief justice, he brings to bear special insight into the role and functioning of a state supreme court in our federal system.

In yet another important and instructive illustration of federal-state dynamics, Heather Davis reviews the historical development and the somewhat uncertain resolution of the Thornburgh Memorandum issue.

Rose Mary Bailly

Originating in a memorandum of the then Attorney General of the United States, federal policy encouraged Department of Justice attorneys to communicate directly with investigated or charged parties in the absence of their lawyers. Inasmuch as such communications have long been forbidden by the ethical standards for lawyers of every state in the nation, a struggle ensued between proponents of the federal policy and those of state legal ethics. The struggle, in Davis's view, is not yet clearly resolved.

*"Whether the relations are between federal and state governments, state and local, or federal and local, the issues that arise are often fundamental, and the resolutions and their ramifications often profound and enduring."*

The "commuter tax case" in New York has generated renewed interest and understanding of the importance of the state's home rule doctrine. In *City of New York v. State of New York* (2000), the state and nation's largest municipality challenged the state's repeal of a major source of the city's revenue: a tax on the income of those who work in New York City but reside elsewhere. Ultimately, the state's high court rejected the city's challenge. Elizabeth Freedman and Spencer Fisher, both of whom worked on the case on behalf of the city, provide a municipal perspective on home rule.

In a second article examining the contours of New York's home rule, James Cole explores the power of supersession. A "valuable tool in the home rule arsenal," it enables towns and villages to alter the requirements of the state's Town and Village Laws to better fit local conditions.

The nation's patchwork of federal, state and local law affecting gays and lesbians is surveyed by Amanda Hiller. As is increasingly the case, states and localities—rather than the federal Supreme Court and Congress—have taken the lead in safeguarding individual liberties and equal treatment.

The remaining articles constitute a diverse collection. The problem of setting the boundaries of Indian nation territory in New York State, in historical context and in recent case law developments, is analyzed by Robert Batson. William Estes reviews the state and federal disclosure requirements for franchisors, and both their importance to the investing public and the burdens such regulations visit upon legitimate businesses. Ralph Miccio explores the application of state lobbying restrictions to lobbying at the local government level, as well as the potential conflicts with local lobbying laws. And finally, Barbara Smith outlines the state ethical requirements that apply to state officers and employees who also serve in their local governments.

As in previous issues of the *GLP Journal*, there are those without whom this issue would not be possible, or would suffer considerably in quality. Our student editors have been assuming an increased responsibility in the screening and editing of manuscripts and in more actively participating in the organizing and preparing of the entire journal. Matthew Mozian, the Executive Editor for this issue, and Carrianna Eurillo have provided invaluable assistance, but regretfully, will be departing as they graduate from the law school in several weeks. Fortunately, however, Erin Kate Calicchia, who has been a tireless and dependable member of the student board, will assume the position of Executive Editor for the coming academic year. Special thanks also go to my Associate Editor Rose Mary Bailly and to the staff at the Bar Association, particularly Wendy Pike, Lyn Curtis, Pat Stockli and Patricia Wood.

As before, any flaws or deficiencies are attributable to me alone, and any comments or suggestions may be addressed to me at Albany Law School or directly via e-mail (VBONV@MAIL.ALS.EDU).

**Vincent Martin Bonventre, Editor-in-Chief of the *GLP Journal*, is Professor of Law at Albany Law School. He is also the Editor of *State Constitutional Commentary*, published annually by the *Albany Law Review*.**

**Rose Mary Bailly, Associate Editor of the *GLP Journal*, is the Executive Director of the New York State Law Revision Commission. She serves on the Board of Editors of the *New York State Bar Journal* and is Contributing Author of *McKinney's Practice Commentaries* on Mental Hygiene Law.**

**Government, Law and Policy Journal**

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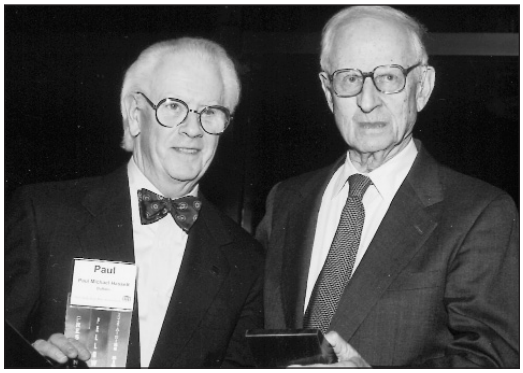
# NYSBA 2001 Annual Meeting Highlights

NYSBA's Committee on Attorneys in Public Service hosted two events at the 2001 Annual Meeting. The first was an educational program on the U.S. Supreme Court, featuring Brooklyn Law School Professor Susan Herman. Program chair was committee member Marjorie McCoy.

The Committee also hosted its second annual "Award for Excellence in Public Service" reception on Tuesday, January 23rd. New York District Attorney Robert Morgenthau was honored for his decades of contributions to the public and profession. Attorney General Eliot Spitzer shared personal remarks about Mr. Morgenthau, and NYSBA President Paul Michael Hassett presented the award. Over 150 NYSBA members, judges and colleagues of Mr. Morgenthau were in attendance at the event.




**Paul Michael Hassett and Hon. Robert Morgenthau**

**Hank Greenberg, Pat Bucklin and Hon. Robert Morgenthau**

**Paul Michael Hassett, Hon. Robert Morgenthau, Eliot Spitzer, Pat Bucklin and Hank Greenberg**

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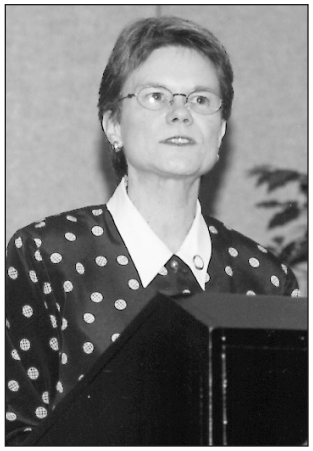

**Marge McCoy**

# Federal-State Devolution and Civil Rights: The Continued Significance of National Interests

By Martha F. Davis

The past decade has seen a marked increase in devolution of public policy responsibility from the federal government to the states. This trend is not limited to a single subject matter area, but runs across areas of government responsibility. For example, the 1996 welfare reform law transformed the Aid to Families With Dependent Children into Temporary Assistance for Needy Families, a block grant program with significantly fewer federal strings attached.[1] Similarly, in the environmental area, the Environmental Council of the States reports that "[b]y 1998, EPA had delegated 757 federal environmental programs to the states, an increase of 323 (nearly 75%) from five years prior."[2]

Most recently, a series of unprecedented Supreme Court cases have begun shifting responsibility for civil rights protection from the federal government to the states by limiting Congress's authority to enact such laws and expanding states' immunity from federal civil rights suits. In *Kimel v. Florida Bd. of Regents*, the Court held that state employees cannot sue their governmental employers under the Federal Age Discrimination in Employment Act because of Eleventh Amendment concerns about state sovereignty.[3] Congress's ability to protect civil rights was further limited in *United States v. Morrison*, where the Supreme Court ruled that Congress exceeded its constitutional authority when it enacted a federal civil rights remedy for victims of gender-motivated violence.[4] The Supreme Court's ruling leaves victims of such violence to seek redress under state law tort and criminal remedies.

## Protecting National Interests While Increasing State Responsibility

Devolution of responsibility for welfare, environmental regulation, and civil rights from the federal government to the states does not mean that there is no longer any national interest in these issues. In fact, in each of these areas strong national interests persist despite devolution. Every American, for example, has an interest in whether the environmental treasures of the western states or New York's Adirondacks are maintained for future generations, whether fellow citizens in other states are living in poverty,[5] or whether discrimination is impeding minority members of the society from full participation in the nation's economy.[6]

*"Most recently, a series of unprecedented Supreme Court cases have begun shifting responsibility for civil rights protection from the federal government to the states by limiting Congress's authority to enact such laws and expanding states' immunity from federal civil rights suits."*

Devolution does, however, raise the difficult question of how to protect national interests while delegating increased responsibility to the states. In the welfare area, the national interest in "promot[ing] the general Welfare"[7] is addressed under current federal law in several ways. First, block grant funds are available only to those states that comply with certain baseline requirements, such as the mandate to establish a child support enforcement system.[8] Second, block grant funds may be used only for certain purposes, such as providing "assistance to needy families so that children may be cared for in their own homes or in the homes of relatives."[9] Additional matching funds create a further incentive to states that initiate certain programs, such as abstinence-only education.[10] Finally, the welfare law establishes a number of bonus and award programs designed to influence state choices. For example, the "high performance bonus" rewards states that demonstrate success in terms of moving individuals from welfare to work.[11] Likewise, the so-called "illegitimacy bonus" rewards the top five states each year that lower statewide nonmarital birthrates without increasing abortion rates.[12]

In the area of environmental regulation, Congress has given the EPA itself considerable latitude to determine when states should take a leadership role. The federal framework remains, but in deference to states, the EPA has often set the floor for state programs "quite low compared to federal enforcement authorities."[13] For example, in delegating authority to the states to enforce the Clean Water Act, the EPA has stopped short of requiring states to develop mechanisms to administer administrative penalties.[14] Similarly, the EPA has some-

times deferred to state programs even when they appear unlikely to operate efficiently or effectively.[15]

The overall success or failure of these newly state-based programs remains to be seen. With less than five years' experience since the welfare devolution of 1996, it is too soon to know whether this framework adequately protects the national interest in promoting the welfare of the population. We do know that a state-based system has failed in this regard in the past. Indeed, the strong federal framework operating from 1935 to 1996 was enacted in response to state outcry for federal assistance during the Great Depression.[16] Today's strong economy has not tested the state-based welfare programs to the same degree.[17] Nevertheless, the results of welfare reform to date do suggest that giving states greater flexibility within certain bounds—and creating a 50-state anti-poverty laboratory—has the potential to promote a healthy climate of innovation and even competition among states that can lead to better anti-poverty policy nationwide.

The same "50 laboratories" rationale has also been cited as support for devolution in the environmental area, creating an opportunity to develop and promulgate "best practices."[18] The essentially local nature of the environment also supports local control. On the other hand, many experts question whether state-based environmental regulatory efforts may be excessively beholden to business interests important to the state economy.[19] Among others, the GAO has criticized states for failing to conform to federal guidelines in carrying out their delegated roles.[20]

In short, devolution has advantages and disadvantages in the areas of welfare and environmental regulation. Regardless of which level of government takes the lead, the challenge is to achieve the right balance between the national and local interests at stake.

## The Challenge of Civil Rights

Given recent Supreme Court cases, civil rights may be the next area of wholesale devolution. However, the history of state-federal partnerships in the welfare and environmental areas argues for a different approach to civil rights.

As an initial matter, while experimentation with different methods of service delivery or conservation methodologies may be valuable in the welfare and environmental spheres, the notion that 50 states would experiment with approaches to protecting civil rights seems antithetical to the proposition that civil rights laws implement basic constitutional and human rights. Indeed, in ratifying the International Covenant on Civil and Political Rights, the United States obligated itself as a nation to protect civil and political rights of the nation's citizens.[21] The international community would certainly not accept the explanation that state experimentation precluded complete civil rights protection for members of the United States community, but would hold the United States accountable for any violations whether under state or federal auspices.

Further, strong federal civil rights protections reflect a recent history of blatant state and local violations of—and deviations from—baseline principles of equal protection and basic civil rights. States and localities blatantly refused to enforce basic civil rights of African-Americans on a large scale as recently as the 1960s.[22] Until 2000, laws on the books in some states still reflected those racist policies.[23] Nor is discrimination by state actors a matter of history. As the 40-state-level Race and Gender Bias Task Force reports demonstrate, sex and race discrimination remain a routine practice in a number of state justice systems.[24]

Because of this recent history—and because civil rights violations inherently involve "moral and social wrong[s]"[25]—a federal law that paralleled welfare and environmental regulation and attempted to promote the national interest in civil rights through bonus incentives, matching funds or *ad hoc* federal audits of state programs would be patently inadequate. As we know from the welfare bonus programs, not all states respond to such incentives. Likewise, the EPA experience indicates that systematic delegation of broad authority to the states may lead to less forceful regulation.

The benefits of state experimentation and control might outweigh these concerns in other contexts. But in the area of civil rights, those potential benefits are minimal. It is impossible to imagine a legitimate state argument for extending fewer civil rights protections than the national norm to citizens of a particular state.[26]

The devolution of civil rights requires a different approach—one that appropriately balances state interests with individual rights and national values. The VAWA Civil Rights Remedy provides a model.[27] In an *amicus* brief to the Supreme Court in *United States v. Morrison*, 36 State Attorneys General praised the Violence Against Women Civil Rights Remedy as an example of an effective state-federal partnership.[28] That law respected state choices about what acts would constitute an actionable felony by incorporating state standards, while at the same time making clear that the federal government stood behind victims in opposition to gender-motivated violence. While that law was struck down, the principles of cooperative federalism reflected in its design should not be forgotten. When clear national interests in civil rights are at stake, this cooperative approach is far preferable to creating 50 state standards.

To the extent that the Supreme Court intervenes to frustrate such federal-state partnerships, moreover, it

may be necessary for states to act affirmatively—and perhaps contrary to narrow state interests—to promote the national interest in protecting individual civil rights. In response to *Kimel*, for example, an opportunistic state could take advantage of the legal construct of sovereign immunity to strip its employees of basic legal protections. However, the overriding national interest in individual civil rights protections dictates the opposite approach. Congress's enactment of the Age Discrimination in Employment Act[29]—and its intent that it apply to state employees—clearly articulates the national interest in this area. Despite states' narrow self-interest in avoiding lawsuits, states should honor this national interest preventing age discrimination in employment by extending age discrimination remedies—and other civil rights protections—to state employees on the same basis that they are extended to all other employees.

## Conclusion

In sum, federalism is a two-way street. Just as devolution gives states greater flexibility to design innovative, state-specific programs, so it also accords states greater responsibility to ensure that national interests are protected. State innovation and experimentation may yield important insights in the areas of welfare and environmental law, ideally creating a race to the top as states try to outdo each other in solving difficult challenges posed by these regulatory areas. But in the area of civil rights, such experimentation undermines individual rights that have historically been a critical national concern. Thus, states have a special responsibility to take national civil rights interests into account as they respond to the new challenges of devolution.

## Endnotes

1. 42 U.S.C. §§ 601-604 (Supp. 1995-1999).
2. David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 Harv. Envtl. L. Rev. 1, 32 (2000).
3. 528 U.S. 62, 75-76 (2000). In 2001, the Supreme Court will decide *Garrett v. University of Alabama*, which will resolve whether the Eleventh Amendment also bars state employees (and potentially any individual) from suing states for violations of the Americans With Disabilities Act. *See* 120 S. Ct. 1669 (2000) (granting certiorari).
4. 529 U.S. 598 (2000).
5. In *Saenz v. Roe*, the Supreme Court recognized that a fundamental right of national citizenship is violated when a state accords newcomers lower welfare benefits than longer-term residents. 526 U.S. 489 (1999).
6. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
7. U.S. Const., pmbl.
8. 42 U.S.C. § 602(a)(2) (Supp. 1995-1999).
9. 42 U.S.C. § 601(a)(1).
10. 42 U.S.C. § 710.
11. 42 U.S.C. § 603(a)(4).
12. 42 U.S.C. § 603(a)(2).
13. Markell, *supra* note 2, at 38.
14. *Id.*
15. *Id.*
16. *See* Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement 7 (1993).
17. Even so, numerous studies chronicle the increase in reliance on soup kitchens and shelters at the same time that some welfare recipients seem clearly to have benefited from the targeted focus on work. *See, e.g.*, Children's Defense Fund, Families Struggling to Make it in the Workforce (2000).
18. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1210-11 (1977).
19. Markell, *supra* note 2, at 53.
20. U.S. GAO, Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained By Violators, GAO/RCED-91-166 (1991).
21. International Covenant on Civil and Political Rights, adopted and opened for signature, Dec. 16, 1966, 999 U.N.T.S. 171 (entry into force, 23 March 1976).
22. W.J. Rorabaugh, *Challenging Authority, Seeking Community and Empowerment in the New Left, Black Power and Feminism*, in Brian Balogh, ed., Integrating the Sixties 118 (Penn State Press 1996).
23. Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 Mich. J. Race & L. 559, 606 (2000) (citing Alabama's antimiscegenation law).
24. National Judicial Education Program, Gender Fairness Strategies Project: Implementation Resources Directory 2 (1998).
25. *Heart of Atlanta*, 379 U.S. at 257.
26. States have an important role, of course, in expanding civil rights protections beyond those protected by the federal government and pioneering new areas of civil rights that may eventually be recognized nationally.
27. 42 U.S.C. § 13981 (1994).
28. Brief of the States of Arizona, et al., *United States v. Morrison*, 99-5 & 99-29 (U.S.).
29. 29 U.S.C. § 623(a)(1) (Supp. 1995-1999).

**Martha F. Davis is Vice President and Legal Director of the NOW Legal Defense and Education Fund in New York City.**

# Florida vs. the Supremes: The State High Court's Supreme Efforts Thwarted in the 2000 Election

By Stephen Clark

November 21, 2000, should be recognized as a momentous occasion in the history of state supreme court decisionmaking. That was the day the Florida Supreme Court handed down its first major decision in the 2000 presidential election dispute.[1] The court's decision to allow manual recounts to proceed in three south Florida counties was one of those instances in which a state high court resists political pressure, stands firm, and directs that the state proceed in accordance with the court's considered view of the law.[2] The court's opinion was exemplary state supreme court decisionmaking—and history ought to regard it as such.

Criticism from some, however, was as harsh as it was swift. In defiant tone, former Secretary of State James A. Baker spoke for candidate George W. Bush in accusing the Florida court of having "rewr[itten] the legislature's statutory system, assumed the responsibilities of the executive branch, and sidestepped the opinion of the trial court as the finder of fact."[3] The reaction of the U.S. Supreme Court was, if less partisan, no more respectful. That Court overruled the Florida court's decision on the basis of a legal theory that a majority of the U.S. Supreme Court itself later appeared unwilling to embrace.[4]

The Florida decision of November 21 may well have been the best hope for political legitimacy in the post-election controversy because, though constrained by practical realities, it might have offered the best chance for a credible resolution of the presidential election. The decision represented a painstaking attempt by the Florida Supreme Court to grapple with a poorly drafted election code and with apparent or potential improprieties in the state's executive branch. Despite the powder keg atmosphere of unprecedented post-election litigation, the Florida Supreme Court made a respectable attempt at redressing those problems and injecting some needed legitimacy into the electoral process. Uncontrollable circumstances and arguably misguided interference by the U.S. Supreme Court, however, were to render that goal largely unattainable. Nevertheless, the Florida Supreme Court's effort should be acknowledged for what it was: the court was trying to do what a state supreme court is supposed to do—formulate a legitimate, consistent, and workable construction of state law that comports with constitutional and public policy norms—and for trying to do so in the most difficult of circumstances.

## The Legislature

To fully appreciate the Florida Supreme Court's November 21 decision, it is important to survey the landscape that the court was facing. In particular, one must understand the serious difficulties that had resulted from the actions of Florida's other branches of government.

First and foremost was the state legislature, in both its past and present incarnations. That body, responsible for crafting a quite poorly drafted election code, deserves much of the blame for establishing the conditions that led to the insoluble electoral fiasco in Florida. The state election code was like an old country road, the aged blacktop of which[5] had been haphazardly patched[6] in a losing effort to keep apace with suburban sprawl.[7] The textual conglomerate contained ambiguities, contradictions, and inconsistencies in basic provisions that made it ripe for exploitation by candidates with high stakes, deep pockets, and shrewd lawyers. Those planets aligned when the 2000 presidential election came to Florida.

Sections of the code governing the certification of statewide election results provide an especially egregious example of the problem, and one that complicated the Bush-Gore dispute. Two provisions of the election code required that county returns relevant to statewide contests be certified to the state within seven days after an election. But the two provisions differed as to the fate of county returns that were not timely filed with the state. Section 102.111, traceable to 1889, declared that untimely county returns "*shall* be ignored,"[8] while § 102.112, added in 1989, declared only that untimely county returns "*may* be ignored"[9]—seemingly oblivious to the inconsistent, mandatory language of its immediately preceding, sibling provision. No doubt, the legislative process can get chaotic at times. But it takes both some serious legislative negligence to create such a glaring contradiction and a remarkable degree of legislative nonfeasance to leave it lying in wait on the books for a decade.

Other examples further confounded the Bush-Gore dispute. Section 102.166, also inserted in 1989 in response to another statewide election debacle, gave a

candidate the prerogative to ask a county canvassing board to conduct a sample manual recount. If the sample recount exposed a potentially outcome-determinative "error in the vote tabulation," the county board was then required to conduct a full countywide recount or otherwise remedy the error.[10] The time frame for making the request, however, was such that, not infrequently, a full manual recount that the sample revealed to be necessary would be incapable of completion before the expiration of the seven-day deadline for counties to timely certify their returns to the state.[11] Yet if a county board failed to certify its final results by that deadline, it would raise the specter that the state either would *or* might (see above) ignore the results of the manual recount, even though § 102.166 would have specifically authorized, if not required, the manual recount in order to correct a potentially outcome-determinative error in the vote tabulation.

That protest provision of the code was further obscured by a complete absence of standards guiding a county board's discretion in deciding whether initially to grant a candidate's request for a sample manual recount.[12] It was further complicated by the obtuse standard mandating remedial action in the event the sample showed "an error in the vote tabulation which could affect the outcome of the election."[13] The code offered no express guidance as to what either "error" or "tabulation" meant as used in that standard.

Lastly, and perhaps most egregiously, the state election code failed to provide clear and definite guidance as to what constituted a legal vote—a concept one might expect to be expressly defined in an election code. More specifically, the code failed to instruct either the county boards or the state as to how, or even whether, to count imperfectly marked paper ballots and incompletely punched ballots. This legislative silence proved critically problematic.

The need to fill these gaps and resolve these inconsistencies in the state election code ultimately caused and aggravated much of the Bush-Gore controversy. One might fairly object to placing too much blame on the legislature, however, on the ground that these kinds of problems are endemic to legislation. Executive and judicial officials are accustomed to filling gaps and resolving inconsistencies in statutory schemes, particularly statutory schemes that have evolved through amalgamation over time. The Florida legislature committed no greater drafting sins in these instances than legislatures routinely commit in all fields of statutory law.

While it is true that administrators and judges do often fill gaps and resolve inconsistencies in statutory schemes, the difference in this instance, to borrow a phrase from Chief Justice John Marshall, is that it is an *election code* they are expounding.[14] As federal public policy recognizes, the procedural rules governing an election ought to be clearly established *before* election day.[15] The reason is obvious and became so in Florida. Although the potential for undue partisan influence or result-oriented decisionmaking is always a risk in administrative and judicial interpretation of statutory standards, it is particularly dangerous when it affects the electoral system, the primary mechanism of democratic control. Moreover, the electoral system is most vulnerable to such troubling improprieties if the administrative and judicial interpretation is undertaken *after* the votes have been cast. The temptation for administrators or judges to evaluate the propriety of alternative interpretations in light of their respective impacts on the outcome of the race may prove irresistible. At the very least, administrative or judicial interpretation of election standards in the highly charged, partisan atmosphere of an election challenge almost inevitably carries a serious risk of producing appearances of impropriety that can undermine public confidence in the electoral system itself.[16]

For these reasons, policy decisions prescribing the rules to govern elections certainly should be made before election day, and they probably ought to be made by the legislature. Prescribing those rules by elaboration of non-specific, ambiguous, or inconsistent statutory standards in post-election legal proceedings is probably the worst possible approach. The culpability of the Florida legislature lay in its forcing the other branches of state government into precisely that most difficult position because of the legislature's utter failure to offer more than the grossly incomplete and inadequate election code that was supposed to regulate the Florida election of 2000.

## The Executive

If the Florida legislature left major statutory gaps to fill and significant contradictions and ambiguities to resolve, perhaps those issues could have been addressed with a little interpretive elaboration by Florida's other political branch, the executive. Democratic theory might suggest that, in the ordinary course, elaboration of ambiguous statutes ought to be informed by the incumbent administration's political or ideological preferences. One might question whether the same view would apply to elaboration of the very electoral standards that regulate the process by which the political branches are held accountable. Regardless, the Florida dilemma was not the ordinary course. It required elaboration of electoral standards after the votes had been cast and substantially counted. That delicate task called not for political policymaking but for apolitical judgment.

Florida's executive branch was ill-suited to provide that kind of judgment, for it was not only political, but seemingly politicized. Like a John Grisham plot, Repub-

lican Governor Jeb Bush was the brother of presidential candidate Bush. Democratic Attorney General Bob Butterworth was a chair of presidential candidate Gore's statewide campaign. And the Republican Secretary of State Katherine Harris was, likewise, a chair of candidate Bush's statewide campaign. As the unfolding events seemed to suggest, it was too difficult for such a group of partisan players to undertake the task of dispassionately elaborating the code's problematic electoral standards.

Jeb Bush, at least, recognized immediately his potential for undermining the appearance of propriety. Given the nature of Florida's quasi-plural executive, Bush was able to recuse himself and largely remove himself from the official process. Since other executive officials, like Harris and Butterworth, owed their tenure to direct election and not gubernatorial appointment, Bush could, by rescuing himself, largely remove any taint that his filial relationship to one of the candidates might cause. Political realities may have compelled no other choice, but the Governor of Florida nonetheless deserves credit for eliminating the appearance and potential for impropriety that he did.

The same, however, cannot be said for the two other officials, Harris and Butterworth. Although both were chairs of their respective candidates' statewide campaigns, they both declined to recuse themselves. In fact, they moved quickly to advise county boards as to the proper interpretation of § 102.166, governing manual recounts. The problem was that they issued diametrically opposed interpretations of the statute, each of which happened to coincide with the interests of their respective presidential candidates. Harris narrowly construed the key statutory phrase "error in the vote tabulation"—a finding of which was necessary to trigger countywide manual recounts—as meaning only "a counting error in which the vote tabulation system fails to count . . . *properly* punched punchcard ballots."[17] She pointedly emphasized that "[t]he inability of a voting systems [sic] to read an . . . *improperly* punched punchcard ballot is not a [sic] 'error in the vote tabulation' and would not trigger" a countywide manual recount or other remedial action by the county board.[18] Had the election code specified whether or not improperly punched punchcard ballots were legal votes, the statutory ambiguity would have been significantly lessened.

One day later and in direct contradiction, Butterworth read the same phrase much more broadly to include "a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts."[19] His reading called for the counting of improperly punched punchcard ballots as legal votes if the voter's intent could be discerned. Although Butterworth's legal reasoning was far more detailed than Harris's had been, it is difficult to defend his decision to inject himself into the post-election controversy and leave the county boards with contradictory guidance. Harris offered unrebutted evidence in subsequent litigation demonstrating that Florida Attorneys General—including Butterworth himself—had historically regarded interpretation of the state election code as committed to the sole or primary jurisdiction of the Secretary of State.[20] Indeed, the election code itself gave the Secretary of State the power to issue binding legal opinions interpreting the code.[21] Regardless of the merits of Butterworth's interpretation, his close connection to the Gore campaign and his apparent reversal of the past practice of abstaining from interpreting the election code[22] could not help but cast suspicion on his actions.

Although Harris had clear statutory authority to administer the election process, her behavior was no more confidence-inspiring than was Butterworth's. Virtually every significant decision that Harris made and every interpretation of the election code she offered happened to favor the candidate whose statewide campaign she chaired, candidate Bush. In addition to issuing a restrictive interpretation of county boards' authority to conduct manual recounts, she followed up by seeking (unsuccessfully) to halt the manual recounts by court order.[23] Moreover, she took a hard line against any extension of time when it became clear that, partly as a result of her own actions, several county boards would be unable to complete their manual recounts in time to satisfy the seven-day deadline for submitting their returns to the state. Harris initially conceded that § 102.112 directed only that she "may" ignore late-filed returns and, thus, made the matter discretionary. But she immediately made clear that she would exercise that discretion vigorously to discard any late-filed returns that had been delayed by anything other than a hurricane or other "unforeseen circumstance."[24] After a state circuit court ruled that such an extreme, anticipatory stance was an "abdication of . . . discretion,"[25] she quickly formulated a new standard. It was a little broader than the previous one. But it still permitted an extension under only very limited circumstances: fraud, prejudicial noncompliance with election procedures, acts of God, or—transplanting her interpretation of "error in the vote tabulation"—"'a mechanical malfunction of the voting tabulation system.'"[26] Based on her new standard, Harris then preemptively informed county boards that they need not bother submitting late returns, for she had already determined to ignore them. The county boards' reason for seeking to file late returns, needing time to conduct the manual recounts under § 102.166, was insufficient under her new standard.[27]

Given Harris's official connection to the Bush campaign, this pattern of consistently adopting positions highly favorable to candidate Bush and her aggressive tack toward manual recounts must inevitably give one

pause. Moreover, her intransigence about the seven-day filing deadline reinforced an appearance of impropriety; it was difficult to conceive of a fully persuasive, nonpartisan justification for it. As the circuit court observed, Harris struck a balance between interests in accuracy and finality by "com[ing] down hard on the side of finality."[28] That heavy emphasis on finality was particularly difficult to reconcile with political neutrality, especially in light of the consent decree on overseas absentee ballots, which meant that the results of the election could not in any event be certified by Harris after that seven-day filing deadline. Her stringent refusal to grant county boards the slightest extension of time seemed administratively purposeless, or at least substantially under-justified.

If interpreting electoral standards after the votes had been cast demanded an appearance of dispassionate judgment, Harris failed to provide it. Her formal link to the Bush campaign was cause for concern from the start, but it was significantly aggravated by Harris's failure to strike a more reasonable balance between accuracy and finality. A display of moderation and wisdom might have allowed her to overcome the appearance problem that her connection to the Bush campaign initially raised. She proved, however, unable to demonstrate those essential virtues.

Was Harris purposely partisan or, at least, unconsciously biased? Possibly. What is certain, however, is that Harris's behavior presented a deeply troubling appearance of impropriety, a problem she should have anticipated and clearly addressed from the outset. Instead, Florida's executive branch, far from bringing interpretive order and public legitimacy to the process, ended up doing precisely the opposite.

## The Judiciary

This legal and political landscape confronted the Florida Supreme Court when two separate vehicles provided an opportunity for judicial review. First, several county canvassing boards asked the court to resolve the conflict between executive branch opinions as to the type of "error in the vote tabulation" that would authorize a countywide manual recount.[29] Second, the Gore campaign asked the state high court to review the circuit court's ruling regarding Harris's decision to ignore late-filed county returns.[30] Circuit Court Judge Terry Lewis had initially rejected Harris's preemptive refusal to consider any justification for a delay, other than a hurricane or other unforeseen circumstance as an abdication of her discretion.[31] However, he accepted her later anticipatory rejection of late-filed returns based on her formulation of the slightly broader standard previously discussed.[32] The cases were consolidated.

Within days the Florida Supreme Court issued its opinion in *Palm Beach County Canvassing Board v. Harris*.[33] The court rejected Harris's narrow interpretation of the phrase "error in the vote tabulation." The county board was thus permitted to proceed with manual recounts.[34] The court further held that, although Harris "may" ignore late-filed returns under § 102.112, the mandatory language of § 102.111 had been superseded.[35] Moreover, Harris had abused her discretion under § 102.112 by refusing to allow the county boards to file late returns on the ground that they could not complete the manual recounts by the seven-day deadline.[36] As part of its remedy, the court granted the county boards five days to complete their manual recounts and file their amended returns.[37] In this way, the court seemed to hope the county boards could quickly finish their manual recounts, file their returns, and bring the election nearer to a more legitimate conclusion.

This ruling was laudable not because it worked; obviously circumstances and intervention by the U.S. Supreme Court prevented that from happening. Rather, the ruling is worthy because it accomplished two necessary objectives and did so in a rather delicate, if somewhat activist, fashion. First, the decision provided the desperately needed reconciliation of the contradictory and ambiguous statutory language—and in a way that attempted to minimize claims of partisanship in its decisionmaking. Second, the decision largely removed Katherine Harris from the process, reducing her role to an essentially ministerial one. Both of those tasks would save the legitimacy of the Florida election. In trying to accomplish that worthy objective of making the system function and function in a seemingly legitimate way, the Florida Supreme Court did what a state supreme courts should do, and it did so unanimously.

That the all-Democrat court was concerned about allegations of its own partisanship is apparent on the face of the opinion. In approaching the case, the court began by articulating "guiding principles" that were to direct its resolution of the case. Those guiding principles were, first, that "the will of the people, not a hypertechnical reliance upon statutory provisions," would serve as the theoretical backdrop[38] and, second, that "traditional rules of statutory construction" would be the tools for discerning legislative intent.[39] Reliance on traditional canons of statutory interpretation is an obvious method for trying to limit the influence of subjective values. The court also tried to insulate its reliance on the "will of the people" standard by locating its origin in the state constitution and by relying on an established articulation in precedents long predating the 2000 election.[40] In adopting both of these approaches, the court was evidently trying to situate as much of the judging as possible in sources external to personal or partisan preferences. That is precisely what the dilemma of elaborating the electoral standards after the votes had been cast required in order to minimize apparent and real impropriety.

Interestingly, however, those two approaches were somewhat in tension with each other. Elevating the will of the people over a hyper-technical reliance on statutory language might seemingly conflict with the use of traditional—and a bit more formalistic—canons of statutory interpretation. In dealing with this difficulty, the Florida Supreme Court emphasized one approach over the other at different points in its opinion. When reviewing the legislature's work product, the court emphasized that the traditional rules of statutory interpretation distance the task of adjudicating from its own subjective values and preference.[41] On the other hand, reviewing only the exercise of discretion by Katherine Harris, the court brought to bear the full power of the "will of the people" standard.[42] In this respect, the opinion can be read as treading lightly on the legislature's turf, but also as severely reducing Harris's participation in the process. The difference in the court's level of deference to the legislature and to Harris was palpable throughout the opinion.

The central weakness of the court's opinion concerned an issue that implicated both the legislature's statute and Harris's exercise of discretion: interpreting the disputed phrase "error in the vote tabulation." Although the court acknowledged that Harris's administrative interpretation of the phrase was entitled to judicial deference, the court, nevertheless, rejected her interpretation and substituted its own broader view more consistent with that offered by Butterworth. In doing so, the court explained that its traditional rule of deference did not pertain to administrative interpretations that were "contrary to law" or inconsistent with "plain meaning."[43] The court then applied rather formalistic, textual reasoning to support its different interpretation—presumably both to show that Harris's interpretation contradicted the plain meaning of the words and to tread lightly on the legislature's statute. Although the court's interpretation was reasonable, and perhaps even more reasonable than Harris's, it is not entirely clear that Harris's interpretation was *so* off-base as to be contrary to law or violative of the plain statutory language. The court's conclusion seemed a bit of a stretch.

But did that unwillingness to give Harris the customary benefit of deference warrant condemnation as evidence of partisan hackery? That conclusion, too, seems a bit of a stretch. Appellate court deference to administrative interpretations is a policy honored frequently in the breach; moreover, the degree of deference an appellate court exhibits toward an agency often varies with the court's assessment as to whether the agency's conduct is such as to merit a high level of deference. Appellate courts often decide it is not.[44] It is hardly far-fetched that the Florida Supreme Court believed Harris's political connections and consistent pattern of decisionmaking in favor of the Bush campaign did not exhibit the kind of administrative behavior deserving deference. Given that Harris was a department head and, under the state constitution, an *elected* one, the court might have deemed it unwise or inappropriate to declare, simply, that Harris had forfeited her entitlement to deference.[45] Instead, the court stretched its reasoning to accomplish the same result. If it had done so out of a partisan desire to elect Al Gore, its approach would obviously be greatly troubling.[46] If, however, it did so in pursuit of a higher public policy than deference—such as preserving the integrity of the political process—then the court's actions were defensible, if not admirable.

What, then, of James Baker's objections to the opinion? Baker complained that the Florida Supreme Court had rewritten the statute. Of course, the court had tried to avoid doing precisely that. It resolved inconsistencies in the election code to hold that Harris had discretion to decide how final to make the seven-day filing deadline. Also, Circuit Judge Lewis, whose ruling Baker supported in the very same public statement, had also identified and sought to resolve the statutory inconsistency and reached the same conclusion.

Baker also complained that the Florida Supreme Court had assumed the responsibilities of the executive branch. If by his criticism, Baker meant that the court gave the county boards a few extra days during which to perform their manual recounts, the response is simple. The court was merely instructing Harris to exercise her discretion in a way that would be consistent with the state constitution and state public policy. She had demonstrated previously that any less specific instruction would be inadequate to ensure her compliance.

Lastly, Baker complained that the state's high court had disregarded the opinion of Circuit Judge Lewis. Certainly, they reversed his decision. Judge Lewis's decision to defer to Harris was not necessarily wrong. But the state supreme court has the greater and ultimate authority in reviewing an executive official's exercise of discretion which appears to the high court to be of dubious legitimacy. Judge Lewis's decision may have been a legitimate one, but so was the decision to reverse him.

In the final analysis, the Florida Supreme Court did what good state supreme courts often do. It recognized the serious inconsistencies and ambiguities in the statutory regime. It further recognized that the executive branch official charged with the primary obligation to elaborate those statutory standards was the subject of serious questions of partisan interest and legitimacy. In an attempt to salvage the political legitimacy of the election, the court took the case, resolved the statutory issue by treading lightly on the legislature's prerogatives, and relied on the state constitution and public policy to ensure that the executive branch exercised its

discretion in a manner the court deemed appropriate. At the least, the Florida Supreme Court deserves recognition for having tried to do the right thing in *Palm Beach County Canvassing Board v. Harris*.

## The Thunder from Above

The U.S. Supreme Court, of course, did not see it that way. Although the Court granted the Bush campaign's request to review the *Palm Beach* decision, the Court did not offer a detailed assessment of the decision. Rather, the Supreme Court adopted the notion that the federal constitution prohibited the Florida Supreme Court from relying on its state's constitution and, perhaps, its own prior articulation of election policy. The Court vacated the Florida Supreme Court's opinion and asked the court to clarify the extent to which it had relied upon the state constitution.[47]

It is surely questionable that the state government of Florida, and specifically its supreme court, is somehow required to disregard its own constitution—the document creating, organizing, and, most importantly, *limiting* the legislative, executive, and judicial branches of the state's government. The U.S. Supreme Court identified the culprit as Article II, § 1 of the federal Constitution, which provides that although each "State shall appoint" presidential electors, the appointment is to be done "in such Manner as the Legislature thereof may direct."[48] Reaching back to an 1892 precedent, the Court indicated that this constitutional provision grants a state legislature absolute power over presidential elections, a power that may be checked by federal constitutional norms, but is immune from any limitation contained in a state constitution.[49] Accordingly, to the extent the Florida Supreme Court was construing the state election code in conformance with state constitutional mandates, its decision in *Palm Beach* violated the federal Constitution.

This theory of Article II, § 1, however, presents a panoply of theoretical and practical problems. How is it, for example, that the very organic document that creates, sustains, and limits the state legislature cannot be a source of limitation on whatever discretionary power the federal Constitution purports to delegate to it? If the state constitution requires, for example, that all bills be presented to the governor for signature before becoming law, does that requirement not apply to enactments passed pursuant to this federal constitutional delegation of power to the state legislature? The legislature of Florida, like that of other states, has presented the state's election code and revisions to the governor for signature. What would be the consequence of a governor vetoing any such bills? Would they nevertheless become law with respect to presidential elections, even though clearly not law for any other purpose? If the state constitution has a requirement that all bills contain but one subject expressed in the bill's title—as the Florida constitution does[50]—may the legislature disregard that constraint and enact a presidential election code through logrolling?

More importantly for the purposes of the *Palm Beach* decision, is a state legislature not bound by a state constitution's recognition of a fundamental right to vote, a right that the Florida Supreme Court relied upon in its initial decision? What about the other branches? As noted above, the Florida Supreme Court did tread rather lightly when interpreting the provisions of the election code so as not to trample on the feet of the legislature. On the other hand, it did appear to rely on constitutional principles in implicitly concluding that Katherine Harris abused her discretion. If a state legislature directs the executive branch to perform some function in its presidential election regime, is the state's executive branch somehow freed of its obligation to adhere to state constitutional limitations? The same goes for a state's judicial branch, whose authority is granted, constrained, and defined in the state's constitution. May a state legislature, when directing the manner in which presidential electors are to be appointed, effectively commandeer the other branches of state government and direct them to do things beyond or even contrary to state constitutional obligations? The theoretical paradoxes quickly become mind-boggling.

Perhaps this Pandora's box explains why the U.S. Supreme Court, on second thought in *Bush v. Gore*,[51] sidestepped its extravagant Article II, § 1 theory in reviewing the subsequent decision of the Florida Supreme Court to order a statewide manual recount.[52] The problem, however, is that the damage had already been done. The Florida Supreme Court rendered its decision to order a statewide manual recount during the brief period between the two decisions of the U.S. Supreme Court. Perhaps the Florida court was constrained by the fear of being accused of relying on the state constitution or changing the law. But for whatever reason, it declined to articulate precise standards for the county boards to apply in discerning the intent of voters from incomplete punches on punchcard ballots. Ironically, it was the failure of the Florida court to formulate specific standards that provided the basis for the U.S. Supreme Court's reversal of the state court's decision to order a statewide manual recount. In fact, the Supreme Court's per curiam opinion even criticized the Florida Supreme Court for failing to be more activist: "[W]e are presented with a situation where a state court *with the power* to assure uniformity has ordered a statewide recount with minimal procedural safeguards."[53] One might fairly have expected the U.S. Supreme Court to drop a footnote to insert a terse mea culpa for its contribution to the Florida court's omission.

Part of the tragedy of the Florida election fiasco is that the Florida Supreme Court was initially acting like

a court of last resort and attempting, with mixed practical success, to correct the problems in both the election code and protect the integrity of the electoral process from the appearances of impropriety in the executive branch. Moreover, the court was doing so with an appropriate measure of deference toward the legislature and a healthy concern for its own appearances. The Florida Supreme Court took the initiative to try to resolve the electoral mess with an eye toward maximizing the legitimacy of the outcome. It was using all the tools at its disposal to do that—the state constitution, long-standing public policy, past election precedents, and traditional rules of interpretation.

The initial intervention of the U.S. Supreme Court hobbled the ability of the Florida court to continue its supervision of the electoral process. Precluding resort to the state constitution and, thus, necessarily restricting reliance on public policy precedents informed by the state constitution, the Supreme Court insured that the state's high court had limited ability to respond to the needs of the election process. The Florida Supreme Court, relying on broad statutory authority to fashion a remedy in an election contest proceeding, was indeed willing to redress the "selective" recount problem by ordering a statewide manual recount.[54] On the other hand, the court was reluctant to "rewrite" the election code to define with specificity what counted as a legal vote. By declining to do so, it slipped into the role of a lower court, reluctant to challenge the thunder that it had heard once before from above. If allowed to act like a supreme court, Florida's high court might well have been successful in giving the election outcome more legitimacy than many believe it ultimately exhibited.

## Endnotes

1. *See Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000) (hereinafter "*Harris I*").
2. *See, e.g., Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding state constitution forbids discrimination against same-sex couples in provision of legal benefits of marriage); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (holding statewide disparities in public school funding violated state constitution).
3. Associated Press, *Text of Remarks by James A. Baker III of the Bush Campaign*, Wash. Post, Nov. 22, 2000, at A17. The remarks, of course, stand in stark contrast to the public reaction of the Gore campaign to the U.S. Supreme Court's final decision in the election dispute. eMediaMillWorks Inc., *Gore: 'I Offer My Concession'; Vice President Urges 'All Who Stood With Us to Unite Behind Our Next President,'* Wash. Post, Dec. 14, 2000, at A23 ("Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court's decision, I accept it."). *Id*. Baker was obviously not delivering a concession speech, as Gore was; still, Baker's remarks struck no balance at all between criticizing the Florida Supreme Court and acknowledging the legitimacy of its authority. Indeed, the heavy implication was to the contrary.
4. *Compare Bush v. Palm Beach County Canvassing Board*, 121 U.S. 471 (2000) (basing remand on implicit theory that state supreme court could not rely upon state constitution in elaborating state election standards) *with Bush v. Gore*, 121 S. Ct. 525, 530 (2000) (per curiam) (purporting to avoid decision of same question by resolving case on equal protection grounds).
5. *See, e.g.*, Fla. Stat. Ann. § 102.168 (enacted 1845).
6. *See, e.g.*, Fla. Stat. Ann. § 102.166 (enacted 1937 & amended 1940, 1945, 1951, 1953, 1957, 1965, 1977, 1979, 1989, 1995 & 1999).
7. Emblematic of its dynamic growth, Florida, which had a mere seven electoral votes in the 1940s, will have fully 27 in 2004. *See* National Archives & Records Admin., U.S. Electoral College (last modified Jan. 2, 2001) <http://www.nara.gov/fedreg/elctcoll/>.
8. Fla. Stat. Ann. § 102.111 (emphasis added).
9. Fla. Stat. Ann. § 102.112 (emphasis added).
10. Fla. Stat. Ann. § 102.166.
11. *See* Fla. Stat. Ann. § 102.166(4)(b) (allowing candidate to request manual recount "prior to the time the canvassing board certifies the results . . . or within 72 hours after midnight" of election day). Even the state circuit court that James Baker would later so strenuously defend observed that "it is easy to imagine a situation where a manual recount could be lawfully authorized, commenced, but not completed within seven days of the election." *McDermott v. Harris*, No. 00-2700, 2000 WL 1693713 (Fla. Cir. Ct. Nov. 14, 2000).
12. *See* Fla. Stat. Ann. § 102.166(4)(c) ("The county canvassing board may authorize a manual recount.").
13. Fla. Stat. Ann. § 102.166(5).
14. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).
15. *See* 3 U.S.C. § 5.
16. For my informal and decidedly academic suggestion of a way to resolve the Florida dispute by in part forthrightly acknowledging this appearance-of-partisanship dilemma see Stephen Clark, *When There Is No Winner to Take All: Salvaging Political Legitimacy by Splitting Florida's Electoral Votes* (last modified Dec. 1, 2000) <http:jurist.law.pitt.edu/election/electionclark.htm>.
17. Definitions of Errors in Vote Tabulation, DE 00-11 (Fla. Op. Div. Elections Nov. 13, 2000) (emphasis added) <election.dos.state.fl.us/opinions/de2000/de00_11html>.
18. *Id.* (emphasis added).
19. Fla. Op. Att'y Gen. 2000-65, 2000 WL 1707267, at *3 (Nov. 14, 2000).
20. *See, e.g.*, Response of Katherine Harris, as Secretary of State, to the Emergency Petition for Extraordinary Writ filed by the Palm Beach County Canvassing Board, at 15, *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (2000), (hereinafter "*Harris I*") available at <http:news.findlaw.com/cnn/docs/election2000/uscharrisresp1124.pdf> (quoting a letter from Butterworth's office disclaiming jurisdiction over interpretation of state election code and citing past attorney general opinions referring legal questions about state election code to Secretary of State).
21. *See* Fla. Stat. Ann. § 106.23(2).
22. Tacitly acknowledging the change of policy, Butterworth opened the opinion with a justification of its issuance. Fla. Op. Att'y Gen. 2000-65, 2000 WL 1707267, at *1 (Nov. 14, 2000) ("Because the Division of Elections opinion is so clearly at variance with the existing Florida statutes and case law, and because of the immediate impact this erroneous opinion could have on the ongoing recount process, I am issuing this advisory opinion."). *Id*.
23. Emergency Petition for Extraordinary Relief at 11, *Harris v. Circuit Judges of the Eleventh, Fifteenth, and Seventeenth Judicial Circuits*, No. SC00-2345, 2000 WL 1702529 (Fla. Nov. 15, 2000) *available at* <http:news.findlaw.com.cnn.docs/election2000/harrisscpetition.pdf> (denying her request, although without prejudice against later refiling).

24. Deadline for Certification of County Results, DE 00-10 (Fla. Op. Div. Elections Nov. 13, 2000) ("Absent such unforeseen circumstances such as a natural disaster, returns from the county must be received by the [state] by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results."), available at <http://election.dos.state.fl.us/opinions/de2000/de00_10.html>.

25. *McDermott v. Harris*, No. 00-2700, 2000 WL 1693713, at *3 (Fla. Cir. Ct. Nov. 14, 2000) (*McDermott I*).

26. *Harris I*, 772 So. 2d 1220, 1226 n.5 (Fla. 2000) (quoting Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000)).

27. *See id.*

28. *McDermott I*, 2000 WL 1693713, at *1.

29. *See, e.g.*, Emergency Petition for Extraordinary Writ at 1-2, *Harris I*, 772 So. 2d 1220, available at <http://jurist.law.pitt.edu/election/00-2346petition.pdf>.

30. *See* Order Accepting Jurisdiction, Scheduling Oral Argument and Setting Briefing Schedule, *Harris I*, 772 So. 2d 1220, available at <http://www.flcourts.org/pubinfo/election/00-2346oralargumentcorrected.pdf>.

31. *See McDermott I*, 2000 WL 1693713.

32. *See McDermott v. Harris*, No. 00-2700, 2000 WL 1714590, at *1 (Fla. Cir. Ct. Nov. 17, 2000) (hereinafter *McDermott II*) ("On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My [first] Order requires nothing more."). *Id*.

33. *Harris I*, 772 So. 2d 1220 (Fla. 2000).

34. *See Harris I*, 772 So. 2d at 1228-30.

35. *Harris I*, 772 So. 2d at 1234-36.

36. *Harris I*, 772 So. 2d at 1237, 1239 (holding Secretary of State may ignore amended county returns under only limited circumstances).

37. *Harris I*, 772 So. 2d at 1240.

38. *Harris I*, 772 So. 2d at 1227.

39. *Harris I*, 772 So. 2d at 1228.

40. *See, e.g.*, *Harris I*, 772 So. 2d at 1227-28 (quoting extensively from *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975)).

41. *See, e.g.*, *Harris I*, 772 So. 2d at 1234-36 (resolving "shall"-"may" contradiction between §§ 102.111 and 102.112 by invoking rule that specific governs general, rule that more recently enacted governs more remotely enacted, rule against interpreting provision to render other provision absurd or superfluous, and rule that statute should be read as a whole, in this case in light of manual recount provisions of § 102.166 and the need of county board for time to carry them out).

42. *See, e.g.*, 772 So. 2d at 1236-38 (emphasizing importance of right to vote under state constitution and fully embracing will of people standard in calling into question Harris's insistence on exercising her discretion to broadly ignore manual recounts).

43. 772 So. 2d at 1228.

44. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (discussing reasons for limiting judicial deference).

45. Of course, this factor is significantly diminished, perhaps, by the fact that Harris's constitutional office was slated to be eliminated in 2003. *See* Fla. Const. art. IV, § 4 (amended 1998 to eliminate office of Secretary of State effective 2003).

46. The fact that the court was unanimous cuts against this conclusion. It is doubtful that all seven members of the court, even if they were all Democrats, would be equally willing to abuse their offices to ensure the election of their preferred candidate. The assumption that all Florida Democrats are necessarily strong supporters of the national Democratic Party is dubious as well. More to the point, the Florida Supreme Court affirmed several lower court decisions contrary to the interests of Al Gore. *See, e.g.*, *Jacobs v. Seminole County Canvassing Board*, 773 So. 2d 519 (Fla. 2000) (upholding dismissal of case challenging disparate access county board gave to Republican officials to correct absentee ballot applications); *Taylor v. Martin County Canvassing Board*, 773 So. 2d 517 (Fla. 2000) (same); *Fladell v. Palm Beach County Canvassing Board*, 772 So. 2d 1240 (Fla. 2000) (upholding refusing to order re-vote because county used allegedly confusing "butterfly" ballot).

    Perhaps the willingness of the court to allow the "selective" manual recounts to proceed only in Democratic-leaning counties was evidence of partisan bias. The court's opinion, however, indicates that the court was sufficiently concerned about that issue that it gave candidate Bush the opportunity to request a broader recount, a request he denied. *See Harris I*, 772 So. 2d at 1240 n. 56. The court also specifically observed that no one had raised an equal protection claim in the instant proceeding. *See Harris I*, 772 So. 2d. at 1228 n. 10. These notes indicate that the Florida Supreme Court was concerned about the issue of selective recounts, as the court's subsequent decision in the election dispute makes clear. *See Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000) (ordering statewide manual recount as remedy in election contest proceeding).

47. *See Bush v. Palm Beach County Canvassing Board*, 121 S. Ct. 471, 475 (2000). The Court also asked the Florida Supreme Court to clarify whether it had adopted an interpretation of the state election code that might have been deemed a change in the law by Congress, thus potentially depriving the state of the "safe harbor" protection of 3 U.S.C. § 5. *See id.* at 474-75. Consideration of this issue is beyond the scope of this article.

48. U.S. Const. art. II, § 1, cl. 2.

49. *See Bush v. Palm Beach County Canvassing Board,* 121 S. Ct. at 474 (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)).

50. *See* Fla. Const. art. III, § 6 ("Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. . . .").

51. 121 S. Ct. 525 (2000).

52. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000). By deciding to reverse the Florida Supreme Court on equal protection grounds, the U.S. Supreme Court was able to dodge the question whether reliance upon the state constitution would have been unconstitutional. *See Bush v. Gore*, 121 S. Ct. at 530. The Florida Supreme Court had also grudgingly issued a revised opinion in the *Palm Beach* case, removing any possible reference to indicate a reliance on the state constitution. *See Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1273 (Fla. 2000) (hereinafter *Harris II*).

53. *Bush v. Gore*, 121 S. Ct. 525, 532 (2000).

54. *See* Fla. Stat. Ann. § 102.168(8); *Harris II*, 772 So. 2d at 1289-90 (relying upon § 102.168(8) to justify order of statewide manual recount).

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# The Thornburgh Memorandum and State Ethical Rules: Has the Conflict Been Resolved?

By Heather Davis

Disciplinary Rule 7-104(a)(1) of the Model Code of Professional Responsibility states that an attorney shall not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so."[1] This ethical prohibition, in one form or another, has been adopted by all 50 states and the District of Columbia.[2] The rule has historically been construed to apply even if the purpose of the attorney is merely to "investigate the facts" of a case,[3] and has also been consistently applied to government attorneys, including Department of Justice attorneys, who act not only as advocates for the government, but, also, as government investigators of crime.[4] All Department of Justice attorneys are required to be "'duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia.'"[5] "To be 'duly licensed and authorized to practice as an attorney,' a member of a state bar must of necessity comply with that state's code of professional responsibility." Therefore, Department of Justice Attorneys must comply with state bar ethical standards.[6]

The underlying purpose of the ethical prohibition (the no unrepresented communications rule) is to "protect the represented individual from overreaching opposing counsel and to ensure that the adverse party's attorney can function properly."[7] The disciplinary rule takes on even more importance in the context of government attorneys prosecuting and investigating criminal offenses, given the government attorneys' "tremendous power and the fundamental individual rights at stake in criminal prosecutions."[8]

## The Thornburgh Memorandum: The Justice Department

In 1989, Dick Thornburgh, then Attorney General of the United States, sent a memorandum to all Justice Department litigators, regarding "Communication with Persons Represented by Counsel."[9] In this memorandum, the Attorney General noted that Department of Justice attorneys must comply with state and local ethical rules as long as these rules do not conflict with the prosecutor's "federal responsibilities, as determined by federal law and the Attorney General."[10] If such a conflict existed, Thornburgh reasoned, the Supremacy Clause of the Federal Constitution would "forbid [] the states from regulating the attorneys' conduct. . . ."[11] While recognizing that local ethical rules have traditionally prohibited contact with parties and/or witnesses represented by counsel, the Attorney General carved out two situations where such communications were permissible under the Department of Justice's policy. First, in the investigatory stages, the Attorney General stated,

> [i]t is the clear policy of the Department [of Justice] that in the course of a criminal investigation, an attorney for the government is authorized to . . . communicat[e] with any person who has not been made the subject of formal federal criminal adversarial proceedings . . . regardless of whether the person is known to be represented by counsel.[12]

This policy applied equally to both overt contacts, as well as to undercover investigations, including the use of undercover law enforcement agents and informants.[13] Second, the memorandum addressed the general prohibition of a government attorney communicating with a represented defendant after criminal proceedings had been initiated, without the defendant's counsel present.[14] The Attorney General noted the Department of Justice's policy was to generally prohibit such communications, but with several exceptions, including: when the represented defendant initiated the contact and knowingly and voluntarily waived his/her right to counsel, when the represented defendant continued to engage in criminal activity, and when the communication was necessary to obtain information "critical to the safety of life."[15] This policy became an effective regulation on September 6, 1994.[16] The regulation specifically addressed Department of Justice attorneys acting as investigators by stating, "an attorney may communicate, or cause another to communicate, with a represented person in the process of conducting an investigation, including, but not limited to, an undercover investigation."[17] The regulations also allowed government attorneys to communicate with represented individuals even after criminal proceedings

had begun, including, but not limited to, the exceptions noted in the Thornburgh memorandum.[18]

The underlying purpose of the Thornburgh memorandum, and the subsequent regulations, was an "attempt to reconcile the purposes underlying [Disciplinary Rule] 7-104 . . . with effective law enforcement."[19] The Department of Justice had been encouraging its attorneys to "play a larger role in preindictment, prearrest investigations."[20] Especially in more complex criminal activities, such as white collar and organized crime investigations, the Department of Justice felt the participation of lawyers in the investigatory stage was a necessity.[21] The Department of Justice also assumed that having attorneys involved in investigations would be "helpful in assuring that police . . . comply with high legal and ethical standards."[22]

Attorney General Thornburgh summed up his justification for his policy by stating, "[i]n the course of investigating and prosecuting violations of federal criminal law . . . Department of Justice attorneys, and those acting at their direction often have occasion to contact or communicate with individuals represented by counsel. Such contacts or communications are an important element of effective law enforcement."[23] In 1991, the Attorney General gave further justification for his policy by stating, "government prosecutors, are not situated similarly to other attorneys . . . [and] to interpose the ethical rules between prosecutors and represented individuals in such routine [investigatory] circumstances would make investigation and prosecution of federal criminal offenses nearly impossible."[24]

## The Courts' Reaction

A few courts upheld the Thornburgh policy.[25] In *United States v. Heinz*, the Fifth Circuit agreed with the underlying justification:

> The dullest imagination can comprehend the devastating effect that such a rule would have on undercover operations. Any potential defendant with an attorney would be insulated from any undercover operation; any potential defendant without an attorney would hire an attorney (if he could afford to do so) in order to build a wall between himself and the government's investigators. . . .[26]

Similarly, in *United States v. Scozzafava*, the court held a government attorney who complied with the Thornburgh memorandum did not engage in professional misconduct.[27] The court ruled that, although the no unrepresented communications rule applied to preindictment, non-custodial investigations, such communications were, nonetheless, authorized by law—i.e., the Thornburgh Memorandum (and, *a fortiori*, so would be the forthcoming implementing regulations).

After the Thornburgh memorandum was issued, but before it was officially codified into regulations, the majority of courts summarily dismissed the policy, and held the memorandum was not binding legal authority, thus, not exempting Department of Justice attorneys from their state ethical responsibilities. The courts were also clear that the policy in the memorandum was contrary to a well-established ethical rule. In *United States v. Lopez*,[28] the court held that Disciplinary Rule 7-104(a)(1) explicitly prohibited "government attorneys [from] question[ing] represented parties in the absence of counsel."[29] In addressing the Thornburgh memorandum the court sent a clear message to Department of Justice attorneys: "[T]he suggestion that DOJ attorneys should be exempted from a long-standing and universally applied ethical norm is alarming. . . . [T]he Department and its attorneys must be held accountable to the same court-adopted ethical rules that govern all other lawyers."[30] Another court dismissed the policy as binding legal authority in a disciplinary hearing setting.[31] In *In re John Doe*,[32] the court held that a federal prosecutor was not "authorized by law" to communicate with an individual represented by counsel.[33] The court held that the state and local ethical rules prohibiting such contact clearly applied to federal prosecutors, and cautioned: "[o]nce federal courts indulge in applying state codes of ethics differently to federal prosecutors, a double standard will inevitably arise causing confusion both among the legal community and those that rely on its integrity."[34]

After the Thornburgh memorandum was codified into official regulations, the courts continued to dismiss the policy as binding legal authority, and found the underlying policy troubling as well. For example, in *United States v. McDonnell Douglas Corporation*,[35] the court held that the Department of Justice did not have the authority to issue regulations exempting Department of Justice attorneys from state ethical rules, specifically, the unrepresented communications rule.[36] The court also found the Department of Justice's "efforts to exempt its attorneys from complying with state ethical rules disappointing."[37] Interestingly, in the *McDonnell Douglas* case, it was reported that a brief was filed by the Conference of Chief Justices, who, on February 2, 1995, unanimously passed a resolution urging its members to continue to enforce state ethical rules without regard to the Department of Justice's policy or actions.[38]

## A Tentative Resolution

On October 21, 1998, President Clinton signed the Omnibus Consolidated and Emergency Supplemental Appropriations Act. An important part of this Act was commonly known as the McDade Amendment,[39] and was officially entitled "Ethical Standards for Federal

Prosecutors."[40] The statute became effective on April 19, 1999, was codified at 28 U.S.C. § 530B, and included the following language:

(a) An attorney for the Government shall be subject to State law and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.[41]

On April 20, 1999, the Department of Justice issued new regulations, pursuant to the statutory authority of 28 U.S.C. § 530B, and these regulations were intended to supersede the Thornburgh policy.[42] The current regulations appear on their face to prohibit a Department of Justice attorney from communicating with a represented party in the course of an investigation, and, also, appear to prohibit communication with a represented party in the course of a criminal proceeding, without a laundry list of exceptions.[43] The pertinent part of the current regulation simply states:

> In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State. . . .[44]

Even though the McDade Amendment was supported by the American Bar Association, the Conference of Chief Justices, the American Corporation Counsel Association, and the United States Chamber of Commerce,[45] overturning the Thornburgh policy was not easy. The McDade Amendment faced strong opposition from the Department of Justice and some members of Congress.[46] Also, the issue does not appear to be completely settled, as Senator Orrin G. Hatch has already introduced the "Federal Prosecutors Ethics Act."[47] The effect of this law would be to subject Department of Justice attorneys to state ethics laws, but with an exception where "the state rule 'interferes with the effectuation of Federal law or policy, including the investigation of violations of Federal law.'"[48] In other words, Senator Hatch's law would permit almost any communication with represented parties as long as there was some "colorable law enforcement purpose."[49] Senator Patrick Leahy has also introduced a bill entitled the "Professional Standards for Government Attorneys Act of 1999."[50] This law "would establish choice-of-law rules for government attorneys," and would direct the Judicial Conference to "formulate a national rule governing federal prosecutors' contacts with represented parties."[51] It does appear that some sort of compromise is being attempted, as the American Bar Association Ethics 2000 Commission and the Standing Committee on Ethics and Professional Responsibility have been meeting with the Justice Department to address concerns about the application of the no-contact rule to Department of Justice attorneys.[52]

## Conclusion

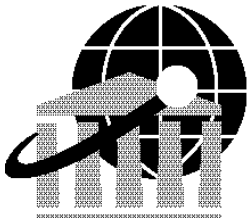
The Thornburgh policy was an attempt by the Department of Justice to allow Department of Justice attorneys to disregard their state ethical responsibilities in order to more effectively "fight crime." The policy was met with much criticism from courts, who saw the policy for what it truly was: an attempt to circumvent ethical rules adopted and enforced by the states. Accordingly, Congress reacted by reinstating the ethical obligations of Department of Justice attorneys as being identical to all others in the profession—i.e., obligated to abide by the standards of legal ethics adopted by the respective states—through the McDade Amendment. However, given the uncertainty facing the McDade Amendment, the victory for legal ethics and the states should be regarded with caution.

## Endnotes

1. *See* John S. Dzienkowski, Professional Responsibility Standards, Rules & Statutes 468 (West 2000). Rule 4.2 of the Model Rules of Professional Conduct similarly provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *Id*. at 88.
2. *See* Department of Justice, Proposed Rules, Communications with Represented Persons, 59 FR at 10087.
3. Dzienkowski, *supra* note 1 at 468 n. 75 (citing ABA Opinion 187 (1938)).
4. *See United States v. Lopez*, 765 F. Supp. 1433, 1448 (N.D. Cal. 1991); *see also United States v. Hammad*, 858 F.2d 834, 837-38 (2d Cir. 1988); *In re John Doe*, 801 F. Supp. 478, 488 (Dist. N.M. 1992).
5. *See United States v. Ferrara*, 847 F. Supp. 964, 969 (D.C. 1993) (quoting The Department of Justice Appropriation Authorization Act).
6. *Id*. at 969-70.
7. *See In re John Doe*, 801 F. Supp. 478, 484 (Dist. N.M. 1992).
8. *See United States v. Lopez*, 765 F. Supp. 1433, 1449 (N.D. Cal. 1991).
9. The Thornburgh Memorandum, as it came to be known, is reprinted in full as "Exhibit E" in the case of *In re John Doe*, 801 F. Supp 478, 489-93 (Dist. N.M. 1992) [hereinafter Thornburgh Memorandum].
10. Thornburgh Memorandum, *supra* note 9.
11. *Id*.
12. *Id*.

13. *Id*.
14. *Id.*
15. *Id*.
16. *See* 28 C.F.R. §§ 77.1 *et seq.* (1994); Neals-Erik William Delker, Comment, *Ethics and the Federal Prosecutors: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys*, 44 Am. U. L. Rev. 855, 856 (1995). The regulations were promulgated under administration of Attorney General Janet Reno, and are sometimes referred to as the "Reno Rules," although the underlying policy can be traced to the Thornburgh Memorandum.
17. 28 C.F.R. § 77.7 (1994).
18. 28 C.F.R. § 77.6(c) (1994).
19. Department of Justice, Proposed Rules, Communications with Represented Persons, 59 FR at 10087 (March 3, 1994).
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id.* at 291.
25. *See* Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 Geo. J. L. Ethics 473, 490 n. 67 (1995).
26. *See* Mashburn, *supra* note 25 at 490 n. 67 (quoting *United States v. Heinz*, 983 F.2d 609 (5th Cir. 1993)).
27. *United States v. Scozzafava*, 833 F. Supp. 203 (W.D.N.Y. 1993).
28. 765 F. Supp. 1433 (N.D. Cal. 1991).
29. *Id*. at 1447.
30. *Id*. at 1449. The court concluded by stating, "To the extent that the Memorandum purports to authorize DOJ attorneys to disregard an ethical rule which has been adopted by this court pursuant to its Local Rules, the Memorandum instructs federal prosecutors to violate federal law." *Id*.
31. *In re John Doe*, 801 F. Supp. 478, 486-87 (Dist. N.M. 1992).
32. 801 F. Supp. 478 (Dist. N.M. 1992).
33. *Id*.
34. *Id*. at 488.
35. 961 F. Supp. 1288 (E.D. Mo. 1997).
36. *Id*. at 1294.
37. *Id*. at 1295.
38. *See* Mark Currieden, *Is DOJ Above the Rules*?: *The department's bid to exempt lawyers from contact rule is blasted by states' chief justices*, 83 A.B.A.J. 26 (Nov. 1997).
39. *See* Rhonda McMillion, *Playing by the Same Rules: Measure confirms that federal prosecutors are not immune to state professional conduct regulations*, 85 A.B.A.J. 91 (1999).
40. 64 FR 19273, 19273.
41. 28 U.S.C. § 530B(a), (b), Ethical Standards for Attorneys for the Government (2000).
42. 64 FR 19275, 19275 April 20, 1999; *see also* McMillion, *supra* note 39.
43. 28 §§ C.F.R. 77.1 *et seq*. (2000).
44. 28 § C.F.R. 77.3 (2000).
45. *See* McMillion, *supra* note 39.
46. *See* Mark J. Biros & Andrew L. Wexton, *Employees vs. Company, The Attorney-Client Privilege Corporations Hold Dear Can Be Breached by Workers*, Legal Times at 41, Oct. 30, 2000; McMillion, *supra* note 39.
47. *See* Robert Morvillo, *Restrictions on Law Enforcement Contact with Corporate Employees*, N.Y.L.J. at 3, Oct. 5, 1999; *see also* 1999 Cong. U.S. S. 250, 160th Cong., 1st Sess., A Bill to establish ethical standards for Federal Prosecutors (introduced on January 19, 1999).
48. *See* Morvillo, *supra* note 47; *see also* 1999 Cong. U.S. S. 250, 160th Cong., 1st Sess., A Bill to establish ethical standards for Federal Prosecutors (introduced on January 19, 1999).
49. *See* Morvillo, *supra* note 47.
50. *See* Morvillo, *supra* note 47; *see also* 1999 Cong. U.S. S. 855, 106th Cong., 1st Sess. (introduced April 21, 1999).
51. See Morvillo, *supra* note 47; *see also* 1999 Cong. U.S. S. 855, 106th Cong., 1st Sess. (introduced April 21, 1999).
52. *See* McMillion, *supra* note 39; *see also* Morvillo, *supra* note 47.

**Heather Davis will receive her J.D. from Albany Law School in May 2001. She currently serves as Editor-in-Chief of the *Albany Law Review*.**



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# Revisiting Home Rule: The New York City Commuter Tax Litigation, the *PBA* Case, and the Future of Home Rule Jurisprudence

By Elizabeth I. Freedman and Spencer Fisher

Elizabeth I. Freedman

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In *City of New York v. State of New York* (hereinafter "*City v. State I*"),[1] the Court of Appeals, in its most recent substantial pronouncement on the issue of home rule, held that a law eliminating the nonresident earnings tax ("commuter tax") for New York State residents who work but do not reside in New York City does not violate the home rule provisions of the New York State Constitution. As enacted, Chapter 5 of the Laws of 1999 ("Chapter 5") amended the definition of "nonresident individual" in Tax Law § 1305(b) and General City Law § 25-m(1)(h) to exclude only New York State residents, thereby permitting the imposition of the commuter tax on out-of-state residents who work in New York City, while eliminating the tax for commuters who live in the state in counties outside of New York City, such as Nassau, Suffolk, Rockland, and other New York State counties. Chapter 5 further provided that if the tax on the redefined class—out-of-state residents—was declared unconstitutional, the original enabling commuter tax legislation would be repealed. The City of New York challenged the law as unconstitutional, seeking a declaration that Chapter 5, repealing the City's authority to impose the tax on state residents, was null and void on the ground that it was enacted without a home rule message from the City, as required by Article IX § 2 of the New York State Constitution. Although the City of New York did not prevail in this case, the decision of the Court of Appeals in *City of New York v. Patrolmen's Benevolent Ass'n* ("*PBA*"),[2] discussed below, demonstrates that the home rule provision has continued vitality.

Article IX, § 2(b)(2) of the New York State Constitution limits the State Legislature's power to act in relation to the "property, affairs or government" of local governments. It provides that, with respect to the City of New York, the Legislature "[s]hall have the power to act in relation to the property, affairs or government of [the City of New York] only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership."[3] Thus, a special law applying only to New York City must be enacted pursuant to a home rule message of the New York City Council, if it relates to the property, affairs or government of the City. This constitutional provision, while granting significant autonomy to local governments to act with respect to local concerns, correspondingly limits the State Legislature's authority to intrude in local affairs. If the state's interest in the subject matter is deemed to be "substantial," however, the home rule provisions have been held not to apply.[4]

In challenging Chapter 5 as violating constitutional home rule requirements, the City contended in *City v. State I* that the State Legislature lacked the authority to repeal a local tax that had been in effect for 33 years, and thereby to dismantle a crucial element of the City's tax structure that had become an integral part of the property, affairs and government of the City of New York, without a home rule message from the City. The State conceded that Chapter 5 was a special law, since it affected only New York City, and related to the property, affairs and government of the City. The City argued that the history of the enactment of Chapter 5 and the record of public statements surrounding that enactment demonstrated that the law was passed for purely partisan political reasons, that is, as a political maneuver to influence the outcome of a special State Senate election in Rockland and Orange counties, and that the law accordingly did not represent a substantial state interest, or serve a substantial supervening state concern sufficient to remove the necessity for a home rule message. As the Court of Appeals reiterated in *PBA*,[5] not only must the subjects of state concern be directly and substantially involved, but the enactment must also bear a rational relationship to the legitimate, accompanying substantial state concern. Consistent with the "sensitive balancing of State and local interests required in resolving home rule issues under our State Constitution,"[6] the substantial state concern that will be permitted to trump constitutional home rule requirements must be found in the "stated purpose and legislative

history of the act in question."[7] The City argued that as in *PBA*, the legislative record in *City v. State I* did not evidence a legitimate and substantial state concern that could constitute an exception to the home rule provisions, and the law itself bore no reasonable relationship to the concerns articulated. Instead, the record demonstrated that the Legislature sought to amend or repeal the commuter tax to gain political advantage, solely based upon its purely parochial interest in influencing the outcome of a hotly contested special election to fill a State Senate vacancy in Rockland and Orange counties, which is certainly not a substantial state concern. The City contended that if the home rule provision's "rights, powers, privileges and immunities," and the literally broad phrase "property, affairs or government"[8] are to mean anything at all, then they must be construed to protect the municipality, and the substantial components of its long-standing existing local tax base, from being fiscally targeted and destroyed by the State Legislature for frivolous and truly insignificant reasons.

In asserting its argument, the City expounded upon the purpose of Article IX, in light of the text and history of the most recent amendments to Article IX of the New York State Constitution in 1963, and the contemporaneous high hopes of commentators and constitutional drafters for the impact of those amendments on judicial decisionmaking.

Home rule is an essential component of the compact between the City and the State. Home rule provides "some measure of protection to a city from possible danger of ill-considered interference by the Legislature in its local affairs."[9] Although the phrase "property, affairs and government" in the current home rule provisions dates back to 1894, the 1923 Home Rule Amendment to the Constitution represented an early effort to address the failure of the earliest statutory and constitutional home rule provisions to achieve their objective. The Home Rule Commission, created to implement the 1923 amendment, noted that an earlier home rule statute enacted in 1913 "was found unworkable. Its provisions were thought to be insufficient to empower cities adequately to regulate matters of local concern." The Commission was hopeful in expressing the idea that the phrase "property, affairs and government" might be construed more liberally by the courts in its new context.[10]

Former Supreme Court Justice and New York State Governor Charles Evans Hughes suggested that "whatever limitations may appear as the Amendment and the Act of 1924 are judicially construed, it is manifest that there is, in any event, a broad grant of authority. In matters of grave import relating to the property, affairs or government of the City of New York, the city may determine its own policy and its destiny is in its own hands."[11]

By 1937, it appeared to some that the scope of home rule had been narrowed significantly by the judicial framework set forth in *Adler v. Deegan*[12] and its progeny. Indeed, that framework has at times been construed as holding that the term "property, affairs and government" is to be narrowly defined, and that where the State Legislature acts on a matter of substantial state concern, the home rule rights of municipalities are vitiated. At least one commentator noted in 1937 that "Judge Crane's opinion in *Adler v. Deegan*, warning that the words of Section 2 must be taken with a Court of Appeals' definition, overlooked the fact that that Court had never defined those words except by indirection" and that "even Court of Appeals' definitions have in the past been subject to change, sometimes without notice."[13] Nevertheless, a study for the 1938 Constitutional Convention asserted that *Adler* rendered home rule "what many have thought to be a decisive blow."[14]

At about the time of the 1938 convention, the Court of Appeals decided *County Securities, Inc. v. Seacord*,[15] which was read broadly by one commentator to exclude taxation from the province of home rule, thereby contradicting the common understanding that the power to raise revenue "fits well within the category of 'traditional' or 'historic' city powers." *County Securities* was thus deemed to be "an interesting indication of the further decline of home rule from the low estate it held after the *Steam Corporation* case [*New York Steam Corp. v. City of New York*, 268 N.Y. 137 (1935)]."[16] These Court of Appeals cases never held that special legislation concerning taxation must inevitably override local concerns. In any event, the 1963 amendments discussed below were formulated, with Richland's input, partly in response to case law perceived to be restrictive, and to encourage a new judicial sensitivity to home rule concerns.

Although amendments made to the State Constitution in 1938 were presented to the voters as an expansion of home rule, the courts recognized little or no such expansion. As discontent continued to grow, a new process to redraft the home rule provisions got underway. Late in 1960, the work of drafting the revisions to Article IX was taken over by the New York Office for Local Government, which established an Advisory Committee on Home Rule. In 1963, the home rule provisions were amended as a result of this process. These amendments added the purpose of "[e]ffective local self-government" in § 1 and, significantly, also added § 3(c), which expressly requires that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." This new rule of liberal construction enlarged municipal home rule protections, and expressly rejected strict judicial construction of Article IX, § 2(b) of the New York State Constitution.[17] Furthermore, the amendments explicitly referred to New York City so as to ensure that

a state law concerning the City's property, affairs or government could be accomplished *only* with a home rule message, and not by action of the Governor and the Legislature as in the rest of the state.[18]

W. Bernard Richland, a member of the Home Rule Advisory Committee and the author of articles cited *supra*, was assigned the task at a 1963 state-sponsored seminar of describing the meaning of "property, affairs and government." He found "substantial encouragement for the cause of municipal autonomy" in the proposed constitutional revision of the local governments article, optimistically noting the new express rule of liberal construction, and heralding "a ringing preamble to the article which proclaims the advancement of local autonomy as the aim of the People." He hoped that the new provisions would encourage courts to "abandon their grudging attitude towards local self-government."[19] Another member of the Home Rule Advisory Committee pointed out in 1964 that the new Article IX contained two provisions which repealed the rule requiring that grants of power to local government be strictly construed and asserted that "we pointed home rule in a different direction."[20]

Given the legislative history, as well as the new statements of purpose and of "liberal construction" in §§ 1 and 2 of the new Article IX, there was reason for hope in the first years after 1963 that the "new" Article IX would be interpreted expansively.[21] Other commentators were more pessimistic about the anticipated judicial reaction.[22]

In the ensuing years, it sometimes appeared that the hopes of the drafters of the 1963 amendments and its stated purposes had been frustrated. When a commentator more recently analyzed the state of home rule, particularly after cases finding residence of civil servants and even succession to the mayoralty in a handful of cities to be matters of state concern,[23] he noted that the state concern doctrine had been extended "into areas that logically should be subject to local determination" and found "reason only for gloom."[24]

Yet in recent years, the Court of Appeals has explicitly recognized, on more than one occasion, the important purpose of Article IX in striking a difficult balance between legitimate state and local needs. In *City v. State II*,[25] while the Court of Appeals declined to decide whether the secession of Staten Island required a home rule message, it noted that a special state law does not require a home rule message when the law's "effect may be at most incidental, not a direct impact on the property, affairs or government" of the municipality. In *Kamhi v. Town of Yorktown*, the Court recognized that "the path of home rule over the century has been unsettled and tortuous."[26]

In decades of case law on the home rule message requirement, the local autonomy of municipalities sometimes seemed to be at risk of being trampled on this tortuous path. In *PBA*,[27] however, the Court of Appeals insisted that the asserted matter of state concern be "directly and substantially" involved, and applied this principle in a manner that reflected a "sensitive balancing of State and local interests."[28] In that case, the Court of Appeals examined the stated purpose of the legislation which purported to grant the New York State Public Employment Relations Board exclusive jurisdiction over negotiation impasses between the City and New York State police, and the legislative history of the enactment, including the Sponsor's memorandum and the debates in both the Senate and the Assembly, and then examined whether the enactment bore a reasonable relationship to the stated underlying legislative concerns. The Court rejected the state's *post hoc* rationalization for a statute that prohibited New York City, when it reached an impasse in collective bargaining negotiations with its police, from referring the dispute to its local public employment relations board and requiring the City instead to submit the dispute to the state board. The Court closely examined the statute and concluded that it bore no reasonable relationship to the stated goal of uniformity of impasse procedures.[29] Hence, the Court concluded that the constitutional infirmity of the special law, "for which no home rule message was ever sent, cannot be cured under the substantial State interest exception."[30] The law did not serve to advance, nor was it reasonably related to, the professed state concerns which prompted its enactment, and thus required a home rule message.[31]

Although the Court of Appeals' decision in *PBA* must be read within the context of long-standing home rule jurisprudence, it also successfully (albeit implicitly) reflects the stated purpose and intended construction of Article IX to further "[e]ffective self-government" and to protect against "ill-considered interference by the Legislature" in local affairs,[32] while retaining an appropriate role for necessary state legislative action either by general law or outside the realm of the City's "property, affairs or government." As shown, the legislative history of home rule through the 1963 amendments supports such balancing.

The 1963 amendments may not have been intended to cast aside decades of jurisprudence, but at a minimum these amendments were intended to inject a new sensitivity to the needs of local governments where the State Legislature acts by special law. The City argued in *City v. State I*,[33] that in its view, the drafters of those amendments would have been troubled by the rash actions of the State Legislature in that case, and would have questioned whether the mere assertion of "State concern" could overcome the sudden loss of hundreds

of millions of dollars to the City, occasioned by the precipitous repeal of the commuter tax, and the lack of a truly deliberative balancing of the City's concerns with those of the State in that matter. While it is possible that the State could have carefully weighed the benefits and disadvantages of retaining the commuter tax, and then imposed its decision upon the City, the reality is that the State became aware of a short-term surplus in the City and snatched it during the City's budget process without weighing anything, to further purely political parochial interests in an upcoming special election.

While reiterating that the special law must bear a reasonable relationship to the legitimate, accompanying substantial state concern, the Court of Appeals concluded in *City v. State I*,[34] that Chapter 5 did not require a home rule message. The Court found that even assuming that Chapter 5 related to the "property, affairs or government" of New York City, the law was supported by a substantial state interest.[35]

In considering whether there was a substantial state concern motivating the enactment of Chapter 5, the Court opined that a tax paid only by New York State residents who work but do not live in New York City was clearly a matter of substantial state concern, as was the sponsor's professed desire to make the City more attractive for investment and growth. The Court found that the legislative history thus reinforced the legitimate, substantial state concern in repealing the commuter tax.[36] Citing *PBA*, the Court noted its consistent reliance upon the stated purpose and legislative history of the enactment to find, or reject, a substantial state concern.[37] The Court declined to speculate on the "political" motivation of the Legislature, noting that to do so would lead it down "a slippery and dangerous slope."[38] The Court also ruled that the Legislature's previous requests for home rule messages for the enactment of the enabling law and extension of the commuter tax were not dispositive of the issue of whether such home rule messages were constitutionally required.[39] The Court accordingly held that a home rule message was not required, since Chapter 5 met the *Adler v. Deegan* test, in that it addressed a subject of substantial state concern, and bore a reasonable relationship to the clearly expressed legislative objective of easing the tax burden on New York State residents who work but do not reside in New York City.[40]

This defeat for municipal home rule may be explained by the somewhat unusual factual context of easing a tax burden on non-residents who work in New York City. Nevertheless, even in this decision, the Court of Appeals, citing *PBA*, emphasized the required relationship between a special law and a substantial state concern. The Court in *PBA* consistently reiterated that "the constitutional balancing of overlapping local and State interests" in enacting a special law requires that the state's interest in the subject matter be "substantial"; that the subject of its concern be "directly and substantially involved"; and that the law "serve a supervening State concern."[41] The statute in *PBA* was found to have violated the home rule provisions because it did not serve to advance, nor was it reasonably related to, the professed state concerns expressed by the legislators and set forth in the legislative history which prompted its enactment. Thus, as evidenced by the *PBA* case, the doctrine of home rule has continued vitality.

Undoubtedly, the Court of Appeals will again be asked to interpret the scope and meaning of the home rule message requirement of Article IX. At that time, some may again advocate to the Court that the State Legislature need do little more than intone any of a dozen or more broad "State concerns" as a mantra when it passes legislation that targets a municipal government for "special" burdens or adverse treatment.[42] This view of home rule, in our opinion, does not fairly characterize "the competing constitutional values involved when State legislation impinges on and overlaps with local concerns."[43] This narrow view effectively denies to home rule the "liberal construction" that the 1963 drafters intended, instead relegating the home rule message requirement to subjects that are wholly bureaucratic, trivial and divorced from importance to the public at large.

If this restrictive view of home rule is rejected and the text of Article IX itself, like all other provisions of law, is interpreted in light of the Court of Appeals' "long tradition of using all available interpretive tools" (including both the words of the provision and the "circumstances surrounding its passage"),[44] then the century-old promise of home rule may finally be fulfilled.

## Endnotes

1. 94 N.Y.2d 577 (2000).
2. 89 N.Y.2d 380 (1996).
3. Outside of New York City, the State Legislature can also act in relation to the property, affairs or government of a local government "on certificate of necessity from the governor reciting facts which in his judgment constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature." N.Y. Const., art. IX, § 2(b)(2)(b). New York City is expressly excluded from this exception to the home rule requirement. *Id.*
4. *PBA*, 89 N.Y.2d at 391.
5. 89 N.Y.2d at 391, citing *Adler v. Deegan*, 251 N.Y. 467, 490 (1929) (Cardozo, Ch. J., concurring).
6. *PBA*, 89 N.Y.2d at 389-90.
7. *Id*. at 391-92.
8. N.Y. Const. art. IX § 2.
9. *City of New York v. State of New York*, 76 N.Y.2d 479, 485 (1990) (hereinafter "*City v. State II*").
10. Second Report of the Home Rule Commission, 148th Sess., No. 72, at 21, 37, 41 (N.Y. 1925).

11. Charles E. Hughes, *Home Rule Assured for New York City*, The American Review of Reviews, at 370-71 (Oct. 1925).
12. 251 N.Y. 467 (1929).
13. Joseph L. Weiner, *Municipal Home Rule in New York*, 37 Colum. L. Rev. 557, 575 (1937).
14. *Problems Relating to Home Rule and Local Government*, New York State Constitutional Convention, at 40-41 (1938).
15. 278 N.Y. 34 (1938).
16. W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 Colum. L. Rev. 311, 335-36 (1954).
17. *See City v. State II*, 76 N.Y.2d 479, 491 & n. 4 (1990) (Hancock, J., dissenting); *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428-29 (1989).
18. N.Y. Const. art. IX, § 2(b)(2).
19. W. Bernard Richland, *Property, Affairs and Government*, Home Rule Handbook (reprinted for 1964 Municipal Law Seminar), at 15, 18, 24.
20. Maurice J. Fleischman, *Expanded Powers for Municipal Self-Government*, Proceedings of 1964 Municipal Law Seminar, at 13, 15-16.
21. *See* Carmin R. Putrino, *Home Rule: A Fresh Start*, 14 Buff. L. Rev. 484, 497 (1965); Lewis A. Millenbach, *Municipal Home Rule in New York*, 22 Syracuse L. Rev. 736, 743, 747 (1970-71) (noting the importance of "liberal construction" and calling for "reassessment by the courts of the policy of restrictive interpretation which has plagued local governments for more than five decades").
22. *See, e.g.*, Reuben A. Lazarus, *Constitutional Amendment and Home Rule in New York State*, New York Law Journal, Oct. 13-16, 1964 (reprint), at 5 ("A statutory admonition to the courts to accord liberal construction to a statute more often than not produces the same effect on judges that precatory words in a last will and testament have on the executor of the will. . . .").
23. *Uniformed Firefighters Ass'n v. City of New York*, 50 N.Y.2d 85 (1980); *Radich v. Council of Lackawanna*, 61 N.Y.2d 652 (1983).
24. James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule*," 59 St. John's L. Rev. 713, 749 (1985); *see also* Peter J. Galie and Robert A. Klump, *Some Significant Decisions: 1847-1997*, New York Law Journal, Oct. 20, 1997, at S8, S9 (commenting that since *Adler v. Deegan*, "the Court has given the phrase 'matter of state concern' an expansive reading, despite the 1963 'Bill of Rights' for local government whose purpose was to limit judicial erosion of home rule powers"). The Court of Appeals very recently reaffirmed that a State-enacted provision on mayoral succession in cities outside New York is "in an area of Statewide significance and, therefore, does not implicate the home rule provisions." *Revere v. Sullivan*, 95 N.Y.2d 881 (2000). The Court thus effectively declined an invitation to revisit the expansive reading of State concern in this area articulated in *Radich*.
25. 76 N.Y.2d 479, 485 (1990).
26. 74 N.Y.2d 423, 428 (1989).
27. 89 N.Y.2d 380 (1996).
28. *Id.* at 391.
29. *Id.* at 393.
30. *Id.* at 394.
31. *Id*. at 393. The State Legislature later enacted Chapter 641 of the Laws of 1998 without a home rule message, in a second attempt to impose State jurisdiction over collective bargaining negotiation impasses, this time involving unions representing firefighters as well as police officers. That legislation is the subject of new litigation presently pending in the Albany County Supreme Court. *Patrolmen's Benevolent Ass'n v. City of New York*, Index No. 7663/2000 (Sup. Ct., Albany Co., Malone, J.).
32. *See City v. State II*, 76 N.Y.2d at 485.
33. 94 N.Y.2d 577 (2000).
34. 94 N.Y.2d at 590.
35. *Id.*
36. *Id.*
37. *Id*. at 591.
38. *Id.*
39. *Id.*
40. *Id.* at 591-92. The City's other grounds, unrelated to home rule principles, asserted to support its argument that Chapter 5 was invalid, were also rejected by the Court. *Id.*, 94 N.Y.2d at 588 n. 2.
41. *PBA*, 89 N.Y.2d at 390, 391 (citations omitted).
42. The State Legislature may of course act by general law applicable to all municipalities, or to all cities, without implicating the requirements of Article IX at all. However, the Legislature does not generally opt to resort to this alternative.
43. *PBA*, 89 N.Y.2d at 390.
44. *See Riley v. County of Broome*, 95 N.Y.2d 455, 463-64 (2000).

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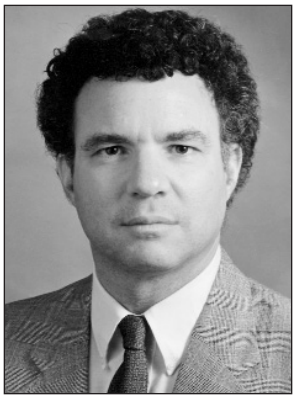
# Home Rule: Supersession of State Law

By James D. Cole

## Introduction



The supersession power is a unique and powerful source of authority that has been delegated to towns and villages. This power has expanded the constitutional and statutory grants of home rule authority. The supersession power often is misunderstood and underutilized, yet it can be a valuable tool in the home rule arsenal. Many towns and villages slavishly follow the provisions of the Town and Village Laws, which are viewed as the charters for these municipalities and sources of authority for topics covered.[1] The supersession power gives towns and villages flexibility to adapt to local conditions.

## The Grant of the Supersession Power

Article IX of the State Constitution, the source of powers of local governments to enact local laws, also states that the specific powers granted are in addition to powers supplied by any other law.[2]

Presumably, under this provision the State Legislature has provided towns and villages with the supersession power. The supersession power authorizes towns to enact local laws relating to

> The amendment or supersession in its application to it of any provision of the town law relating to the property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such local law. Unless authorized by other state statute this subparagraph shall not be deemed to authorize the supersession of a state statute relating to (1) a special or improvement district or an improvement area, (2) creation or alteration of areas of taxation, (3) authorization or abolition of mandatory or permissive referendum or (4) town finances as provided in article eight of the town law; provided however that nothing set forth herein shall preclude the transfer or assignment of functions, powers and duties from one town officer or employee to another town officer or employee, and provided, however, further that the powers of local legislation and appropriation shall be exercised by the local legislative body.[3]

Villages have similar authority.[4]

## Grant of Authority in Plain Language

Simplifying the language of these two grants of power, towns and villages may amend or supersede any provision of the Town Law and Village Law, respectively, relating to a subject which falls within their grant of home rule authority under § 10 of the Municipal Home Rule Law. Exceptions are noted.

## Supersession Expands Home Rule

Under article IX of the State Constitution and the Municipal Home Rule law, local governments are authorized to enact local laws relating to their property, affairs or government and in relation to a broad range of topics, subject to the restriction that local laws *must be consistent with* the Constitution and *general state laws*.[5] For purposes of home rule, the term "general law" has a distinct definition. A general law is "[a] law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages."[6] The supersession power significantly expands this local law authority by authorizing villages and towns to supersede provisions of the Village and Town Laws, notwithstanding that they are general state laws. The grant of supersession power has, in effect, enabled towns and villages to establish their own charters and to tailor many regulations to meet uniquely local needs and conditions. The Court of Appeals specifically endorsed the legality of the supersession power in a case involving amendment by a town of a provision of the Town Law relating to zoning and land use.[7]

## Procedural Requirements and Judicial Review

The authority of a town and village to amend or supersede provisions of Town or Village Law is conditioned upon substantial compliance with the procedures set forth in Municipal Home Rule Law § 22(1).[8] That provision requires that a local law set forth the specific provisions of law that it is amending or superseding.

A clear statement that the supersession power is the source of authority for amending a provision of the Town or Village Law and of the specific provisions of law that are being amended accomplishes two important purposes. First, in that the supersession power

exceeds normal home rule authority, it will be important in any subsequent judicial review to establish that this authorization was used. Second, compliance with § 22(1) avoids the confusion that would result if it were unclear whether the local legislative body intended to amend or supersede an entire state statute or only a portion of the statute.[9] While § 22(1) provides that failure to comply with all of its specifications will not invalidate the local law, where a local law "reveals nothing of the Town's intention to amend or supersede" a state statute, it may be declared invalid.[10]

Local laws often begin with statements of the legislative intent. A clear statement in this precatory language that, for example, supersession power is the source of authority for a local law and specification of the state statute or part of a state statute that is being superseded will ensure compliance with § 22 of the Municipal Home Rule Law. Section 22, by its terms, applies to a local law that supersedes another local law or state statute, regardless of the authority used.[11] For example, a local law superseding a state statute under general home rule authority, empowering a local government to supersede a state statute that is not a "general law," must comply with § 22.

## Limitations on Supersession Power

The grant of supersession power, by its terms, includes express limitations on its use. In the case of both towns and villages, the supersession power may not be utilized where the Legislature expressly has prohibited the adoption of such a local law. Also, the grant of the supersession power to towns includes specific prohibitions on its use. Town supersession power also requires that the powers of local legislation and appropriation continue to be exercised by the local legislative body. While the grant of the supersession power to villages does not include the specific limitations applicable to towns, most of these limitations will apply anyway because the subjects covered are beyond the scope of a village's local law authority.[12]

## Use of Supersession Power

### Home Rule Authority

Prior to any use of supersession power by a town or village, a judgment is required whether the subject is covered by a proposed local law that would supersede a provision of the Town Law or Village Law that falls within the scope of the municipality's local law authority. For example, home rule authority is restricted in relation to the state's navigable waters, regulation of use of the state's highways and streets and the procedures for financing the construction of highways and bridges.[13] Authority to regulate navigable waters and highways, to a limited and specific extent, has been delegated by the Legislature to local governments.[14]

### Matters of State Concern, Preemption and Supersession

Where a state law is a *matter of state concern*, it may be enacted through the regular course of legislative action, unhampered by the home rule provisions of the Constitution.[15] Matters of state concern fall outside Article IX of the Constitution and therefore State Legislation in this area is not restricted by home rule provisions. For example, a home rule request would not be required as a condition of passage of a state law relating to matters of state concern.[16] The Legislature, unrestricted by home rule provisions, may establish different benefits, obligations or standards for various categories of local governments.[17]

Challenges to the use of the supersession power based on arguments that specific provisions of the Town and Village Laws are matters of state concern, thereby protected from supersession, are rebuttable in that the grant of supersession power is extraordinarily broad and includes specific limitations. The "supersession power" authorizes the amendment or supersession "of *any* provision of the Town Law or Village Law . . . unless the Legislature expressly shall have prohibited the adoption of such a local law." Therefore, the supersession power may be exercised provided that the provision of the Town Law or Village Law to be amended or superseded includes no express prohibition on use of the supersession authority and does not fall within one of the specific subject matter limitations on the use of supersession power. Similarly, a challenge based on preemption can be defeated. The Legislature has granted plenary supersession power subject to specific limitations on its use, virtually eliminating the efficacy of any challenge based upon preemption or state concern regarding provisions of law not subject to the limitations.[18]

### Referendum Considerations

It is well established in this state that only the State Legislature may authorize or repeal a referendum. Local governments have no local law power in relation to this subject.[19] It follows that local governments may not, through use of the supersession authority, authorize or repeal a referendum requirement. They may not modify a referendum, for example, by converting a mandatory referendum into a permissive referendum.

This restriction has implications. If, for example, a town in exercising its supersession power enacts a local law that falls within the subjects covered by § 23 or 24 of the Municipal Home Rule Law, a mandatory referendum or a referendum on petition will be required. For example, if in superseding a provision of the Town Law, the town board transfers, curtails or abolishes a power of an elective officer or eliminates an elective office, the local law will be subject to a mandatory referendum.[20]

### Subsequent Amendments of State Law Superseded

What if a local government supersedes a section of the Town Law or Village Law and the section subsequently is amended or repealed and reenacted by the State Legislature? Does the action by the State Legislature have any effect on the previously enacted local law? Has the local law been rendered invalid and is it necessary to supersede the amended or reenacted state law?

While this question has not been litigated, it seems clear that a subsequent amendment to state law has no effect on such a prior local law. The supersession power enables a local government to enact local laws opting out from under the provisions of state law. Supersession represents action by the local government, pursuant to state law, to apply locally enacted provisions in place of a provision of state law relating to a particular subject. The supersession power is designed to permit towns and villages to tailor local governmental operations to meet uniquely local needs and conditions. Supersession is analogous to provisions of county charters and city charters that replace provision of state law consolidated in the County Law and the General City Law. Should a town or village desire to reapply provision of the amended state law, it need only repeal the local laws enacted pursuant to the supersession authority.

### Examples

The broad scope of local law authority creates vast potential for use of the supersession power. For example, towns and villages and other local governments are authorized to enact local laws determining the structure of municipal departments, establishing local positions, defining the powers and duties of these positions, and generally relating to the terms and conditions of employment of officers and employees.[21] The courts have recognized extensive home rule authority of local governments regarding local offices and positions.[22] The broad grant of local police power permits towns and villages to supersede many provisions of the town and village laws relating to protection of health, safety and welfare of persons and property in the municipality.[23] Towns and villages may restructure the legislative body utilizing supersession authority, effectuating, for example, larger or smaller bodies, staggered terms, legislative districts, districts and at-large members, and executives with veto power.[24]

## Summary

The supersession power can be viewed simply. It is authority to amend or supersede any provisions of the Town and Village Laws, absent express prohibition on its use and subject to specific subject matter exceptions. It is important to remember that local authority is the vehicle for exercising supersession power and therefore exercise of this power is pursuant to home rule authority under § 10 of the Municipal Home Rule Law.

## Endnotes

1. The grant of home rule power by Article IX of the New York State Constitution and § 10 of the Municipal Home Rule Law is utilized to legislate in other areas.
2. *See* N.Y. Const. art. IX, § 2(c).
3. N.Y. Municipal Home Rule Law § 10(1)(ii)(d)(3) (McKinney 2000). (This bill would give towns the authority to structure their forms of government to meet local needs. This grant of power will add considerable flexibility to powers of towns in the areas of local government reorganization and administration. The extent of the authority granted to towns by this legislation are the limits of power under § 10 of the Municipal Home Rule Law, the grant of authority to enact local laws. (Bill Jacket, L. 1976, ch. 365, memo on assembly 11478; memo on Senate 7209.)
4. *See id.* at § 10(1)(ii)(e)(3).
5. *See* N.Y. Const. art. IX, § 2(b)(2); N.Y. Municipal Home Rule Law § 10 (McKinney 2000).
6. N.Y. Const. art. IX, § 3(c)(1).
7. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).
8. *See id.*, 74 N.Y.2d at 435, 547 N.E.2d at 352, 548 N.Y.S.2d at 150.
9. *See id.*
10. *Id.*
11. N.Y. Municipal Home Rule Law § 22(1) (McKinney 2000).
12. *See* Op. Att'y Gen. No. 91-19 (1991).
13. *See* Op. Att'y Gen. No. 97-29 (1997); N.Y. Vehicle and Traffic Law §§ 1063, 1064 (McKinney 2000); *Albany Area Builders Association v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989); *People v. Grant*, 306 N.Y. 258 (1954).
14. See Op. Att'y Gen. No. 97-29 (1997); N.Y. Vehicle and Traffic Law §§ 1063, 1064 (McKinney 2000).
15. *See Town of Islip v. Cuomo*, 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528.
16. *See Kelley v. McGee*, 57 N.Y.2d 522, 443 N.E.3d 908, 457 N.Y.S.2d 434.
17. *See id*.
18. *See* N.Y. Town Law § 67 (McKinney 2000).
19. *See* Op Att'y Gen. No. 91-19 (1991).
20. *See* N.Y. Municipal Home Rule Law §§ 23(2)(e), (f) (McKinney 2000).
21. *See* N.Y. Municipal Home Rule Law § 10(1)(ii)(a)(1) (McKinney 2000).
22. *See Resnick v. County of Ulster*, 44 N.Y.2d 279, 367 N.E.2d 1271, 405 N.Y.S.2d 625 (1978).
23. *See* N.Y. Municipal Home Rule Law § 10(1)(ii)(a)(12) (McKinney 2000).
24. *See* N.Y. Municipal Home Rule Law §§ 10(1)(i), (ii)(a)(1), (2) (McKinney 2000).

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# Governing Same-Sex America: A Patchwork of Overlapping Jurisdictions and Responsibilities

By Amanda Hiller

These days some of the most challenging issues facing governments revolve around the proper place for gays and lesbians in American society. Federal, state and local authorities each play roles in governing same-sex America. Policies involving gay and lesbian Americans touch on issues central to the moral and cultural fabric of our society: the structure of families, civil rights, workplace protections and benefits, and the like. This article will briefly survey three key areas of law affecting gays and lesbians—criminal, family, and civil rights law—highlighting areas where the responsibilities and approaches of different levels of government overlap or conflict. The article will also examine three leading issues within these areas—sodomy statutes, marriage laws, and anti-discrimination measures—in greater depth to highlight the conflicts between federal, state and local governments.

## Criminal Law

Criminal laws have traditionally been within the purview of state and local governments, with the federal government, particularly the federal judiciary, acting as a restraint on state powers. Although quite broad, this generalization captures the state of affairs with regard to federal-state relations in the area of criminal laws affecting gays and lesbians.

There are two main types of criminal laws affecting gays and lesbians: hate crimes legislation, where penalties for certain crimes are enhanced when motivated by bias against protected groups; and consensual sodomy laws, which traditionally criminalize 'deviant' sexual conduct, sometimes specifically between members of the same sex. In each of these areas, states have been the primary actors, with the Supreme Court acting to affirm state authority.

Hate crimes laws have been enacted in 43 states, with "[t]he common denominator for all these laws [being] bias-motivated criminal conduct that carries some form of additional or heightened penalty."[1] However, only 22 states and the District of Columbia include sexual orientation as one of the protected categories, with five states also covering gender identity.[2]

The subject of hate crimes legislation has generated significant controversy, with critics charging that such laws criminalize a perpetrator's thoughts rather than actions. However, the Supreme Court upheld a Wisconsin statute providing for enhanced penalties whenever a defendant intentionally selected the crime victim based on race, religion, color, disability, sexual orientation, national origin or ancestry.[3] The court chose to hear the case in part to provide guidance to state courts that had drawn divergent conclusions when faced with similar state statutes.[4]

The federal government also plays a role in combating hate crimes. A hate crime can be prosecuted under federal law if the victim was exercising a federally protected right (e.g., voting) and the crime was motivated by bias based on race, religion, color, or national origin.[5] Gays and lesbians are not protected under this law, and a proposed amendment to include sexual orientation, gender and disability as protected categories has stalled in Congress.[6] However, hate crimes against gays and lesbians are tracked under the Hate Crimes Statistics Act of 1990, showing that sexual orientation bias was the basis for 16% of all hate crimes reported in 1999, second only to race (55%) and religion (17%).[7]

### Criminalization of Consensual Sodomy

Sodomy laws were some of the earliest laws in American history, reflecting traditional religious and common law values.[8] Beginning with the earliest American colonies, sodomy has been criminalized on the local, and later state, levels. After a period of refinement and expansion of sodomy laws in the 19th century, emerging criticism of statutes criminalizing essentially private consensual conduct led to challenges of state sodomy laws.[9]

#### *Bowers v. Hardwick*

The Supreme Court affirmed the constitutionality of state sodomy laws in *Bowers v. Hardwick*, a 1986 case involving a Georgia statute.[10] The respondent in *Bowers*, who had been arrested in the bedroom of his home after committing consensual sodomy with another adult,[11] argued that the state sodomy statute was "an unconstitutional intrusion into his privacy and his right of intimate association."[12]

The *Bowers* Court characterized the issue in *Bowers* as whether homosexuals have a fundamental right to engage in consensual sodomy. After framing the issue as one of "fundamental rights," the Court articulated the appropriate test as whether the liberty interest at issue was "'deeply rooted in this Nation's history and tradition.'"[13] The Court documented the "ancient roots" of prohibitions against sodomy, emphasizing that states have historically prohibited consensual sodomy:

> Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.[14]

The Court also rejected the respondent's claims that the Georgia electorate's views on the morality of sodomy were an insufficient basis for the criminal statute, noting they were "unpersuaded" that this argument justified invalidation of state sodomy laws.[15] Chief Justice Burger, in his concurring opinion, framed the issue even more directly as one of state rights: "[t]his is essentially not a question of personal 'preferences' but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here."[16]

It should be noted that the Court was sharply divided, with the four dissenters arguing that the majority had mischaracterized the issue at hand. The dissenters approached the issue as one of privacy rights, which they described as "'the right most valued by civilized men.'"[17]

### State Judicial and Legislative Repeals

After the Supreme Court's decision in *Bowers v. Hardwick*, attention turned to state courts, where challenges to consensual sodomy statutes met greater success. Several state courts, including Kentucky,[18] Montana,[19] and Tennessee,[20] have found that their state constitutions provide stronger equal protection and privacy protections than the federal constitution. The Georgia Supreme Court even struck down the sodomy statute that was at issue in *Bowers*.[21] In *Powell v. State*,[22] the Georgia court relied on the "long and distinguished history" of state constitutional privacy protections,[23] a sharp contrast from the *Bowers* court's reliance on a history of state condemnation of consensual sodomy.

Many state legislatures have also repealed statutes criminalizing consensual sodomy. As a result, now only 16 states have valid laws criminalizing consensual sodomy by members of the same sex.[24]

## Family Law

Policies governing family relationships, such as marriage and child-rearing, are traditionally within the province of state governments. For example, under traditional conflicts of law principles, "[t]he validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage. . . ."[25] Similar principles govern the rights to obtain divorces and annulments, as well as the recognition of these decrees by other jurisdictions.[26]

The federal government has traditionally deferred to state laws with regard to recognition of marriage and families. Federal immigration policies give immigration preferences to the spouses of U.S. citizens. Recognition of "spouses" for these purposes is based on the validity of the marriage under the laws of the state where the marriage was celebrated.[27] Other examples include federal income and estate tax policies,[28] which are structured to accommodate different state approaches to ownership of marital property.[29]

Recognition of same-sex families has been one of the most visible issues involving gays and lesbians in recent years. Some of the thorniest issues confronting legislators and jurists involve gay and lesbian parenting—issues such as adoption,[30] child custody,[31] and visitation.[32] Parenting issues fall within the purview of state governments without substantive involvement by other levels of government, although it should be understood that policies in these areas vary tremendously from state to state.[33] In recent years some states have expanded parenting options for gays and lesbians, allowing traditional adoptions as well as so-called "second-parent" adoptions, where an individual is permitted to adopt a partner's biological child(ren) without the biological parent losing parental rights.[34]

Over the past decade several state courts have heard equal protection challenges to state marriage laws blocking same-sex marriages, resulting in two states enacting some forms of recognition for same-sex couples. However, the majority of states continue to treat same-sex couples as outside the sphere of marriage, and thus ineligible for traditional spousal protections such as intestacy rights[35] and standing to bring wrongful death actions.[36]

Local governments also play a role in the recognition of same-sex families. Local zoning laws often

restrict household composition based upon local definitions of "family" in order to exclude non-traditional families.[37] State and local policies may also overlap, as in the area of state laws governing rent control in New York City.[38] In the landmark *Braschi v. Stahl Associates*[39] decision, the New York Court of Appeals held that a gay man who had shared a rent-controlled apartment with his "life partner" for 11 years could be considered a member of the named tenant's family, and thus protected from eviction.[40] The key question, according to the court, is whether the nature of the relationship between the parties exhibits "normal familial characteristics" such as "emotional and financial commitment and interdependence."[41]

Many local governments allow same-sex couples to register as domestic partners. Domestic partner registries offer couples intangible benefits in the form of public recognition and validation. To date, 41 municipal governments, including 37 cities and 4 counties, operate domestic partnership registries, as does the State of California.[42] The District of Columbia has also passed a domestic partnership registry, but operation of the registry has been thwarted by congressional restrictions on the use of funds by the District for this purpose.[43]

Domestic partners have also been recognized by some state and local governments for purposes of health insurance coverage and other employment-based benefits for their same-sex partners. Although many private employers extend benefits to the domestic partners of their employees,[44] "[l]ocal governments are counted among the leaders in introducing and experimenting with domestic partner benefits."[45] Eighty-three municipal governments extend "soft" benefits, such as leave policies, to the domestic partners of their employees, including 68 local governments that also provide "hard" benefits such as health insurance coverage.[46] Eight state governments offer some form of domestic partnership benefits to some or all of their employees, covering a total of more than 650,000 active and retired government workers.[47] Despite fears to the contrary, the costs of extending these benefits has been negligible.[48]

### Same-Sex Marriage

In 1993 the Hawaii Supreme Court dramatically changed the course of policies governing same-sex families when it held that the state's marriage laws were a presumptively unconstitutional violation of equal protection under the Hawaii constitution.[49] In *Baehr v. Lewin*,[50] a plurality of the court found that the state's marriage laws relied on an impermissible sex-based classification in that gay and lesbian applicants for marriage licenses were denied licenses solely because of their sex.[51] The court remanded the case in order to give the defendant state official the opportunity to rebut the presumption of invalidity[52] or otherwise resolve the constitutional infirmity.

The mere possibility that Hawaii would recognize same-sex marriages raised the prospect that other states would similarly be bound to recognize these unions under the Privileges and Immunities Clause of the federal Constitution.[53] As a result, 32 states have enacted statutes and/or constitutional amendments either limiting recognition of same-sex marriages from other states or banning performance of same-sex marriages in their own states.[54] However, it is not clear that these laws would survive constitutional scrutiny.[55]

Ironically, one of the two states that enacted constitutional amendments was the State of Hawaii, which amended its constitution to authorize its state legislature to limit marriage to people of opposite sexes.[56] The Hawaii state legislature had responded to the *Baehr* decision by establishing a limited statutory classification of "reciprocal beneficiary," extending specific limited rights and protections traditionally associated with marriage to couples who are barred from marrying.[57] The new statutory scheme extends benefits ranging from health insurance coverage and medical treatment decisionmaking to property ownership and inheritance rights.[58]

### The Defense of Marriage Act

The prospect of the federal government and other states being forced to recognize same-sex marriages performed in Hawaii also prompted Congress to enact the Defense of Marriage Act (DOMA), which provides, in part, that

> No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[59]

DOMA also limited the definition of marriage to mean "a legal union between one man and one woman as husband and wife" and similarly defined "spouse" as "a person of the opposite sex who is a husband or a wife."[60] A study by the General Accounting Office found that this legislation will affect 1,049 federal laws that consider marital status.[61]

### Civil Unions

Last year, Vermont became the first state in the union to formally extend broad marriage-like rights to

same-sex couples, creating a new statutory classification: civil unions.[62] This landmark legislation was brought about as a result of a Vermont Supreme Court decision that found the state's marriage statutes discriminated against same-sex couples in violation of the Vermont constitution.[63] The court found that the state's statutory scheme violates the Common Benefits Clause of the state constitution, which provides, in part, that the "'government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community.'"[64] The court did not specify a remedy for this constitutional violation, deferring to the state legislature, but did suggest a number of statutory alternatives, such as establishing a parallel statutory scheme or extending the current scheme to include same-sex couples.[65]

The Vermont Legislature opted to create a parallel statutory scheme, extending nearly all the benefits and responsibilities of marriage to same-sex couples who have obtained "certificates of civil union."[66] Under the new civil union law, "parties to a civil union shall have *all the same benefits, protections and responsibilities* under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[67] Since Vermont opted to enact a "civil unions" scheme instead of a more fundamental restructuring of "marriage," this new category will not raise the kind of full faith and credit concerns that arose when the *Baehr* decision was rendered.

## Civil Rights Issues

The Supreme Court has traditionally played a leading role in the extension of civil rights protections to various categories of individuals. In the Supreme Court's most recent decision directly implicating lesbian and gay civil rights, the Court rejected a former assistant scoutmaster's challenge to the revocation of his membership in the Boy Scouts of America, a private, not-for-profit organization, based on his sexual orientation.[68] The Court found that the Boy Scouts are an "expressive association," and that requiring the organization to accept an openly gay scoutmaster would burden the organization's efforts to promote anti-gay moral values.[69]

This result is consistent with the Court's previous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[70] There the Court held that requiring St. Patrick's Day parade organizers to admit a contingent of Irish-American gays, lesbians, and bisexuals would violate the parade organizers' First Amendment rights.[71] The Court rejected the argument that exclusion of the contingent violated the Massachusetts public accommodations law, which prohibits discrimination on the basis of sexual orientation, among other classes.[72]

In another area of civil rights, the Supreme Court permitted a Title VII sexual harassment action alleging same-sex sexual harassment to move forward, holding that harassment by a member of the same sex would violate sex discrimination prohibitions.[73] More recently, a federal appeals court held that an individual's sexual orientation is a constitutionally protected "matter[] of personal intimacy" that must be "safeguarded against unwarranted disclosure."[74]

### Anti-Discrimination Laws and Policies

Anti-discrimination laws may be the area of greatest conflict between different levels of government. Eleven states, and the District of Columbia, have enacted broad anti-discrimination measures, while seven others have policies in place protecting state employees from discrimination.[75] In addition, hundreds of local governments have established policies or enacted ordinances protecting gays and lesbians, with more than 100 prohibiting discrimination even in the area of private employment.[76] However, "more than 170 million Americans (more than 62% of the population)" live in areas that do not have anti-discrimination measures in place.

Unlike other areas of civil rights, such as race, gender, and disability, the federal government has not played a leadership role in the area of gay and lesbian civil rights. Legislation extending existing employment discrimination protections to sexual orientation has been stalled in Congress for many years.[77] Furthermore, under the military "don't ask don't tell" policy, gay and lesbian service personnel are surely treated differently than others.[78]

#### *Romer v. Evans*

In 1992 Colorado voters passed a statewide referendum amending the Colorado constitution to repeal existing local ordinances and prohibit local governments from enacting new ordinances "to the extent they prohibit discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct, practices or relationships.'"[79] This referendum was specifically intended to repeal local anti-discrimination measures that had been adopted by several Colorado municipalities, including Aspen, Boulder, and Denver.[80]

The Supreme Court struck the so-called "Amendment 2" as a violation of equal protection, concluding that it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[81] The Court focused on the amendment's prohibition against future protections, finding that "the disqualification of a class of persons from the right to seek

specific protection from the law is unprecedented."[82] According to the Court, a "law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the law in its most literal sense."[83] Essentially, the Court found it impermissible to deny gays and lesbians the right to seek protections from their local governments.

### *Equality Foundation*

The story of ballot initiatives repealing local protections did not end with *Romer*. In 1993, one year after the passage of Colorado's Amendment 2, the voters in the City of Cincinnati, Ohio passed a ballot initiative amending the city charter to revoke two city ordinances prohibiting discrimination on several bases, including sexual orientation.[84] The charter amendment, which was modeled after Amendment 2, provided that

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.[85]

The charter amendment was promptly challenged as a violation of equal protection and First Amendment rights, including free speech and association, and of the right to petition government for redress of grievances.[86] The Sixth Circuit Court of Appeals determined that the charter amendment did not violate the First or Fourteenth Amendments,[87] but the Supreme Court decided the *Romer* case while a petition for certiorari was pending. Soon after the *Romer* decision the Supreme Court granted certiorari and remanded the case back to the circuit court for rehearing in light of *Romer.*[88]

Upon rehearing, the Sixth Circuit reaffirmed the charter amendment, holding that it "did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally enacted special protection from gays and lesbians."[89] The court characterized the charter amendment as "local legislation of purely local scope" that would result in cost savings to the city through avoidance of the "substantial public costs that accrue from the investigation and adjudication of sexual orientation complaints."[90]

The key to the *Equality Foundation* decision, and to the prospects for repeal of other anti-discrimination provisions, is the standard of scrutiny adopted by the court. In *Romer* the Supreme Court had affirmed prior caselaw by adopting a rational basis standard of review. Since the Court could discern no rationale for Amendment 2 other than animus, the Court struck down the amendment. However, the Cincinnati initiative had been justified on fiscal grounds, which the Sixth Circuit court found sufficient to survive constitutional scrutiny.[91]

### Local Anti-Discrimination Measures

Local anti-discrimination measures have served as the basis for numerous court challenges to discriminatory acts based on sexual orientation. For example, New York City's anti-discrimination law has been the basis for claims ranging from housing discrimination to harassment.[92] In addition, the Tompkins County anti-discrimination law has served as the basis for an action alleging employment discrimination.[93] In addition, a Rochester City School Board resolution barring employers who discriminate on the basis of sexual orientation from recruiting on school grounds, and which thus barred military recruiters, was upheld by the New York Court of Appeals as a permissible exercise of the board's authority.[94] It is likely that local protections such as these, which generally have been enacted fairly recently, will increasingly serve as the basis for discrimination complaints in the years to come.

## Conclusion

The lives of gay and lesbian Americans are affected by a patchwork of local, state and federal policies, some of which affirmatively protect and benefit gays and lesbians, such as civil union and anti-discrimination laws, and others that specifically prohibit establishment of similar benefits and protections. In the state-dominated areas of criminal and family law, some states have begun to liberalize traditional restrictions on gays and lesbians, despite federal legislative and judicial actions discouraging these trends. In the civil rights arena, many state and local governments have established varying levels of protections for gays and lesbians, while the federal government continues to discriminate against gays and lesbians in the military.

The picture emerging in each of these areas, as well as in the numerous other areas of law affecting gays and lesbians, seems to point toward increasing recognition and protection of same-sex America. However, one thing is clear: issues surrounding sexual orientation and same-sex families will continue to be some of the most exciting, yet divisive issues for years to come.

## Endnotes

1. National Gay and Lesbian Task Force, *Understanding Key Elements of Hate Crimes Legislation,* available at www.ngltf.org /statelocal/hatecrimes.htm.
2. *See id.* The Texas and Georgia statutes cover crimes motivated by prejudice generally rather than specifying protected classes. *Id.*
3. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).
4. *Id.* at 482-83.
5. 18 U.S.C. § 245; *see also* Human Rights Campaign, *The Federal Government's Role in Combating Hate Crimes,* available at www.hrc.org/issues/leg/hcpa/fedrlsm.html.
6. *See* Hate Crimes Prevention Act, H.R. 1082 / S. 622, 106th Cong. (2000).
7. Pub. L. 101-275 § 1(b)(1), 104 Stat. 140 (codified at 28 U.S.C. § 534). Hate crimes data collected under this law are available at www.fbi.gov/ucr.htm.
8. William Eskridge has compiled state and local sodomy laws dating back to 1610, as well as sodomy arrest statistics for various historical periods. *See* William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 328-41, 374-84 (1999). In fact, Eskridge traces the history of sodomy laws back to the days of Henry VIII, when in 1533 the Reformation Parliament "secularized" offenses previously governed by the Catholic Church. *Id.* at 157.
9. *See id.* at 24-26, 83-86.
10. 478 U.S. 186, 187-88 (1986).
11. *Id.* at 188.
12. *See id.* at 201 (Blackmun, J., dissenting).
13. *Id.* at 191-92 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).
14. *Id.* at 193-94 (internal references omitted).
15. *Id.* at 196.
16. *Id.* at 197 (Burger, C.J., concurring).
17. *Id.* at 199 (Blackmun, J., concurring).
18. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 491-92 (Ky. 1992).
19. *See Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997).
20. *See Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. App. 1996), appeal denied (June 10, 1996), appeal denied (Sept. 9, 1996).
21. *See Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).
22. 510 S.E.2d 18 (Ga. 1998).
23. *Id.* at 21.
24. *See* Lambda Legal Defense and Education Fund, *State-by-State Sodomy Law Update 6/14/2000,* available at www.lambdalegal.org.
25. Restatement (Second) of the Laws of Conflicts of Laws § 283 (1971).
26. *See id.* §§ 285-86.
27. *See Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982).
28. *See* Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as are Currently Granted to Married Couples: An Analysis in Light of Horizontal Equity*, 23 S. Ill. U. L.J. 41, 46 (1998). The right to file joint returns is one of the many federal tax benefits married couples enjoy. This policy provides significant tax benefits for traditional single-income households by spreading the income, and tax liability, of one "bread-winner" to two taxpayers, while dual-income married couples often suffer from the so-called "marriage penalty"—taxing of dual incomes at a higher rate because the taxpayers are married and presumably sharing basic living expenses. Married couples also benefit from estate tax policies, including exemptions from estate taxes for bequests to spouses.
29. *See, e.g.,* James J. Freeland et al., Fundamentals of Federal Income Taxation: Cases and Materials 946 (10th ed. 1998) (discussing amendments to the Internal Revenue Code enacted in order to equalize the tax treatment of married couples from community and non-community property states).
30. *See, e.g.*, *In re Adoption of Anonymous*, 622 N.Y.S.2d 160 (App. Div. 1994) (reversing a lower court decision improperly denying an adoption petition because the prospective parent was in a same-sex relationship).
31. *See, e.g., Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (denying a biological mother custody of her son because of her ongoing lesbian relationship).
32. *See, e.g., V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000), *cert. denied*, 121 S. Ct. 302 (2000) (granting visitation to the former lesbian partner of a child's biological parent); *Alison D. v. Virginia M.*, 569 N.Y.S.2d 586 (App. Div. 1991) (denying visitation to the former lesbian partner of a child's biological parent).
33. *See, e.g.*, Adoption by Lesbians and Gay Men: An Overview of the Law in the 50 States 1 (Lambda Legal Defense & Education Fund 1996) (noting that adoption policies "must be discussed in state-specific terms, since adoption statutes and procedures, and the legal decisions interpreting them, are governed wholly by the individual states" and that "there is no uniform set of laws applicable across the country").
34. *See, e.g., In re Jacob*, 636 N.Y.S.2d 716 (Fam. Ct. 1995) (finding that unmarried heterosexual and homosexual partners of biological parents have standing to adopt their partners' children).
35. *See Vasquez v. Hawthorne*, 994 P.2d 240, 241 (Wash. Ct .App. 2000); *see also* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 Law & Ineq. J. 1, 10 (2000).
36. *See Raum v. Restaurant Associates*, 675 N.Y.S.2d 343, 344-45 (1st Dep't 1998) (holding that the state's wrongful death statute, E.P.T.L. § 5-4.1, does not give unmarried individuals, other than specified relatives, the right to bring wrongful death actions).
37. *See, e.g., Fry v. Village of Tarrytown,* N.Y.L.J. 4/14/98 at 31 (Sup. Ct. 1998); *McMinn v. Town of Oyster Bay*, 498 N.Y.S.2d 128 (1985) (both cited in *Slatterly v. City of New York*, 686 N.Y.S.2d 683 (1999), a case rejecting a challenge to tenant protections under the city's domestic partnership law).
38. *See* N.Y. Comp. Codes R. & Regs, tit. 9, § 2204.6(b) (protecting family members who lived with a deceased tenant from eviction).
39. 543 N.E.2d 49 (1989).
40. *See id.* at 50, 53-55.
41. *See id.* at 53-54 (concluding that the legislature intended to extend protections against evictions to individuals "who reside in households having all of the normal familial characteristics").
42. *See* Wayne van der Meide, Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States 6-7, 86 (National Gay and Lesbian Task Force 2000). The NGLTF report catalogs the anti-marriage laws of each of these states, as well as other state and local laws affecting lesbian, gay, bisexual, and transgendered (LGBT) Americans. *See generally id.*
43. *See id.* at 6.
44. *See, e.g.,* Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30

N.M. L. Rev. 19, 28 (2000) (citing statistics from several sources indicating that between 500 and 600 private employers offer domestic partnership benefits). These employers are clustered in entertainment, academic and high-tech fields, primarily along the West Coast. *Id.*

45. *Id.* at 31.
46. Van der Meide, *supra* note 42, at 7, 16, 85-86. The municipalities offering hard benefits include 54 cities and 14 counties, while soft benefits are offered by an additional ten cities and five counties. *Id.* at 85-86.
47. Paula Ettelbrick, Domestic Partner Benefits for State Employees: Family Policy Project Fact Sheet—October 2000 1-4 (NGLTF Policy Institute 2000). Delaware provides bereavement leave, while Massachusetts extends bereavement and family sick leave benefits to its "managerial and 'confidential'" employees. California, Connecticut, New York, Oregon, Vermont and Washington provide health benefits for the domestic partners of their employees; Washington even provides benefits for the domestic partners of its retirees.
48. *See* Hein, *supra* note , at 33-34 (pointing out that insurance carriers that had initially imposed a surcharge for the additional coverage dropped the surcharges a few years later due to the low costs).
49. *See Baehr v. Lewin*, 852 P.2d 44, 67(1993).
50. 852 P.2d 44 (1993).
51. *See id.* at 63, 67.
52. *Id.* at 68.
53. U.S. Const. art. IV.
54. *See* National Gay and Lesbian Task Force, *Anti-Same-Sex Marriage Laws in the U.S.—April 2000*, *available at* www.ngltf.org; van der Meide, *supra* note 42, at 14.
55. *See, e.g.*, Committees on Lesbians and Gay Men in the Profession, Civil Rights, and Sex and the Law, *Same-Sex Marriage in New York*, 52 The Record 343, 344 (1997) (noting that "[t]he constitutionality of those measures is in doubt").
56. *See* van der Meide, *supra* note 42, at 14, 44 (reporting the amendment to Hawaii Const. art. I, § 23). The other constitutional amendment was enacted by the state of Alaska. *See id.* at 14, 25.
57. *See* 1997 Hawaii Laws Act 383.
58. *See generally id.*
59. Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738c).
60. *Id.* § 7.
61. *See* U.S. General Accounting Office, *The Defense of Marriage Act*, GAO/OCG 97-16 (1997), 1997 WL 67783.
62. *See generally* 2000 Vt. Acts & Resolves 91; *see also* National Conference of State Legislatures, *On First Reading: Landmark Legislation in Vermont Raises Questions for Other States*, State Legislatures, Jul./Aug. 2000, *available at* www.ncsl.org/programs/pubs/7-800OVT.htm.
63. *See Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999) (holding that the state impermissibly excluded "same-sex couples from the benefits incident to a civil marriage under Vermont law").
64. *Id.* at 867 (quoting Vt. Const., ch. I, art. 7).
65. *See id.* at 886; *see also* Memorandum from Thomas A. Little, Chair, to House Judiciary Committee Members (Jan. 4, 2000), *available at* www.leg.state.vt.us/baker/intro.htm (discussing the options available to the legislature after the *Baker* decision).
66. *See* 2000 Vt. Acts & Resolves 91, § 3 (codified at Vt. Stat. Ann. tit. 15, § 1201).
67. Vt. Stat. Ann. tit. 15, § 1204(a) (2000) (emphasis added).
68. *Boy Scouts v. Dale*, 120 S. Ct. 2446, 2457 (2000).
69. *Id.* at 2453-54.
70. 515 U.S. 557 (1995).
71. *Id.* at 566.
72. *Id.* at 571-73.
73. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-79 (1998).
74. *See Sterling v. Minersville*, 232 F.3d 190, 196 (3d Cir. 2000).
75. *See* van der Meide, *supra* note 42, at 4-5.
76. *See id.*; Lambda Legal Defense and Education Fund, Summary of States, Cities and Counties Which Prohibit Discrimination Based on Sexual Orientation (1999), *available at* www.lambdalegal.org.
77. *See* Employment Non-Discrimination Act, H.R. 2355/S. 1276, 106th Cong. (2000).
78. 10 U.S.C. 654.
79. *Romer v. Evans*, 517 U.S. 624, 624 (1996) (quoting Colo. Const. art. II, § 30b).
80. *Id.* at 623-24.
81. *Id.* at 634.
82. *Id.* at 633.
83. *Id.* at 633-34.
84. *See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 291-92 (6th Cir. 1997) (hereinafter *Equality II*) (discussing the ordinances and subsequent ballot measure).
85. *Id.* (quoting City Charter of Cincinnati, art. XII).
86. *See id.* at 292-93 (setting out the early procedural and substantive history of the case).
87. *See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 260-70 (6th Cir. 1995).
88. *See Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996).
89. *Equality II*, 128 F.3d at 301.
90. *Id.* at 300.
91. *Id.* at 301 (distinguishing the charter amendment from Colorado's Amendment 2, which it characterized as "an irrational measure fashioned only to harm an unpopular segment of the population in a sweeping and unjustifiable manner").
92. *See, e.g., Loews Corp. v. Acosta*, 717 N.Y.S.2d 47 (App. Div. 2000) (harassment); *In re Application of 119-121 E. 97th St. Corp.*, 642 N.Y.S.2d 638 (App. Div. 1996) (landlord/tenant).
93. *See Parry v. Tompkins Co.*, 689 N.Y.S.2d 296 (App. Div. 1999).
94. *See Lloyd v. Grella*, 611 N.Y.S.2d 799 (1994).

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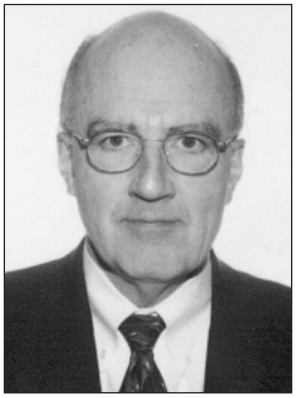
# Pushing the Boundaries of Indian Country

By Robert Batson



Recent litigation has brought to light that there is a lack of consensus as to the boundaries of Indian country in New York. Prior to 1985 when the Oneidas received a favorable decision from the United States Supreme Court in their land claim action,[1] few non-Indians would have considered the possibility that Indian country might be larger than the relatively small and well-defined reservations with boundaries that remained mostly unchanged for over a century. Now, both Indian nations and individual tribal members are asserting Indian country status on property that is within the area of lands purchased by New York State from various Indian nations.

## Indian Country

"Indian tribal territory has always held a separate status under federal law. Tribes exercise substantial governing powers within their territory, they have important economic and property rights, and a number of federal laws also govern other relationships, all to the exclusion of state law."[2] Areas known as Indian reservations or Indian territory in New York are legally Indian country as defined in 18 U.S.C. § 1151.[3]

Indian nations have exclusive authority to govern within their territories, subject to whatever limitations Congress might impose. A state has no jurisdiction over Indian territory within its borders except to the extent it is granted by Congress. New York has been granted criminal jurisdiction over Indian territory[4] and its courts have been granted authority to adjudicate civil actions arising on Indian territory.[5] New York has no authority to tax transactions between Indians on reservations, to tax income earned by Indians on reservations, or to tax reservation land. In addition, New York has no authority to deprive any Indian tribe or its members of hunting and fishing rights as guaranteed them by agreement, treaty, or custom, and may not require them to obtain state fishing and hunting licenses for the exercise of such rights.[6]

One of the first items of business of the government of the United States after the conclusion of the American Revolution was the negotiation of a treaty of peace with the nations of the Iroquois Confederacy in upstate New York. The result of these negotiations was the Treaty of Fort Stanwix.[7] The significance of this treaty and ensuing treaties in 1789 and 1794 between the United States and the Six Nations was an implicit recognition of the Indian nations, "as distinct and separate political communities capable of managing their internal affairs as they had always done."[8]

The effect of the Treaty of Fort Stanwix was to establish a border between Indian country and New York State by guaranteeing to the nations of the Iroquois Confederacy the right to occupy their well-defined territories. At first, "the State left the Indians to manage their own internal affairs as they saw fit, as had been implicitly guaranteed by federal treaty."[9] However, early on New York acquired most of the land reserved to the nations of the Iroquois Confederacy and sold it to developers and homesteaders who settled the central and western parts of the state.

Beginning in the middle of the 19th century, lands of the Seneca Nation on the Allegany Reservation in Cattaraugus County were leased to railroads to construct a right of way. This right of way led to the construction of homes and other structures that later became the City of Salamanca. Congress has consented in several acts to this lease arrangement, which remains in effect.[10] It is important to note that, while the City of Salamanca operates as any other municipality in New York, it is located within the boundaries of an Indian Reservation, and none of the acts of Congress dealing with the lease arrangement diminished the boundaries of the Allegany Reservation. All laws of New York apply to the leased lands, except that no Indian nor property belonging to an Indian may be taxed.[11]

As a result of several land claim actions and the acquisition by various Indian nations or their members of lands formerly clearly within Indian country, the boundaries of Indian country are not always as clear or uncontroverted as they once were. In addition, land has been taken into trust by the United States on behalf of at least one Indian nation so that it might operate a casino on lands that were never within the boundaries of its territory.

## Status of Land in Indian Country

Generally, an Indian tribe's title to its lands is described as a right of possession.

> [A]lthough fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original states and

> the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act.[12]

In most states, the fee title to Indian land is held by the United States. However, New York existed prior to the establishment of the United States and at the time of Independence was the successor to the sovereignty of the English Crown. With a few exceptions, New York holds the fee title or "right of preemption" to Indian land within its borders.[13]

## Restrictions on Alienation of Indian Land

In one of its earliest acts, the United States asserted its exclusive right to extinguish Indian title by the enactment of the Indian Nonintercourse Act of 1790.[14] While the statute has been amended on several occasions, it has consistently provided that no purchase of land from an Indian tribe is valid unless duly authorized by the United States, even where the purchaser is a state that holds the right of preemption. The United States Supreme Court has held that the exclusive right of the United States to extinguish Indian title applies in the original states, where the United States never held fee title to Indian lands, and the pre-emptive right to purchase from the Indians (or fee title) belongs to the state.[15]

During the 1780s, while the Articles of Confederation were in effect, New York State purchased significant amounts of the land reserved to the nations of the Iroquois Confederacy by the 1784 Treaty of Fort Stanwix. The Federal Court of Appeals has held that "the Articles of Confederation, the 1784 Treaty of Fort Stanwix, and the Proclamation of 1783 are properly construed not to prohibit, or require the assent of Congress for, New York's 1785 and 1788 purchases of Indian land from the Oneidas."[16]

However, New York continued to purchase Indian land after enactment of the Indian Nonintercourse Act in 1790. In a pair of transactions in 1795 and 1807, New York purchased all of the land of the Cayugas. Between 1795 and 1846, in a series of 26 written agreements, New York purchased most of the land of the Oneidas. Between 1793 and 1822 New York purchased a substantial portion of the lands of the Onondagas. Between 1816 and 1845 New York purchased approximately one-half of the land reserved to the St. Regis Indians (later St. Regis Mohawks). During the same period, New York also purchased land from the Seneca Nation,[17] and certain tribes that had migrated to New York from elsewhere (Stockbridge, Munsee and Brothertown Indians). These transactions were generally called treaties but, with a few exceptions, were not conducted under federal authority as required by the Indian Nonintercourse Act.

A claim to land in New York was filed by the Oneidas in 1970 as a test case that sought trespass damages from Oneida and Madison Counties. The Oneidas were successful in establishing that an Indian tribe has a federal common law right to bring a suit for damages for the occupation and use of tribal land conveyed to a state in violation of the Nonintercourse Act.[18] On remand, the District Court found the county defendants liable to the plaintiffs for wrongful possession of the land and awarded damages.[19] The Supreme Court also found that the action was not barred by any statute of limitations, as there was no federal statute of limitations that applied and that borrowing a state statute of limitations would be inconsistent with federal policy.

The Cayugas used a different approach in asserting their land claim. Their action names a number of governmental, corporate and individual defendants as representatives of all persons occupying the area of the former Cayuga Reservation.[20] The plaintiffs seek a declaration of their current ownership of and right to possess a 64,015 acre tract of land, and an award of fair rental value for the approximately 200 years during which they were out of possession. While the Cayugas were successful in establishing liability on the part of the defendants,[21] ejectment was ultimately precluded as a remedy.[22] Similarly, ejectment was eliminated as a remedy in an expanded Oneida land claim action.[23]

## Status of Claimed Land

Numerous lawsuits and media reports have examined the question of whether various transactions between New York State and several Indian nations validly effected a transfer of the right of possession to New York State by extinguishing Indian title. Only recently has much attention been given to the question of whether and how an Indian nation might regain jurisdiction over ceded lands within the boundaries of their reservation.

The Northern District has been asked to determine whether land that was within the original boundaries of an Indian reservation has the status of Indian country when the fee title was obtained by an individual member of an Indian tribe in one case, and by an Indian nation in its own name in another.

### Purchase by a Tribal Member

A member of the St. Regis Mohawk Tribe purchased property within the boundaries of a portion of its reservation that it conveyed to New York State in the early 19th century.[24] The tribal member refused to pay taxes on her property, and when informed by Franklin County of its intent to perfect its title to the property based on its tax lien, instituted an action seeking a dec-

laration that the boundaries of the St. Regis Mohawk Reservation have never been diminished from those set forth in a 1796 treaty. The complaint challenges the County's taxing power under the theory that it lacks jurisdiction to assess taxes on real property within "Indian country" as defined in 18 U.S.C. § 1151. It was the plaintiff's position that the conveyance granting the state title to reservation lands did nothing to alter the jurisdictional boundaries of the St. Regis Reservation.

The U.S. Supreme Court has held that

> our cases make clear that a tribal member need not live on a formal reservation to be outside the state's taxing jurisdiction; it is enough that the member live in "Indian country." Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.[25]

Thus, in determining whether a state or local government has taxing power over members of an Indian tribe, "the perimeters of the formal reservation are irrelevant; '[i]nstead, we ask *only* whether the land is Indian country.'"[26]

In 1948, when Congress enacted 18 U.S.C. § 1151, it "uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held in fee by non-Indians within reservation boundaries."[27] Thus, the mere conveyance of reservation lands to non-Indians does not necessarily disestablish the reservation boundaries for jurisdictional purposes. The Second Circuit found nothing in the record to support a conclusion that the conveyance of the Tribe's title to the state uncoupled the land from the boundaries of the reservation as originally established by the Treaty of 1796.[28]

On remand, the District Court applied the three-part test developed by the U.S. Supreme Court in *Solem v. Bartlett*, and concluded that the 1824 and 1825 purchase agreements between the St. Regis Tribe and New York State effected a reservation diminishment.[29] The Court concluded that Indian title and reservation status were not uncoupled until Congress enacted the statutory definition of Indian Country in 1948, so the signatories to the conveyance agreements could not have intended to extinguish title and still retain the reservation status of the land. However, applying a previous determination of the Second Circuit that the St. Regis Tribe is a dependent Indian community,[30] the District Court found that plaintiff's property is within Indian country as defined by 18 U.S.C. § 1151(b), and it is not taxable by the County.

Defendants filed an appeal with the Second Circuit, and a motion with the District Court for post-judgment relief based on newly discovered evidence, that plaintiff had resigned as a member of the St. Regis Mohawk Tribe.[31] The District Court determined that it would not grant the motion because of the pending appeal, but indicated its willingness to grant the motion in the event the case is remanded from the Second Circuit.[32] Defendant then filed a remand motion with the Second Circuit which was granted.[33] Defendant then made a second motion for reconsideration based on a fundamental change in the law as a result of two U.S. Supreme Court decisions. Thus, on remand, the County asked the District Court to not only modify the judgment to reflect plaintiff's tax exempt status following her resignation from the Tribe, but to reconsider whether plaintiff was taxable while she was a member of the Tribe.

The District Court granted the County's motion for relief from judgment based upon newly discovered evidence, and determined that plaintiff is liable to the County for taxes after the date of her resignation. The Court then determined that the Supreme Court changed the controlling law regarding the standard to be employed in ascertaining dependent community status, and held that plaintiff was also liable for taxes on her property before the date of her resignation, since her property does not lie within the boundaries of a reservation nor is the St. Regis Mohawk Tribe a dependent Indian community.

The District Court held that the U.S. Supreme Court implicitly overruled *U.S. v. Cook* in terms of the test to be applied in determining what constitutes a dependent Indian community.[34] According to the Supreme Court, there are two requirements that must be met for a tribe's lands to be deemed a dependent Indian community: "first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."[35]

With respect to the first prong of the test, the District Court found that plaintiff's land is no longer set aside for the use of the Indians as Indian land since the Indian reservation was diminished by the conveyances to New York State. However, the decision does not reconcile the fact that 18 U.S.C. § 1151(b) defines a dependent Indian community as something separate from and outside an Indian reservation. The Court also noted that "the fact that plaintiff's land is freely alienable augurs strongly against a finding of Indian use."[36]

The Supreme Court case involved former reservation lands in Alaska that were transferred in fee simple to a Native government pursuant to the Alaska Native Claims Settlement Act.[37] It is not clear that the purchase agreement between the St. Regis Tribe and New York State had the same effect as the Alaska Native Claims

Settlement Act in revoking the reservation status of the affected land, in that the latter was an act of Congress that specifically disestablished the reservation in question. Furthermore, the question of the alienability of plaintiff's land is presently the subject of a land claim action pending in the Northern District.[38] A decision in favor of the Indian tribes bringing the land claim action could make it relatively easy to establish federal set-aside and superintendence of plaintiff's land.[39]

Since the District Court found that plaintiff's land was neither within a reservation nor Indian country, it did not consider whether another recent U.S. Supreme Court decision renders plaintiff's land taxable. In *Cass County, Minn., et al. v. Leech Lake Band of Chippewa Indians*,[40] the Supreme Court held that ad valorem taxes may be imposed upon land that was made alienable by Congress and sold to non-Indians by the federal government, but was later repurchased by a tribe. "When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation. The repurchase of such land by an Indian tribe does not cause the land to reassume tax-exempt status."[41] Of course, the alienability of the reservation land of the St. Regis Indians derives from a purchase agreement with New York State, not an act of Congress, and it is very likely that these issues will be reviewed by the Second Circuit.

**Purchase by a Tribe**

The Oneida Nation has purchased the fee of nearly 13,000 acres of the approximately 270,000 acres it conveyed to New York State between 1795 and 1846.[42] The Oneida Nation asserts sovereignty over the purchased land in several ways. In particular, the Oneida Nation treats a portion of the purchased lands as "Indian lands" for purpose of the Indian Gaming Regulatory Act, and conducts casino gambling on such land pursuant to a Compact with New York State.[43] The Oneida Nation also sells motor fuel and tobacco products on the purchased lands without collecting state sales and excise taxes. Furthermore, the Oneida Nation does not pay real property taxes to any municipal corporation, treating the lands as immune from such taxes.[44]

When the City of Sherrill commenced proceedings to foreclose on land owned by the Oneida Nation for failure to pay taxes, the Oneida Nation commenced an action in U.S. District Court to stop the City's action.[45] Defendants and amicii argue that the Oneida Nation's reservation that was acknowledged by the 1794 Treaty of Canandaigua[46] was disestablished by the 1838 Treaty of Buffalo Creek.[47] The defense cites that treaty as "a textbook example of an 'obligatory removal treaty' that necessarily disestablished tribal sovereignty over the area from which the tribe was required to remove."[48]

The focus of the Treaty was the lands of the Seneca Nation that blocked the expansion of the City of Buffalo to the southeast. By signing the 1838 Treaty, the New York Indians relinquished to the United States 500,000 acres of land purchased from the Menominees in Wisconsin in exchange for 1,824,000 acres to be set aside in what is now Kansas.[49] According to Professor Helen Upton, New York State opposed the Treaty, and Governor William Seward indicated in 1841 that he was sure that the consent of the Indians had been obtained by fraud.

Article 13 of the 1838 Treaty contains language to the effect that certain Oneidas agree to remove from New York to Indian Territory as soon as they can make satisfactory arrangements with the Governor of New York for the purchase of their lands at Oneida. In any event, it is clear that not all the Oneidas agreed to leave New York, and the right of Oneidas to remain in New York on reservation land was confirmed in several treaties between the Oneidas and New York State subsequent to 1838.[50] The language of the 1838 Treaty does not have the clear language of disestablishment that appears in other acts, such as the Alaska Native Claims Settlement Act discussed above.

In 1919, in the *Boylan* decision, the U.S. District Court for the Northern District found that

> [i]n 1890, 106 of the Oneidas remained in Madison and Oneida counties (adjoining), and these retained 350 acres of the reservation; the balance having been sold by treaties. . . . All this may reduce the area or a reservation, and the population may be reduced by death and emigration; but this does not annihilate the reservation.[51]

The *Boylan* decision concluded that

> Congress has not terminated the tribal relation of these Oneida Indians, . . . has not authorized them to hold their lands in severalty . . . ; that the United States has not authorized or empowered them to sell and convey their lands except under restrictions; that the state of New York has no power to do these things; and that such Oneida Indians remain Indians and wards of the United States.[52]

In light of the *Boylan* decision and the treatment of the Oneidas in New York by the United States, it may be difficult for the amicii in the *City of Sherrill* case to establish that the Oneida Reservation in New York has been disestablished.[53] However, the Northern District may very well find that the lands purchased by the Oneida Nation are not Indian country based on its reasoning in its most recent decision in *Thompson v.*

*Franklin County*.[54] The Northern District will likely analyze whether the land purchased by the Oneidas is taxable in any event based on the reasoning of the U.S. Supreme Court in *Cass County, Minn., et al. v. Leech Lake Band of Chippewa Indians*.[55]

## Conclusion

As of December 2000, it would appear that the view of the U.S. District Court for the Northern District of New York is that New York State's agreements with various Indian nations to purchase portions of their reservation lands had the effect of terminating the Indian country status of such lands. Certainly, an Indian or non-Indian fee holder of such lands is liable for the payment of real property taxes. It is still not clear whether such lands regain Indian Country status when the fee is acquired by the Indian nation that originally conveyed such lands to New York State.

## Endnotes

1. *See County of Oneida, et al. v. Oneida Indian Nation of New York et al.*, 470 U.S. 226 (1985).
2. Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law 27 (1982) (citations omitted).
3. Except as otherwise provided in §§ 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
4. *See* 25 U.S.C. § 232.
5. *See* 25 U.S.C. § 233.
6. 25 U.S.C. § 233 provides,

   > That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York.

7. *See* 7 Stat. 15 (containing the Treaty of October 22, 1784 with the Six Nations).
8. Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law 417 (1942 ed., reprinted by Five Rings Corp., 1986).
9. *Id.* at 419.
10. *See* 18 Stat. 330 (confirming existing leases of Allegany Reservation lands, authorizing further leasing by the Seneca Nation, and making the confirmed leases renewable for 12-year period by the Act of February 19, 1875); 26 Stat. 558 (authorizing a lease renewal term of 99 years by the Act of September 30, 1890); 25 U.S.C. §§ 1774, *et seq.* (authorizing new leases under a 1990 agreement between the Seneca Nation and the City of Salamanca).
11. *See* N.Y. Indian Law § 71 (McKinney 2000) (stating that normally real property on Indian reservations owned by an Indian nation is exempt from taxation). *See also* N.Y. Real Property Tax § 454 (McKinney 2000).
12. *Oneida Indian Nation of New York v. Oneida County*, 414 U.S. 661, 667 (1974).
13. In the Treaty of 1789, the Cayugas ceded and granted "all their lands to the People of the State of New York forever," and of the ceded lands held certain described lands for their own use and cultivation. Similar language is contained in the Treaty of 1788 with the Oneidas and the Treaty of 1788 with the Onondagas. In a 1796 Treaty under the authority of the United States, the St. Regis Indians ceded all their land to the People of the State of New York, reserving certain described lands "to the use of the Indians." However, the right of preemption of the lands of the Seneca Nation in the western part of the state were ceded by New York to Massachusetts in 1786 in exchange for the cession by Massachusetts of its claim to the government, sovereignty and jurisdiction of that area.
14. *See* 25 U.S.C. § 177 (codifing 1 Stat. 137).
15. *See Oneida Indian Nation*, *supra* at note 12.
16. *Oneida Indian Nation of N.Y., et al. v. State of New York, et al.* 860 F.2d 1145, 1167 (2d. Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).
17. Most purchases of land from the Seneca Nation were made by the grantee of Massachusetts' right of preemption pursuant to treaties under the supervision of agents of the United States appointed for that purpose. *See* Felix S. Cohen, *supra* note 8, at 419.
18. *See Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974).
19. *See Oneida Indian Nation of New York, et al. v. County of Oneida, et al.*, 434 F. Supp. 527 (N.D.N.Y. 1977), *aff'd in part*, 719 F.2d 525 (2d Cir. 1983). The Court of Appeals affirmed the District Court's ruling with respect to liability, but remanded for further proceedings on the amount of damages.
20. *See Cayuga Indian Nation of N.Y., et al. v. Cuomo, et al.*, 565 F. Supp. 1297 (N.D.N.Y. 1983).
21. *See Cayuga Indian Nation of N.Y., et al. v. Cuomo, et al.*, 771 F. Supp. 19 (N.D.N.Y. 1991) (granting plaintiffs' motion for partial summary judgment on the issue of liability as to all defendants except New York State).
22. *See Cayuga Indian Nation of N.Y., et al. v. Cuomo, et al.*, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999).
23. *See Oneida Indian Nation of N.Y., et al. v. County of Oneida, et al.*, 2000 U.S. Dist. LEXIS 14187 (N.D.N.Y. 2000). It can be expected that the availability of ejectment as a remedy in an Indian land claim action will be considered at a later date by an appellate court.
24. The property is within the boundaries of one of several tracts of land that were conveyed to New York State. The legality of the conveyances are being challenged by the St. Regis Mohawk Tribe and others in a land claim action pending in U.S. District Court. *See Canadian St. Regis Band of Mohawk Indians by Francis v. State of N.Y.*, 640 F. Supp. 203 (N.D.N.Y. 1986) (deciding a motion in the currently pending case).

25. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993).
26. *Thompson v. County of Franklin*, 15 F.3d 245, 250 (2d Cir. 1994) (emphasis added) (citation omitted).
27. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).
28. *See Thompson v. County of Franklin*, 15 F.3d 245 (2d Cir. 1994).
29. *See Thompson v. County of Franklin*, 987 F. Supp. 111 (N.D.N.Y. 1997).
30. *See United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991).
31. *See* Fed. R. Civ. P. 60(b)(2).
32. *See Thompson v. Franklin County*, 180 F.R.D. 216 (N.D.N.Y. 1998).
33. *See Thompson v. Franklin County*, No. 92-CV-1258 (N.D.N.Y. filed 12-26-2000).
34. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).
35. *Id*. at 527.
36. *Thompson v. Franklin County*, No. 92-CV-1258 at 36 (N.D.N.Y. filed 12-26-2000).
37. *See* 43 U.S.C. §§ 1601 *et seq*.
38 . *See Canadian St. Regis Band of Mohawk Indians, et al. v. State of New York, et. al*., 640 F. Supp. 203 (N.D.N.Y. 1986) (deciding a motion in the currently pending case).
39. However, a decision in favor of the Indian tribes would have the effect of voiding plaintiff's title to her land, and make her subject to whatever remedy is imposed against others occupying land within the original reservation.
40. 524 U.S. 103 (1998).
41. *Id*. at 115.
42. According to the Madison County Planning Department, the Oneida Nation owned 12,803.6 acres of land in Madison and Oneida Counties as of October 17, 2000.
43. *See* 25 U.S.C. §§ 2703(4), 2710.
44. *See* 25 U.S.C. § 233.
45. *See Oneida Indian Nation v. City of Sherrill*, No. 00-CV-223 (N.D.N.Y. filed 11-13-00), http://www.madisoncounty.org/PressRelease/OLAAAC.html.
46. *See* 7 Stat. 44.
47. *See* 7 Stat. 550.
48. *See Oneida Indian Nation of New York State et al. v. County of Oneida*, No. 74-CV-187 (N.D.N.Y. filed 12-20-2000). Memorandum of Law and Addendum of Proposed *Amicus Curiae*, Oneida Ltd., in Opposition to the Oneida Indian Nation's Motion for Summary Judgment and in Support of the City of Sherrill's Motion for Summary Judgment, or in the Alternative for a Preliminary Injunction. The same defense has been asserted by the defendants to the Oneida land claim action in the Northern District.
49. *See* Helen M. Upton, The Everett Report in Historical Perspective–The Indians of New York 45-49 (1980).
50. *See U.S. v. Boylan*, 256 F. 468 (N.D.N.Y. 1919).
51. *Id*. at 478.
52. *Id*. at 494-95.
53. However, the 1838 Treaty may be evidence that the United States ratified New York's purchase of Oneida Reservation lands.
54. *See Thompson v. Franklin County*, No. 92-CV-1258 (N.D.N.Y. filed 12-26-2000).
55. 524 U.S. 103 (1998).

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# Franchise Regulation in New York: Federal, State and Local Cooperation

By William J. Estes

## The New York Franchise Act

The earliest records of the New York State Attorney General's Office (OAG) indicate that Attorney General Louis J. Lefkowitz was so concerned with the large number of complaints the OAG was receiving regarding the burgeoning business method of franchising, that he ordered an inquiry into the matter in 1969.[1] Attorney General Lefkowitz wanted to determine whether the concept of full disclosure, a concept already embraced in securities regulation, should be mandated by the New York legislature.

The inquiry found that

> in almost 100% of the cases where the Attorney General's investigators have obtained the literature used to promote sales (involving approximately 500 franchising companies) . . . the offering literature is either grossly inadequate, misleading, insubstantial or non-existent as to material facts, and in general presents a danger to the investing public, particularly to persons of low and moderate incomes who would be interested in bettering themselves from such investments.[2]

The report recommended that legislation be passed which would require full and fair disclosure in offering literature to be reviewed by the OAG and then circulated to potential franchisees, which is exactly what the legislature did, albeit over a decade later. On January 1, 1981, the New York Franchise Act became effective, despite the opposition of the International Franchise Association and several large franchisors.[3]

The reach of the New York Franchise Act is the broadest of any franchise act in the nation. The statutory definition of a "franchise" under New York law is the right to distribute goods and services with the payment of a franchise fee and *either* 1) the right to use a marketing plan or system *or* 2) the right to use the franchisor's trademark.[4]

The Franchise Act's reach stretches beyond the offices of the Attorney General and into the offices of local government. Thanks to *Aristacar Corp. v. Attorney General*,[5] an entire industry regulated by local government was also brought under state regulation. The *Aristacar* decision held that luxury, non-medallioned radio dispatched car services fit the statutory definition of a franchise, and that their drivers were franchisees. As a result of this finding, New York City's Taxi and Limousine Commission (the "TLC") amended their regulations to prevent the licensing of luxury car service companies which had not registered as a franchise with the state.[6] Cooperation between the OAG and the TLC is ongoing, as evidenced by two recent enforcement actions brought by the author against non-registered luxury car service companies which resulted in penalties for the State of $78,000.

Once a franchisor finds itself within the Franchise Act's purview, it then must comply with its disclosure requirements. Franchise disclosure aspires to provide potential franchisees with enough relevant, factual information regarding the franchisor's business that an investor will be able to make a meaningful decision as to whether the business's opportunity is an appropriate investment. The information to be provided is delineated by state and federal regulators. The New York Franchise Act's supplemental regulations[7] specify the content and organization of the offering prospectus, similar to the prospectus of a publicly traded company.

The scope of disclosure encompasses virtually every aspect that touches upon the business of becoming a franchisee and includes: insurance; advertising; lease and mortgages of real or personal property; sales of goods and services; promises to pay; security interests; pledges; servicing, construction, and installation contracts; and all other arrangements in which the franchisor has an interest.[8]

New York's franchise examiners, who must have completed a minimum of 24 accounting credits,[9] perform a review of each prospectus to ensure that all required information is disclosed. If deficiencies are found in the franchise offering, the examiner will send a comment letter to the franchisor asking that corrections or additions be made before the franchisor is deemed "registered for filing" and can begin selling its franchises in New York.

## Federal and State Disclosure Laws

California was the first state to pass a franchise disclosure law in 1972.[10] Other states followed with statutes which were similar; there are now a total of 12 states which have franchise disclosure laws.[11] Despite the fact that franchising is often not limited to the borders of one state, no conscious effort was made to bring uniformity to state laws, although many of the laws are similar and later laws borrowed heavily from earlier laws. Efforts to pass a uniform franchise act have resulted in failure because each disclosure state would have to repeal their current franchise acts and pass the new, uniform version. The result is a "patchwork quilt" of franchise regulation. Franchisors with units across the country must satisfy regulators in 12 different states, each with different laws and different disclosure requirements.

A second layer of regulation was added on October 21, 1979, when § 5 of the Federal Trade Act, known as the FTC Franchise Rule (the "FTC Rule"), became effective. This rule mandates disclosure in prospectus format to prospective franchisees nationwide; however, unlike state franchise laws, there is no filing requirement or review by the FTC of the prospectus. The FTC Rule preempts state acts in a few areas in which "inconsistencies" may arise between state and federal law.

### State Regulators Create the Uniform Franchise Offering Circular (UFOC)

In an effort to bring uniformity to filing, in 1975 the predecessor of the North American Securities Administrators Association (NASAA)[12] formulated the Uniform Franchise Offering Circular (UFOC).[13] This document was intended to satisfy the disclosure requirements of all the states and the federal government. The New York Franchise Act, passed after the creation of the UFOC, explicitly permits the use of the UFOC as it complies with the provisions of the statute.[14] The success of the UFOC is demonstrated by its acceptance by the FTC, all disclosure states except California, and is practically the exclusive offering prospectus format used by franchisors.

The UFOC seeks to elicit crucial information about the franchise—everything an informed investor would and should want to know before making a substantial commitment of time and money. The UFOC consists of 23 items which include, among other things: the names and backgrounds of the principals; whether the franchisor and its officers have a criminal history, have declared bankruptcy, or were involved in civil litigation; detailed descriptions of the initial franchise fee and other continuing fees; the franchisor's financial history; the obligations to purchase specific goods, services, or equipment; territorial rights; and length of time for which the franchise right is granted.

Despite the success of state regulators in creating a uniform format for franchise disclosure, franchise registration is still a burdensome process. Although franchisors now have a common format in the UFOC, additional addenda must be prepared to meet the unique disclosure requirements of each state. In an effort to create uniformity in registration, NASAA wrote UFOC Guidelines[15] (the "Guidelines") to assist franchise practitioners in meeting the disclosure requirements of the UFOC. However, an unintended consequence of the Guidelines, but a natural consequence of any task involving human discretion, is that interpretation of the Guidelines varies from examiner to examiner and state to state.

### State Regulators Create the Coordinated Franchise Review (CFR)

Responding to these shortcomings, NASAA's Franchise and Business Opportunities Project Group[16] recommended the states participate in a program called Coordinated Franchise Review (CFR) in 1998. Under CFR, which is a voluntary program, a franchisor files his or her prospectus in as many states as he or she wishes to register. Each state reviews the filing, but instead of sending its comments back to the franchisor, it sends its comments to a "lead state" who is the sole liaison with the franchisor during the entire registration process. The burden of dealing with 12 different state regulators is therefore shifted from the franchisor to the lead state who compares the participating state's comments, discusses any differences or inconsistencies with the states and then sends out a single coordinated comment letter to the franchisor.[17]

There have been approximately five CFRs, and New York has already served once as the lead state.[18] CarDay, a New York based franchisor, has also participated in the coordinated review.[19] The benefits cited for CFR include: the elimination of inconsistent comments from examiners, a single comment letter and a single review process, cost-effective and time saving procedures for franchisors, comprehensive disclosure for franchisees and simultaneous approval in several jurisdictions. An ancillary benefit is the opportunity for franchise regulators from various jurisdictions to work closely together on a disclosure document. Such an experience will promote greater uniformity in the interpretation of the UFOC Guidelines in the long term.

### Federal Regulators and the Private Sector Create the National Franchise Council (NFC)

The most recent innovation in franchise regulation does not concern registration procedures and did not arise from collaboration among state franchise regulators. Instead, it is an enforcement tool, and it was initially created as a collaboration between the federal government and the private sector.

Two enabling documents, one from the President and another from Congress, made possible the creation of a public-private project in the franchise industry. The first of these documents was an Executive Memorandum signed by President Clinton in 1998 which designated an interagency committee to encourage the use of alternate means of dispute resolution. The Memorandum stated

> As part of an effort to make the Federal Government operate in a more efficient and effective manner, and to encourage, where possible, consensual resolution of disputes and issues in controversy involving the United States, including the prevention and avoidance of disputes, I have determined that each Federal agency must take steps to: (1) promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques.[20]

The second enabling document was the much heralded "Contract with America Advancement Act of 1996."[21] Section two of the act, known as the "Small Business Regulatory Enforcement Fairness Act of 1996," found that "small businesses bear a disproportionate share of regulatory costs and burdens," that fundamental changes were needed in the regulatory and enforcement culture of federal agencies to make agencies more responsive to small business and that "three of the top recommendations of the 1995 White House Conference on Small Business involve reforms to the way government regulations are developed and enforced." The Act sought "to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented."

With these two documents as its mandate, the FTC released an Advance Notice of Proposed Rulemaking which solicited comments on whether the FTC should develop a program to reduce or waive civil penalties for technical or minor violations of the Franchise Rule.[22] The Steering Committee of the National Franchise Mediation Project[23] responded with a proposal to create a new entity call the National Franchise Council.

The National Franchise Council (NFC) is a non-profit organization created by some of the nation's largest franchisors to increase compliance with federal and state franchise sales laws. The NFC's program has been adopted on a trial basis by the federal government through the Federal Trade Commission (FTC). The OAG is the first and so far the only state law enforcement agency to officially utilize the program. Referrals are made to the NFC when a franchisor has violated the New York Franchise Act. Member franchisors pay $17,500 in annual membership dues in the hope that by underwriting this program they will prevent franchising from being tarnished by errant franchisors.

The NFC program has three key components:

1) Compliance Training: The NFC administers a comprehensive compliance training program for franchisors, providing review of state and federal laws governing franchise sales activity, registration requirements, franchise-related advertising and earnings claims, and negotiations with franchisees. Copies of the *National Franchise Council Franchise Disclosure Law Compliance Manual* are distributed to participants.

Franchisors are assessed a fee of $2,500 for each case referred to the program which compensates the NFC for administering the program and providing one day of on-site training. While $500 is assessed for each additional consecutive day of training, none of the New York referrals has required an additional day. In fact, the training takes approximately four hours.

2) Mediation of Disputes: Franchisees who believe they may have been hurt by non-compliance with the Franchise Act's disclosure requirements may have the opportunity of participating in a mediation program. The mediation program has been endorsed by the International Franchise Association and is run by the National Franchise Mediation Project, in collaboration with the Center for Public Resources Institute for Dispute Resolution. The philosophy of the program is to find a solution to the franchisees' disputes that will maintain the franchisee-franchisor business relationship, which would be destroyed by litigation.

The administrative cost of the mediation, $1,200, plus the cost for the mediator, which can be between $200-$350 per hour (franchise mediations are estimated to take between 1-15 hours), is usually split between franchisor and the franchisee so that both parties feel invested in the process. Mediation is conducted in the location where the franchisee's claims arose.

3) Continuous Monitoring (when needed): The NFC will continue to monitor certain franchisors for an agreed-upon time frame. If additional monitoring is mandated, the franchisor must pay $500 for each year of monitoring.

The Attorney General can make participation in the NFC program a precondition to settling a matter with the OAG, and may also require payments of costs, penalties, fines and agreement to injunctions. The Attorney General may offer participation in the program in exchange for a reduced fine and a faster resolution to litigation. In every situation where the Attorney General has made a referral to the NFC, the errant franchisor has had to sign either an Assurance of Discontinuance prohibiting future violations or a Consent Order and

Judgment which is filed in the Supreme Court. A franchisee's private right of action under the Franchise Act is not disturbed by a referral to the NFC. At the time this article went to press, the OAG has sent three franchise companies to compliance training and one franchisee to mediation with the franchisor.

Attorney General Lefkowitz would no doubt approve of the level of disclosure potential franchisees receive when considering an investment in a franchise. Disclosure laws have made it difficult for fly-by-night operators and con-artists to make quick money and in cases of fraud, the New York Franchise Act and Penal Law can be used to bring harsh civil and criminal penalties. Not wanting to burden legitimate franchisors, federal and state regulators have worked together to make compliance with disclosure laws less burdensome and will continue to work with franchise lawyers to streamline the registration process. Most importantly, the franchise-investing public, who are low- to middle-income citizens, now have material information to assist them in determining if a franchise is appropriate for them.

## Endnotes

1. David Clurman, *A Report to the Honorable Louis J. Lefkowitz Attorney General of the State of New York on Franchising* 1 (Jan. 7, 1970) (on file in the Franchise Unit, Investor Protection and Sec. Bureau, N.Y. Att'y Gen.).
2. *Id*. at 2.
3. William J. Estes, *Enforcement Powers of the Attorney General in the Regulation of Franchises*, in Franchise and Distribution Law in New York 56 (N.Y. Bar Ass'n CLE, Spring 2000).
4. N.Y. Gen. Bus. Law § 681(3) (McKinney 1996).
5. 541 N.Y.S.2d 165 (N.Y. Sup. Ct. 1989).
6. 35 RCNY § 6-19 (2000).
7. The Franchise Act explicitly gives the OAG authority to establish rules and regulations which are necessary in carrying out the mandates of the New York Franchise Act through Gen. Bus. Law § 694(2). These regulations can be found in 13 N.Y.C.R.R. Part 200, §§ 200.1 *et seq*.
8. Gen. Bus. Law § 682.
9. Qualifications for examiners in other disclosure states run the gamut and include lawyers, certified public accountants, and paralegals.
10. Cal. Corp. Code §§ 3100 *et seq*.
11. Aside from franchise disclosure laws, there are also franchise relationship laws and business opportunity laws; since New York has neither, those laws will not be discussed in this article. The registration states are California, Hawaii, Illinois, Indiana, Maryland, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia and Washington. Michigan, Texas and Wisconsin require a notice filing. Texas and Florida may require a filing under their business opportunity law.
12. The North American Securities Administrators Association (NASAA) is an organization concerned with efficient capital formation and investor protection whose members consist of the nation's 50 state securities agencies.
13. Harold Brown et al., *Franchising: Realities and Remedies* 6-62 (1981).
14. Gen. Bus. Law § 683(1).
15. The UFOC Guidelines, consisting of the Requirements, the Instructions, the Commentary and the Sample Answers, were designed to facilitate compliance with federal and state disclosure laws and to serve as an interpretive guide. Uniform Franchise Offering Circular [July, 1999 Supplement] Business Franchise Guide (CCH) & 5790 at 8463.
16. The Franchise and Business Opportunities Project Group is the driving force behind state franchise regulation. Meeting frequently throughout the year, the Project Group sets franchise policy in the United States by discussing multi-state franchise problems; developing new procedures for filings; developing standard comments for registration deficiencies; considering the impact of technology and the Internet on franchise regulation; planning yearly training sessions for examiners and enforcement attorneys; and drafting revisions to the NASAA Model Franchise Investment Law. New York is fortunate to have a voice in setting national franchise policy as Assistant Attorney General Joseph Punturo is one of five state regulators who sit on the Project Group. An Advisory Board consisting of private sector attorneys and accountants who specialize in franchising makes recommendations to the project group.
17. Dale E. Cantone, *New Developments in Franchise Registration: The Coordinated Review Experiment*, The Franchise Lawyer Vol. 2 No. 4, Spring 1999, at 4 (Am. Bar Ass'n Forum on Franchising, Chicago, IL).
18. The franchisor was Robecks, a juice store franchise.
19. *See* Thomas M. Pittegoff, *Coordinated Franchise Review: One Franchisor's Perspective* (January, 2001) (on file with the Comm. on Franchise, Distribution and Licensing L., Bus. L. Section, N.Y. Bar Ass'n).
20. 31 Wkly. Comp. Pres. Doc. 363 (May 1, 1998).
21. Small Business Regulatory Fairness Act of 1996, 5 U.S.C. § 601 (Supp. 1999).
22. 62 Fed. Reg. 9115 (Feb. 28, 1997).
23. The National Franchise Mediation Project was created in 1993 by an ad hoc group of major franchisors to resolve disputes between franchisors and franchisees without the rancor of litigation as quickly, amicably and cost-effectively as possible. In collaboration with the CPR Institute for Dispute Resolution, the program has been endorsed by the International Franchise Association and boasts a 90% success rate. CPR Institute for Dispute Resolution, *National Franchise Mediation Program: A Dispute Resolution Process for Franchising*, 1 (CPR Institute for Dispute Resolution, 1996).

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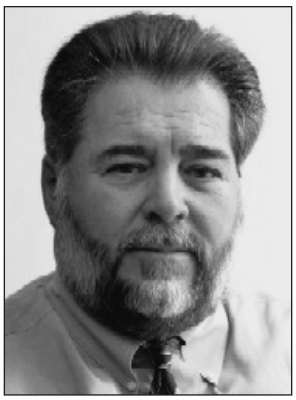
# The Lobbying Act of 1999: Extending New York's Lobbying Disclosure Laws to the Local Level

By Ralph P. Miccio

## Introduction



In order for the operation of government to remain responsible and democratic, the fullest opportunity must be afforded to the people to express freely to appropriate officials their opinions on legislation and governmental operations.[1] In fact, the education and direction given to lawmakers at the legislative, executive, and administrative level of today's widespread and multi-leveled government is essential to effective governmental action. Lobbying is an acknowledged, honorable, and ever-necessary part of efficient modern government.

The people of New York do ask, however, that those who lobby and those who are lobbied do so in a manner that is open and aboveboard. That is why in 1977 the State Legislature and Governor made a commitment to preserve the integrity of the governmental decisionmaking process by enacting the Regulation of Lobbying Act.[2] The Act created the Temporary State Commission on Lobbying, a bipartisan, independent Commission that was intended to oversee the activities of those individuals and groups who seek to influence legislation, rules, regulations, and ratemaking processes of New York State government.

The Act requires that the Commission regularly monitor and make public the identities, activities and expenditures of New York's lobbyists. The monitoring of these activities allows the Commission to function as a clearinghouse for information and make it readily available to the public.

## Disclosure v. Regulation

The Lobbying Act does not *regulate* lobbying in New York. Lobbying activity is not limited or restricted, it simply must be disclosed. Lobbying is a form of speech and the New York Lobbying Act is not intended to nor does it directly restrict speech.[3] Government has a legitimate purpose in requiring disclosure. Government interests which go to the free functioning of the nation's institutions can overbalance the abridgement of constitutional rights.[4]

Providing the public and government officials with information regarding who is lobbying, at what cost, for what purpose and at what level is information vital to having an open and honest government.[5] The Lobby Act does not limit or restrict what information is provided to state or local officials by lobbyists. It does not limit the amount spent on such endeavors. It simply requires that those who lobby, as it is defined in the statute, disclose the required information so that the citizenry and officials can better understand the interests of all and the influence they may bring into public debate.

*"Lobbying is an acknowledged, honorable, and ever-necessary part of efficient modern government."*

Is it a bad thing? If a lobbyist or client is threatened by the mandate of the law, it may be cause to ask why. If a lobbyist or client objects to public disclosure of the content and/or cost of their lobbying effort, then a reasonable conclusion may be that the disclosure itself may influence the decisionmakers and/or the public at large and therefore would be appropriate information to report. In all probability, if the identity and investment of clients into lobbying activities are sensitive areas for clients and lobbyists, then a reasonable conclusion might be that the information this reporting provides is definitely relevant under the stated purpose of the statute that disclosure is essential for honest and open government.[6]

## The Lobby Act of 1999

On December 30, 1999, Governor Pataki signed a new Lobby Statute that reaffirmed the State's commitment to a stronger lobbying disclosure law and granted improved enforcement powers to the New York Temporary State Commission on Lobbying.[7]

The changes in the lobbying laws were considerable. The Act created new administrative late fees, higher civil penalties, gift restrictions, and stricter criminal sanctions. It established more frequent reporting and random audits.[8] The Act also required that the disclosed information be available on the Internet, for "remote computer users," [9] greatly improving the public's access to the activities of lobbyists.

But beyond these revisions was another major change: the extension of the Act to lobbying at the local level.

## Local Lobbying

On January 1, 2001, the Lobby Statute was fully enacted to include those who lobby before many of the state's local-level governmental bodies. Local-level lobbying is now subject to disclosure through registration, reporting and by enforcement. This new requirement is a natural extension of the state lobbying disclosure since many important laws and regulations are now routinely being passed at the municipal level.

To think that local governments are not lobbied would be naïve. All governments are lobbied. Officials of these governments as well as their constituents should have as much right to know the details of lobbyists' activities as state level lobbying, and thus the 1999 Lobbying Act in New York was adopted with the inclusion of local government.

Lobbying has always been strictly defined under the state statute, and this definition has not changed. The term "lobbying" or "lobbying activities" shall mean "any attempt to influence the passage or defeat of any legislation by either house of the state legislature or the approval or disapproval of any legislation by the governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency."[10]

Under the new statute, lobbying or lobbying activities on the local level are defined as "any attempt to influence the passage or defeat of any local law, ordinance or regulation by any municipality or subdivision thereof or the adoption or rejection of any rule or regulation having the force and effect of a local law."[11]

"Municipalities" are defined in the law, and are limited by population or function. A municipality is defined as "any jurisdictional subdivision of the state, including but not limited to counties, cities, towns, villages, improvement districts and special districts, with a population of more than fifty thousand; and public authorities, and public corporations, but shall not include school districts."[12] Forty-five counties, 13 cities and 20 towns have been identified as municipalities meeting the population requirements at this time. A public official shall mean "municipal officers and employees including an officer or employee of a municipal entity, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds."[13]

The movement of state government into local lobbying is well warranted. Law making, rule making, and regulations at the local level have become economically and socially as important to the citizens of New York as activity at the state level. Except for the City of New York and Suffolk County,[14] no local governments in New York require registration or reporting of information of those who lobby local governments.

When the state passes a law that directly impacts local governments there will be questions and concerns. In this case, where municipalities generally do not have a law or regulation regarding lobbying activity there is no great fear of conflict of laws or overreaching. However New York City does have a Lobbying Law. It requires lobbyist registration on a broader scale than the state law does. (City law requires registration for lobbying permit applications and procurement contracts, while the state law does not.) The reporting periods are also different.[15] The laws are separate and distinct.

These differences may cause anxiety and confusion for those who lobby both at the city and state levels. As of now, both levels require filings if a lobbyist qualifies under each law for such registration and reporting requirements. Not all lobbyists recognize this immediately.

Due to this problem and others, it has become Commission policy to conduct an educational program for the first year of implementation of this law as it applies to local lobbying. This policy includes directing the Commission's Educational Coordinator and Counsel to prepare and implement a strategy of education for local lobbyists and local public officials. The plan calls for the production and publication of informational materials, which are distributed throughout the State of New York. Local officials are requested to place these materials in a public place and advise known lobbyists of the material and the requirements of the new law.

The Commission also makes presentations to state, county and regional bar associations, chamber groups, and business and educational associations. This is done, not only to directly inform those in attendance as to how the law affects them, but also to help local officials and the Commission identify who is actually lobbying at the local level so that a real and direct dialogue can take place with those lobbyists who are most affected by the new law.

The Lobby Act applies to specific activities defined in the statute at the local level. Not all local government functions at the legislative and executive level are clearly defined by the wording in the statute; however, questions concerning these types of activities will be answered pursuant to a request made by a lobbyist for

a Commission Advisory Opinion. The statute does not speak to "resolutions" or "quasi judicial" actions such as Zoning Board of Appeals decisions or administrative or advisory decisions like those made by planning boards. These issues and others will be resolved over time and with experience.

Disclosure, after all, is the main goal of the Lobbying Act. The people and their representatives have a right, under this law, to know who is lobbying, who is being lobbied, for what purpose and at what cost.

Its new applications to local government would also seem to be a legitimate concern of all in New York since these issues are likewise vital to understand the needs and pressures that both state and local governments face on a daily basis. No one—lobbyist, governmental official or citizen—should object to casting a "ray of sunshine" on these governmental functions. Disclosure and oversight is a safeguard to better and honest government at all levels, local and state.

## Endnotes

1. N.Y. Legis. Law (hereinafter "Lobbying Act") § 1-a (McKinney Supp. 2001).
2. Created by Chapter 937 of the Laws of 1977.
3. *United States v. Harriss*, 347 U.S. 612 (1954).
4. *Comm'n on Indep. Coll. and Univ. v. New York Temp. State Comm'n on Lobbying*, 534 F. Supp. 489, 498 (N.D.N.Y. 1982).
5. *Buckley v. Valeo*, 424 U.S. 1 (1976).
6. Lobbying Act § 1-a.
7. Created by Chapter 2 of the Laws of 1999.
8. Lobbying Act § 1-d(c)(2-a).
9. Lobbying Act § 1-r.
10. Lobbying Act § 1-c(c).
11. *Id.*
12. Lobbying Act § 1-c(k).
13. Lobbying Act § 1-c(l)(v).
14. Suffolk County, N.Y., Local Law No. 4 (1996); New York, N.Y. Admin. Code, Title 3, ch. 2, Local Law No. 14 (1986).
15. New York, N.Y. Admin. Code, Title 3, ch. 2, Local Law No. 14 (1986).

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# State Officers and Employees Performing Local Government Service: Implications of State Ethics Law

By Barbara F. Smith

Are outside activities performed by state officers or employees serving in a local government capacity permissible? Generally, yes they are. Services rendered on behalf of local governments are subject to the same type of scrutiny as outside activities involving private sector employers. However, because the client is the public-at-large, the general trend of the State Ethics Commission, which interprets the law on these matters, has been to approve such activities.

Public Officers Law §§ 73 and 74 govern the conduct of state officers and employees and restrict the types of permissible outside activities.[1] Current employees and former employees are treated differently.

## Current Officers and Employees

It is a credit to the state workforce that many state officers and employees choose to serve their local governments. The Commission has considered numerous requests from individuals seeking advice or approval to serve as appointed members of local government boards (e.g., planning boards, zoning boards), or to serve in elected positions (e.g., mayor, supervisor, town justice, member of a municipal governing board).

Salaried state officers and employees who have been designated as policymakers must obtain approval from the State Ethics Commission to serve in a public office or public employment for which more than $4,000/year in salary will be paid.[2] Others should seek the Commission's advice to insure that their service is appropriate and permissible.

Public Officers Law § 73 precludes certain activities by state officers and employees before state agencies.[3] However, these provisions have a limited impact on the propriety of state officers and employees rendering services as part-time local government officials.[4]

Public Officers Law § 74 contains the code of ethics for state officers and employees. The code is intended to preclude activities that present actual or apparent conflicts of interest. The rule with respect to conflicts is set forth in subdivision 2, which states:

> No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his official duties in the public interest.

The standards of § 74(3) relevant to this discussion include:

> (a) No officer or employee of a state agency . . . should accept other employment which will impair his independence of judgment in the exercise of his official duties.
>
> (b) No officer or employee of a state agency . . . should accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.
>
> (c) No officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.
>
> (d) No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.
>
> (f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

> (h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

In assessing an outside activity, the Commission considers several factors: the employee's duties on behalf of the state agency for which he or she works, the relationship of the agency and the employee to the proposed outside activity, whether the employee would be in a position to use his or her position to secure unwarranted privileges, and whether the outside activity would impair the employee's independence of judgment in the exercise of official state duties.[5]

The Commission has held that Public Officers Law § 74 does not prohibit an officer or employee from seeking and holding elective office when the responsibilities of the office would not conflict with the employee's state responsibilities.[6] Only where there is a potential for conflict has the Commission disallowed the seeking of elective office. The same holds true for appointed positions, or municipal employment. In determining the potential for conflict, the Commission undertakes an analysis of the specific local government position sought and compares the duties with those of the state position held.

When a particular service in local government is found generally permissible, there may still be potential for conflict that would necessitate recusal by the state officer or employee. For example, should a matter involving an employee of the same state agency come before a town board where the state employee serves, the state employee serving on the town board should recuse himself or herself from participation in the matter.

Discussion of some circumstances where the Commission has considered involvement by a state officer or employee in a local government position can be found in the following Advisory Opinions:

92-16 where the Commission concluded that § 74 prohibited a state employee from seeking election to and serving on a city council in the geographic area where he worked as a leasing agent; noting that political opponents would accuse the state employee of using his office to secure political advantage, that his official state activities could be influenced by the contributions and support of his state agency's clients, and that his objectivity and negotiations on behalf of his state agency could be questioned. Recusal on a case by case basis was not deemed a satisfactory option.

93-9 a non-policymaking employee serving as an agency coordinator for a drug and alcohol prevention program was permitted to seek the elected office of county legislator, provided he disclosed his activities to his supervisor and recused himself from matters coming before his state agency that affected his county. Based on § 74, the employee was precluded from appearing as a county legislator before any state agency.

96-30 a Director of the State University of New York was permitted to serve as a county legislator even though that local legislature oversaw a SUNY community college located within the county. He was required to recuse himself from discussion of community college matters and to resign from the county legislature's education committee which acted on funding resolutions passed by the community college.

97-17 a non-policymaking psychiatric center employee was permitted to seek election to and serve as a town board member, the Commission noting that "in the unlikely event that a specific matter should arise which might create a conflict of interest or the appearance of a conflict, either in his State or elected position, the employee should recuse from dealing with that matter."

*"The Commission has held that Public Officers Law § 74 does not prohibit an officer or employee from seeking and holding elective office when the responsibilities of the office would not conflict with the employee's state responsibilities."*

97-21 an engineer for a state authority was permitted to seek election to and serve as a county legislator on the ground that "there appears to be no connection with or relationship between [the employee's] State responsibilities and those that he would be called upon to perform as a legislator."

## Former Employees

The post-employment restrictions set the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate state service. The restrictions are intended to preclude former state officers and employees from exercising undue influence over former colleagues or to

utilize insider-type information gained in government service for their own benefit or that of private clients.

The so-called "revolving door" restrictions are found in Public Officers Law § 73(8)(a). A two-year bar prohibits state officers and employees from appearing or rendering compensated services on any matter before their former agencies within two years of separation from state service. The specific matter is irrelevant; the dispositive question is whether the matter involved is before the former agency. There is also a lifetime bar. It prohibits former officers and employees from appearing or rendering compensated services involving cases, proceedings, applications or transactions with which they were directly concerned and in which they personally participated while in state service, as well as matters which had been under their active consideration.[7]

Unlike the provisions governing current employees, the post-employment restrictions contain a specific "government-to-government" exception. Public Officers Law § 73(8)(e) states:

> This subdivision shall not apply to any appearance, practice, communication or rendition of services before any state agency, or either house of the legislature, or to the receipt of compensation for any such services, rendered by a former state officer or employee . . . which is made while carrying out official duties as an elected official or employee of a federal, state or local government or one of its agencies.[8]

This exception applies only to work in a government office or position of employment. It does not extend to former state officials or employees working as paid consultants to governmental entities. The Commission has had occasion to apply the government-to-government exception in a variety of circumstances, such as in the following Advisory Opinions:

94-8 within two years of his having left state service, a former employee was permitted to serve by appointment on a local planning board which may have contact with his former state agency; appointed status was equated by the Commission to that of employment status.

96-1 the government-to-government exception does not apply to a mediator appointed by a federal court; employment status was distinguished from that of a mediator appointed to handle a single case, and paid a fee.

96-15 the NYS Association of Counties, a not-for-profit corporation comprised of county governments and the City of New York, is not a governmental agency: "its mission is not to carry out governmental functions or to serve the 'public at large,' but to represent the interests of its members, officials of local government."

96-16 the government-to-government exception applies to employees of New England Interstate Water Pollution Control Commission, which was created by interstate compact and exercises sovereign power subject to the regulatory authority of government.

98-17 the government-to-government exception applies to an employee of the I-95 Corridor Coalition, a regional association of the transportation agencies.

00-6 the government-to-government exception does not apply to the New York City Housing Partnership Development Corporation or the Community Partnership Development Corporation. Although those entities perform quasi-public functions, they were not created by a government agency nor are they controlled by government officials or agencies.

## Getting Advice

State officers and employees wishing to seek the Commission's advice before engaging in outside activities may direct their written inquiries to: State Ethics Commission, 39 Columbia Street, Albany, NY 12207. The Commission's formal opinions are accessible on the web at: www.dos.state.ny.us/ethc/ao.html.

## Endnotes

1. This article focuses on the implications for salaried state officers and employees serving in a local government position. Covered officers and employees include those from virtually every executive branch agency, including public authorities and public benefit corporations where the Governor has named at least one board member.
2. *See* 19 N.Y.C.R.R. Part 932.3, governing outside activities.
3. Subdivision 2 precludes state employees from handling any case, proceeding, application or other matter before any state agency, where the compensation is contingent upon any action by such agency with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise, or other benefit (however, nothing prohibits the fixing at any time of fees based on the reasonable value of the services rendered). Subdivision 3 precludes handling any matter against the interests of the State in the Court of Claims. Subdivision 4 precludes a state officer or employee, or a firm or association of which such person is a member, or corporation ten percent of the stock of which such person owns or controls directly or indirectly from (i) selling goods or services valued in excess of $25 to any state agency, or (ii) contracting to provide such goods or services to a private entity where the power to contract, appoint or retain on behalf of the private entity is exercised by a state agency, absent competitive bidding. Subdivision 7 precludes a state officer or

employee from appearing or receiving compensation for services rendered before a state agency in connection with (i) the purchase, sale, rental or lease of real property, goods or services, or a contract therefor; (ii) ratemaking proceedings; (iii) the adoption or repeal of regulations; (iv) the obtaining of grants of money or loans; (v) licensing; or (vi) a franchise proceeding under the public service law. Finally, subdivision 12 precludes a state officer or employee from orally communicating, whether for pay or otherwise, as to the merits of any of the enumerated items in subdivision 7, with any employee of the agency concerned with the matter. Pursuant to § 73(10), these restrictions do not apply to the state employee's firm so long as the state employee does not share in the net revenues resulting from any prohibited matter (*See also* Advisory Opinion No. 90-14).

4. This is so because the § 73 restrictions bar activities in which municipalities do not often engage.
5. Advisory Opinion No. 95-43, citing Public Officers Law § 74(3).
6. Advisory Opinion No. 92-16.
7. Public Officers Law § 73(8)(a) states:

> (i) No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency.
>
> (ii) No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.

8. Prior to the legislative enactment of the government-to-government exception, the Commission, in Advisory Opinion No. 89-5, had concluded that the post-employment restrictions did not apply to "one who terminates employment with a State agency and takes employment with the legislative or judicial branch of government or with any municipal government as long as he or she is acting within the proper discharge of his or her official duties."

**Barbara F. Smith is a member of the NYSBA Committee on Attorneys in Public Service and Committee on Attorney Professionalism. She currently serves as Counsel to the State Ethics Commission, although the views expressed are not necessarily those of the Commission.**

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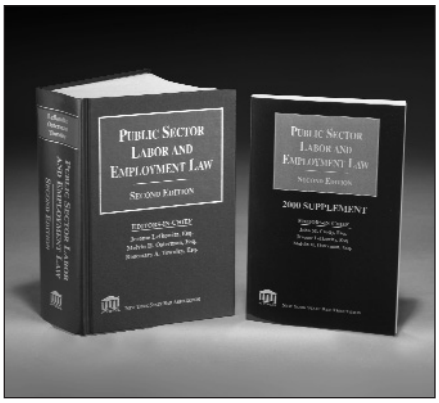


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