

## EPILOGUE: A NOTE ON LOCAL LEGISLATION

This handbook has focused on state campaign finance reform, but the recommendations and constitutional analysis apply equally to local reform efforts. Such efforts raise two additional concerns, however, which we address briefly below: (1) state limits on local governance, and (2) supposed counterexamples to the legal analysis we have provided in Part Two.

**Home Rule.** Unlike states, municipalities are not sovereigns in their own right. Localities are chartered entities limited to the powers that the state confers upon them. The state constitutional or statutory right of localities to exercise control over matters of local concern—such as the financing of local campaigns—is known as “home rule.” Some states give broad authority for home rule; others retain tighter or complete state control.<sup>1</sup> The scope of home rule may be discerned from the state constitution, state statutes, and judicial decisions interpreting those laws.<sup>2</sup>

Local activists thus should not automatically assume that their municipality has the power to enact the campaign finance provisions of its choice. Reformers wishing to draft laws relating to the financing of elections in any jurisdiction smaller than the state—including counties, cities, towns, and villages—should first confirm that such an enterprise is authorized. State law may preclude political subdivisions from adopting laws pertaining to elections or require consultation with the state. State law also will govern the procedures that may be used to adopt and amend local laws, including campaign finance measures. If the state has its own campaign finance legislation, that law may limit the scope of local reform.

This handbook cannot provide a 50-state analysis of home rule law. Our concern here is rather to alert activists to not only the federal but also the state legal constraints on local campaign finance reform. If a locality is severely constrained by miserly home rule provisions, its only options may be legislative action at the state level or a state constitutional amendment.

**Unchallenged Laws.** Where local reform is possible, activists often ask the Brennan Center for assistance in assessing the constitutionality of proposed amendments to their campaign finance laws. When we flag provisions presenting potential legal problems, unhappy reformers sometimes hold up identical provisions from other jurisdictions

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1 See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 10-11 (1990) (describing two models of home rule).

2 See, e.g., N.Y. Const. art. IX, § 2 (McKinney 2002) (including home rule powers of local governments); N.Y. Mun. Home Rule L. § 10 (McKinney 2005) (describing general powers of local governments to adopt and amend local laws).

and ask how those laws can exist if our analysis is right. The answer to that question lies in the important distinction between laws that are likely to survive, if challenged, and laws that survive because no one has sued yet.

There are many local laws now on the books and in force that do not comply with the “*Tips*” or “*Legal Analysis*” presented in this handbook. For example, many jurisdictions have successfully implemented time limits on fundraising. Those provisions have never been challenged (or at least never litigated to a final decision) in court. Unless and until they are, they will remain the law in their jurisdictions.

The survival of numerous local laws, despite their obvious constitutional weaknesses, in part reflects economic and political choices of campaign finance reform opponents. Litigation is resource-intensive, and even the well-financed and organized opposition must choose its battles. Because state laws generally affect larger jurisdictions and offices carrying greater power than local laws do, state laws are more likely to be challenged in court. Reformers may also find it easier to build broad-based coalitions in support of municipal reform and thus ward off challenge by local special interests.

Reformers nevertheless run a risk if they use constitutionally vulnerable laws as models for new legislation. The new reforms may slip under the radar screen of the opposition, but if the legislation *is* challenged, the locality may be unable to defend it under current constitutional precedents. In addition, risk-averse lawyers for the municipality are likely to resist such reforms and thus make the reforms more difficult to enact via legislation rather than initiative.

Ultimately, of course, proponents of reform must decide what risks they are willing to take. To make that decision wisely, however, reformers first must understand fully what those risks are. We hope that this handbook will be helpful in enhancing that understanding, even to activists who choose to go for broke.