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THE 2023 COOPER-WALSH ISSUE
LOCAL GOVERNMENT STRUCTURE
THROUGH A LEGAL LENS

INTRODUCTION

*Nestor M. Davidson**

On October 14, 2022, the *Fordham Urban Law Journal* hosted its annual Cooper-Walsh Colloquium, this year entitled *Local Government Structure Through a Legal Lens: Conversations on Law and Local Governance*. The Colloquium brought together leading legal scholars to discuss the varied ways that the law shapes and interacts with local government institutions. These institutions include legislatures, local chief executives, local administrative agencies, and local courts. The conversation was particularly timely, with local governments increasingly at the center of governance not only in the United States, but across the globe. Cities, counties, and even smaller local governments of general jurisdiction and special purpose, are deeply engaged in policy over issues as far-ranging as economic development and inequality, labor and employment, climate change and the environment, the practical impact of emerging technology, and others. Bringing a constructive and critical scholarly lens to institutional structure is critical to understanding the nature, challenges, and potential of the growing role of local governance.

Generations of legal scholars have understood the importance of studying the nexus between law and government structure at the federal and state level, spawning a productive and vast literature that has long explored questions about separation of powers, legislative

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process, executive authority, and the entire ambit of administrative law. Fortunately, legal scholars are increasingly grounding similar discourses at the local-government level, generating a flowering of innovative research.

As part of its historic 50th anniversary volume, the *Fordham Urban Law Journal* is now publishing a selection of articles and essays in this vein shared at this year's Cooper-Walsh Colloquium. The publication echoes a long arc of promise, retreat, and return for urban law as field over the five decades since the *Journal's* founding in 1972. The *Journal* arguably arrived at a near nadir in urbanism in the United States. At the time, reflecting a generations-long decline growing from trends such as deindustrialization and the on-going consequences of racial and socio-economic segregation, the urban crisis of the 1960s and 70s seemed to cement the perception that big cities were ungovernable.¹ The urban renaissance of the past two decades, as uneven as it has been, has been in part a story of institutional reform, with local governments investing in building internal capacity and increasing sophistication to match their growing responsibilities.² For local governments, on the other hand, struggling with the hollowing out of capacity to serve their residents, that phenomenon also has institutional implications as much as it shapes peoples' daily lives.³

Exploring the interplay between the legal system and the institutions of local governance raises questions that are universal to public law. Who has what power? How are decisions made? What mechanisms exist for public participation and accountability? At the same time, local government is distinctive in imbricating public and private forces, often with much greater flexibility to shape institutional forms. The Articles and Essays in this year's Colloquium issue all grapple in their own ways with the complexity of local government structure and the consequences of institutional constraints.

Ava Ayers' *The Impossibility of Local Police Reform*, to begin, turns a structural lens on one of the great contemporary local policy challenges, namely why there have not been transformational changes to policing in the wake of the murder of George Floyd and the national

1. See, e.g., Kevin Boyle, *The Ruins of Detroit: Exploring the Urban Crisis in the Motor City*, 27 MICHIGAN HISTOR. REV. 109, 123–24 (2001).

2. See, e.g., INGRID GOULD ELLEN ET AL., MANHATTAN INST. FOR POL'Y RSCH., THE NEXT URBAN RENAISSANCE: THE PUBLIC-POLICY INNOVATION AND EVALUATION CAN IMPROVE LIFE IN AMERICA'S CITIES (2015), https://media4.manhattan-institute.org/pdf/The_Urban_Renaissance.pdf [<https://perma.cc/R5DK-Q6V2>].

3. See, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018).

reckoning that followed.⁴ Noting the reality of entrenched racism and the strong force of inertia, Ayers argues that several other factors are critical. These include both the complexity of the policy dimensions of law enforcement and limitations on the ability of local governments to transcend their own policy and capacity silos require state intervention. In this way, the nature of the institutions of local governance meaningfully constrain how local governments can respond to demands for change, and Ayers constructively maps ways of overcoming those constraints.

Mitu Gulati and Richard Schragger's *Do Investors Care About Municipal Debtors' Access to Bankruptcy? Evidence from Bond Disclosures* looks skeptically at an institutional constraint long thought important to local public finance, which is the ability of bondholders to pursue their creditors' remedies.⁵ The intuitive narrative posits that creditors faced with the ability of governmental entities to avoid repayment in full will tend to raise interest rates or decline to lend, either of which is challenging to local governance capacity, which relies heavily on bond finance. As a consequence of this moral hazard, it is thought, local leaders tend conform their behavior to what bond markets expect, which may not align with the policy preferences of the local community, especially when local governments face the hard choices presented by fiscal crisis. Examining a novel data set of municipal bond offering documents, Gulati and Schragger amass evidence to suggest that bondholders largely do not seem to care about the availability of municipal bankruptcy. This market indifference to an important creditor protection (states and local governments can limit access to bankruptcy) in turn suggests that commentators should be cautious before blaming local officials and the structure of local governance for fiscal conditions largely out of their control, with important institutional implications.

Caitlin Toto and Joseph Gallagher, in *Debating Debates: A Discussion of the New York City Campaign Finance Board's Debate Eligibility Requirements for Citywide Elections*, turn to a case study of one local administrative agency, the New York City Campaign Finance

4. Ava Ayers, *The Impossibility of Local Police Reform*, 50 FORDHAM URB. L.J. 609 (2023).

5. Mitu Gulati & Richard C. Schragger, *Do Investors Care About Municipal Debtors' Access to Bankruptcy? Evidence From Bond Disclosures*, 50 FORDHAM URB. L.J. 657 (2023).

Board (CFB).⁶ Their Article provides a fascinating anthropology of local decision making. Among the underappreciated functions of the CFB is setting the criteria for participation in official debates for candidates to the three city-wide offices (mayor, public advocate, and comptroller), a critical gatekeeping function for one of the highest-profile aspects of campaigning. The governing statute requires that eligibility rules be non-partisan, objective, and non-discriminatory, but leaves a great deal of discretion for the CFB and the entities the CFB turns to for sponsoring debates. Toto and Gallagher trace the evolution of the rules that have emerged over several election cycles for balancing access and administrability, and the challenges CFB has faced in responding to an ever-changing local electoral context.

The Cooper-Walsh issue also includes three Essays further exploring law, institutions, and local governance. Paul Diller's *Emergency Rule: A New Paradigm for State and Local Governance?* surveys ways that local governments, as well as states, invoke emergency — in public health crises, and in response to a variety of other governance challenges — particularly where mayors and other chief executives assert powers normally in the legislative realm.⁷ The essay frames important concerns about the risk of abuse presented by this horizontal allocation of power and what structural responses might mitigate those risks.

Nadav Shoked's *Annexation's Long Good-bye* tackles an intriguing puzzle in how different states structure local authority to grow through annexation.⁸ Several states, such as North Carolina, Tennessee, and Texas, have recently curtailed the power of local governments to add territory, seemingly in line with a broader trend of state anti-urban "new preemption" interventions. Shoked argues, however, that these state limitations on local boundary expansions should not be understood as punishing local governments. Instead, he views annexation restrictions as a nuanced response to the life cycle of metropolitan governance, particularly around allocating the cost of vital infrastructure such as water and sewage.

6. Joseph Gallagher & Caitlin Toto, *Debating Debates: A Discussion of the New York City Campaign Finance Board's Debate Eligibility Requirements for Citywide Elections*, 50 FORDHAM URB. L.J. 695 (2023).

7. Paul A. Diller, *Emergency Rule: A New Paradigm for State and Local Governance?*, 50 FORDHAM URB. L.J. 723 (2023).

8. Nadav Shoked, *Annexation's Long Good-bye*, 50 FORDHAM URB. L.J. 739 (2023).

Finally, Daniel Farbman's *Plantation Localism* provides crucial historical context, situating contemporary arguments about the nature and purpose of local government institutions in light of the antebellum South's history of treating the plantation as the basic locus of local governance.⁹ That model, in which public institutions govern little and owners occupy much of a local sphere, has powerful echoes today as the counterpart to the Tocquevillian ideal of the New England town meeting as the repository of local democracy. In this way, to paraphrase Faulkner, the past is neither dead, nor even past, but still haunting how we structure and understand local governance.¹⁰

In short, the 2022 Cooper Walsh Colloquium raised fundamental questions about the legal dimensions of the structures and institutions that define local governance and this volume underscores the remarkable richness of the scholarship that can emerge from those questions. No doubt in 50 years, on the occasion of the hundredth anniversary of the *Fordham Urban Law Journal*, these questions will remain just as fascinating — and the *Journal* just as central to providing a forum for answering them.

9. Daniel Farbman, *Plantation Localism*, 50 FORDHAM URB. L.J. 771 (2023).

10. Cf. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951)