

## St. John's Law Review

---

Volume 74  
Number 3 *Volume 74, Summer 2000, Number 3*

Article 16

---

March 2012

### City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule in New York

Eliot J. Kirshnitz

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

#### Recommended Citation

Kirshnitz, Eliot J. (2000) "City of New York v. State of New York: The New York State Court of Appeals, in Declaring the Repeal of the Commuter Tax Unconstitutional, Strikes Another Blow Against Constitutional Home Rule in New York," *St. John's Law Review*. Vol. 74 : No. 3 , Article 16.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol74/iss3/16>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# RECENT DEVELOPMENT IN NEW YORK LAW

*-City of New York v. State of New York: The New York State Court of Appeals, in declaring the repeal of the commuter tax unconstitutional, strikes another blow against constitutional home rule in New York.*

ELIOT J. KIRSCHNITZ\*

## INTRODUCTION

On May 27, 1999, Governor George Pataki signed into law Chapter Five of the 1999 Laws of New York,<sup>1</sup> amending the tax law<sup>2</sup> and the general city law,<sup>3</sup> effectively abolishing the thirty-three year old income tax on commuters who work in New York City but live elsewhere<sup>4</sup> in New York State.<sup>5</sup> The potential

---

\* J.D. Candidate, June 2001, St. John's University School of Law; B.A., New York University.

<sup>1</sup> Act of May 27, 1999, Ch. 5, [1999] N.Y. Laws 102 (McKinney) (codified as amended at N.Y. TAX LAW § 1305(b) (McKinney 2000)).

<sup>2</sup> See Ch. 5, § 1, [1999] N.Y. Laws 102 (McKinney).

<sup>3</sup> See Ch. 5, § 2, [1999] N.Y. Laws 102 (McKinney).

<sup>4</sup> The commuter tax was originally enacted in July 1966. See Memorandum of Legislative Representative of City of New York, *reprinted in* Ch. 774, [1966] N.Y. Laws 2923 (McKinney) (codified as amended at N.Y. GEN. CITY LAW § 25-m (McKinney 1999)). The bill was the subject of contentious debate. See Esther Fuchs, *Two Views of the Commuter's Curse; The City Already Pays More Than Its Fair Share*, N.Y. TIMES, May 22, 1999, at A13 (quoting Jules Sabbatino, a Queens Democrat, as shouting to upstate Republicans, "[l]et us secede from the state, and you'll come begging to get us back"). The act was designed to "place[] a share of the burden of operating a large metropolitan hub equitably upon those who use its facilities and services but who do not live within the City." Memorandum of Legislative Representative of City of New York, *reprinted in* [1966] N.Y. Laws 2923 (McKinney). While the bill applied to any city with a population in excess of one

revenue loss to the City was extensive.<sup>6</sup> While the repeal was slated to take effect on July 1, 1999,<sup>7</sup> within a week of its

---

million, it specifically "enable[d] the City of New York to adopt local legislation . . . to tax nonresidents of the City who earn their livelihood in the City but who live beyond its boundaries." *Id.* Accordingly, New York City enacted a tax on nonresident commuters by local law. *See* NEW YORK, N.Y., ADMIN. CODE ch. 19, § 11-1901 (1997). The original 1966 tax rate was 0.25% on all wages. *See* Ch. 774, § (a)(1), [1966] N.Y. Laws 2923 (McKinney). In 1971, however, the rate was increased for two years to 0.45%. *See* Act of June 9, 1971, Ch. 408, § 6, [1971] N.Y. Laws 578, 580-81 (McKinney). The law was periodically renewed so that the effective tax rate never lapsed back to the 1966 rate of 0.25%. The 1971 increase was scheduled to lapse on December 31, 1999. *See* Act of Aug. 26, 1997, Ch. 497, § 2(a)(2)(i), [1997] N.Y. Laws 1455, 1456 (McKinney).

<sup>5</sup> The repeal accomplished this by amending two statutes. First, it amended the definition of "[c]ity nonresident individual" in section 1305(b) of the tax law to mean "an individual who is not a resident of such city or the state of New York." Ch. 5, § 1, [1999] N.Y. Laws 102 (McKinney); N.Y. TAX LAW § 1305(b) (Consol. Supp. 2000) (emphasis added). Second, it amended the definition of "nonresident individual" in section 25-m of the General City Law to mean "an individual who is not a resident of the city or the state of New York." § 2, 1999 N.Y. Laws at 102; N.Y. GEN. CITY LAW § 25-m (Consol. Cum. Supp. Feb. 2000) (emphasis added). The legislation further provided that in the event that either amendment was adjudged to be invalid or unconstitutional on its face or in its application, the entire commuter tax would be repealed. *See* Ch. 5, §§ 3, 4, 9(2), [1999] N.Y. Laws at 102-03.

The repeal of the commuter tax was first raised in late April 1999 by State Senator and Nassau County Republican Dean G. Skelos, who questioned the fairness of retaining the commuter tax while the Giuliani administration was announcing tax cuts for residents of New York City. *See* Clifford J. Levy & Abby Goodnough, *End to Commuter Tax Nears With Jolting Speed in Albany*, N.Y. TIMES, May 14, 1999, at A1. The issue was soon taken up by Rockland County Democrat Kenneth Zebrowski in his race for the state senate against Republican Thomas Morahan, who also seized on the issue. *See id.* At that time, however, Zebrowski did not believe the repeal to be truly viable, due to opposition from Assembly Speaker and Manhattan Democrat Sheldon Silver. *See id.* Unexpectedly, Silver supported the repeal, leading Mayor Giuliani to assert that the bill was calculated to hurt his appeal with upstate voters in his possible United States Senate bid. *See id.* Giuliani vowed to fight the repeal in the courts if necessary. *See* Richard Pérez-Peña, *Experts Say Repeal of Commuter Tax Seems Valid*, N.Y. TIMES, May 14, 1999, at B10. The debate in Albany was contentious and marked by cynicism. *See* Clifford J. Levy, *Legislature Acts Quickly to Repeal Commuter Tax*, N.Y. TIMES, May 18, 1999, at A1. Democrats and Republicans alike from New York City opposed the bill. *See id.* Queens Democrat Anthony Seminerio charged, "[t]hey can't get a budget together . . . but when it came to this piece of garbage, they are . . . scheming all over the place . . . Of course this is for the election coming up." *Id.* The bill passed on May 17, 1999 by a vote of 92 to 49. *See id.*; *see also* Abby Goodnough, *State Senate Republicans Seek to Drop Commuter Tax*, N.Y. TIMES, May 12, 1999, at B6 (addressing the political motivations behind repealing the commuter tax).

<sup>6</sup> The Independent Budget Office estimated a potential loss to the City of \$360.6 million in fiscal year 2000 alone. *See Current Development: Audits and Reports: Independent Budget Office Commuter Tax*, 5 CITY LAW 58 (May/June 1999). The

passage, several out-of-state parties mounted court challenges against New York State in New York Supreme Court.<sup>8</sup> The City of New York (the "City") also challenged the repeal, but by necessity had to mount its challenge from a different legal basis.

The four out-of-state plaintiffs charged that imposing the commuter tax only on non-New York State residents violated the Privileges and Immunities, Equal Protection, and Commerce Clauses of the United States Constitution.<sup>9</sup> If the out-of-state plaintiffs were successful and the repeal was found unconstitutional, then by the very terms of the repeal, the entire commuter tax would be repealed and of no force and effect.<sup>10</sup> The City, of course, could not afford that outcome—it desperately needed the commuter tax in place.<sup>11</sup> The City, therefore, challenged the repeal on the basis that the state could not repeal the tax without a "home rule" message from the City.<sup>12</sup> As

---

City stands to lose over \$1.5 billion through 2003. *See id.* The New York City Council announced that it would have to forego its own planned tax cuts of \$443 million for New York City residents. *See* Abby Goodnough, *City Council to Curtail Planned Tax Cuts*, N.Y. TIMES, May 23, 1999, at A31; Abby Goodnough, *Budget Surplus Puzzle: Spend Today What Could Vanish Tomorrow?*, N.Y. TIMES, May 24, 1999, at B1 (noting the Giuliani administration's statement that City surplus funds would not be sufficient to make up for the \$360 million dollar loss created by the repeal of the commuter tax).

<sup>7</sup> *See* Act of May 27, 1999, Ch. 5, § 9(1), [1999] N.Y. Laws 102, 103 (McKinney) (codified as amended at N.Y. TAX LAW § 1305 (McKinney 2000)).

<sup>8</sup> Citizens and Attorneys General from Connecticut, New Jersey, and Pennsylvania filed suit. *See New Jersey Files Commuter Tax Suit*, N.Y. L.J., June 2, 1999, at 2. (arguing that the "limited repeal is a violation of interstate commerce and travel and of equal protection and due process"); *see also* Wolf v. State, No. 99 Civ. 111272 (Sup. Ct. N.Y. County 1999).

<sup>9</sup> *See* Glenn Newman, *The Commuter: Residents v. Non-Residents*, N.Y. L.J., June 16, 1999, at 3, 7. The plaintiffs also claimed that the repeal violated their civil rights pursuant to 42 U.S.C § 1983 (1994). *See id.* at 7.

<sup>10</sup> *See* Newman, *supra* note 9, at 3 (stating that the entire New York City Nonresident Earnings Tax would be repealed if not applied to residents of New York State).

<sup>11</sup> *See* Goodnough, *supra* note 6, at A31 (noting that New York City needed the commuter tax in order to provide for the proposed \$443 million in tax cuts for city residents). State lawmakers noted suburban residents who work in New York City deserved a piece of this windfall. *See id.*

<sup>12</sup> *See* Pérez-Peña, *supra* note 5, at B10 (quoting Mayor Giuliani as saying that "[t]here is no question that you need a home rule message in order to do this"). The Mayor's conviction in this position was, no doubt, buoyed by the fact that just three years earlier the City had successfully fought state legislation relating to the Public Employment Relations Board for failure to comply with the home rule requirements of the New York State constitution. *See City of New York v. Patrolmen's Benevolent Ass'n*, 676 N.E.2d 847, 849 (N.Y. 1996) (affirming the lower court's decision that the

explored in greater detail later in this Recent Development, the New York State constitution limits the State's power over its cities. This system of local governance, which in limited circumstances, prevents the state legislature from directly affecting a city without that city's consent, is known as "home rule."<sup>13</sup> The City postulated that if its challenge was successful, the entire repeal would be invalidated, the constitutional challenges would be moot, and the commuter tax would be restored for all non-New York City commuters.<sup>14</sup>

### I. *IGOE V. PATAKI*: THE NEW YORK SUPREME COURT DECISION

The five cases challenging the tax law amendment were consolidated and argued before Justice Barry A. Cozier in the Supreme Court of New York for New York County.<sup>15</sup> In a "well reasoned decision,"<sup>16</sup> Justice Cozier declared that the commuter tax, as amended by the 1999 repeal for residents of New York State, was "in violation of the Privileges and Immunities Clause, Commerce Clause, and the Equal Protection Clause of the U.S. Constitution, as well as the Equal Protection Clause of the New York State constitution."<sup>17</sup> As to New York City's coffers, Justice Cozier declared the repeal valid and not in violation of the home

---

enactment of Chapter 13 of the Laws of 1996, which "relate[d] to the 'property, affairs or government' of New York City," was unconstitutional because it was enacted without a home rule message from New York City; *see also infra* notes 84-92 and accompanying text. The Mayor proclaimed, "[w]e litigated this issue with the state just a few years ago . . . and we won." Pérez-Peña, *supra* note 5, at B10.

<sup>13</sup> *See infra* Part III.

<sup>14</sup> *See Current Development: Audits and Reports: Independent Budget Office Commuter Tax, supra* note 6, at 58. This position was only partially true. The 1971 increase was set to lapse on December 31, 1999, cutting the tax rate nearly in half, from 0.45% to 0.25%. *See* N.Y. TAX LAW § 1305 2-A(a)(i) (Consol. Supp. 2000). Even Mayor Giuliani conceded that the state could let the 1971 increase lapse without a home rule message. *See* Pérez-Peña, *supra* note 5, at B10. Under the Independent Budget Office analysis, if the repeal remained in effect, eliminating the tax for New York State residents only, the loss to the City would have been \$208.6 million in fiscal year 2000. *See Current Development: Audits and Reports: Independent Budget Office Commuter Tax, supra* note 6, at 58. Even if the City's challenge was successful and Albany let the 1971 increase lapse, the City would still have lost approximately \$150 million in 2000.

<sup>15</sup> *See Igoe v. Pataki*, 696 N.Y.S.2d 355 (Sup. Ct. N.Y. County), *aff'd sub nom.* City of New York v. State, 696 N.Y.S.2d 426 (1st Dep't 1999) [hereinafter *City of New York I*], *aff'd*, 730 N.E.2d 920 (N.Y. 2000) [hereinafter *City of New York II*].

<sup>16</sup> *City of New York II*, 730 N.E.2d at 924.

<sup>17</sup> *Igoe*, 696 N.Y.S.2d at 365.

rule provision of the New York State constitution.<sup>18</sup> While Justice Cozier declined to enjoin its collection,<sup>19</sup> the entire commuter tax was repealed and of no force or effect.<sup>20</sup> While the City vowed to appeal,<sup>21</sup> the New York State Tax Department advised employers to continue to deduct the tax from the salaries of out-of-state residents.<sup>22</sup> Justice Cozier's decision was unanimously affirmed by the Appellate Division for the First Department<sup>23</sup> and the New York Court of Appeals.<sup>24</sup>

## II. THE NEW YORK COURT OF APPEALS REVIEWS THE REPEAL OF THE COMMUTER TAX

In an opinion by Judge Wesley, the Court of Appeals reasoned that while the Privileges and Immunities Clause of the United States Constitution<sup>25</sup> does allow a state to afford residents and nonresidents disproportionate treatment, in order for a state to advance a tax policy that discriminates against nonresidents, the state must show a substantial reason for the discrimination and a substantial relationship between the discrimination and the state's objective.<sup>26</sup> Since the state failed

---

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See Act of May 27, 1999, Ch. 5, § 9(2), [1999] N.Y. Laws 102 (McKinney).

<sup>21</sup> See Abby Goodnough, *Judge Upholds and Extends Commuter Tax Repeal*, N.Y. TIMES, June 26, 1999, at A1 (stating that Judge Cozier's opinion was incorrect and that the City's corporation counsel would immediately appeal).

<sup>22</sup> See *Employers Urged to Deduct Tax*, N.Y. L.J., July 1, 1999, at 7 (explaining that since Justice Cozier did not enjoin the state from collecting the tax, it was under no obligation to refrain from collecting it). While the parties appealed, the state continued to collect the tax from out-of-state commuters. See *City of New York I*, 696 N.Y.S.2d 426, 427 (1st Dep't 1999) (stating that administrative convenience militated against enjoining the tax's collection while the issue was being adjudicated by the courts). Indeed, the state was never enjoined from collecting the tax, the refund process providing an adequate remedy at law. See *City of New York II*, 730 N.E.2d 920, 924 (N.Y. 2000).

<sup>23</sup> See *City of New York I*, 696 N.Y.S.2d at 427.

<sup>24</sup> See *City of New York II*, 730 N.E.2d at 924.

<sup>25</sup> See U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

<sup>26</sup> See *City of New York II*, 730 N.E.2d at 927 (citing Supreme Court of N.H. v. Piper, 470 U.S. 274, 284 (1985)) (noting that the discriminating state must show a substantial reason and substantial relationship between the discrimination and the state's objective).

to meet this burden, the court declared that the commuter tax, as amended, violated the Privileges and Immunities Clause.<sup>27</sup>

The court next reasoned that, under the Commerce Clause of the United States Constitution,<sup>28</sup> the national interest in protecting interstate commerce was so strong that in order for a state to maintain a tax that discriminates against out-of-state commerce, the state must "advance[] a local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."<sup>29</sup> While a state may advance a compensatory tax defense for its imposition of a discriminatory tax against nonresidents, such arguments will receive strict scrutiny.<sup>30</sup> Judge Wesley found that the state failed to sustain this defense and thus held that the commuter tax, as amended, violated the Commerce Clause.<sup>31</sup>

---

<sup>27</sup> See *City of New York I*, 730 N.E.2d at 929. The state had advanced the argument that the discriminatory treatment of out-of-state commuters was justified by the fact that New York State commuters suffered under a greater tax burden than out-of-state commuters and the repeal amounted to a form of tax relief for overburdened New York commuters. See Daniel Wise, *Judge Strikes Down City's Commuter Tax*, N.Y. L.J., June 28, 1999, at 1 (relating the arguments of New York State Assistant Attorney General Elizabeth Foreman). Specifically, the state maintained, even with the repeal in effect, the amount of an out-of-state commuter's tax would be less than half of what a New York State commuter would pay in miscellaneous *other* taxes—from the Metropolitan Commuter Transportation District tax, to state sales tax, to consumption taxes, as well as others. See *City of New York II*, 730 N.E.2d at 928. Judge Wesley rejected these arguments. See *id.* (stating that the repeal's legislative history "revealed no 'tax equalization' rationale").

<sup>28</sup> See U.S. CONST. art. I, § 8 ("Congress shall have the power to . . . regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes . . .").

<sup>29</sup> *City of New York II*, 730 N.E.2d at 930 (citing *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 511 U.S. 93, 101 (1994)).

<sup>30</sup> See *id.* Under *Oregon Waste* and *Maryland v. Louisiana*, 451 U.S. 725 (1981), the state must meet a strict three prong test: (1) identify the intrastate tax it wishes to compensate for; (2) show that the tax is equivalent to the tax it wishes to impose on non-residents; and (3) show that the two taxes are based upon similar taxing events. See *Igoe v. Pataki*, 696 N.Y.S.2d 355, 363 (Sup. Ct. N.Y. County), *aff'd sub nom.* *City of New York v. State*, 696 N.Y.S.2d 426 (1st Dep't 1999), *aff'd*, 730 N.E.2d 920 (N.Y. 2000).

<sup>31</sup> See *City of New York II*, 730 N.E.2d at 926 ("[T]he tax clearly is assessed against the interstate labor market per se . . . and favors intrastate economic activity over interstate activity by taxing only out-of-State workers."). Unlike the lower courts, the Court of Appeals did not address any further constitutional claims. In the trial court, Justice Cozier had reasoned that, under the Equal Protection and Due Process Clauses of the United States and New York State constitutions, a statute affording disparate treatment between classes of people need only survive

Judge Wesley further reasoned that while the New York State constitution specifically limits the power of the state legislature to act in relation to local governments,<sup>32</sup> in that a law relating to the “property, affairs, or government of a local government” requires a home rule message,<sup>33</sup> the state’s overriding power over taxation rendered a home rule message for the repeal of the commuter tax unnecessary in this instance.<sup>34</sup> The New York Court of Appeals refused to pass on the wisdom of the repeal of the commuter tax<sup>35</sup> and declared the commuter tax, as amended, unconstitutional.<sup>36</sup>

### III. CONSTITUTIONAL HOME RULE IN NEW YORK

While the New York Court of Appeals was certainly correct in holding that the commuter tax, as amended, was in violation

---

rational basis scrutiny: that is, it must rationally advance a legitimate purpose. *See Igoe*, 696 N.Y.S.2d at 364 (noting that the Equal Protection Clauses of the United States and New York State constitutions provide essentially the same guarantees). Finding a tax that discriminated solely on the basis of residency to be arbitrary, irrational, and illegitimate, Justice Cozier held that the amended commuter tax violated Equal Protection and Due Process. *See id.* at 364 n.4. Because he had found the amended tax legislation to violate the Privileges and Immunities, Commerce, Equal Protection, and Due Process Clauses, Justice Cozier declined to address the argument that the tax also violated the right to travel. *See id.*

<sup>32</sup> *See City of New York II*, 730 N.E.2d at 924–25; *see also* N.Y. CONST. art. IX, § 2.

<sup>33</sup> N.Y. CONST. art. IX, § 2(b)(2) (“Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature . . . [s]hall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law . . .”).

<sup>34</sup> *See City of New York II*, 730 N.E.2d at 926 (holding that “[a] home rule message was not required”).

<sup>35</sup> *See id.* (explaining that judicial speculation on the political motivation of the legislature would be a “slippery and dangerous slope”). Justice Cozier, in a portion of his opinion later withdrawn for publication, was more effusive on the political motivation of the repeal, stating that,

[t]he Court recognizes that the manner in which Chapter 5 was enacted into law may not please many of the citizens of New York State. Debate was limited to less than one hour in the Senate; in the Assembly to approximately ninety minutes. The Commuter Tax bill passed in a mere eleven days. No public hearings were held and no legislative studies or reports were conducted, despite the fact that the City potentially stood to lose \$360 million annually in revenue. However, it is not [the] province of the Court to endorse or condemn the Legislature’s judgment in passing legislation . . . .

*Igoe v. Pataki*, N.Y. L.J., July 1, 1999, at 30 (Sup. Ct. N.Y. County 1999).

<sup>36</sup> *See City of New York II*, 730 N.E.2d at 924.



of the United States Constitution,<sup>37</sup> and while “[s]uch authority as there is”<sup>38</sup> arguably supports its conclusion that a home rule

---

<sup>37</sup> Over eighty years ago, the Supreme Court held that a state, under the proper circumstances, may impose a tax on nonresidents based upon income earned within the state. See *Shaffer v. Carter*, 252 U.S. 37, 52 (1920) (“[A] State may impose . . . taxes . . . upon incomes accruing to non-residents from their property or business . . . or their occupations carried on therein.”). The effect of the tax, however, must be reasonable and “not more onerous in its effect.” *Id.* If the Court were unable to find adequate ground for the discrimination of such a tax, it would be stricken as “an unwarranted denial . . . of the [non-resident’s] privileges and immunities.” *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 80 (1920); see generally John D. Perovich, Annotation, *Validity of Municipal Ordinance Imposing Income Tax or License Upon Nonresidents Employed in Taxing Jurisdiction*, 48 A.L.R.3d 343 (2000). When the Privileges and Immunities Clause is implicated, however, an income tax on non-residents will be held to “a standard of review substantially more rigorous than that applied to [other] state tax distinctions.” *Austin v. New Hampshire*, 420 U.S. 656, 663 (1975). In *Austin*, the Supreme Court held that New Hampshire’s commuter tax, which the state had argued was not “onerous in [its] effect . . . on non-residents” was nonetheless violative of the Privileges and Immunities Clause. See *id.* at 666. The Court specifically rejected an argument similar to the one advanced by New York State in *Igoe*, that the tax on nonresidents’ incomes affected tax equity between nonresidents and residents who paid more in other taxes. See *id.* at 665–66 n.10. (“[W]e find no support . . . for the assertion . . . that the . . . [t]ax creates no more than a ‘practical equality’ between residents and nonresidents when the taxes paid only by residents are taken into account.”).

More recently, the United States Supreme Court has underscored the need for greater scrutiny of discriminatory taxes. See *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1997) (citing *Austin*, 420 U.S. at 663). The Court explained that “tax provisions imposing discriminatory treatment on nonresident individuals must be reasonable in effect and based on a substantial justification other than the fact of nonresidence.” *Id.* at 314 (emphasis added).

New York State’s argument in *Igoe*, that New York State residents’ higher tax burden provided substantial justification for disparate treatment of out-of-state commuters, was bound to fail. Assuming that there is a disparate tax burden, and that the tax on out-of-state commuters only provided equality for that disparate burden, the tax still failed for being based upon different taxable events. See *City of New York I*, 696 N.Y.S.2d 426, 426 (1st Dep’t 1999). In fact, the real question becomes, how did Albany think the repeal of the commuter tax would survive its first court challenge? Obviously, Albany contemplated just such a result since the repeal provided for a total repeal of the commuter tax in just such an event. See *supra* note 5 (discussing how the legislation provided that if the amendment was adjudged to be invalid or unconstitutional on its face or in its application, the entire commuter tax would be repealed) (citing Act of May 27, 1999, §§ 3, 4, 9(2), [1999] N.Y. Laws at 102–03 (McKinney)). The state tried, cynically, to bolster its argument by claiming that if the repeal were found unconstitutional, nonresidents would fail to share in the cost of city services and facilities. See *Igoe v. Pataki*, N.Y. L.J., July 1, 1999, at 29 (Sup. Ct. N.Y. County 1999) (stating, in a passage not included in the final version of the opinion, that “[i]t was the Legislature and Governor who chose to repeal the tax in an expedient fashion; the State cannot now complain for the ensuing loss of revenue due to its own actions”).

message was not required prior to its enactment, it is suggested that this decision is only one more in a long line of narrow judicial interpretations exemplifying the near total failure of constitutional home rule in New York.

Article IX of the New York State constitution provides the basic system of local governance in New York State.<sup>39</sup> In its present form, adopted in 1963,<sup>40</sup> it provides that the state

shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only . . . 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.<sup>41</sup>

The state may freely enact legislation relating to local property, affairs, or government by a general law which "in its terms and in effect applies to all counties . . . all cities, all towns or all villages."<sup>42</sup> If the legislature desires to enact a special law that "applies to one or more, but not all, counties . . . cities, towns or villages,"<sup>43</sup> then it must obtain a home rule message. A home rule message is one requested by two-thirds of the local legislative body or by the local chief executive officer with a majority of the local legislative body.<sup>44</sup>

---

<sup>38</sup> See *City of New York I*, 696 N.Y.S.2d at 428 ("Such authority as there is on the subject does not suggest that legislation enabling local taxation cannot be repealed without a home rule message." (citing N.Y. CONST. art. IX, § 2(b)(1) and *Roosevelt Raceway v. County of Nassau*, 218 N.E.2d 539 (N.Y. 1966), *appeal dismissed*, 385 U.S. 453 (1967)).

<sup>39</sup> See PETER J. GALIE, *THE NEW YORK CONSTITUTION* 210 (1991).

<sup>40</sup> See *id.*

<sup>41</sup> N.Y. CONST. art. IX, § 2(b)(2). The Article further provides that, for cities besides New York City, the state may act in emergencies certified by the Governor and concurred in by two-thirds of the legislature. See *id.* § 2(b)(2)(b); see also GALIE, *supra* note 39, at 210 (stating that Article IX was "meant to embody a new concept in state-local relationships by constitutionally recognizing that the 'expansion of powers for effective local self-government' is a purpose of the people of the state").

<sup>42</sup> N.Y. CONST. art. IX, § 3(d)(1).

<sup>43</sup> *Id.* § 3(d)(4).

<sup>44</sup> See GALIE, *supra* note 39, at 217.

The state legislature has the power to act in relation to the property affairs of government of any local government only by general law as defined in section 3(d)(1) and by special law as defined in section 3(d)(4) and only when requested by two-thirds of the members of the local legislative body or the chief executive officer with the concurrence of a majority of that body . . . .

The roots of constitutional home rule in New York extend deep into the State's history and reflect a persistent and fundamental problem—inadequate representation of New York City in the state legislature and consequent loss of power.<sup>45</sup> Home rule first became a part of the New York State constitution in 1894.<sup>46</sup> By 1924, when the home rule Article was amended “with much ado and after many years of agitation,”<sup>47</sup> the basic framework of modern home rule and its attendant problems were already firmly established.<sup>48</sup> The original ideal of giving underrepresented cities constitutional protection against abuse by the state legislature had already been undermined.<sup>49</sup> Further, with the parameters of home rule being defined by the dichotomy of “special” versus “general” laws on the one hand<sup>50</sup>

---

<sup>45</sup> See W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 317–19 (1954) (stating that while home rule came about as the result of a long history of legislative abuse, because of “systematically narrow judicial interpretation,” home rule has failed in its purpose). As early as 1821, Martin Van Buren was reported to have decried the inverse relationship between the amount of taxes New York City paid to the state coffers and the number of representatives the City sent to the state legislature. See *id.* at 317.

<sup>46</sup> See N.Y. CONST. art. XII, § 2 (1894). Original efforts to limit the state's power to enact legislation relating to the property, affairs, or government of cities except by general laws that applied to all cities were quashed. See Richland, *supra* note 45, at 320. Instead, cities were divided into three classes by population, with a general law being a law that applied to all cities within any class. See *id.* at 321. The first class was defined as a city of 250,000 or more inhabitants; the second class was defined as a city of 50,000–250,000 inhabitants; the third class was defined as less than 50,000 inhabitants. See *id.* at 321 n.34. Further, the state could still act by special law, which applied to less than all the cities within any class, but only with permission of that city's mayor. See *id.* If such permission was not received within fifteen days, the state legislature could simply pass the bill again with no further permission needed. See *id.*

<sup>47</sup> *In re Elm Street*, 158 N.E. 24, 25 (N.Y. 1927).

<sup>48</sup> See J.D. Hyman, *Home Rule in New York 1941–1965; Retrospect and Prospect*, 15 BUFF. L. REV. 335, 341 (1965) (explaining how the New York Court of Appeals recognized the problems associated with modern home rule: “Here are the germs of the fever about what is of the city and what is of the state, a fever which throve on the simple fact that the city is in the state”).

<sup>49</sup> See *id.* (exemplifying how courts did not construe the home rule liberally in order to effectuate its purpose of reducing legislative involvement in city affairs).

<sup>50</sup> The transparency of this distinction, purportedly establishing an inviolate, albeit limited, sphere of city autonomy, was shown only the next year when the legislature amended the Rapid Transit Act in order to create transit boards in the class of “cities of over one million inhabitants.” See *Sun Printing & Publ'g Ass'n, v. Mayor*, 40 N.Y.S. 607, 638 (1st Dep't 1896) (citing Ch. 4, [1891] N.Y. Laws 3 (McKinney)). This was a general law, applicable to all the cities within a class, except that the class contained only New York City! See Richland, *supra* note 45, at

and the undefined "property, affairs or government"<sup>51</sup> on the other, the concept was soon to be undermined by the courts; a precipitous fall from which it has never recovered.<sup>52</sup>

As has already been seen,<sup>53</sup> home rule was seriously undermined at an early stage by the simple expedient of passing a law affecting only New York City but calling it a general law.<sup>54</sup> This practice was given credence by the courts in 1896.<sup>55</sup> In a challenge against a liquor licensing law for which City approval

---

322 ("It was thus manifest that . . . home rule . . . could be frustrated by the familiar device of fictitious classification."); see also *New York Steam Corp. v. City of New York*, 276 N.Y.S. 99, 107-08 (Sup. Ct. N.Y. County 1934) (describing the Buckley Act as a general law, not a local law, referring to cities with a population of a million inhabitants or more, even though New York City was the only city that fit the criteria).

<sup>51</sup> The meaning of this phrase, ostensibly the starting point for any discussion relating to the division between state and city government, was so little understood that in 1907, the phrase was changed temporarily to "property, affairs of government." See N.Y. CONST. art. XII, § 2 (1894) (amended 1907) (emphasis added). The reason for this critical change in constitutional language is unknown and appears to have gone unnoticed. See Richland, *supra* note 45, at 324 ("Curiously enough, the change was overlooked not only by the courts but also by all the writers on home rule.").

<sup>52</sup> See Richland, *supra* note 45, at 311.

[Home rule provisions] came about as the result of a long history of legislative abuse, and were inserted in the constitution only after the most strenuous efforts of leaders of the community. Yet because of systematically narrow judicial interpretation these provisions must be recognized as having failed in their purpose.

*Id.*

<sup>53</sup> See *id.*; *supra* text accompanying note 50.

<sup>54</sup> It should be noted that this course of events was by no means unintentional. The classification of cities, and the distinction between special and general laws was suggested in 1894 by Joseph H. Choate. Mr. Choate stated that, "in the city of New York, about which I suppose the principal interest in this amendment centers, I think we need from time to time rescue by the Legislature." Richland, *supra* note 45, at 321 (quoting 2 *The Revised Record of the Constitutional Convention of 1894* 245 (1900)).

<sup>55</sup> See *People ex rel. Einsfeld v. Murray*, 44 N.E. 146 (N.Y. 1896). The court upheld the constitutionality of an act that taxed the trafficking of liquors, and in effect, burdened New York City residents most heavily. The court rejected the view that this act was not uniform throughout the state and therefore encroached on the powers of local government. Instead, the court reasoned that because revenue from the tax did not go into the state treasury, and in fact two-thirds of the revenue went to the local governments, the act was a "general state excise law, with such special provisions and adaptations to localities as to the legislature seemed proper." *Id.* at 150. Furthermore, the court held that because it was done to limit the "dangerous traffic, in the interests of social order and public welfare" the act was within the State's powers and should not be subject to home rule. *Id.* at 148-49.

had not been obtained,<sup>56</sup> the New York Court of Appeals declared that, indeed, the State could act solely in relation to New York City without implicating home rule.<sup>57</sup>

The cynical practice of enacting purely local laws under the name of "general law"<sup>58</sup> was finally addressed and rejected by the Court of Appeals in 1927.<sup>59</sup> Chief Judge Cardozo, fearing that home rule would become "another Statute of Uses, a form of words and little else,"<sup>60</sup> decried the practice of enacting a law general "in its terms" but local "in its effect."<sup>61</sup> In striking such a law for failure to comply with home rule requirements,<sup>62</sup> the court boldly declared that "[t]he municipality is to be protected in its autonomy against the inroads of evasion."<sup>63</sup>

<sup>56</sup> See Hyman, *supra* note 48, at 340. In describing the grounds upon which the constitutionality of the act was assailed, Chief Justice Andrews stated "that the act is a special city law . . . required to be submitted to the mayor, for acceptance or rejection, before final enactment." *Einsfeld*, 44 N.E. at 146.

<sup>57</sup> See *Einsfeld*, 44 N.E. at 150 ("[T]he legislature is not hampered or restrained by the classification of cities in the constitution. It may adjust details to meet varying conditions. . . . [R]egulations which might be suitable . . . for the city of New York . . . might be unnecessary . . . if applied to . . . Buffalo."). It should be noted that this statement was pure dicta, as the law in question was clearly a general law. See Richland, *supra* note 45, at 321-22.

<sup>58</sup> See 1921 INF. OP. ATT'Y GEN. 263-64 (quoting *Sun Printing & Publ'g Ass'n v. Mayor of New York*, 46 N.E. 499 (N.Y. 1897).

"[C]ities of over one million inhabitants" was advisedly used by the Legislature in order to obviate the necessity of submitting such provisions of the law to the mayor. . . . The substitution of the words "the city of New York" would undoubtedly make such sections local and not general and the bill would of necessity be submitted to the mayor for approval or disapproval.

*Id.*

<sup>59</sup> See *In re Elm Street*, 158 N.E. 24, 26 (N.Y. 1927). In this case, American Express was barred from collecting a twenty-three year old receivable from the City of New York pursuant to the Civil Practice Act, which stated that there was a presumption of payment after twenty-two years. Four years later, the state passed a law, tailored so that it applied only to American Express' barred claim.

We close our eyes to realities if we do not see in this act the marks of legislation that is special and local in terms and in effect. This group of conditions so unusual and particular is precisely fitted to the claimant's case, and only by a most singular coincidence could be fitted to any other.

*Id.* at 26.

<sup>60</sup> *Id.* at 25.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 26 ("By its terms a new burden has been laid, not upon cities generally, despite its pretense of generality, but upon one city or a few.").

<sup>63</sup> *Id.*

While the ramparts of constitutional home rule were being fortified against encroachment by sham general laws,<sup>64</sup> the ultimate defeat of home rule was already within the gates. In 1929, the Court of Appeals upheld the Multiple Dwelling Law<sup>65</sup> despite its failure to conform to home rule requirements.<sup>66</sup> Declaring the words "property, affairs or government" to be "words of art,"<sup>67</sup> and the subject of the legislation to be a "matter of state concern,"<sup>68</sup> the court forever undermined city autonomy in favor of state power.<sup>69</sup>

In a concurring opinion, Chief Judge Cardozo declared that even if a law affects the property, affairs, or government of a city, "if the subject be in a substantial degree a matter of state concern, the Legislature may act, though intermingled with it are concerns of the locality."<sup>70</sup> This test is more than a simple means of classifying general and local laws; it is an express limitation on the power of local governments to act in the face of legislative power.<sup>71</sup> Thus, under the "state concern" doctrine, even if legislation relates to the property, affairs, or government of a city, if the legislation is also a matter of state concern, home

---

<sup>64</sup> See *id.*

<sup>65</sup> See ch. 713, § 3, [1929] N.Y. Laws 1663 (McKinney). The law was posted to deal with slum dwellings. It was applicable only to cities with 800,000 residents or more. New York City was the only city that met the requirements. See *Adler v. Deegan*, 167 N.E. 705, 709 (N.Y. 1929).

<sup>66</sup> See *Adler*, 167 N.E. at 709; *Richland*, *supra*, note 45, at 329.

<sup>67</sup> See *Adler*, 167 N.E. at 707 ("When the people put these words in . . . the Constitution, they put them there with a Court of Appeals' definition, not that of Webster's Dictionary."). This assertion was based upon faulty premises. See *Richland*, *supra* note 45, at 330. The prior home rule cases were based on the deliberate misclassification of local laws as being general. See *supra* notes 50, 53-63 and accompanying text. Further, during the period 1907-1924, the phrase was not "property, affairs or government" but "property, affairs of government." See *supra* note 51 (emphasis added).

<sup>68</sup> See *Adler*, 167 N.E. at 708 ("[A]nything that affects the health and the welfare of the city of New York, touches almost directly the welfare of the state as a whole.").

<sup>69</sup> See James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 715 (1985) ("The balance between state and local powers has tipped away from the preservation of local authority toward a presumption of state concern.").

<sup>70</sup> *Adler*, 167 N.E. at 714 (Cardozo, C.J., concurring).

<sup>71</sup> See *id.* ("[I]f the affair is partly state and partly local, the city is free to act until the state has intervened. . . . The power of the city is subordinate at such times to the power of the state . . .").

rule is not implicated and the legislature may act through ordinary legislative process.<sup>72</sup>

The courts have repeatedly found legislation relating to the property, affairs, or government of cities, yet which also related to a state concern, valid despite the failure of those laws to conform to home rule requirements.<sup>73</sup> Reviewing the "degree of autonomy granted to municipalities under the . . . constitutional . . . home rule provisions,"<sup>74</sup> and mindful of the "possible danger of ill considered interference by the Legislature in . . . local affairs,"<sup>75</sup> the Court of Appeals has found that home rule "applies only to a special law which is directly concerned with the property, affairs or government of a local government and unrelated to a matter of proper concern to State

---

<sup>72</sup> See Cole, *supra* note 69, at 718. It should be noted that the law at issue in *Adler* was a good law, "aimed at many evils, but most of all . . . to eradicate the slum." *Adler*, 167 N.E. at 711 (Cardozo, C.J., concurring). In achieving a just result, however, the court completely undermined the ideals of home rule. See Richland, *supra* note 45, at 332 ("[T]hrough the invention of the doctrine of state concern [cities] had lost what immunity they had enjoyed from legislative interference."). Cardozo's fear that the city could undermine the powers of the state to act in relation to matters of statewide concerns, especially health and safety, could have been prevented while preserving the rubric of home rule. "[The state] still possesses the constitutional power [to act in relation to health and safety], which has never been abdicated, to pass this identical statute by a two-thirds vote on an emergency message." *Adler*, 167 N.E. at 719 (O'Brian, J., dissenting); see also Oelbermann Assoc. Ltd. Partnership v. Borov, 535 N.Y.S.2d 315, 321 (Civ. Ct. N.Y. County 1988) (holding that the Loft Law, N.Y. MULT. DWELL. LAW §§ 280-87 (McKinney Supp. 2000), a state statute exempting loft apartments from zoning requirements, was valid and home rule was therefore not applicable); Kelley v. McGee, 443 N.E.2d 908, 915 (N.Y. 1982) (holding a state statute that imposed minimum salary requirements for district attorneys, depending on the size of the county, constitutional and not in violation of home rule). *But see* City of New York v. Patrolmen's Benevolent Ass'n, 642 N.Y.S.2d 1003 (Sup. Ct. N.Y. County 1996) (holding a state statute unconstitutional and in violation of home rule where the Public Employment Relations Board was permitted to intervene in bargaining negotiations between the City and police officers).

<sup>73</sup> See *supra* note 72.

<sup>74</sup> Baldwin v. City of Buffalo, 160 N.E.2d 443, 445 (N.Y. 1959) (holding that the altering of ward boundaries was a matter of state concern because members of the County Board of Supervisors are elected from these wards).

<sup>75</sup> City of New York v. State, 562 N.E.2d 118, 120 (N.Y. 1990). The court held that a law requiring residents of Staten Island to be asked if they wanted Staten Island to be a separate city was not an act in relation to the property, affairs, or government of New York City because the law was not authorizing secession; it was merely recognizing the interest of its residents, which is a state concern. See *id.* (citing City of New York v. Village of Lawrence, 165 N.E. 836, 839 (N.Y. 1929)).

government.<sup>76</sup> Under the doctrine of state concern, the state was free to act, without implicating home rule, when it issued serial bonds to cover liabilities;<sup>77</sup> executed projects in disregard of local zoning laws;<sup>78</sup> enacted zoning laws for Adirondack Park;<sup>79</sup> enacted legislation directed solely at the Museum of Modern Art;<sup>80</sup> forbade New York City from instituting residency requirements for its firefighters;<sup>81</sup> and mandated the pay of county district attorneys.<sup>82</sup>

---

<sup>76</sup> *Town of Islip v. Cuomo*, 473 N.E.2d 756, 757 (N.Y. 1984) (holding that the state can regulate waste disposal in Nassau and Suffolk Counties because it has a state interest in pollution protection).

<sup>77</sup> *See Bugeja v. City of New York*, 215 N.E.2d 684 (N.Y. 1966). The court held an act that gave the Mayor of the City of New York the authority to issue serial bonds in the maximum amount of \$225,800,000 for payment of pension or retirement liabilities to be constitutional. *See id.* (affirming the constitutionality of the act "with respect to its object and its means").

<sup>78</sup> *See Floyd v. New York State Urban Dev. Corp.*, 300 N.E.2d 704 (N.Y. 1973). The court ruled that a statute under which the New York State Urban Development Corporation (UDC) was authorized to plan and execute projects in disregard of local zoning laws was constitutional. The court reasoned that the state did not provide actual building codes on behalf of the state and therefore did not overstep any guidelines. Furthermore, the court held the state has a legitimate interest in allowing the UDC to solve housing problems. It was explained that the UDC was "given the power to 'override' local zoning ordinances and regulations in order to overcome restrictive local standards that have often impeded urgently needed development or have rendered it prohibitively expensive." *Id.* at 706 (quoting [1992] N.Y. LEGIS. ANN. 448). Therefore, the court held that "local laws otherwise in conflict may not inhibit the operation of general laws." *Floyd*, 300 N.E.2d at 706.

<sup>79</sup> *See Wambat Realty Corp. v. State of New York*, 362 N.E.2d 581 (N.Y. 1977) (upholding the constitutionality of the Adirondack Park Agency Act, in which the state set up a zoning and planning program for all public and private lands within the park despite the zoning and planning powers of local government, because the court concluded it was an issue of legitimate state concern).

<sup>80</sup> *See Hotel Dorset Co. v. Trust for Cultural Resources of City of New York*, 385 N.E.2d 1284 (N.Y. 1978). The court upheld as constitutional, an act that permitted the Museum of Modern Art to realize income though tax equivalent payments made from the sale and rental of condominiums to be built above the Museum. *See id.* at 1288 (reasoning the act was not tailored to meet the sole needs of the Museum of Modern Art and that other institutions would also be eligible).

<sup>81</sup> *See Uniformed Firefighters Ass'n v. City of New York*, 405 N.E.2d 679 (N.Y. 1980). In rejecting the validity of a New York City law that created a residency requirement for municipal officers and employees, the court reasoned that although the "structure and control" of municipalities are within the power of local government, residency of employees is a matter of state concern. *Id.* at 680.

<sup>82</sup> *See Kelley v. McGee*, 443 N.E.2d 908 (N.Y. 1982) (deciding that the section of the Judiciary Law which required district attorneys in counties with a certain population to be paid the same salary as county court judges did not conflict with



In one exception to this trend, and the case upon which New York City Mayor Giuliani had pinned his hopes in *Igoe*,<sup>83</sup> the New York Court of Appeals rejected state legislation relating to collective bargaining procedures for public employees because the legislature failed to obtain a home rule message from New York City.<sup>84</sup> Critical of the ease with which a matter of state concern could overcome local concerns,<sup>85</sup> the court declared that "a more substantive nexus should be required if home rule is to remain a vital principle of fundamental law."<sup>86</sup> Emphasizing that the state concern must be *substantial*,<sup>87</sup> the court found that the interest advanced by the state bore no relationship to the enactment of the legislation.<sup>88</sup> Despite a holding that seems to be in favor of home rule, the decision must be viewed narrowly. There was clear precedent for the proposition that fire departments were a matter of local concern<sup>89</sup> and the court's conclusion that there was no substantial state concern,<sup>90</sup> while in conflict with the greater trend in home rule jurisprudence,<sup>91</sup> at a minimum, had a rational basis.<sup>92</sup>

Clearly then, "[s]uch authority as there is on the subject does not suggest that legislation enabling local taxation cannot

home rule provisions of state constitution because the classification was reasonable and was related to an area of proper state concern).

<sup>83</sup> See *supra* notes 12–15 and accompanying text.

<sup>84</sup> See *City of New York v. Patrolmen's Benevolent Ass'n*, 676 N.E.2d 847 (N.Y. 1996).

<sup>85</sup> See *id.* at 851 (stating that "[s]tate local legislation will almost invariably result in upholding the statute over home rule objections if, . . . the law merely bears some relationship to some conceivable State interest").

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* notes 70–72 and accompanying text (discussing Chief Judge Cardozo's test).

<sup>88</sup> See *Patrolmen's Benevolent Ass'n*, 676 N.E.2d at 852 ("[I]t would be absolutely inconsistent with the sensitive balancing of State and local interests that has been our tradition . . . to justify legislation inimical to . . . home rule . . . based purely on considerations having no apparent role in its enactment . . .").

<sup>89</sup> See *City of New York v. Patrolmen's Benevolent Ass'n*, 642 N.Y.S.2d 1003, 1011 (Sup. Ct. N.Y. County), *aff'd*, 647 N.Y.S.2d 728 (1st Dep't), *aff'd*, 676 N.E.2d 847 (N.Y. 1996) ("Historically . . . fire departments . . . have been deemed matters of local concern") (quoting *Osborn v. Cohen*, 4 N.E.2d 289, 290 (N.Y. 1936)).

<sup>90</sup> See *Patrolmen's Benevolent Ass'n*, 676 N.E.2d at 851–53.

<sup>91</sup> See *supra* notes 73–82.

<sup>92</sup> See Pérez-Peña, *supra* note 5, at B10 (quoting legal experts as stating that "city contract negotiations with its police officers and firefighters are solely a city concern").

be repealed without a home rule message.”<sup>93</sup> For while New York City relied upon the commuter tax for over thirty years to meet its unique fiscal burden,<sup>94</sup> when it comes to defining what is a local concern, “[m]ost important of all, perhaps is the control of the locality over payments from the local purse.”<sup>95</sup> The State can justify the repeal of the commuter tax under the policy of a pattern of cutting taxes.<sup>96</sup> It is tempting to suggest that a simple solution to this problem would be to eliminate, either legislatively or judicially, the state concern doctrine which has so undermined the ideals of home rule,<sup>97</sup> but this solution is illusory. While “[a] municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose,”<sup>98</sup> under the New York State constitution, the legislature’s “power of taxation shall never be surrendered, suspended or contracted away.”<sup>99</sup> Any legislation enabling a local government to impose taxes “shall specify the types of taxes which may be imposed . . . and provide for their review.”<sup>100</sup> Even the main revenue source for most local governments, the property tax, is severely restricted by the legislature.<sup>101</sup> While

---

<sup>93</sup> *City of New York I*, *supra* note 15, 696 N.Y.S.2d 426, 428 (1st Dep’t 1999).

<sup>94</sup> See Fuchs, *supra* note 4, at A13. New York, alone among major cities, pays 50% of the state’s share of welfare and Medicaid for city residents. See *id.* Chicago has its courts, corrections, and hospitals financed and administered by Cook County; its welfare financed by Illinois; and its mass transit financed by a regional transportation authority. See *id.* In contrast, New York City spends approximately 70% of its budget on these services. See *id.*

<sup>95</sup> Adler v. Deegan, 167 N.E. 705, 713 (N.Y. 1929) (Cardozo, C.J., concurring).

<sup>96</sup> See George E. Pataki, *Two Views of the Commuter’s Curse: Isn’t it Obvious? Cutting Taxes Helps the Economy*, N.Y. TIMES, May 22, 1999, at A13 (stating that eliminating the commuter tax is part of the Governor’s broad pattern of tax cuts meant to encourage economic growth.). In fact, though, New York City residents pay more to the state in revenue that they receive from the state in expenditures. See *City of New York II*, 730 N.E.2d 920, 928 (N.Y. 2000) (observing that “New York City is not a net drain on the financial strength of the rest of the State and, contrary to the State’s argument, resident commuters are not supporting New York City”).

<sup>97</sup> It is common for commentators on home rule generally—even those not dealing directly with New York—to point to New York as an example of a home rule system that has failed its purpose. See, e.g., Rubin G. Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27, 33–34 (1957) (maintaining that “Constitutional home rule in New York, far from liberating cities from the domination of the legislature . . . reaffirms the doctrine of state supremacy . . . . Municipal autonomy . . . is wholly non-existent”).

<sup>98</sup> *United States v. New Orleans*, 98 U.S. 381, 393 (1878).

<sup>99</sup> N.Y. CONST. art. XVI, § 1.

<sup>100</sup> *Id.*

some have suggested that a solution to this problem might lie in establishing a multipurpose taxing jurisdiction including Westchester and Nassau counties,<sup>102</sup> what is really needed is a comprehensive system of fiscal home rule. California, Ohio, and Illinois allow localities to initiate tax and finance programs, limited by legislative oversight.<sup>103</sup> Ideally, such a system would provide local governments with the power to tax, with mandatory state assistance to poorer communities to provide a minimum level of local services, and a limit on the state's power to enact unfunded mandates.<sup>104</sup>

In any event, if constitutional home rule in New York State is to remain true to the ideals that prompted its enactment over a century ago, then, in the words of New York State Governor Russell P. Flower in 1892: "[T]he legislature should be content with supplying the framework of municipal government, wisely guarded against possible abuses, and within that framework the properly constituted local authorities should have sole charge of local administration . . . . The State's interference may occasionally be wholesome, but it is more likely to be pernicious."<sup>105</sup> Otherwise, home rule will have been relegated from being a viable political concept to only "a form of words and little else."<sup>106</sup>

---

<sup>101</sup> See N.Y. CONST. art. VIII, §§ 1-11 (establishing extensive tax and debt limits on local governments); N.Y. CONST. art. VIII, § 12 ("Nothing in this article shall be construed to prevent the legislature from further restricting the powers . . . [of local governments] . . . to contract indebtedness or to levy taxes on real estate.").

<sup>102</sup> See Fuchs, *supra* note 4, at A13 (citing Chicago as an example of how neighboring suburban counties and the state can relieve the burdens inherent in providing services for a large city.).

<sup>103</sup> See Joni Armstrong Coffey, *The Case for Fiscal Home Rule*, 71 FLA. B. J. 54, 58 (1997); Note, *Democracy or Distrust? Restoring Home Rule for the District of Columbia in the Post-Control Board Era*, 111 HARV. L. REV. 2045, 2060-61 (1998) (recommending a clear delegation between national interests, reserved for Congress, and local interests which should be delegated to the District.).

<sup>104</sup> See Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POLY SYMP. 79, 101-06 (1996) (stating that such a system could be accomplished either by giving localities the constitutional power to enact specific taxes or by expanding home rule to include general authority over taxation); George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 419 (1995) (discussing the conflict inherent in protecting the local power of the municipality while simultaneously insuring the effectiveness of state government).

<sup>105</sup> 9 N.Y. Gov. Ann. Mess. 28-30 (1909).

<sup>106</sup> *In re Elm Street*, 158 N.E. 24, 25 (1927).