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Local Government Redistricting in New York: Where Does the Power Repose?

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LOCAL GOVERNMENT REDISTRICTING IN NEW YORK: WHERE DOES THE POWER REPOSE?[1]

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I. INTRODUCTION

The completion of the 1990 federal census signals the onset of the decennial political bloodletting officially known as legislative redistricting, but more cynically referred to as gerrymandering. Given the significant political stakes involved in the redrawing of legislative election district lines, it is not surprising that those persons and entities who believe themselves aggrieved[4] often turn to the courts to invalidate redistricting plans.[5]

Most plaintiffs generally attack redistricting "substantively" by alleging that the new legislative districts violate "one person, one vote,"[6] the Federal Voting Rights Act of 1965,[7] and the requirements of convenience, compactness and contiguity.[8] Ironi-

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[1] This article analyzes issues raised by and decided in Mehiel v. County of Westchester, 175 A.D.2d 109, 571 N.Y.S.2d 808 (2d Dep't), *appeal denied*, 78 N.Y.2d 855, 573 N.Y.S.2d 645 (1991), in which the authors successfully defended Westchester County's redistricting of the county legislature against a challenge that the new districts could not be implemented until approved at a countywide referendum. Citations to the *Mehiel* plaintiffs' appellate brief are to the "Respondents' Brief" and citations to Westchester County's appellate brief are to "Appellants' Brief."

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[4] For example, the two lead plaintiffs in *Mehiel* were Dennis Mehiel, the chair of the Westchester County Democratic Committee, and Sandra Galef, the Democratic minority leader of the county legislature. Respondents' Brief at 9. Furthermore the *Mehiel* plaintiffs explicitly stated that they viewed the redistricting as purely politically motivated for the sole purpose of retaining Republican control of the county legislature. *Id.* at 7-9.

[5] Westchester County is an appropriate example. No less than *four* separate lawsuits have been filed challenging the 1991 redistricting of the county legislature. *See* note 12 *infra*.

[6] *See, e.g.*, Abate v. Mundt, 403 U.S. 182, 183, (1971); Avery v. Midland County, Tex., 390 U.S. 474, 475-76, (1968); Fortson v. Morris, 385 U.S. 231 (1966), *reh'g denied*, 385 U.S. 1021 (1967); Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965).

[7] 42 U.S.C. § 1973 (1988).

[8] For example, the Westchester County Charter provides that a local law redistricting the county legislature: "shall comply with the legal requirements for equal represen-

cally, because substantive redistricting litigation usually turns on the specific facts of the new districting plan—for instance, is there impermissible dilution of voting power, are minorities disenfranchised, is a district "compact"?—important precedent is not often generated. However, when a "procedural" redistricting case calls into question the very source and nature of local government redistricting powers, affecting the state constitution's "vertical"[9] separation of powers between the people and their elected representatives, very important precedent is set indeed.

In the New York Constitution the people retain the power to approve changes to the most fundamental aspects of county government, while elected representatives are allowed to exercise less fundamental powers. For example, in article 9, section 1(h)(2), a permissive referendum[10] is guaranteed whenever there is a change proposed to the "form or composition of the county legislative body." As redistricting is not mentioned explicitly in this provision, the constitutional question must inevitably be confronted: Does redistricting constitute a change in "form or composition" of a legislative body? If so, the ultimate power to rerdistrict reposes with the people. If not, the ultimate power reposes with the legislature.

This issue was recently raised in *Mehiel v. County of Westchester*, where the redistricting of the Westchester County Legislature was attacked for failure to submit the redistricting plan, enacted as Local Law 8-1991,[11] to a countywide referendum before implementing the new county legislative districts for the November 1991 primary and general elections. While other subsequently filed lawsuits have challenged the substance of the

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tation and representation areas prescribed in such local law [shall] be of convenient and contiguous territory in as compact a form as practicable." WESTCHESTER COUNTY, N.Y., CHARTER § 107.31(6) (1990) (COUNTY CHARTER).

[9] "Vertical" is used to describe separation of powers between groups that are not coequal, such as between the people and their elected representatives. "Horizontal" describes separation of powers among the coequal legislative, executive and judicial branches of the same government.

[10] To have a "permissive" referendum, the people in the area in question must first file a petition calling for the referendum. Generally there is a statute or constitutional provision that prescribes the number of petition signatures required, the time within which such signatures can be gathered and filed, the persons eligible to sign, etc. N.Y. MUN. HOME RULE LAW § 24 (Consol. 1977). A referendum is said to be "mandatory" when a state statute or constitutional provision requires a referendum as a condition precedent to the effectiveness of a given legislative action. *Id.* § 23.

[11] *See* note 75 and accompanying text *infra*.

particular redistricting plan adopted by the county,[12] the *Mehiel* procedural challenge attacked the underlying power of a charter county[13] to redistrict without a referendum.

Indeed, not only did the *Mehiel* plaintiffs seek to invoke the permissive referendum guarantee of the state constitution,[14] but also to force Westchester and all other charter counties to conform to the same rules of redistricting imposed by the state upon noncharter counties, to wit: no redistricting plan could be implemented without subjecting the redistricting local law to referendum procedures mandated by the Municipal Home Rule Law (MHRL).[15] The plaintiffs also argued that a change in legis-

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[12] Town of Scarsdale v. County of Westchester, No. 91-11877, slip op. (N.Y. Sup. Ct. Westchester County Mar. 27, 1992) (alleging that the redistricting was illegal because it split the Town of Scarsdale into two county legislative districts); Paulin v. County of Westchester, No. 91-11288 (N.Y. Sup. Ct. Westchester County Oct. 10, 1991) (decision and order allowing intervention in *Town of Scarsdale* and dismissing action); Chonigman v. County of Westchester, No. 91-9214 (N.Y. Sup. Ct. Westchester County filed 1991) (alleging that the redistricting violated one person, one vote and failed to create districts which were contiguous, convenient, and as compact as practicable).

[13] A charter county is a county whose fundamental powers and form of government are established in a charter adopted either by special state statute or by local law under the County Charter Law. The County Charter Law is a state statute that authorizes counties to adopt a local charter establishing a county's fundamental governmental organization and powers. The County Charter Law is codified as part of the Municipal Home Rule Law. N.Y. MUN. HOME RULE LAW §§ 30-35 (Consol. 1977).

The Municipal Home Rule Law is a statute that, along with the Statute of Local Governments, implements local government home rule powers granted in article 9 of the N.Y. Constitution. The principle of home rule is that local governments are empowered to exercise local control over local affairs. The permissible limits of such local control are determined by the provisions of the state constitution, the Municipal Home Rule Law, and the Statute of Local Governments. A county seeking to maximize its home rule powers would ordinarily adopt a charter as authorized in the County Charter Law. A county charter is a local law approved by the county voters or a special law adopted by request of a county which establishes the basic form of governmental structure and the powers of the county. A county operating under a charter maintains control over the form and structure of its government through charter revision powers granted in the County Charter Law.

A noncharter county is a county whose powers and form of government are established by applicable provisions of the County Law. *See* N.Y. COUNTY LAW §§ 1-1003 (Consol. 1977). The County Law and the County Charter Law are different statutes and are codified separately. Many counties have elected to remain organized under the County Law because it is adequate to meet their needs. Typically, rural counties or counties with smaller populations have found that they possess adequate powers and an appropriate governmental organization as authorized in the state statutes and consequently have not seen fit to adopt a local charter.

[14] N.Y. CONST. art. IX, § 1(h)(2); note 25 *infra*.

[15] The Municipal Home Rule Law (MHRL) is a comprehensive statute that governs the most basic affairs of counties, cities, towns and villages throughout the state. It must

lative district boundaries constitutes, as a matter of law, a change in the form or composition of the local elected legislature guaranteeing at least a permissive referendum under the New York Constitution[16] and the County Charter Law[17] and a mandatory referendum under the Westchester County Administrative Code (County Code).[18] In effect, the plaintiffs were arguing that even the movement of only *one* boundary line a distance of only *one* block would constitute a change in the local elected legislature's form or composition, thereby triggering referendum procedures and transferring the power to redistrict from the political branches to the people. The underlying conceptual thrust of the plaintiffs' case was that the power to redistrict did not repose ultimately with the Westchester County government but with the people.

The *Mehiel* plaintiffs relied heavily on MHRL section 10(1)(a)(13)(e), which they argued guaranteed at least the opportunity for the county's qualified electors to file a petition requesting that a referendum be held on the redistricting plan. Among other things, they contended that the MHRL preempted and superseded any independent source of power under which Westchester County might redistrict, such as the Westchester County Charter (County Charter) or the County Code.

These procedural attacks on the county's redistricting authority struck at the very heart of local government home rule[19] powers. Few powers are more fundamental to home rule than

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be read in conjunction with Article 9 of the New York Constitution, the N.Y. County Law, the N.Y. General City Law, the N.Y. General Municipal Law, the N.Y. Town Law, the N.Y. Village Law and the N.Y. Statute of Local Governments, which together comprise the fundamental grants to and limitations upon the powers of local governments. An example of the grant of powers in the MHRL is the County Charter Law which authorizes counties to adopt and amend local county charters. *See* note 13 *supra*. An example of the limitation of powers in the MHRL is the referendum requirement imposed upon any redistricting legislation enacted by *noncharter* counties. N.Y. MUN. HOME RULE LAW § 30. In *Mehiel* the plaintiffs sought to impose upon charter counties the referendum limitation imposed by the MHRL on noncharter counties.

[16] *See* N.Y. CONST. art. IX, § 1(h)(2); note 25 *infra*.

[17] *See* N.Y. MUN. HOME RULE LAW § 34(4) (Consol. 1977).

[18] *See* WESTCHESTER COUNTY, N.Y., ADMIN. CODE § 209.161 (1990) (COUNTY CODE).

[19] Home rule is generally considered the power of local governments to control their own affairs. In New York, home rule is granted to units of local government principally for the purpose of authorizing local control over matters falling within the property, affairs and government of local government. *See* N.Y. CONST. art. IX; N.Y. MUN. HOME RULE LAW (Consol. 1977); N.Y. STAT. LOCAL GOV'TS §§ 10-13, 20 (Consol. 1984).

the power to determine local legislative district boundaries for a locally elected legislative body under local charter provisions. In fact, for many years the New York Court of Appeals has explicitly held that local government redistricting is a matter of local concern falling within the "property, affairs or government" of local governments.[20]

The concrete issues raised in *Mehiel* and addressed in this article, which are of vital importance to all involved with local government redistricting in New York, can be summarized as follows:

1. Under what grant of authority do units of local government redistrict?

2. Do the terms and provisions of the MHRL govern local government redistricting and supersede local charter provisions?

3. Under what circumstances is a referendum required or permitted as a prerequisite to implementing new legislative districts?

4. Does redistricting constitute a change in the form or composition of a local elected legislative body?

The balance of this article is a full exploration of these issues, beginning with a discussion of the underpinnings of the *Mehiel* plaintiffs' procedural attack on the county's legislative redistricting. Then, relevant aspects of the history and evolution of local government organization and powers in New York are analyzed to provide the background against which the *Mehiel* plaintiffs' theories can be evaluated. Finally, the article details the resolution of the *Mehiel* case and analyzes its impact on local government redistricting powers generally.

II. THE *Mehiel* PLAINTIFFS' CLAIMS

A. *Form or Composition*

The *Mehiel* plaintiffs' most far-reaching argument was their allegation that any redistricting constitutes, as a matter of law, a change in the "form or composition" of a local elected legislature. If the plaintiffs were correct, no local government redistricting in New York could be effective unless referendum procedures were complied with prior to implementation of the

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[20] *See* Baldwin v. City of Buffalo, 6 N.Y.2d 168, 173, 160 N.E.2d 443, 445, 189 N.Y.S.2d 129, 133 (1959).

redistricting plan.[21]

The plaintiffs argued that the terms "change in form or composition," "restructure," "recast," "reapportion," and "redistrict" were all used interchangeably by the state legislature in article 9, section 1 of the New York Constitution and in the MHRL.[22] Accordingly, they argued that any statute or other provision of law which referred to a change in the form or composition of a legislative body was also intended to apply to redistricting. They also relied on a number of cases in which the courts had ordered a referendum on proposed redistricting plans.[23] In two of these cases a referendum was required when the only change proposed was a change in district boundaries, as was the case in *Mehiel*.[24]

Assuming they had proved that a change in the form or composition of the local elected legislative body is synonymous with redistricting, the *Mehiel* plaintiffs then focused on New York Constitution, article 9, section 1(h)(2),[25] section 34(4) of

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[21] *See* N.Y. CONST. art. IX, § 1(h)(2); N.Y. MUN. HOME RULE LAW §34(4). Both the state constitution and the MHRL delay the effective date of a local law purporting to change a local legislature's form or composition in order to allow filing of a petition calling for a referendum on the local law. *See also* N.Y. MUN. HOME RULE LAW § 23(2)(b) (requires cities, towns and villages to hold a mandatory referendum if a local law "changes the membership or composition of the legislative body or increases or decreases the number of votes which any member is entitled to cast"). *See also* COUNTY CODE, *supra* note 18, § 209.161 (imposes a mandatory election if the Westchester County Legislature enacts a local law changing the form or composition of the county legislature).

[22] Respondents' Brief at 26-27.

[23] *See* Graham v. Board of Supervisors of Erie County, 25 A.D.2d 250, 269 N.Y.S.2d 477 (4th Dep't 1966); Trieber v. Lanigan, 25 A.D.2d 202, 269 N.Y.S.2d 595 (4th Dep't 1966); Village of North Syracuse v. County Legislature of Onondaga, 74 Misc. 2d 842, 346 N.Y.S.2d 439 (Sup. Ct. Onondaga County 1973); Prentiss v. Cahill, 73 Misc. 2d 245, 341 N.Y.S.2d 741 (Sup. Ct. Albany County 1973).

[24] *See North Syracuse*, 74 Misc. 2d at 844, 346 N.Y.S.2d at 441; *Prentiss*, 73 Misc. 2d at 249, 341 N.Y.S.2d at 747. However, neither of these cases was accepted by the appellate division in *Mehiel* as viable precedent. Westchester County had criticized these cases for not actually analyzing whether referenda were required, but rather merely assuming that referenda were necessary. *See* note 100 *infra*. Although the cases are not mentioned at all in the appellate division's opinion in *Mehiel*, during oral argument Presiding Justice Mangano did press counsel for the plaintiffs on this point and noted in his questions that there was no reasoning in either *North Syracuse* or *Prentiss* to indicate that the referendum issue was aggressively briefed or argued therein.

[25] NY CONST. art. IX, § 1(h)(2) provides: "After adoption of an alternative form of county government by a county, any amendment thereof . . . by local law which . . . changes the form or composition of the county legislative body shall be subject to a permissive referendum as provided by the legislature."

the MHRL,[26] and section 209.161 of the County Code to support their argument that a redistricting plan cannot be implemented except in compliance with referenda procedures. They argued that while article 9, section 1(h)(2) of the New York Constitution and section 34(4) of the MHRL require charter counties to comply with a *permissive* referendum process as a prerequisite to implementing a change in a county's form or composition,[27] the County Code imposes a greater restriction on the county by requiring a *mandatory* referendum when a change in form or composition occurs:

> No local law shall become operative or effective unless and until the same is adopted by the affirmative vote of a majority of the qualified electors of the county . . . if it . . . changes the form or composition of the elective governing body of the county.[28]

There is no doubt that New York Constitution, article 9, section 1(h)(2) and MHRL section 34(4) require that county electors of charter counties be given an opportunity to petition for a referendum on a proposed change in the form or composition of a county legislature and that Westchester County Code section 209.161 requires a mandatory referendum on any local law that proposes a change in the form or composition of the Westchester County Legislature. Thus, if the *Mehiel* plaintiffs were correct in arguing that redistricting is synonymous with a change in form or composition, there would be no denying that a referendum would be a prerequisite to implementing any redistricting of the Westchester County Legislature.

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[26] This provision of the County Charter Law executes N.Y. CONST. art. IX, § 1(h)(2) as follows:

> [N]o charter law or local law, which . . . changes the form or composition of the board of supervisors of such county, shall become effective in such county until at least sixty days after its final enactment. If . . . within such sixty days electors of the county . . . in number equal to at least five per centum of the total number of votes cast in the county for governor at the last gubernatorial election, shall file a petition . . . protesting against such law, charter law or local law, it shall become effective in such county only if approved by the electors thereof at the next ensuing general election . . . .

N.Y. MUN. HOME RULE LAW § 34(4).

[27] *See* notes 25 & 26 and accompanying text *supra*.

[28] COUNTY CODE, *supra* note 18, § 209.161.

B. *Referendum Theory Based Upon MHRL §10(1)(a)(13)*

The *Mehiel* plaintiffs also argued that even if a mandatory referendum were not required, compliance with the procedures for a *permissive* referendum was still necessary.[29] They noted

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[29] Alternatively, in an argument that was virtually ignored by the appellate division, the *Mehiel* plaintiffs posited that even if a redistricting local law was not equivalent to a change in the form or composition of the local legislature, MHRL section 10(1)(a)(13)(e) still required a *mandatory* referendum on Local Law 8-1991. As is relevant to the *Mehiel* plaintiffs' claims, the MHRL provides that a county, city, town or village may engage in:

> [t]he apportionment of its legislative body . . . . The power granted by this subparagraph shall be in addition to and not in substitution for any other power and the provisions of this subparagraph shall apply only to local governments which adopt a plan of apportionment thereunder. . . .
>
> . . . .
>
> (e) A local law proposed to be adopted under this subparagraph shall be subject to referendum only in the manner provided by paragraph j of subdivision two of section twenty-four of this chapter, except that such local law shall be subject to a mandatory referendum *in any county in which a provision of law requires a mandatory referendum if a local law proposes a change in the form or composition of the elective governing body of the county.*

N.Y. MUN. HOME RULE LAW § 10(1)(a)(13) (emphasis added).

Relying upon the emphasized language of the statute, the *Mehiel* plaintiffs argued that MHRL section 10(1)(a)(13)(e) forces a mandatory referendum on a redistricting local law in *any* county in which *a separate* provision of law requires a mandatory referendum on a local law proposing a change in the form or composition of the elective governing body of the county. In other words, the *Mehiel* plaintiffs argued that a local law merely changing district boundary lines for a county legislature would be subject to a mandatory referendum, even if it did not *itself* change the form or composition of the County's legislature, so long as *another* provision of law would require the county to conduct a mandatory referendum on a local law that might be proposed to change the form or composition of the county legislature.

By linking MHRL section 10(1)(a)(13)(e) to section 209.161 of the County Code, the *Mehiel* plaintiffs contended that a local law redistricting the county's legislature would be subject to a mandatory referendum because the County Code contains a provision of law which "requires a mandatory referendum if a local law proposes a change in the form or composition of the elective governing body of the county." Thus, under the *Mehiel* plaintiffs' theory, the presence of section 209.161 in the County Code triggers the mandatory referendum requirement of MHRL section 10(1)(a)(13)(e) every time that the County redistricts.

However, the county did not redistrict pursuant to MHRL section 10(1)(a)(13) because it redistricted pursuant to its charter. Sub-subparagraph (e) is irrelevant to and wholly inapplicable to charter counties that redistrict pursuant to a grant of power in their charters because (e) by its express terms applies only to: "A local law proposed to be adopted under this subparagraph . . ." § 10(1)(a)(13)(e).

The quoted clause expressly establishes that both the permissive and mandatory referendum requirements in sub-subparagraph (e) are applicable only to a redistricting local law adopted under MHRL section 10(1)(a)(13) and not to a redistricting local law adopted under a local charter.

On appeal, Westchester County argued that the trial court erroneously "linked" sec-

that MHRL section 10(1)(a)(13)(e) provides that a redistricting local law shall be subject to referendum as "provided by paragraph j of subdivision two of section twenty-four of this chapter." MHRL section 24(2)(j) establishes a permissive referendum process consisting of two alternatives. The local government's legislative body can call for a referendum on its own, or at least five percent of the qualified voters who voted for governor at the last gubernatorial election can file a petition calling for a referendum on the proposed redistricting.[30] Under such a process, the effective date of Local Law 8-1991 would be delayed until the statutory period for filing a petition demanding a referendum had expired.[31]

The key assumption underlying all of the MHRL-based attacks on Local Law 8-1991 was that the state legislature had enacted MHRL section 10(1)(a)(13) to supersede *any* charter powers that the county may have had to enact redistricting without prior referendum, permissive or mandatory. In *Mehiel* the court was forced to determine whether the state had usurped the redistricting power of charter counties. This issue prompts a more fundamental constitutional question, where does the power to redistrict repose—with the people or with their elected representatives? To reach the answer to both issues it is necessary to review the historical circumstances that culminated in the adoption of MHRL section 10(1)(a)(13) and thereby ascertain the actual intent of the state legislature and the framers of the state

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tion 209.161 of the County Code to MHRL section 10(1)(a)(13) to create a "preemption" of the County's redistricting powers as granted in its charter. As MHRL section 10(1)(a)(13) does not apply at all to a charter county, it cannot be "linked to" or "triggered by" *any* provision of the County Code or Charter nor can it preempt a local charter's grant of redistricting power. For the trial court's treatment of the plaintiff's argument, see note 79 *infra*.

[30] N.Y. MUN. HOME RULE LAW §24(2)(j).

[31] As a practical matter, such a delay would have prevented the use of the new district boundaries for the 1991 elections, even if no petition requesting a referendum had been filed. Thus, the *Mehiel* plaintiffs did not need a court ordered referendum to prevent use of the new lines in the 1991 elections. All they needed was a judicial opinion that the cross reference to MHRL § 24(2)(j) in MHRL § 10(1)(a)(13)(e) required the county to comply with the permissive referendum procedures of § 24(2)(j). This would have accomplished their most immediate political goal of delaying elections under any new districts until 1993. Given that Local Law 8-1991 was enacted by a 9 to 8 vote which was virtually along party lines, the Democrats hoped that the 1991 elections would change the membership of the county legislature, possibly enabling proponents of a different districting plan to be in the majority. This new majority could then repeal Local Law 8-1991 and substitute a more politically palatable plan.

constitution.

III. Evolution of County Government's Home Rule Powers Over Form of Government and Redistricting

A. *Typical County's Supervisorial Form of Government*[32]

Historically, New York noncharter counties had a supervisorial form of government. Under this form of government a county's legislature was a board of supervisors composed of town and city supervisors.[33] Town and city supervisors would also serve in the county legislature by virtue of their holding town or city elective office.[34] In this system, the various town and city elected officials represented the *territorial unit* of the county from which they were elected. For example, before a judicially mandated change in the form and composition of the county board of supervisors in the 1960s, the Onondaga County Board of Supervisors was composed of supervisors elected from each of the nineteen towns of the county and each of the nineteen wards[35] of the city of Syracuse.[36] There was no requirement that each member of the board of supervisors represent a substantially equal number of people.

This form of government was summarized by the New York Attorney General:

> [N]on-charter counties had a legislative body consisting of the town supervisor from each town regardless of its population. (If there was a city within a county, the city charter provided for supervisors to be elected to sit on the county board of supervisors.) This was the long-

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[32] The following discussion of a typical county's form of government is important for historical purposes. Today the requirement of "one person, one vote" often precludes the supervisorial form of county government as it traditionally existed in New York.

[33] Town Law § 20 provides that each town has one supervisor and one or more councilors depending on its size. Town Law § 41 allows certain towns to have more than one supervisor. *See* N.Y. Town Law §§ 20, 41 (Consol. 1987 & Supp. 1992). The office of city supervisor was provided either in a city's charter or in a state statute. For example, Second Class Cities Law § 11 provides that one city supervisor shall be elected from each ward of the city. N.Y. Second Class Cities Law § 11 (Consol. 1952).

[34] County Law § 150 provides that the county board of supervisors be composed of elected town and city supervisors. Town Law § 29(14) provides that town supervisors shall serve on the county board of supervisors. Second Class Cities Law § 210 provides that city supervisors shall perform the same duties as town supervisors.

[35] For purposes of this article, the terms "ward" and "district" are synonymous.

[36] *See* Barzelay v. Board of Supervisors of Onondaga County, 47 Misc. 2d 1013, 1014, 263 N.Y.S.2d 854, 856 (Sup. Ct. Onondaga County 1965).

established form of government for counties.[37]

In this system, noncharter counties were empowered to determine the number of supervisors that would comprise the county board of supervisors. In theory the county could determine the number of supervisors to be allocated to each city. However, counties were not allowed to alter the boundaries of the city wards from which the local supervisors were elected. Rather, the power to draw district lines was retained by the cities. This curious split of powers has been well documented in the courts:

> [A]lthough the defendant Common Council of the City of Syracuse has no power to fix the number of [county] supervisors to be chosen by the electors of the City of Syracuse, it is, in fact, required to set the boundaries of the wards from which those supervisors from the City of Syracuse are elected.[38]

Thus, even if a noncharter county desired to change the form and composition of the board of supervisors, it could not do so because it lacked the power to implement the new form and composition of the legislative body. In other words, even if a county could in theory change its county legislature so that its members would be persons directly elected solely to serve on the county legislature from districts of substantially equal population, the county had no power to put such a system into effect because it had no power to draw ward or district boundary lines.[39]

While the state legislature enacted a very limited authorization in the mid-1930s for noncharter counties to choose between two alternative forms of government, most counties desiring greater home rule and more local control over the county's form of government sought adoption of a county charter by special law of the state legislature.[40]

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[37] 1981 N.Y. Op. Att'y Gen. 254, 256 (Informal).

[38] *Barzelay*, 47 Misc. 2d at 1015, 263 N.Y.S.2d at 857.

[39] *See* Baldwin v. City of Buffalo, 6 N.Y.2d 168, 160 N.E.2d 443, 189 N.Y.S.2d 129 (1959); *Barzelay*, 47 Misc. 2d at 1013, 263 N.Y.S.2d at 854; Brairton v. Gillette, 40 Misc. 2d 1009, 244 N.Y.S.2d 513 (Sup. Ct. Monroe County 1963), *aff'd*, 23 A.D.2d 537, 255 N.Y.S.2d 831 (4th Dep't 1965); Neils v. Yonkers, 38 Misc. 2d 691, 237 N.Y.S.2d 245 (Sup. Ct. Westchester County 1962).

[40] Before the mid-1930s, counties had no general powers to alter their form of government. In 1935, counties were granted limited power to alter their form of government under the Fearon Amendment to the New York Constitution, article III, section 26 (re-

B. *Westchester County Charter*

As was typical of counties seeking true home rule in the mid-1930s, Westchester County obtained a special state grant of power with the enactment of the Westchester County Charter in 1937.[41] In the County Charter the state legislature conferred *full* home rule powers on the county by authorizing the county legislature to "exercise all powers of local legislation and administration as provided in section twenty-six of article three of the constitution of the state of New York."[42] and by affirmatively stating that among the other extensive powers granted to the county were "all the rights, privileges, functions, powers, duties and obligations conferred or imposed on it by general or special law, not inconsistent with or in limitation of the provisions of this act . . . [and] all other powers necessary or proper for carrying into execution any of the powers specifically conferred upon it."[43]

As was typical in such legislation, the state legislature also temporarily established the county's form of government. The

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pealed). The Fearon Amendment, 1935 N.Y. Laws 1833, authorized counties to choose from two alternative plans of government. However, to execute a change to an alternative form of government, the law required "split referenda" in which multiple geographic areas of a county were required to approve the plan separately. *See* Comment, *County Home Rule: Freedom from Legislative Interference*, 8 BUFFALO L. REV. 252 (1959). Accordingly, only one county availed itself of this cumbersome process. *See* Cort v. Smith, 249 A.D. 1, 291 N.Y.S. 54 (4th Dep't), *aff'd*, 273 N.Y. 481, 6 N.E.2d 414 (1936). Due to this cumbersome process, a county charter was the only realistic means of attaining greater local control over the county's form of government.

[41] *See* Act of May 25, 1937, ch. 617, 1937 N.Y. Laws 1371 (codified at COUNTY CHARTER, *supra* note 8, arts. I-XIX).

[42] *Id.* §7(2), 1937 N.Y. Laws at 1319. The same provision is presently codified in the COUNTY CHARTER, *supra* note 8, § 107.21.

[43] *Id.* §3, 1937 N.Y. Laws at 1318. The same provision is currently codified in the COUNTY CHARTER, supra note 8, § 104.11(1).

The state legislature included additional language in the County Charter granting unenumerated powers—akin to the federal Constitution's unenumerated rights grant found in the Ninth Amendment—making it clear beyond doubt that local home rule was real and that the county did indeed possess all of the powers necessary for it to discharge its myriad political and other functions:

> The enumeration of particular powers by this act shall not be deemed to be exclusive, but in addition to the powers enumerated or implied herein or appropriate to the exercise of such powers, the county shall have and may exercise all powers which under the Constitution of the State of New York it would be competent for this act specifically to enumerate, and all powers necessarily incident or fairly to be implied, not inconsistent with the provisions hereof.

COUNTY CHARTER, *supra*, note 8, § 104.21(1).

County Charter provided that the county legislature would consist of the board of supervisors composed of elected city and town supervisors—the same system Westchester County had before the enactment of the County Charter.[44]

However, the intent of the state legislature was to empower the county to change its form of government. As the county had no power under the general laws of the state to change its own form of government, the County Charter also included a specific grant of power enabling the county to change the form and composition of its governing body. Specifically, the charter authorized a switch from the board of supervisors to a county legislature composed of not less than ten members or more than twelve members who would be *directly* elected from districts to be created by the county legislature and to be based primarily upon population equality.[45] Such a change in the form and composition of the county legislative body could not be undertaken unless the change was approved by the county's voters at a referendum.

The state legislature expressly granted the following power to the county legislature, which would be utilized if the form and composition of the county legislature were ever changed to a system of directly elected legislators representing districts: "Members of the county board shall be known as county legislators and shall be elected at large from the districts fixed by the board of supervisors."[46]

These provisions of the Charter are of more than mere passing historical interest. In fact, in 1941 a referendum was held under the County Charter as it then existed in which the voters rejected the switch in the form and composition of the county legislature.[47] Thus, the supervisorial form of government re-

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[44] Ch. 617, § 5, 1937 N.Y. Laws at 1318.

[45] *Id.* § 8, 1937 N.Y. Laws at 1320.

[46] *Id.* § 8(3), 1937 N.Y. Laws at 1321.

[47] *Id.* §§ 5, 8. Decades later the supervisorial system retained by the county's voters was challenged as a violation of the constitutional mandate of one person, one vote. In the course of upholding the challenge, the Supreme Court of Westchester County noted that the county electorate could have switched their form of government to one in which county legislators were directly elected from districts of equal population:

> [The referendum] was never again submitted, but it deserves mention as evidence of the fact that long before any reapportionment of the county legislative body was mandated on constitutional grounds, the feasibility of replacing the city and town supervisors with a smaller body chosen by districts was spe-

mained in effect until it was eventually held to violate the principle of one person, one vote.[48]

C. *Westchester County Code*

After the enactment of the Westchester County Charter the state legislature subsequently enacted another special law in order to create the County Code.[49] In the County Code, the state legislature reiterated the strong grant of home rule powers to Westchester County:

> It is the intention of the legislature by this title to provide for carrying into effect the provisions of article nine of the constitution pursuant to the direction contained therein and hereby to enable Westchester county to adopt and amend local laws for the purpose of fully and completely exercising the powers granted to counties by the terms and spirit of such article.[50]

In addition, similar to the County Charter's required referendum to approve a switch in the form and composition of the county legislature from a board of supervisors to a board of county officials elected from single member districts, the state legislature expanded this requirement in the County Code by re-

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cifically contemplated.

Town of Greenburgh v. Board of Supervisors of Westchester County, 59 Misc. 2d 152, 154, 298 N.Y.S.2d 615, 618 (Sup. Ct. Westchester County), *aff'd*, 32 A.D.2d 892, 302 N.Y.S.2d 970 (2d Dep't), *aff'd*, 25 N.Y.2d 817, 303 N.Y.S.2d 673 (1969).

[48] *See Greenburgh*, 49 Misc. 2d 116, 266 N.Y.S.2d 998 (Sup. Ct. Westchester County 1966). As of 1966 the Westchester Board of Supervisors had one supervisor each from the towns of Greenburgh and North Salem, two supervisors from the city of Peekskill, four supervisors from New Rochelle, five from Mount Vernon, three from White Plains, and twelve from the city of Yonkers. *Id.* at 117, 266 N.Y.S.2d at 1001.

[49] Act of Apr. 6, 1948, ch. 852, 1948 N.Y. Laws 1542 (codified at COUNTY CODE, *supra* note 18).

[50] *Id.* § 42, 1948 N.Y. Laws at 1556 (codified at COUNTY CODE, *supra* note 18, § 209.221. To implement this intention, the state legislature added the express admonition that: "*This title shall be construed liberally.* The powers herein granted shall be in addition to all other powers granted to the county by other provisions of law." *Id.* § 43, 1948 N.Y. Laws, at 1556 (emphasis added) (codified at COUNTY CODE, *supra* note 18, § 209.231).

In addition, the state legislature expressly stated that beyond each and every one of the broad powers it had already *specifically* granted to Westchester County, the county possessed still *further* powers even though no one had yet thought of exactly what those powers were: "The enumeration of specific powers by this title shall not operate to restrict the meaning of a general grant of power given by statute or otherwise, or to exclude other powers comprehended in such general grant." *Id.* § 44, 1948 N.Y. Laws at 1556 (codified at COUNTY CODE, *supra* note 18, § 209.241).

quiring that any change in the "form or composition" of the county legislature be subject to a mandatory referendum.[51]

From this review of the Westchester County Charter and Code certain historical facts are evident:

1) the County Charter and Code conferred broad home rule powers on the county by direct grant of the state legislature;

2) the County Charter and Code authorized a switch in the form and composition of the county legislature from a board of supervisors composed of town and city officials to a board composed of county officials directly elected from districts of substantially equal population;

3) in the event of such a switch, the County Charter granted the power to the county legislature to redistrict itself;

4) in 1941 the voters opted to retain the supervisorial system; and

5) the supervisorial system was eventually held to violate the constitutional mandate of one person, one vote.

Critical to the placement of these events in the context of the evolution of local government powers in New York is the fact that all of the powers granted to Westchester County in its Code and Charter were the product of special legislation. In the absence of special legislation creating a county charter and code, counties had no general power to adopt and revise their own charters.[52]

D. *Expansion of County Home Rule Powers*

In 1959 the state legislature finally adopted the County Charter Law and cured New York's long-standing failure to grant broad charter creation and revision authority to New York counties by general law.[53] In the County Charter Law, counties were empowered to adopt or amend charters to "set forth the structure of the county government" in the county charter.[54] Westchester County was given the power to amend its charter,

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[51] *See id.* § 36, 1948 N.Y. Laws at 1554, (codified at COUNTY CODE, *supra* note 18, § 209.161).

[52] *See* note 40 *supra.*

[53] *See* Act of Apr. 20, 1959, ch. 569, 1959 N.Y. Laws 1400 (codified at N.Y. COUNTY LAW §§ 320-25) as amended by Act of Apr. 9, 1962, chs. 367 & 403, 1962 N.Y. Laws 2161, 2219 (amending N.Y. COUNTY LAW §§ 324(4) & 323(1)). The County Charter Law was carried forward into the MHRL in 1963. *See* N.Y. MUN. HOME RULE LAW §§ 30-35.

[54] *See* N.Y. MUN. HOME RULE LAW § 33(2).

as previously enacted by special state law, because the term "county charter" was defined to include a charter established "by act of the legislature."[55]

While this expansion of home rule powers for counties aided counties *with* charters, it did not *in any way* expand the powers of noncharter counties to change the form or composition of their county legislature—a matter of *critical* importance in light of the county government upheavals that would soon follow in the 1960s.[56]

E. *The 1963 Home Rule "Package"*

The enactment of the County Charter Law was followed a few years later by a comprehensive set of constitutional and legislative enactments designed to expand home rule powers for local governments generally,[57] to create a new Statute of Local Governments,[58] and to overhaul the multiple statutes governing local government home rule by creating a new composite statute—the Municipal Home Rule Law (MHRL).

In generating these new state statutes, the state legislature did not place any restrictions on the power of any county, charter or noncharter, to redistrict. In this regard it is critical to note that MHRL section 10(1)(a)(13)(e) was *not* included in the 1963 home rule package of constitutional and statutory amendments. Rather, this provision was added to the MHRL six years later, in 1969, in response to the intervening revolution of the law of voting rights during the 1960s. As will be demonstrated, MHRL section 10(1)(a)(13) was enacted to grant additional powers to noncharter counties in order to enable them to comply with one person, one vote and *not* to restrict the existing powers of New York's charter counties.

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[55] *Id.* § 32(4).

[56] *See* notes 59-75 and accompanying text *infra.*

[57] The very first section of the Constitution's new article 9, adopted November 5, 1963, not by the legislature but by the people themselves, contained a new "Bill of Rights" for local governments. N.Y. CONST. art. IX, § 1.

[58] See note 19 and accompanying text *supra.*

IV. One Person, One Vote and Its Impact on County Government

A. *One Person, One Vote*

During the 1960s, the Supreme Court firmly established the principle of "one person, one vote" and applied it to units of local government.[59] As a result a number of counties in New York were sued,[60] including Westchester County.[61] In those cases the typical county board of supervisors was struck down because city and town supervisors represented "territory" for purposes of their membership on the county board rather than election districts of substantially equal population.[62]

Unfortunately, as a matter of state law, New York's *noncharter counties* were on the horns of a dilemma. On the one hand, they had to comply with "one person, one vote," but on the other they had no way to implement a switch in the form and composition of their county legislatures from supervisors elected from towns and cities to county legislators elected from districts. The source of the obstacle was the inability of noncharter counties to redraw district boundaries, as this power was vested solely with the town and city governments.[63]

B. *Adoption of MHRL Section 10(1)(a)(13)*

To remedy the split in power between noncharter counties and the towns and cities located within its borders, the state legislature enacted MHRL section 10(1)(a)(13).[64] The need for this legislation was aptly summarized by the attorney general:

> Clause 13 was added to the Municipal Home Rule Law in 1969 [be-

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[59] *See* note 6 *supra*.

[60] Typical examples include Trieber v. Lanigan, 25 A.D.2d 202, 269 N.Y.S.2d 595 (4th Dep't. 1966), Barzelay v. Board of Supervisors of Onondaga County, 47 Misc. 2d 1013, 263 N.Y.S.2d 854 (Sup. Ct. Onondaga County 1965).

[61] *See* notes 67-70 and accompanying text *infra*.

[62] Justice Nolan of the Westchester Supreme Court observed: "We have been told by the Supreme Court that legislators represent people, not trees or acres, and are elected by voters, not farms or cities or economic interests . . . ." Town of Greenburgh v. Board of Supervisors of Westchester County, 49 Misc. 2d 116, 117, 266 N.Y.S.2d 998, 1000 (Sup. Ct. Westchester County 1966).

[63] *See* notes 33-40 and accompanying text *supra*.

[64] *See* Act of May 22, 1969, ch. 834, § 2, 1969 N.Y. Laws 1224, 1225-26 (amending N.Y. Mun. Home Rule Law §§ 10, 24); ch. 835, § 1, 1969 N.Y. Laws 1227, 1227-28 (amending N.Y. Mun. Home Rule Law § 10).

> cause] prior to that addition, non-charter counties had had no statutory authority to comply with the "one person one vote" rule enunciated by the United States Supreme Court . . . .[65]

The state legislature's express statement of its intent fully supported the attorney general's reading of the act:

> The requirement that constituencies of legislators must be substantially equal in population, so as to prevent an impairment of the constitutionally protected right to vote, as lately found and declared by the federal judiciary, imposed upon many local governments the obligation to make confirming adjustments in the structures of their legislative bodies. . . . [E]xisting law in many cases, does not adequately permit local governments to recast the structures of their legislative bodies in a form which complies with the aforesaid requirements.[66]

Accordingly, it is clear that MHRL section 10(1)(a)(13) was enacted to provide additional powers to noncharter counties and was never intended to abrogate or limit independent grants of power already possessed by home rule counties such as Westchester. Specifically, MHRL section 10(1)(a)(13) authorized noncharter counties to redistrict and thereby implement a switch from the supervisorial form of government to a directly elected county legislature.

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[65] 1981 Op. N.Y. Att'y Gen. 255, 256 (Informal). The attorney general continued:

> Non-charter counties had a legislative body consisting of the town supervisor from each town regardless of its population. (If there was a city within a county, the city charter provided for supervisors to be elected to sit on the county board of supervisors.) This was the long-established form of government for counties. Unlike cities and villages, counties were not chartered and therefore did not have a tailored form of government. Beginning in the middle of the 1930's, counties were given power, limited at first, to adopt their own form of government. This power continued to be broadened, culminating in the broad charter power granted by section 33 of the Municipal Home Rule Law. Counties that did not follow the charter route were stymied by "one person-one vote." They could not change their board of supervisors, for they could change neither town government nor city charters.
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> . . . . Subclause (13) was added primarily to give non-charter counties statutory authority to apportion its legislative body. The Chairman of the Assembly Judiciary Committee, who introduced the bill that enacted subclause (13), said in the memorandum in support of his bill:
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> "More important, apart from certain of the larger counties which had special structures or were adopting or amending their county charters, there was considerable doubt as to the power of the local governments to reorganize their legislature absent a judicial decree specifically directing such a change." (Bill jacket, L 1969, ch 834.)

Id.

[66] Ch. 834, §1, 1969 N.Y. Laws, 1224, 1224.

C. *Westchester's New Legislative Form and Composition*

Predictably, in the mid-1960s, Westchester County's supervisorial form and composition of the county legislature was challenged on constitutional grounds. The supervisorial form had survived because the county voters had previously refused to change the form and composition of the Board of Supervisors in 1941. The litigation generated a litany of ten reported and three unreported opinions at all levels of the New York State courts.[67]

This tortured saga unfolded because the Supreme Court of Westchester County disapproved of a number of alternate systems for the composition and form of the county legislature in which weighted and fractional voting and multi-member districts were proposed. Two systems that were finally approved by the supreme court were subsequently defeated in referenda.[68] Finally, the Westchester Supreme Court itself ordered the switch in the form and composition of the county legislature. The plan chosen was very similar to the alternative plan that had been specifically authorized in the County Charter since 1937 and rejected in 1941.[69] Forty-two months after the first reported deci-

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[67] The decisions are all captioned Town of Greenburgh v. Board of Supervisors of Westchester County, and are reported as follows: 49 Misc. 2d 116, 266 N.Y.S.2d 998 (Sup. Ct. Westchester County 1966); 51 Misc. 2d 168, 272 N.Y.S.2d 906 (Sup. Ct. Westchester County 1966); 53 Misc. 2d 88, 277 N.Y.S.2d 885 (Sup. Ct. Westchester County 1967); 55 Misc. 2d 1031, 287 N.Y.S.2d 154 (Sup. Ct. Westchester County 1968); 30 A.D.2d 708, 292 N.Y.S.2d 334 (2d Dep't 1968); 57 Misc. 2d 1008, 293 N.Y.S.2d 957 (Sup. Ct. Westchester County), *rev'd*, 23 N.Y.2d 732, 244 N.E.2d 63, 296 N.Y.S.2d 373 (1968); 59 Misc. 2d 152, 298 N.Y.S.2d 615 (Sup. Ct. Westchester County), *aff'd*, 32 A.D.2d 892, 302 N.Y.S.2d 970 (2d Dep't), *aff'd*, 25 N.Y.2d 817, 250 N.E.2d 719, 303 N.Y.S.2d 673 (1969). Officially unreported decisions of the Westchester Supreme Court were issued on August 23, 1967, and May 21, 1968, and one additional decision is reported at N.Y.L.J., Feb. 5, 1969, at 20 (Sup. Ct. Westchester County 1969).

[68] Referenda had been held because the county was changing from a legislative system of territorial representation by Supervisors to a different form and composition of the county legislature in which county legislators were directly elected from districts of approximately the same population. *See* COUNTY CODE, *supra* note 18, § 209.161. The referenda could *not* have been held pursuant to MHRL § 10(1)(a)(13) because that provision was added to the MHRL *after* these referenda occurred.

[69] While the alternative form and composition contemplated by the County Charter was a county legislature of ten to twelve members elected from single member districts of 50,000 persons each, the court found that a seventeen member county legislature elected from single member districts would be appropriate in light of population growth since 1937. *See Town of Greenburgh*, 59 Misc. 2d 152, 155, 298 N.Y.S.2d 615, 619-20 (Sup. Ct. Westchester County), *aff'd*, 32 A.D.2d 892, 302 N.Y.S.2d 970 (2d Dep't), *aff'd*, 25 N.Y.2d 817, 244 N.E.2d 63, 303 N.Y.S.2d 673 (1969); *cf.* ch. 617, §§ 5, 8, 1937 N.Y. Laws 1317, 1318, 1320.

sion, and after all appeals were completed, Westchester County was finally operating under a judicially ordered system which changed the form and composition of the county legislature to that which is in use today.

To memorialize and codify the judicially ordered switch in the form and composition of the county legislature, the county legislature enacted Local Law No. 10-1970.[70] In so doing, the county legislature retained its power to redistrict under local law by using language that was very similar to the original grant of power from the state legislature.[71]

Since the enactment of Local Law No. 10-1970, the county legislature has continually retained its form and composition. To this date, the county legislature is composed of seventeen members elected from single-member election districts. In 1973, in a local law that became effective without any delay to allow the filing of any referendum petition, the county legislature modified certain election district lines in response to the population data generated by the 1970 decennial census.[72] Similarly, district boundaries were modified again pursuant to the 1980 decennial census.[73] It is important to note that both of these redistrictings share two critical attributes: both were effective immediately and no referendum followed either local law's enactment.[74]

Finally, in 1991, the county redistricted pursuant to the 1990 decennial census.[75] As it had after the 1970 and 1980 decennial census, the county sought to implement the new legislative districts immediately without any referendum.

V. THE *Mehiel* LITIGATION

A. *The Trial Court Ruling*

There being no disputed issues of fact and only matters of law before the court, the *Mehiel* case was decided on summary

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[70] Local Law No. 10-1970 also deleted material from the original text of the County Charter that had been effectively superseded by the court's decree. *See* COUNTY CHARTER, *supra* note 8, § 107.31.

[71] *Compare* COUNTY CHARTER, *supra* note 8, § 107.31(6) *with* Act of May 25, 1937, ch. 617, § 8(1) & (3), 1937 N.Y. Laws 1317, 1320, 1321.

[72] *See* Local Law No. 2-1973.

[73] *See* Local Law No. 6-1983.

[74] *See* Local Law No. 2-1973; Local Law No. 6-1983.

[75] The county redistricting was adopted as Local Law 8-1991.

judgment by Supreme Court Justice Donovan, Westchester County.[76] Justice Donovan granted the plaintiffs' motion for summary judgment and held that the Local Law 8-1991 *or any other redistricting of the county legislature* is subject to a mandatory referendum.[77]

Justice Donovan accepted the plaintiffs' argument that MHRL section 10(1)(a)(13) governed the county's exercise of its power to redistrict the county legislature.[78] In particular, he held that all local governments have the power to adopt and amend local laws "relating to their government" so long as they are "consistent with [the] state constitution and general law . . . including subparagraph 13 [of MHRL §10(1)(a)]:"[79]

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[76] *See* Mehiel v. County Bd. of Legislators of Westchester, N.Y.L.J., June 27, 1991, at 28 (Sup. Ct. Westchester County June 20, 1991).

[77] *Id.* Justice Donovan also held that Local Law 8-1991 would be placed on the ballot at the November 1991 general election and that the 1991 primary and general elections would be conducted under the existing district lines.

[78] Curiously, Justice Donovan reached this conclusion even though he expressly recognized that MHRL section 10(1)(a)(13) was enacted as an *addition* to other powers of local governments. *Id.*

[79] *Id.* Justice Donovan then concluded that the cross reference to MHRL section 24(2)(j) in MHRL section 10(1)(a)(13)(e) *would have* required Westchester County to allow the county's qualified electors an opportunity to file a petition demanding a referendum on Local Law 8-1991. *Id.* However, requiring compliance with permissive referendum procedures was unnecessary because Justice Donovan concluded that a mandatory referendum was required.

Justice Donovan accepted the plaintiffs' argument that MHRL section 10(1)(a)(13)(e) should be linked to section 209.161 of the County Code. As a result, he ruled that the existence of a County Code provision requiring a mandatory referendum on a local law purporting to change the form or composition of the county legislature would cause the mandatory referendum language of MHRL section 10(1)(a)(13)(e) to be applicable to Westchester County.

Justice Donovan held:

> In determining whether in Westchester County an apportionment or reapportionment plan is subject to mandatory referendum, the Court initially turns to the County Charter . . . . Section 107.31 . . . provides that the County Board will, if necessary, after each decennial federal census adopt a local law amending the districting plan . . . . The Court next refers to section 209.161 of the Westchester County Administrative Code [which] provides that no local law shall be effective unless and until passed by a majority of voters . . . if such a law . . . "changes the form or composition of the elective governing body of the county . . . ."
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> Returning to MHRL section 10, 1., a., (13) (e.), an apportionment plan is to be subjected to the permissive referendum procedures of MHRL section 24:
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> ". . . except that such local law shall be subject to a mandatory referendum in any county in which a provision of law requires a mandatory referendum if a local law proposes a change in the form or composition of the elective governing body of the county . . . ."

Justice Donovan ruled that MHRL section 10(1)(a)(13)(f), which prohibits a local government from "restructuring" its local legislative body more than once each decade, demonstrated that the state legislature considered redistricting to be a "restructuring" of the legislative body.[80] While Justice Donovan did not expressly state that redistricting is synonymous with a change in the form or composition of the legislative body, as a practical matter he did so by stating that the state legislature intended to use "restructure" and "redistrict" or "reapportion" interchangeably.

Furthermore, Justice Donovan relied upon the following language in MHRL section 10(1)(a)(13)(f) for the proposition that the state legislature intended to preempt the field of local legislation in the area of reapportionment: " 'Notwithstanding any inconsistent provisions of any general or special law, or any local law, ordinance, resolution or city or county charter heretofore or hereafter adopted, no local government may restructure its local legislative body . . . more than once in each decade . . . . ' "[81]

Even though MHRL section 10(1)(a)(13)(a)-(e) mentions nothing about preemption of charter county redistricting, Justice Donovan found in MHRL section 10(1)(a)(13)(f) an overall intent by the state legislature to preempt all aspects of local government redistricting and to require that all redistricting be undertaken in accordance with the requirements of the MHRL.[82]

> Such a local law, i.e. section 209.161 . . . does so require a mandatory referendum regarding a change in form or composition of government and hence, any apportionment plan sought to be adopted must . . . be submitted to a mandatory referendum. While counsel may have argued much over the identity of meaning of "change in the form or composition" and "apportionment or reapportionment," the State legislature in section 10 *has either equated them or, in the least, joined them as a common triggering device for mandatory referendum.*

Id. (emphasis omitted and added).

[80] *Id.*

[81] *Id.* (quoting N.Y. MUN. HOME RULE LAW § 10(1)(a)(13)(f)) (emphasis omitted).

[82] *Id.* Justice Donovan cited three cases in support of his conclusion that local government redistricting powers had been preempted: Consolidated Edison v. Town of Redhook, 60 N.Y.2d 99, 456 N.E.2d 487, 468 N.Y.S.2d 596 (1983) (involving state preemption under a local law inconsistent with the Public Service Law in the context of siting a major steam generating plant); Ames v. Smoot, 98 A.D.2d 216, 471 N.Y.S.2d 128 (2d Dep't 1983) (preemption of local regulation of pesticide use); Davis Constr. Corp. v. County of Suffolk, 95 A.D.2d 819, 464 N.Y.S.2d 519 (2d Dep't 1983) (preemption of local control over the functions of the district attorney). However, none of these cases in-

Westchester County appealed.

B. *Issues on Appeal*

1. Preemption of Local Government Powers

The doctrine of preemption is a limitation on local government home rule powers.[83] The New York Court of Appeals has described local government preemption as follows:

> The preemption doctrine represents a fundamental limitation on home rule powers. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies "the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern."[84]

Generally, a local law will be ruled invalid if the state legislature has preempted the entire field and the local law attempts to regulate in the field, or if the local law is inconsistent with applicable state general laws. In either case, the state legislature must intend to prevent local action, although that intent may be implied from the subject matter regulated, the purpose and scope of applicable state legislation, or the need for statewide uniformity.[85] In fact such intent must be clear when the legislature intends to occupy the entire field,[86] particularly when the power to be preempted involves a matter of local concern such as local legislative redistricting.[87]

a. *State Legislature Did Not Intend MHRL Section 10(1)(a)(13) to Preempt Local Charters*

On appeal, one of the fundamental questions presented for review was whether the state legislature intended the MHRL to

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volved local government redistricting or local legislative form or composition.

[83] *See* Wambat Realty Corp. v. State, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977); Perales v. Heimbach, 166 A.D.2d 707, 561 N.Y.S.2d 290 (2d Dep't 1990); Dougal v. County of Suffolk, 102 A.D.2d 531, 477 N.Y.S.2d 381 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 668, 481 N.E.2d 254, 491 N.Y.S.2d 622 (1985).

[84] Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 377, 546 N.E.2d 920, 922, 547 N.Y.S.2d 627, 629 (1989) (citations omitted).

[85] *Id.*

[86] *See, e.g.*, Ba Mar, Inc. v. County of Rockland, 164 A.D.2d 605, 566 N.Y.S.2d 298 (2d Dep't 1991).

[87] *See* Baldwin v. City of Buffalo, 6 N.Y.2d 168, 173, 160 N.E.2d 443, 445, 189 N.Y.S.2d 129, 133 (1959).

prevail over differing provisions of the County Charter and Code relating to redistricting. In other words, does a chartered local government that has been delegated the power in its charter to redistrict exercise its redistricting powers under the grant in its charter or under the MHRL?

Westchester County argued that not only did the language of MHRL section 10(1)(a)(13) fail to demonstrate any express or implied intent of the state legislature to preempt the redistricting powers granted to the county in its charter, but in addition, that the actual *expressed* intent of the state legislature was to allow the exercise of redistricting powers under local government charter provisions.

The express language employed by the state legislature in the session law enacting subparagraph 13 of MHRL section 10(1)(a) unambiguously establishes that section 10(1)(a)(13) was not enacted to *limit* local government powers but rather to *expand* them and to *preserve* existing powers of local governments to redistrict without referenda of any type:

> It is recognized that local governments do have some powers of local legislation respecting restructuring of their legislative bodies and *this act is intended to extend alternative powers to them. To the extent that local governments already have local legislative powers not subject to referenda requirements,* or subject to less restrictive referenda requirements, *this act is not intended to and does not impose additional referenda requirements upon them* in the exercise of such powers.[88]

Accordingly, the state legislature itself has stated that subparagraph 13 was included in MHRL section 10(1)(a) to provide additional flexibility and powers to noncharter counties and not to diminish any existing powers of chartered counties. To ensure that the statute actually implemented its expressed intent, the state legislature drafted subparagraph 13 to circumscribe clearly the applicability of the statute to the "apportionment of [a county's] legislative body . . . *taken pursuant to this subparagraph.*"[89] Only noncharter counties need redistrict pursuant to

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[88] Act of May 22, 1969, ch. 834, §1, 1969 N.Y. Laws 1224, 1225 (amending N.Y. MUN. HOME RULE LAW § 10) (emphasis added).

[89] N.Y. MUN. HOME RULE LAW § 10(1)(a)(13) (emphasis added). The state legislature reinforced this expression of its intent by beginning each of the relevant sub-subparagraphs of MHRL § 10(1)(a)(13) with the *same* proviso:

(a) A plan of apportionment *adopted under this subparagraph* . . .

subparagraph 13 of MRHL section 10(1)(a).

Finally, as if all of the prior provisions were not explicit enough, the state legislature specifically and directly addressed the interrelationship between subparagraph 13 and other sources of local power to district: "The power granted by this subparagraph shall be in addition to and not in substitution for any other power and the provisions of this subparagraph shall apply only to local governments which adopt a plan of apportionment thereunder."[90]

Thus, the only possible construction of subparagraph 13 is that the state legislature enacted it to provide additional powers and authority to those units of local government which needed such a grant (i.e. noncharter counties), while it preserved other existing grants of authority and sources of power without modification. Thus, when a home rule charter county, such as Westchester, redistricts pursuant to article 9 of the state constitution as delegated through the County's Code and Charter, the county may *ignore all of the provisions of MHRL section 10(1)(a)(13).*

b. *MHRL Section 10(1)(a)(13) is Inapplicable to Local Government Units That Redistrict Under a Separate Grant of Power*

While the trial court's decision relied upon general precedents in the area of local government preemption, precedents specifically analyzing MHRL section 10(1)(a)(13) were consistent with Westchester County's analysis of the statute. For example, in *Calandra v. City of New York*[91] the city of New York redistricted its city council once in 1971 and again in 1974. The second change to the districts was challenged on the ground that MHRL section 10(1)(a)(13)(f) prohibited more than one redistricting per decade. Justice Alexander,[92] in analyzing the powers

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(b) A plan of apportionment *adopted by a county under this subparagraph* . . .

(d) Where a public hearing on a local law proposed to be *adopted under this subparagraph* is required . . .

(e) A local law proposed to be *adopted under this subparagraph* shall be subject to referendum . . . .

Id. (emphasis added).

[90] *Id.*

[91] 90 Misc. 2d 487, 395 N.Y.S.2d 995 (Sup. Ct. N.Y. County 1977).

[92] Judge Alexander has since recently resigned from the N.Y. Court of Appeals.

of the city to redistrict, concluded that the city had authority and power to redistrict independent of MHRL section 10(1)(a)(13). Justice Alexander concluded that MHRL section 10(1)(a)(13) was intended to provide alternative supplemental powers and not to supersede existing grants of redistricting power: "The legislature intended that chapter 834 would extend *alternative* powers to those already possessed by local governments and declared that Chapter 834 was not intended to, *nor did it impose additional referenda or more restrictive requirements upon local legislative powers not then subject to referenda requirements.*"[93]

Not only does the statutory language of MHRL section 10(1)(a)(13) fail to demonstrate any intent of the state legislature to preempt charter counties' districting powers, but, to the contrary, the language is such a strong statement of the state legislature's desire to leave chartered local governments' districting powers intact and unaffected, that MHRL section 10(1)(a)(13) was held totally inapplicable to chartered local governments in *Calandra*:

> An examination of the legislative history out of which [County] Charter Sec. 22 g emerged and a comparison of that history with the manifested legislative intent underlying the enactment of Municipal Home Rule Law section 10(1)(a)(13)(f), satisfies this Court that the provisions of the two statutes are not in conflict and that *the cited section of the Home Rule Law has no application to the circumstances at bar.*[94]

Indeed, *Calandra* supports the conclusion that the referendum requirements of MHRL section 10(1)(a)(13)(e) are equally inapplicable to local governments districting pursuant to their charter.[95]

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[93] *Calandra*, 90 Misc. 2d at 493, 395 N.Y.S.2d at 999 (emphasis added).

[94] *Id.* at 490-91, 395 N.Y.S.2d at 997-98 (emphasis added).

[95] Justice Alexander stated:

> The Court finds therefore that the enactment by the City Council of Local Law 23 pursuant to the mandate of chapter 634 of the Laws of 1972 is not in violation of Municipal Home Rule Law Sec. 10(1)(a)(13)(f) and indeed was accomplished through a power and procedure authorized by the Legislature to exist in addition to and not subject to the limitations of the powers conferred by Chapter 834 of the Laws of 1969.
>
> Indeed, it is clear that the restructuring of the City Council accomplished pursuant to the mandate of chapter 1206 of the Laws of 1971 was done pursuant to a power expressly conferred by the legislature, in addition to and not

The clear import of Justice Alexander's analysis of MHRL section 10(1)(a)(13)—an analysis equally applicable to the *Mehiel* litigation—is that preemption is not only entirely without foundation, but that the entire legislative scheme codified in MHRL section 10(1)(a)(13) is of absolutely no relevance to a chartered local government redistricting under express authority granted by the state legislature.[96]

c. *Appellate Division Adopts Westchester County's Position*

When the matter finally came to the appellate division for decision in *Mehiel*, the Second Department unanimously reversed the trial court and held as follows:

> We find that the Supreme Court's reliance on Municipal Home Rule Law §10(1)(a)(13)(a) is misplaced. Westchester County operates under a charter form of government and its reapportionment plans are adopted pursuant to its charter, not Municipal Home Rule Law §10(1)(a)(13)(a). Since the County Board of Legislators did not adopt a plan of apportionment pursuant to Municipal Home Rule Law §10(1)(a)(13)(a), it is not controlling here.[97]

In essence, the appellate division firmly rejected any notion that MHRL section 10(1)(a)(13) was enacted to limit the powers of charter counties which redistrict pursuant to a delegation of redistricting power in their own charters. The appellate division equally definitively reaffirmed that a charter county redistricts pursuant to the delegation of power in its charter and not pursuant to the redistricting powers conferred in MHRL section 10(1)(a)(13).[98]

> subject to the limitations of Chapter 834 of the Laws of 1969. *It is noted that this expansion and redistricting (apportionment, if you will) of the City Council was done without regard to the referendum on petition requirements of Municipal Home Rule Law Section 24(2)(j) although those requirements existed at the time Local Laws 4 and 53 of 1973 were enacted by the City Council.*

Id. at 494, 395 N.Y.S.2d at 999-1000 (emphasis added).

[96] In accord with *Calandra*, *see* 1979 Op. N.Y. Att'y Gen. 110; 1981 Op. N.Y. Att'y Gen. 255 (Informal).

[97] *Mehiel*, 571 N.Y.S.2d at 808 (citations omitted).

[98] As the appellate division ruled that a county which has been delegated redistricting powers in its charter does not redistrict pursuant to MHRL section 10(1)(a)(13), the appellate division did not reach the question of whether the County's home rule charter provisions could supersede inconsistent provisions of MHRL section 10(1)(a)(13), should

As the appellate division rejected any preemption of local government charter-based redistricting powers, the only way that Westchester County could be subject to a referendum requirement in connection with its redistricting is if redistricting is equivalent to a change in the form or composition of the county legislature.

2. Form or Composition of a Local Elected Legislative Body

To understand what comprises a change in the "form or composition" of the county legislature, and what does not, it is helpful to focus once again on the history of local government in New York during the last half-century. The typical supervisorial system of organizing county legislatures possessed the following attributes:

1. supervisors were town and city elected officials who also served on the county board of supervisors by virtue of their holding a municipal elected office;

2. supervisors represented territorial units of the county, that is its towns and the wards in its cities;

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that provision of the MHRL have been held applicable to the County. In fact, strong authority exists to support such a supersession argument.

There is no doubt that the County Charter and Code are special state statutes and MHRL section 10(1)(a)(13) is a general law. The following rule of construction applies when special and general statutes conflict:

> A special statute which is in conflict with a general act covering the same subject matter controls the case and repeals the general statute insofar as the special act applies' (McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 397) at least where no contrary intention is *clearly* indicated.

208 East 30th St. Corp. v. Town of North Salem, 88 A.D.2d 281, 283, 452 N.Y.S.2d 902, 905 (2d Dep't 1982) (emphasis added) (citations omitted). *See also* Bloom v. Town Bd. of Yorktown, 80 A.D.2d 823, 436 N.Y.S.2d 355 (2d Dep't 1981).

In *Bloom* and *North Salem* the Westchester County Code was held to supersede conflicting provisions of the General Municipal Law. Similarly, a provision of the Nassau County Administrative Code relating to service of process and enacted as a state special law was held to supersede an inconsistent provision of CPLR § 3211. *See* Horowitz v. Incorporated Village of Roslyn, 144 A.D.2d 639, 535 N.Y.S.2d 79 (2d Dep't 1988). *See also* Grayson v. Town of Huntington, 144 Misc. 2d 1064, 545 N.Y.S.2d 633 (Sup. Ct. Suffolk County 1989).

As the County Code and Charter are both special laws enacted by the state legislature, under *Bloom* and *North Salem*, they both should supersede the general MHRL to the extent that the MHRL is inconsistent with the County's Code and Charter. Thus, even had the appellate division found MHRL section 10(1)(a)(13) applicable to the County, for the reasons stated above, the provisions of MHRL section 10(1)(a)(13) should have been held to have been superseded by the County's Code and Charter.

3. counties determined the total number of supervisors on the county board and the number of supervisors to be elected from each territorial unit of the county;

4. if a city was represented by more than one supervisor on the county board, then the city established the division of its territory into wards for purposes of electing supervisors to serve on the county board.

Following the voting rights lawsuits of the 1960s, the following form and composition of the county legislature was typically adopted:

1. legislators were elected directly to the county board;

2. legislators represented districts of the county which were designed to be relatively equal in population;

3. the county board determined the division of the county into election districts;

4. the number of county legislators changed as population increased.

Such alterations accomplished a change in the form and composition of the county legislature without changing the county's form of government. In other words, the representational system, organization, number, and method of electing county legislators changed, but the legislature's powers and its relation to the other branches of the county government did not. But, while a change in the form and composition of the county legislature is less than an entire change in the form of county government, it nonetheless involves a significant change in the county legislature's structural system of organization and representation.

By contrast, a change in ward or district boundaries, as was enacted by Local Law 8-1991, does not change any attributes of the legislative body's form or composition. The same number of elected county legislators are still in the county legislature, the county is still divided into the same number of districts, the manner of electing the county legislators has not changed, and the predicate for representation is unchanged (representing people, not territory). All that garden-variety redistricting accomplishes is a decennial adjustment to the boundary lines of the local government's legislative districts, to assure that the existing form and composition of the county legislature does not violate the proscription of one person, one vote or any other relevant constitutional or statutory standards.

When a county changes from a supervisorial system to a system of directly elected legislators representing districts of substantially equal population, establishing district lines is part of the overall change in the form and composition of the legislative body. However, when no such change to the form or composition occurs, and the purpose for redistricting is merely to shift district boundaries to account for demographic changes identified in the decennial census, then such redistricting is not, as a matter of law, a change in the form or composition of the local elected legislative body.[99]

This is not a novel idea. Indeed, there is a line of authority stretching back at least half-a-century which has repeatedly held that, in effect, redrawing election district lines is merely a routine task which local governments may perform free of referendum requirements.[100]

In *Lane v. Johnson*[101] the New York Court of Appeals held that even increasing the number of supervisors was not a change in the form or composition of the elective governing body of the county. In *Baldwin v. City of Buffalo*[102] the court of appeals observed that the mere changing of ward boundaries did not require a mandatory referendum. In *Neils v. City of Yonkers*[103] the Supreme Court of Westchester County held that *"[t]he*

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[99] It must be remembered, however, that "substantive" attacks on redistricting are unaffected by *Mehiel*-like "procedural" decisions. Challenges to newly drawn legislative district lines can still be made on state and federal equal protection grounds, for alleged violations of the constitutional "one person, one vote" requirement and of the statutory Voting Rights Act antidiscrimination guarantee. *See* notes 6-8, 12 and accompanying text *supra*.

[100] The principal authorities relied on by the plaintiffs in *Mehiel* are distinguishable. Graham v. Supervisors of Erie County, 25 A.D.2d 250, 269 N.Y.S.2d 477 (4th Dep't 1966), and Trieber v. Lanigan, 25 A.D.2d 202, 269 N.Y.S.2d 595 (4th Dep't 1966), involved a typical change in the composition and form of the County Board after the traditional Board of Supervisors election system was struck down. In Village of North Syracuse v. County Legislature of Onondaga, 74 Misc. 2d 824, 346 N.Y.S.2d 439 (Sup. Ct. Onondaga County 1973), the court ordered a referendum after reapportionment without any analysis of whether a referendum was in fact required. Rather, the court merely *assumed* that a referendum could occur, relying upon Prentiss v. Cahill, 73 Misc. 2d 245, 341 N.Y.S.2d 741 (Sup. Ct. Albany County 1973), in which the court also had merely assumed that a referendum was appropriate. In all of the cases in which the issue was truly analyzed, briefed and aggressively argued, the result was that a mere change in district boundary lines does not change the "form or composition" of the elected legislative body.

[101] 283 N.Y. 244 (1940).

[102] 6 N.Y.2d 168, 160 N.E.2d 443, 189 N.Y.S.2d 129 (1959).

[103] 38 Misc. 2d 691, 237 N.Y.S.2d 245 (1962).

changing of ward boundary lines . . . does not constitute a change in the form or composition of the local legislative body."[104] In *Dobish v. State*[105] the adoption of a weighted voting plan for county board of supervisors was held not to require a referendum, mandatory or otherwise.

When the matter reached the appellate division in *Mehiel*, the court again ruled definitively. Relying on *Baldwin* and *Neils* the Second Department held:

> The redistricting plan under consideration merely changes the boundary lines of the legislative districts in Westchester County and does not constitute a change in the "form or composition" of the Westchester County Legislature. Accordingly, Municipal Home Rule Law § 34(4) and Westchester County Administrative Code § 209.161 do not require a referendum under the circumstances herein.[106]

In this ruling, the appellate division clearly rejected the plaintiffs' attempt to equate simple redistricting with a change in the form or composition of a local elected legislative body.

CONCLUSION

The *Mehiel* case has answered many questions on the power of local governments to redistrict. First, units of local government that are redistricting under a grant of power separate and apart from MHRL section 10(1)(a)(13) are not governed by that subparagraph unless they affirmatively choose to redistrict pursuant to it. In other words, MHRL section 10(1)(a)(13) is available as a supplemental source of redistricting power, but any unit of local government that possesses a separate grant of power may redistrict under such a separate grant and thereby avoid the requirements and limitations of this provision of the MHRL. Such a separate grant of power may be contained in a local charter, whether the charter is adopted locally under the County Charter Law or some other enabling legislation, or is enacted by the state as special legislation.

To the extent that a county redistricts under a grant of authority contained in its charter, it is bound by New York Constitution, article 9, section 1(h)(2), and section 34(4) of the MHRL

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[104] *Id.* at 696, 237 N.Y.S.2d at 251 (emphasis added).
[105] 54 Misc. 2d 367, 282 N.Y.S.2d 791 (Sup. Ct. Wayne County 1967).
[106] *Mehiel*, 571 N.Y.S.2d at 809 (citations omitted).

and will be required to comply with permissive referendum provisions contained therein, only if the county redistricts *as part of a change in the local legislative body's form or composition.* However, mere redistricting alone does not trigger such referendum requirements because the simple act of locally adjusting legislative district boundary lines is not a change in the form or composition of the local elected legislative body.

To the extent that a county or other unit of local government redistricts under MHRL section 10(1)(a)(13), either because it has no other grant of redistricting power or because it chooses to do so, such a redistricting will be subject to the permissive referendum provisions of MHRL section 24(2)(j) as provided in MHRL section 10(1)(a)(13)(e). The permissive referendum process will be applicable to all redistricting undertaken under MHRL section 10(1)(a)(13). However, if the redistricting is undertaken under MHRL section 10(1)(a)(13) *and* is also part of a change in the form or composition of the local elected legislative body, then a mandatory referendum will occur on the redistricting local law if another provision of law mandates a referendum on a change in local legislative form or composition.

Interestingly, there is no general law provision subjecting a change in the form or composition of a county elected legislative body to a mandatory referendum. At most, a permissive referendum is required, per New York Constitution, article 9, section 1(h)(2) and MHRL section 34(4).

As the courts in *Calandra* and *Mehiel* both concluded that MHRL section 10(1)(a)(13) is wholly inapplicable to units of local government that district under an independent grant of power, it is clear that *all* of the provisions of MHRL section 10(1)(a)(13) are inapplicable to chartered units of local government, such as Westchester, which district per a grant of power in their charter. Thus, not only are the referendum requirements of MHRL section 10(1)(a)(13)(e) inapplicable to such chartered units of local government, but the substantive limits of subdivision (a) of this provision and the prohibition against districting more than once every ten years in subdivision (f) are equally inapplicable to units of local government that redistrict under a separate grant of power, such as Westchester County.

Finally, as it is clear that redistricting under MHRL section 10(1)(a)(13) can subject a unit of local government to far greater substantive and procedural restrictions than might otherwise be

the case when redistricting under a local charter or other grant of power, a wise precaution in all redistricting local laws would be an express statement noting that the local government has enacted its redistricting local law under the particular grant of authority in its charter or elsewhere outside MHRL section 10(1)(a)(13), assuming such grant of power exists.

These then are the important lessons of *Mehiel.* But, most significantly, the case explicitly answers the fundamental state constitutional question that mere redistricting, in and of itself, is not such a fundamental reworking of county government as to trigger permissive referendum guarantees of the state constitution. As a charter county or other unit of local government can redistrict pursuant to its charter, the power to redistrict reposes with the popularly elected political branches of the local government unless the charter affirmatively vests the redistricting power with the people by providing for a permissive or mandatory referendum.