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## HOME RULE IN NEW YORK 1941-1965 RETROSPECT AND PROSPECT

J. D. HYMAN\*

JUDGE Charles S. Desmond ascended the bench of the Court of Appeals in January, 1941. Only two years before, on January 1, 1939, numerous amendments to the New York Constitution had become effective. They were adopted by referendum in November, 1938, upon recommendation of the Constitutional Convention which had been in session from April to August of that year. In their address to the People of the State, the delegates had this to say about their recommendations concerning home rule:

The powers of cities to act in relation to their property, affairs and government are enlarged. Enactment of special State laws in that field is prohibited except at the request of the city affected. Cities are empowered to supersede or amend special State statutes enacted in that field under the existing home rule article. Public education, pension and retirement systems, administration of justice, and compensation and working conditions heretofore fixed by local referendum are protected against impairment by local law.

Comparable Home Rule privileges are given to counties.

Before July 1, 1940, the Legislature is required to confer home rule upon villages having 5,000 or more inhabitants, but the civil service status of village employees is protected against impairment by local village law.<sup>1</sup>

If the observations of the delegates were sound, the ensuing years should have seen substantial participation by the courts in enlarging the law of home rule in New York. But the trend was the other way. One of the leading critics of the course of home rule in New York has asserted that: "From 1938 to 1953, there was accumulated a weight of legislative and judicial precedent which was to cause the final collapse of constitutional city home rule."<sup>2</sup>

On January 1, 1964, a completely revised local government article of the New York Constitution became effective. It has been praised as heralding a new day for home rule in New York, as making "a significant new contribution to the principle that local problems can best be solved by those most familiar with them and most concerned with them."<sup>3</sup> On the other hand, a directly contrary assertion has been made by an outstanding authority on New York local government law: "The conclusion is inescapable that the 'revision' produced little or no meaningful improvement in the article."<sup>4</sup> Similarly, a commentator, after

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1. New York State Constitutional Convention 1938, Journal and Documents, Doc. No. 18, at 5.

2. Richland, *Constitutional City Home Rule in New York: II*, 55 Colum. L. Rev. 598, 610 (1955).

3. N.Y.S. Office for Local Govt. Newsletter, No. 15, Sept. 18, 1963, p. 3.

4. Lazarus, *Constitutional Amendment and Home Rule in New York State*, 152 N.Y.L.J. Oct. 13, 1964, p. 1, 4, col. 7.

a section-by-section review of the new constitutional provision, has declared: "It is unlikely that the new amendment will have the effect of changing a single significant court decision dealing with home rule. The balance of power between the state and its municipalities remains unchanged—except that towns now have home rule status!"<sup>5</sup>

The first twenty-five years of Judge Desmond's service on the Court of Appeals thus coincide approximately with the interval between two extensive revisions of the constitutional provisions regarding home rule, the effect of both being the subject of sharply contradictory claims. It would seem to be an appropriate time to attempt to clarify perspectives. A few preliminary points must be made, in order to provide the writer and his readers with a common starting point for the purposes of the inquiry.

With few exceptions, and most of those temporary, the law of all American states is premised upon the doctrine of legislative supremacy: municipalities are entirely under the control of the state legislature except insofar as it may be restricted by state constitutional limitations. Broadly speaking, this means that municipalities have only such power as the legislature chooses to confer upon them and are subject to whatever intervention in their affairs the legislature chooses to exercise.<sup>6</sup> In many states, including New York, various constitutional limitations have been imposed upon this sweeping legislative power. Characteristically, difficult problems of application have been presented, involving the courts deeply in the detailed working-out of the limitations. One commentator has tartly characterized the resulting situation this way: "Under the current scheme of things, the term 'constitutional home rule' is a misnomer. In most states, a more accurate designation would be 'judicial home rule.'"<sup>7</sup> It may be inferred from this kind of criticism that the courts have been thought to have more or less deliberately, either through perversity or wilfulness, distorted constitutional and legislative solutions to the problems of state-local relationships. But as one considers the widespread nature of the complaint, and as one examines the specific problems which have to be dealt with, one becomes rather inclined to the view that the courts have been struggling with conflicts of interest which the constitutions and statutes have either failed to resolve, or, if they have resolved them, have failed to state the resolution in terms clear enough to guide judicial decisions when specific disputes arise.

No two states which have embarked upon home rule have used identical patterns. And in each state an interaction between legislative and constitutional

5. Grad, *The New York Home Rule Amendment—A Bill of Rights for Local Government?* 14 Local Gov't Law Service Letter 9 (June 1964). For a thoughtful effort to provide a new analytical structure for developments under the recent amendment, see Comment, *Home Rule: A Fresh Start*, 14 Buffalo L. Rev. 490, 491-92 (1965).

6. See *City of New York v. Village of Lawrence*, 250 N.Y. 429, 437, 165 N.E. 836, 838 (1929); 1 Antieau, *Municipal Corporation Law* 57-68 (1955); Fordham, *Local Government Law* 40-50 (1949); 1 McQuillin, *The Law of Municipal Corporations* 328 (3d ed. 1949); 2 *id.*, at 9.

7. Mott, *Home Rule for American Cities* 51 (1949), quoted in Richland, *Constitutional City Home Rule in New York*, 54 Colum. L. Rev. 311 n.10 (1954).

declarations and judicial interpretations has created so individualized a pattern that it is most hazardous to attempt to apply to one state standards formulated in another. In any event it is essential that the specific background of current controversies in a given state be at least generally understood.

## I. BACKGROUND OF HOME RULE IN NEW YORK

### A. *Meanings of the Term*

In the State of New York home rule has three strands which must be distinguished from each other. One, the earliest, attempts to preserve some degree of local independence by prohibiting the legislative transfer to existing state officials or new state appointees of functions previously performed by local officials. As early as 1777, the State's first constitution required the election "by the people" of town clerks, supervisors, assessors, constables, and collectors "and all other officers heretofore eligible by the people."<sup>8</sup> In 1846, this constitutional protection was broadened to cover county and "all city, town and village officers," and to ensure that such officers "shall be elected by the electors of said cities, towns and villages, or of some division thereof, or appointed by such authorities thereof . . ." as the legislature shall designate.<sup>9</sup> The courts gave some support to this effort to prevent state dictation of local officers or state usurpation of power over local affairs by appointing the responsible officers.<sup>10</sup> But the questions arising when new functions were established by legislation, or when new offices were created, required the courts to determine the breadth of the limitation, and in doing so they did leave room for some state intervention.<sup>11</sup> Long referred to as the home rule provision, these limitations collectively, although continued, have in recent decades played a more significant role in blocking the transfer and consolidation of functions among local units than in protecting the localities from state-appointed local officials.<sup>12</sup> In recognition of this effect of the limitation, recent amendments to the constitution providing for county charters have prescribed procedures, including split referenda, for the transfer of functions to the county or among units in the county.<sup>13</sup>

Today, "home rule" is more commonly understood to refer to two other closely related but independent principles. One is the grant of affirmative power to municipalities. The other is the imposition of restrictions on state legislative

8. N.Y. Const. art. XXIX (1772).

9. N.Y. Const. art. X, § 2 (1846).

10. See *Wendell v. Lavin*, 246 N.Y. 115 158 N.E. 42 (1927); *People ex rel. Wogan v. Rafferty*, 208 N.Y. 451, 102 N.E. 582 (1913); *People ex rel. Metropolitan St. Ry. Co. v. Tax Comm'rs*, 174 N.Y. 417, 67 N.E. 69, 63 L.R.A. 884 (1902); 11 New York State Constitutional Convention Committee, *Problems Relating to Home Rule and Local Government* Ch. 5 (1938) [Hereinafter cited as 1938 Comm.].

11. *People ex rel. Wood v. Draper*, 15 N.Y. 532 (1857); *McBain*, *The Law and the Practice of Municipal Home Rule*, at 34-45 (1916); 1938 Comm., *supra* note 10.

12. *People ex rel. Town of Pelham v. Village of Pelham*, 215 N.Y. 374, 109 N.E. 513 (1915).

13. N.Y. Const. art. III, § 26 (1935—Fearon Amendment); N.Y. Const. art. IX, § 1 (1938 amend.), as amended 1945.

interference in matters over which the municipality does have affirmative power. With respect to the first principle, it should be noted that different aspects of municipal power present somewhat different problems in this context, although the aspects overlap. Municipal power over the structure of local government is perhaps the most fundamental aspect of home rule. Quality of municipal government can be significantly affected although not wholly controlled by the basic form of the government, the offices created, the distribution of power among them, the method of filling them, the compensation paid to their incumbents, and the lines of responsibility among offices and departments. The next most significant aspect of affirmative home rule power is the power to regulate conduct within the territorial limits of the municipality. In a general sense, this is what is simply the police power: the power to make legally binding regulations governing the conduct of those within the municipality in order to protect and enhance the safety, health and general welfare of the community. There is another aspect of local government which falls somewhere between the two mentioned, although it could be classified with either. This is the operation of enterprises which are not strictly governmental, such as public utilities, transit systems, market and freight handling facilities, parking facilities and the like.

The other principle of home rule which is of current significance is the extent to which each municipality is subject to direct legislative intervention by the state with respect to matters over which the municipality has affirmative power. It is the application of this principle which, apart from the lack of any general power in New York municipalities to levy taxes, has been the focus of the most heated controversy about home rule in New York. There has been little dispute about the liberality with which the municipalities have been given the power to devise their governmental structure and to provide for the allocation of responsibility for the discharge of governmental functions.

These are the areas in which the fate of the 1938 amendments on home rule at the hands of the courts must be appraised. And these are the areas in which guesses about the effects of the 1964 amendments must be made. A brief review of the history of home rule in New York, insofar as it relates to police power and immunity from legislative interference is desirable, simply because it would be impossible to deduce even the fundamental principles of the New York law from a reading of the current and recently superseded constitutional provisions, so heavily have they been overlaid with judicial gloss.

### *B. Historical Development*

Municipal powers, until 1924, were entirely matters of statutory grace. When a city was incorporated, which was always done by special law, its powers were specifically spelled out in the charter creating it. Insofar as the new city had regulatory power, it was because the legislature conferred it. Section 9, article VIII of the Constitution of 1846 imposed the following obligation upon the legislature: "It shall be the duty of the legislature to provide for the or-

## HOME RULE

ganization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations."<sup>14</sup> The Convention had declined to approve a suggestion that the constitution be amended to prohibit charters or special acts for the incorporation of cities and villages.<sup>15</sup> The legislature in 1847 did enact the first of a series of general laws providing for the incorporation and government of villages.<sup>16</sup> But no general law providing for the incorporation of cities has ever been passed: they still come into being only by special law.<sup>17</sup> However, beginning in 1900, with the passage of the General City Law,<sup>18</sup> there has always been at least one general statute relating to the government of cities.<sup>19</sup> Not until the passage of the Home Rule Amendment of 1923 did the constitution contain a direct grant of general powers to cities. Section 3 of article XII of the Constitution of 1894, as amended in 1923, read as follows:

Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state, relating to the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all officers and employees of the city, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, the wages and salaries, the hours of work, or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it, and the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health. The legislature shall, at its next session after this section shall become part of the constitution, provide by general law for carrying into effect the provisions of this section.

Something will be said later of the effect upon city powers of this shift from a legislative to a constitutional basis. The extensive revisions in home rule powers made by the Constitution of 1938 repeated the above grant of affirmative powers, but prefaced it with the following additional grant: "Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government."<sup>20</sup>

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14. 1 New York State Constitutional Convention Committee, New York State Constitution Annotated Part II, 68 (1938).

15. Potter, *The History of the Village Law*, 63 McKinney's Consolidated Laws vii (1951).

16. N.Y. Sess. Laws 1847, ch. 426. The 1874 amendments to the Constitution of 1846 contained a provision, art. III, § 18 (now § 17) forbidding the passage of local or private bills incorporating villages.

17. Only three cities have been incorporated since 1920. See Potter, *op. cit. supra* note 15, at xv.

18. N.Y. Sess. Laws 1900, ch. 327.

19. There are other general laws which impose restrictions or confer authority upon all or several classes of municipal corporations, including cities. See especially N.Y. Local Fin. Law; N.Y. Munic. Law.

20. N.Y. Const. art. IX, § 12 (1938).

In order to understand the impact of this addition, it is necessary to glance at the development of constitutional limitations upon the legislature's power to pass special laws relating to particular cities. This is so because a fundamental source of the confusion surrounding city-state relationships in New York is the fact that the phrase "property, affairs or government," although introduced as a limitation on state legislative action, has for twenty-five years also been regarded as stating the principal grant of affirmative power to cities. The phrase first came into the New York Constitution in 1894. Article XII of that year's revision contained in section 1 the provision quoted above directing the legislature "to provide for the organization of cities and incorporated villages." Section 2, which was wholly new, classified all cities into three classes in accordance with population: 250,000 or more; 50,000 to 250,000; and all others. It then provided: "Laws relating to the property, affairs, or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class." Every special law, as thus defined, was required to be sent, after passage, to the city concerned. If the bill was accepted by the city, it could be signed by the governor. If rejected, it had to be re-passed by both houses of the legislature before being submitted to the governor for action. The amendment was a response to the practice of extensive, detailed legislative intervention in the affairs of New York City primarily. As formulated, it gave the city only a suspensive veto: but since most legislation is passed in a rush at the close of the session, it was an effective check in practice.<sup>21</sup>

The first case to come before the Court of Appeals under the 1894 provision involved a new general liquor licensing law of the state, which included a formula for the distribution of revenues derived from license fees among the cities and towns of the state in which the fees were collected. Among numerous constitutional objections, the point was raised that the consent of the cities had not been obtained. The objection was brushed aside in the Court of Appeals. In the course of his opinion, Chief Judge Andrews expressed an intention to construe the new provision "with that liberal spirit which is especially

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21. Richland, *supra* note 7, at 318-21, notes that the early practice of limiting legislative intervention to instances where the city requested it (see *City of New York v. Ordrenan*, 12 Johns. (N.Y.) 122 (1815)), and the subsequent increasing intervention by a legislature which, largely through the apportionment system, underweighted the city as compared with the rural areas. A commission report of 1875 observed that "legislative interposition in the affairs of cities is an evil of the first magnitude." (*Id.* at 320). This phenomenon was by no means confined to the State of New York, and it not infrequently had overtones of special privilege and corruption. See Peppin, *Municipal Home Rule in California I*, 30 Calif. L. Rev. 1, 9-15 (1941); 1938 Comm., *supra* note 10, at 36. It should not be forgotten, however, that the corruption in New York City in the third quarter of the century provided ammunition for those opposed to extensive home rule. Thus, Joseph H. Choate was able to observe, in the 1894 Convention: ". . . 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." 1 Rev. Record, 1894 N.Y. Constitutional Convention 4 (1900), quoted in Richland, *supra* note 7, at 321.

required in the interpretation of a remedial provision of the fundamental law, so that, if possible, it shall be efficient to secure the purpose of its enactment."<sup>22</sup> Yet he made some observations, by no means necessary to his decision, which hardly presaged so liberal an interpretation. Thus, after stating that the law in question "is neither a general nor special city law, nor does it relate to the 'property, affairs or government' of cities," a perfectly reasonable assertion, he went on:

In enacting a general law under the police power, the legislature is not hampered or restrained by the classification of cities in the Constitution. It may adjust details to meet varying conditions. In a health law, regulations which might be suitable and proper for the city of New York, a great seaport, exposed to peculiar dangers from infection and disease, might be unnecessary, burdensome and oppressive if applied to an inland city like Buffalo. The constitutional limitation relates to city laws either general or special, and not to general laws for the government of the state including the cities therein.<sup>23</sup>

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.

Five years later the Court of Appeals<sup>24</sup> was confronted with post-1894 amendments to the 1891 Rapid Transit Act which, like the original act, applied only to cities having a population of more than one million. The over-riding issues in the case were whether or not the transit system was for a city purpose, and whether public money or credit was being given to private persons in violation of constitutional limitations. Practically no consideration was given by the Appellate Division to the classification problem. The majority adverted to it only to hold that the constitutional amendment did not change the prior interpretation which allowed classification by population under article III, section 18, which provided that the legislature "shall not pass a private or local bill . . . granting . . . the right to lay down railroad tracks."<sup>25</sup> The Court of Appeals did not mention the classification issue.

These tentative underminings of the 1894 home rule amendment blossomed into a clear holding in 1912 in *Admiral Realty Co. v. City of New York*.<sup>26</sup> Once again the major attack on the laws providing for New York City's street railroads was based on the constitutional prohibition against the gift or loan of city property or credit. But the Court this time dealt specifically with the

22. *People ex rel. Einsfeld v. Murray*, 149 N.Y. 367, 381, 44 N.E. 146, 150, 32 L.R.A. 344, 349 (1896).

23. *Id.* at 380-81, 44 N.E. at 150, 32 L.R.A. at 349.

24. *Sun Printing & Publishing Ass'n v. Mayor*, 152 N.Y. 257, 46 N.E. 499, 37 L.R.A. 788 (1897).

25. 8 App. Div. 230, 252, 40 N.Y. Supp. 607, 622 (1st Dep't 1896). The 1874 amendments to the 1846 constitution listed about a dozen situations in which the legislature was prohibited from passing "a private or local bill" and was required to "pass general laws." As Richland notes, the New York courts, like state courts generally, accepted population classifications as meeting this requirement. *Supra* note 7, at 323.

26. 206 N.Y. 110, 99 N.E. 241 (1912).



home rule provision. After pointing out that the basic statute had been passed before the 1894 amendment, the majority opinion continued:

In the second place, the act is not one of those contemplated by the provision in question. The latter contemplates laws which relate to municipal property and affairs and which may be described, as the provision does describe them, as "city" laws. To come within the precise provision which is invoked here it would be necessary to hold that the Rapid Transit Act was "a special city law." It seems to me that this term could not be regarded as a reasonable description of the statute before us. It was adopted not only for the benefit of the cities which, of course, would be affected, but of the public at large . . . . It is a much more general law than is contemplated by the provision in question.<sup>27</sup>

This statement gives no clear indication of the kind of statutes which the provision does cover. But neither does it fulfill Chief Judge Andrews' promise in the *Einsfeld* case that the provision would be construed liberally to effectuate its purpose of reducing special legislative involvement in the affairs of particular cities. It goes beyond the limitation suggested there, that laws imposing regulation on a state-wide basis might vary the impact of the regulation on individual cities because of their special situation; it contemplates legislation which is not state-wide but which relates only to one of a few cities. As has so often been the case, the Court confronted these constitutional provisions in situations in which the public interest in the enterprise in question was very great and hence the pressure on the Court to approve the enabling legislation was heavy.

The 1923 Home Rule Amendment, in addition to granting affirmative power to the cities, as noted above, made a new effort to limit state intervention in the affairs of particular cities. Section 2 of article XII read as follows:

The legislature shall not pass any law relating to the property, affairs or government of cities, which shall be special or local either in its terms or in its effect, but shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities except on message from the governor declaring that an emergency exists and the concurrent action of two-thirds of the members of each house of the legislature.

This made two departures from the 1894 limitation. It converted the suspensory veto into a prohibition against special laws except when the governor declared that an emergency existed and the special law commanded a two-thirds majority in each house of the legislature. It also defined a special law to cover any one which was "special or local in its terms or in its effect." This would seem effectively to hit at the previous doctrine that the bar could be avoided by

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27. *Id.* at 140, 99 N.E. at 250. It is of some interest that the Appellate Division, in sustaining the Rapid Transit Act as involving a city purpose, emphasized that: "It was not for travelers nor for public travel, in the ordinary sense . . . . It was primarily for the benefit of its long-suffering inhabitants alone." *Sun Printing & Publishing Ass'n v. Mayor*, 8 App. Div. 230, 239, 40 N.Y. Supp. 607, 612 (1st Dep't 1896).

couching the law in general-sounding terms which in fact identified only one city. And in 1927, a statute was actually struck down under this provision.<sup>28</sup> Without mentioning any names, the statute permitted a suit to be brought against a city within one year, notwithstanding the statute of limitations, where an award for damages had been made by the supreme court in condemnation proceedings for land needed to open a street in that city, where the award had not been paid, but within one year last past had been declared by the courts to be barred by the statute of limitations. Only by the wildest of coincidences could it possibly have applied to any other event than the one before the Court. Emphasizing the change in definition of special laws made in 1924, Chief Judge Cardozo wrote warmly of the constitutional purpose and concluded: "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."<sup>29</sup>

Hopes thus aroused for a restraining influence from the new amendment were shattered two years later in the key case of *Adler v. Deegan*,<sup>30</sup> which sustained the Multiple Dwelling Law, establishing a housing code for cities having a population of more than one million, that is, New York City. The law passed without a two-thirds majority. As Richland points out: "The law was both salutary and badly needed," but it was opposed by New York City, and members of the legislature from New York City voted against it.<sup>31</sup> Although the three opinions sustaining the law are not wholly compatible in reasoning, the holding has been taken to be, as Judge Cardozo put it, that even if a matter might appear to be part of 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>32</sup> A major premise of the decision was that this interpretation of "property, affairs or government" was established in the cases prior to 1924, and was thus carried into the new amendment by the continued use of the phrase. Although, as Richland points out, the cases referred to did not use the words "property, affairs or government" in discussing the meaning of the 1894 amendment,<sup>33</sup> the quotations above from the *Einsfeld* and *Admiral Realty* cases at least adumbrate the notion of state concern.

There has not been the slightest retreat by the Court from the heart of the holding in the *Adler* case: that "property, affairs or government," as used in the Constitution to delimit the scope of state legislative interference in the affairs of cities by special laws, does not cover matters which are of "state concern." In view of this, any appraisal of the performance of the New York courts in relation to home rule since that time, and in the immediate future, must weigh heavily the fact that the amendments of 1938 and 1964 continued to use the

28. In the Matter of Mayor of New York (Elm St.), 246 N.Y. 72, 158 N.E. 24 (1927).

29. *Id.* at 77-78, 158 N.E. at 26.

30. 251 N.Y. 467, 167 N.E. 705 (1929).

31. *Supra* note 7, at 329, 330, n.67.

32. *Adler v. Deegan*, 251 N.Y. 467, 491, 167 N.E. 705, 714 (1929).

33. *Supra* note 7, at 330-31.

same phrase in the same context. When, in 1938, a proposal was placed before the Convention to eliminate "property, affairs or government" from the clause restricting the legislative power to pass special laws, it received almost no support. One delegate, from New York City, pointedly asked whether

. . . in the long run it is desirable to vest within the power of 60 municipalities of the State beyond recall the police powers of the State . . . . It is a question of whether you are going to burn all your bridges behind you and forever vest that power in the municipalities. I for one am frank to say that I am apprehensive that in certain communities the dominant local interests may so control a situation as to use police powers adversely to the public interests, and I doubt very much whether that should be done.<sup>34</sup>

In adopting a provision built upon property, affairs or government, the Convention surely made a commitment to the principle that fear of abuse of power by the municipalities required the retention of a broad power in the legislature to intervene in the affairs of any municipality by special law, a power which although vaguely defined, had been sustained almost invariably by the courts when exercised.

One change was made in the limitation. The requirement of a gubernatorial emergency message for special laws which might be within a city's property, affairs or government was replaced by the requirement of a local request. This reflected the fact that the practice of all governors under the 1923 Amendment had been "with few exceptions, to send an emergency message, only at the request of a city administration . . ." <sup>35</sup> The two-thirds requirement was retained, however, despite the lack of reason for it when action is taken only at the request of the affected locality. The theory of emergency intervention was thus abandoned, but, as noted, this was done in apparent reliance upon the reasonable assumption that if there was a genuine emergency the legislature could act by simple majority and the courts would find the matter acted upon to be one of state concern.

The most recent amendment continues the same pattern: "property, affairs or government" still defines or characterizes the area within which the legislature may not act by special laws passed in the ordinary way. Special laws may be passed within that area upon local request, but now only a simple majority is required. This makes a reasonable correction in the 1938 provision. But there now is restored the pre-1938 authorization to act within the area of property, affairs or government upon certificate of necessity and two-thirds vote in each house.<sup>36</sup> Perhaps this reflects a revival of the feeling expressed in 1938 that it was unwise to vest the police powers of the state in the municipalities, beyond recall, especially in view of the fact that it was now to be lodged,

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34. 2 Rev. Record, 1938, N.Y. Constitutional Convention 1364. See Richland, *supra* note 2, at 601-02.

35. 11 1938 Comm. 72.

36. N.Y. Const. art. IX, § 2(b)(2).

not only in 60 or more cities, but also in more than 900 towns, as well as in villages and in counties. In other words, the hazards of improvident local action may have been felt to be too great to rely alone upon the specialized meaning of "property, affairs or government" to support necessary legislative intervention. It seems curious, however, that New York City is excluded from the certificate of necessity proceeding. At first glance this may seem to be a recognition of New York City's special and superior status. But the exclusion of New York City from this emergency escape clause is likely to hurt attempts to persuade the courts to adopt a broader view of what constitutes a city's property, affairs or government; for only this avenue will be open to the legislature to correct a true emergency which might arise involving the affairs of New York City.

II. PROSPECTS UNDER THE 1964 AMENDMENT:  
SPECIAL LEGISLATION

In the light of this review of the history of the constitutional limitations on the power of the legislature to pass special laws relating to cities, it is hard to see any reasonable basis for believing that under the new constitution the restraints on special legislative action will be greater than they have been.

This may seem to be acquiescing too rapidly in the charges of the critics that the 1964 amendment changes nothing. It may be argued that the constitutional direction to construe liberally the powers and immunities granted to local governments obligates the courts to abandon the previous course of decision which may not unfairly be characterized as a very narrow construction of the immunity. But the constitution defines the immunity in the same words which have produced the narrow construction. The argument that the constitution must be applied in the light of the established judicial construction of the words used may have been vulnerable as it was used in *Adler v. Deegan*. But it is most compelling now in view of the steadfast adherence of the Court to the doctrine of *Adler*: that a substantial infusion of state interest in a matter makes it no longer a part of the property, affairs or government of the city for the purposes of the limitation on state legislative action. A preponderance test (whether the local or state interest was greater) would add little in the way of certainty. A shift to the other extreme of holding that any substantial admixture of distinctively local interest would make the matter the property, affairs or government of the city would be a repudiation of the firmly established meaning of the phrase as of the time of its adoption.

Within the accepted definition of "property, affairs or government," however, there is one aspect of its application which may well be liberalized with some profit to home rule. There has been some tendency toward a rigid topical approach in the application of the limitation: it is not necessary that special legislation be permitted with respect to every aspect of a topic merely because certain fundamental aspects have been held to be of state concern. For example,

important considerations affecting the health of residents and non-residents have been thought to justify special legislation affecting New York City's multiple dwellings and Buffalo's sewer system. It does not follow from such determinations that everything in a city or its operations which is in any way related to health automatically becomes a matter of state concern. The Appellate Division came close to holding that it does in the 1949 decision of *Ainsley v. Lounsberry*.<sup>37</sup> Under the City Home Rule Law, section 11, cities were authorized by local law to supersede "any provision of an act of the legislature theretofore enacted which provision does not in terms and effect apply alike to all cities" provided that the local law was "in relation to the property, affairs or government of the city."<sup>38</sup> Chapter 4 of the General City Law provided that there should be examining boards of plumbers in cities, and defined their qualifications. New York City was subsequently excluded from this act.<sup>39</sup> It was therefore no longer a general law and was subject to supersedure if the matter covered were within the city's property, affairs or government. In holding that it was not, the court said: "The state law superseded is concerned with public health . . . which is a matter of State concern and is not within the definition of property, affairs or government of a city. (*Adler v. Deegan*, 251 N.Y. 467)."<sup>40</sup> In contrast to this automatic categorization, some cases disclose a tendency to examine more closely the particular aspect of the matter being regulated and to ascertain whether, in that aspect, there is substantial state concern.<sup>41</sup> While a development along these lines will not change fundamentally the operation of the restraint on special legislation, it should allow the localities more freedom in superseding special laws, since under the new constitution the legislature is authorized to restrict supersedure in the case of laws which do not relate to the property, affairs or government of cities.<sup>42</sup>

If it be thought that the extension of home rule to the towns might provide the cities with politically useful allies in their struggle for more independence, the experience of the last twenty-five years suggests the wisdom of a second thought. One of the most significant judicial developments of the period was the treatment of constitutional enlargement of the home rule power of counties.<sup>43</sup>

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37. 275 App. Div. 729, 86 N.Y.S.2d 857, *appeal denied*, 275 App. Div. 865, 89 N.Y.S.2d 240 (3d Dep't 1949).

38. Supersedure was also authorized in connection with a few of the enumerated city powers, but not the general police power.

39. N.Y. Gen. City Law, art. 4, § 57.

40. *Ainsley v. Lounsberry*, 275 App. Div. 729-30, 86 N.Y.S.2d 857, 858 (3d Dep't 1949).

41. *Caparco v. Kaplan*, 20 A.D.2d 212, 245 N.Y.S.2d 837 (4th Dep't 1964). Respondents argued that civil service was a matter of state concern and therefore not within the property, affairs or government of the city. The Court said: "In our view, the administration of civil service is not capable of such precise classification. . . . The local administration of civil service is a matter relating to the property, affairs or government of any city. . . ." *Id.* at 216, 245 N.Y.S.2d at 841.

42. N.Y. Const. art. IX, § 2(c)(ii).

43. The development is well reviewed in Comment, *County Home Rule: Freedom from Legislative Interference*, 8 Buffalo L. Rev. 252 (1959).

## HOME RULE

A 1935 amendment<sup>44</sup> required the legislature to provide alternative forms of government for counties, and prescribed the method for the adoption of their charters. Once a county adopted such a charter, it received the same protection against special legislation which the cities had received under the 1923 amendment; that is, no laws might be passed relating to the property, affairs or government of the county which were special or local in terms or in effect, except on emergency message of the governor and two-thirds vote of both houses.

The 1938 amendment made applicable to all counties this restriction on special legislation. It also broadened the restriction by deleting the reference to property, affairs or government, thus prohibiting the passage of any law "which shall be special or local in its terms or in its effect, or which shall relate specially to one county only," unless there was a local request or the governor submitted a certificate of necessity and the legislature adopted the statute by a two-thirds vote in both houses. This restraint plainly requires interpretation. And in the principal case which came to the Court of Appeals, the Court responded in the same manner as it had responded in the City Home Rule cases. In 1956, in *Farrington v. Pinckney*,<sup>45</sup> the Court upheld a uniform jury law which treated counties differently depending upon whether their population was more or less than 100,000. A 1944 case, which arose not under the county home rule provisions of the constitution, but under the older article III, section 17 which specifically prohibited private or local bills in connection with jurors, had held that this provision allowed reasonable classification.<sup>46</sup> Following this analysis, the Court declared that the County Home Rule limitation on special legislation merely prohibited arbitrary classifications, but allowed reasonable ones. The Court went further and observed, *obiter*, that the only special legislation affecting counties which the constitution restrained was that relating to the organization and government of counties. This decision has been criticized on both counts, much as the earlier interpretations of property, affairs or government were criticized. The 1958 amendment broadened the opportunity for counties to adopt charters, and made verbal changes in the restriction on special legislation. It has been suggested that the changes leave little room for the doctrine that special legislation is limited only insofar as it relates to the organization and government of counties, but that the reasonable classification doctrine would persist.<sup>47</sup> Argument about the meaning of these earlier bans on special legislation affecting counties is academic now, since the new amendment puts counties and towns, along with cities, back under the property, affairs or government umbrella, riddled as it is. It is significant, however, that even though free of the influence of the big city-upstate conflict, the Court leaned heavily away from imposing substantial restrictions on the legislature's freedom to pass special laws. It can hardly be expected that, with the re-adoption of the

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44. N.Y. Const. art. III, § 26(1)-(4) (1935).

45. 1 N.Y.2d 74, 133 N.E.2d 817, 150 N.Y.S.2d 585 (1956).

46. *Stapleton v. Pinckney*, 293 N.Y. 330, 57 N.E.2d 38, 155 A.L.R. 783 (1944).

47. Comment, *supra* note 43, at 257-60, 264-67.

property, affairs or government phraseology, the Court will make a radical shift in the degree of restraint imposed upon the legislature in dealing with the home rule municipalities. On this point, the critics appear to have the better of the argument and about the significance, or lack of it, of the 1964 amendment.

III. PROSPECTS UNDER THE 1964 AMENDMENT:  
AFFIRMATIVE LOCAL GOVERNMENT POWERS

What, then, is the situation with respect to the affirmative powers of the cities? We suggest that the prescribed liberal interpretation of the constitution, as recently amended, should end the uncertainty, frequently complained of, as to the scope of the cities' powers. It should be emphasized that this complaint has not been addressed to the powers of the cities over the structure of their government. The City Home Rule Law has broadly implemented the charter-making power, and the courts have been liberal in allowing changes relating to structure. Two recent examples illustrate the tendency. In *Baldwin v. City of Buffalo*,<sup>48</sup> the Court of Appeals held that, under its home rule charter, the City of Buffalo was authorized to change the ward boundaries within the city, despite the fact that their only present function of any significance was to serve as districts for the election of members of the Erie County Board of Supervisors. The close relationship of the ward boundaries to county government would have permitted a court hostile to city home rule to find a prohibited interference with county affairs.<sup>49</sup> Another example is the decision interpreting the City Home Rule Law not to require a referendum for an amendment eliminating a charter prohibition against a mayor's serving two successive terms.<sup>50</sup> On the whole, it may be said that the urban residents of New York have the necessary power to fashion almost any form of government which they believe to be most helpful for the achievement of good government for their community.

With respect to regulatory laws, however, it has been customary to complain that the scope of authorized action is too uncertain, almost compelling recourse to the legislature for special laws in order to assure the validity of the desired controls. The 1924 amendment, which conferred enumerated powers upon the cities, did not confer power over property, affairs or government in so many words.<sup>51</sup> When New York City attempted to exercise its new affirmative powers

48. 6 N.Y.2d 168, 160 N.E.2d 443, 189 N.Y.S.2d 129 (1959).

49. N.Y. Const. art. IX, § 12 (1938) gave each city power to adopt local laws relating to the powers, duties, qualifications, number, mode of selection and removal of all of its officers and employees "except of members of the governing elective body of the county in which such city is wholly contained."

50. *Benzow v. Cooley*, 22 Misc. 2d 208, 199 N.Y.S.2d 22 (Sup. Ct. 1960), *aff'd*, 12 A.D.2d 162, 209 N.Y.S.2d 364 (4th Dep't 1961), *aff'd*, 9 N.Y.2d 888, 175 N.E.2d 830, 216 N.Y.S.2d 701 (1961).

51. N.Y. Const. art. XII, § 3 (1894). The City Home Rule Law, implementing the amendment, as adopted in 1924 (N.Y. Sess. Laws 1924, ch. 363), conferred power over property, affairs and government only as "relating to" the enumerated constitutional powers. This was amended in 1928 (N.Y. Sess. Laws 1928, ch. 670) to give the cities power to regulate their property, affairs or government including but not limited to the enumerated powers.

## HOME RULE

by acquiring and operating a very extensive transportation system, it was told by the Court of Appeals that none of the enumerated powers embraced this activity.<sup>52</sup> The Court also pointed out that there was no affirmative grant of power over that area (property, affairs or government) which the legislature was forbidden to enter by special laws unless extraordinary procedures were utilized. At this point, before the "state concern" limitation on property, affairs or government had been formulated, it was thought that there might be a serious gap in legislative power; an area in which, in the absence of a two-thirds legislative majority, neither the city nor the state legislature could act.<sup>53</sup> This fear of a gap seems to have persisted, although the disclosure of the uncertain boundaries of property, affairs or government in *Adler* and subsequent cases made that phrase a very unsure basis for the exercise of affirmative power.<sup>54</sup> The Court could have determined that "property, affairs or government" has the broad meaning which its words suggest, but that the meaning is constricted, solely for purposes of the limitation on special legislation, by the showing of a substantial state interest. But the latter issue was decided before the phrase was used in an affirmative sense. And the Court never unequivocally declared that its later affirmative use had a broader meaning than its earlier restrictive use. Hence there was a natural tendency on the part of local officials to seek state legislative action on matters on which the legislature might appear to be free to act by special legislation under the state concern doctrine. And this explains in part the frequency of local requests for special state laws.<sup>55</sup> The retention of the affirmative grant of property, affairs or government power in the amendment, now extended to all towns and counties, as well as to cities and villages, would seem to guarantee a continuance of the uncertainty if major reliance is placed upon the property, affairs or government power. Even a constitutional admonition to construe the new provisions liberally would hardly seem sufficient to extricate the Court from its present property, affairs or government trap.

However, a review of action by the cities, especially in recent years, suggests that they have been exercising increasingly broad police powers.<sup>56</sup> And there is one way of removing doubts about the affirmative legislative power of municipalities: to rely more heavily upon the police power clause in the enumerated

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52. *Browne v. City of New York*, 241 N.Y. 96, 149 N.E. 211 (1925).

53. See Richland, *supra* note 7 at 328.

54. See Richland, *Property Affairs and Government*, Home Rule Handbook 18. New York State Office for Local Government, Municipal Law Seminar (1964) [hereinafter cited as Handbook].

55. Another reason for the frequent local requests for special legislation was that the City Home Rule Law, which implemented the constitutional grant of police power, imposed referendum requirements in numerous situations. Considerations of economy, speed, and political practicability at various times made the special law method more attractive to a local government than local laws. See Fleischman, *Home Rule Requests for Legislation*, Handbook 112, 114; Richland, *Statutory And Practical Limitations Upon New York City's Legislative Powers*, 24 Fordham L. Rev. 326, 330 (1955).

56. See Richland, *Property, Affairs and Government*, Handbook, *supra* note 54, at 24; Radlein, *The Police Power*, *id.* at 26-37.



powers. This will not cover taxing and debt control, of which something will be said later. Excluding these items, it appears that the new constitutional provision can be construed to confer adequate home rule powers to meet the responsibilities confronting urban areas in the immediate future. The amendment, New York Constitution article IX, section 2, in addition to granting power to adopt local laws relating to its property, affairs and government, provides that:

(c) In addition to powers granted in the statute of local governments or in any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

(1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees, except that cities and towns shall not have such power with respect to members of the legislative body of the county in their capacities as county officers.

(2) In the case of a city, town or village, the membership and composition of its legislative body.

(3) The transaction of its business.

(4) The incurring of its obligations, except that local laws relating to financing by the issuance of evidences of indebtedness by such local government shall be consistent with laws enacted by the legislature.

(5) The presentation, ascertainment and discharge of claims against it.

(6) The acquisition, care, management and use of its highways, roads, streets, avenues and property.

(7) The acquisition of its transit facilities and the ownership and operation thereof.

(8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature.

(9) The wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it.

(10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

These ten enumerated items follow closely, but with some changes, the enumeration in the 1938 constitution, which was an expansion of the affirmative powers first granted at the constitutional level in 1924. It is pertinent to note that the 1924 amendment concluded its recital of granted powers as follows:

"The legislature shall . . . provide by general law for carrying into effect the provisions of this section."<sup>57</sup> The omission of the clause in the 1938 and 1964 grants strongly implies that the latter are self-executing; that is, that the affirmative powers there specified are vested immediately in the municipalities, by direct authorization of the people, subject only to limitations contained in or authorized by the constitution. Reading afresh the language of these grants, one must be struck by their breadth, particularly that of subdivision 10, the police power. Successive amendments have moved steadily in the direction of enlarging the statement. Notably, the most recent change regarding the police power of the municipality extends it from "its inhabitants and . . . their property" to "persons or property therein." The present language, indeed, is a good definition of the far-reaching police power.<sup>58</sup> In the light of this expanded grant, and the constitutional direction to construe the granted powers liberally, why is not this provision an adequate basis for any exercise of regulatory action which the localities may feel it necessary to take? Sponsors of the latest amendment have emphatically urged the municipalities to validate the large grants of power by exercising them imaginatively.<sup>59</sup> Under these circumstances, why should not the municipalities abandon the stumbling search for police powers in the will o' the wisp of property, affairs or government?

The first question that arises is whether interpretations by the courts of the earlier grants threaten to raise any obstacles comparable to those presented by the pattern of decisions which has whittled down the phrase property, affairs

57. 1924 Constitutional Amendment, N.Y. Const. art. XII, § 3 (1894).

58. A classic definition is that of Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. (61 Mass.) 53, 85 (1851): "The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." See Alpert, *What Towns Can Do by Local Law*, Handbook, 67, 71.

59. See Alpert, *Powers of Local Legislation*, New York State Office of Local Government, Municipal Law Seminar 1964 (hereafter referred to as 1964 Seminar) 2, 8; Fleischman, *Expanded Powers for Municipal Self-Government*, 1964 Seminar 5-6; Zimmerman, *Powers of the Legislature*, Handbook, 104, 111. Before the 1964 amendment, local laws passed under the authority of cities to regulate their property, affairs and government could supersede state laws which did not in terms and effect apply alike to all cities, whereas local laws passed under the police power grant could not supersede any act of the legislature. N.Y. Const. art. IX, § 12, 2d par.; N.Y. City Home Rule Law, § 11, Pars. 1, 2. This fact made the use of the police power clause undesirable in many situations. Under the 1964 amendment every local government has power "to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government." The police power is the tenth of the "following subjects." Almost identical language appears in the Municipal Home Rule Law which implements the new constitutional provision. N.Y. Municipal Home Rule Law § 10(ii) (a) (11). Thus, regulatory local laws under the police power may now supersede state laws which are not general even if the matter regulated is found, because of the state concern doctrine, not to be within the property, affairs or government of the local government. Limitations on this enlarged supersedeure power must be specifically imposed by the legislature. 2 N.Y.S. Office for Local Govt. Newsletter, Sept. 18, 1963, p. 3, col. 2.

or government as a limitation on special legislation. No such danger is apparent in this instance. In preparation for the adoption of the new amendment, the New York State Office for Local Government has been presenting a series of seminars, primarily for local government attorneys throughout the state. In 1963 and 1964, several papers were read by outstanding authorities on local government law, analyzing the scope of local law power which the cities have been recognized as enjoying. The papers given by those closely identified with city governments are critical of the constitutional structure, of the interpretation and application of the provisions by the courts, and of the imposition of legislative restrictions.<sup>60</sup> Yet a review of the material which they present suggests that, insofar as affirmative police power is concerned, there is a solid basis for effective local action. A survey made for the Corporation Counsel of New York City disclosed that since 1924, the City had enacted many hundreds of sweeping police power regulations, over 500 of which affected bulidings and multiple dwellings, over 100 affected licensing and regulation of an enormous variety of businesses and occupations, 60 related to fire prevention, over 50 to health and welfare, 40 to rent control, and nine dealt with discriminatory practices.<sup>61</sup> The statement incorporating these facts observes that "ordinances and local laws enacted in the exercise of the police power are rarely struck down on the ground that the subject matter is not within the scope of municipal police power. More often their invalidity is based on inconsistency with state laws."<sup>62</sup>

#### IV. JUDICIAL CONTROL OF LOCAL POLICE POWER

##### A. *Standards in General*

Before discussing the effect of the limitation based upon inconsistency with state laws, it may be desirable to consider more generally the basis for judicial

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60. Radlein, *The Police Power*, Handbook, 26-37; Richland, *Property, Affairs and Government*, Handbook, 15-25.

61. Radlein, *supra* note 60 at 36.

62. *Id.* at 28. One rather surprising instance of judicial liberality toward the exercise of municipal police power occurred in connection with municipal liability for torts. *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604, 161 A.L.R. 364 (1945) held that § 8 of the Court of Claims Act, waiving state immunity in tort, stripped the municipalities of their derivative immunity. Then the Court relaxed its control over sidewalk accident cases. *Loughran v. City of New York*, 298 N.Y. 320, 82 N.E.2d 136 (1948). And with few exceptions, the Court responded favorably to attempts to override the previous immunity. *But see Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342 (1945), reaffirming the immunity with respect to the maintenance of a water supply, one of the exceptions, Judge Desmond dissenting. These developments, coupled with the trend toward easing recovery in accident cases, created increasing strain for the cities. Some of them, including Schenectady, passed local laws providing that the city would not be liable for sidewalk and street injuries unless it had received written notice of the defect before the accident. This provision was upheld by the Appellate Division in the Third Department, *Fullerton v. City of Schenectady*, 285 App. Div. 545, 138 N.Y.S.2d 916 (3d Dep't 1955), and the Court of Appeals affirmed without opinion, 309 N.Y. 701, 128 N.E.2d 413, *reargument denied*, 309 N.Y. 855, 130 N.E.2d 909 (1955). This would seem to be a clear case of modifying the general substantive law of torts. The whole story is told in N.Y. First Interim Report of the Joint Legislative Comm. on Municipal Tort Liability, Leg. Doc. No. 42 (1955); Eighth Report of the Joint Legislative Comm. on Municipal Tort Liability, Leg. Doc. No. 13 (1962).

control over local legislation. Thus far we have been discussing only the fundamental question of whether or not power has been granted to the municipality, not the validity of the manner in which the power is exercised. On this latter point, the primary limitations are those constitutional restraints which would be operative even if the power were exercised directly by the state legislature, such as the due process and equal protection clauses of the fourteenth amendment to the United States Constitution and comparable provisions of the state constitution.<sup>63</sup> Insofar as the federal constitution is concerned, two of the outstanding doctrinal developments of the past thirty years have been the judicial deference to the legislative judgment where matters of economic regulation are involved, and a closer judicial scrutiny of the need for and costs of the regulation where first amendment freedoms are restrained.<sup>64</sup> Roughly speaking, the constitutional requirements are satisfied in the former class of cases if the objective is one within the legislative power of the state and if the means adopted are reasonably calculated to achieve that objective.<sup>65</sup> On the whole, the states generally and New York in particular have moved in the direction of the new Supreme Court standard, although not many have adopted and applied it completely.<sup>66</sup> In the latter class of cases, involving personal freedoms, the Supreme Court in particular and the state courts to some degree have insisted upon a more compelling showing of need for the restraint in order to achieve an objective of paramount importance. This approach involves a critical weighing of the conflicting interests, although it is generally thought

63. N.Y. Const. art. I, § 1: "No member of this state shall be . . . deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." § 11: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."

64. See Freund, *The Supreme Court of the United States*, ch. III, *Standards for Civil Liberties* (1961); Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 Nw. U.L. Rev. 1, 41-78 (1965); McCloskey, *Economic Due Process: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34; Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 Vand. L. Rev. 446 (1951).

65. "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Douglas, J. in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

66. See Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U.L. Rev. 13, 226 (1958); Paulsen, *The Persistence of Substantive Due Process In The States*, 34 Minn. L. Rev. 91 (1950); Comment, *Counterrevolution in State Constitutional Law*, 15 Stan. L. Rev. 309 (1963); Note, 53 Colum. L. Rev. 827 (1953). For a recent statement of the official New York doctrine, see Desmond, J. in *Defiance Milk Products Co. v. Du Mond*, 309 N.Y. 537, 540-41, 132 N.E.2d 829, 830 (1956):

Every legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions. . . . If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. . . . Questions as to wisdom, need or appropriateness are for the Legislature. . . . Courts strike down statutes only as a last resort, . . . and only when unconstitutionality is shown beyond a reasonable doubt.

A typical lower court statement of the same doctrine may be found in *Gail Turner Nurses Agency, Inc. v. New York*, 17 Misc. 2d 273, 274, 190 N.Y.S.2d 720, 723 (Sup. Ct. 1959). For an application of the same standard to the action of a local government, see *Samuels v. Town of Harrison*, 195 N.Y.S.2d 882, 885 (Sup. Ct. 1959).

not to authorize the substitution of a wholly independent judicial judgment as to the desirability of the legislation.<sup>67</sup>

Traditionally there has been an additional factor involved in judicial review of local legislation. It stems from the assumption that since the local government is exercising a power delegated by the state legislature, it must exercise that power "reasonably." Whether or not it was exercised reasonably became a factual issue to be tried by the court in which the local law was challenged, and in some instances by the jury.<sup>68</sup> Although not phrased in the same way, the standard approximates that which is now used by the Supreme Court when first amendment and personal freedoms are restrained. The operation of this standard of review is interlaced with a long-standing rule, generally referred to as Dillon's rule, that powers delegated to municipalities are to be narrowly construed.<sup>69</sup>

The doctrinal foundation for the rule that courts must weigh the reasonableness of local laws disappears when the power is conferred directly upon the municipality by the constitution; for the municipality is then exercising a part of the same legislative power broadly vested in the state legislature, and the same presumption as to the validity of its exercise should apply. In general, the New York courts have been reviewing local legislation in this manner in recent decades.<sup>70</sup> Similarly, the basis for the rule of strict construction of the scope of the granted power should fall when the power derives directly from the constitution. The New York courts have rarely invoked Dillon's rule in recent decades. Its inapplicability to New York is established beyond dispute by the new constitutional mandate to the courts to construe the granted powers liberally, and the proponents of the amendment have praised it as definitely ending any possibility of the courts' invoking Dillon's rule.<sup>71</sup>

### B. *Inconsistency and Preemption*

If the new constitutional provisions' definitive reversal of Dillon's rule is merely confirmatory of the previous position of the New York courts, and if

67. See Hyman & Newhouse, *supra* note 64, *passim*.

68. *Stubbe v. Adamson*, 220 N.Y. 459, 116 N.E. 372 (1917); *Safee v. City of Buffalo*, 204 App. Div. 561, 198 N.Y. Supp. 646 (4th Dep't 1923). As these cases indicate, in New York the stricter standard of review applied when the local legislation was enacted pursuant to general authority conferred by the legislature. When the local enactment was in accordance with specific authority of the legislature, it was reviewed under the same standards as enactments of the state legislature. See 1 Antieau, *Municipal Corporation Law* § 5.11 (1964).

69. "Any fair, reasonable, substantial doubt concerning the existence of power [of a municipal corporation] is resolved by the courts against the corporation, and the power is denied." 1 Dillon, *Municipal Corporations* § 237 (5th ed. 1911). See 1 Antieau, *Municipal Corporation Law* § 5.03 (1964).

70. See note 66 *supra*. Early in 1941, the Court of Appeals, sustaining a harsh New York City licensing limitation upon milk distributors, significantly cited *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) in declaring: "It is needless to labor the point, long settled, that we may declare such a regulation invalid only in the event that it is so lacking in reason for its promulgation that it is essentially arbitrary." *Stracquadanio v. Department of Health*, 285 N.Y. 93, 97, 32 N.E.2d 806, 808 (1941).

71. See *Fleischman*, *supra* note 59, at 4; *Richland*, *supra* note 60, at 24.

local legislation has been reviewed on the constitutional standards of validity, it may be asked why there has been any complaint about the courts insofar as the local exercise of police power is concerned. Primarily, the criticism is directed at an excessive willingness on the part of the courts to find that a local law is inconsistent with a state statute. Since 1924, the grant of affirmative power to cities has always been prefaced by the limitation: "not inconsistent with the constitution and laws of the state."<sup>72</sup> Richland charges that the courts "have been quick to find valid state laws which have the effect of preempting the field in which a locality has attempted to legislate."<sup>73</sup> Two recent cases are pointed to as demonstrating the unfavorable attitude of the courts. One, *Wholesale Laundry Board of Trade, Inc. v. City of New York*,<sup>74</sup> invalidated an attempt by the City to establish within the City a comprehensive minimum wage of \$1.50 an hour, on the ground that it conflicted with the state minimum wage law which established a basic minimum of \$1.25, with administrative procedures for increasing the rate industry by industry, and allowing variations by locality. The case appears to be a close one even on a restricted application of the notion of preemption. The Appellate Division<sup>75</sup> found both inconsistency and preemption. The latter point is the more persuasive, because the establishment of minimum wages requires the striking of a balance between assuring an adequate return for services rendered on the one hand, and, on the other, discouraging business because of excessively high labor costs. The state statute set a floor of \$1.25. It provided a particular form of administrative procedure operating under specified standards to raise the minimum above that level in the light of the countervailing considerations. Arguably it wanted the judgment as to the need for a higher minimum under the statutory standards to be struck by the administrative body acting under the procedures specified by the act. On the other hand, reasons advanced by the Appellate Division for its finding of inconsistency are not persuasive. The opinion assumed that the state statute, by prescribing a particular minimum, "permits" hiring at any rate above that minimum. This statement plays on an ambiguity in the meaning of "permit" which the dissenters in the Court of Appeals correctly noted. The reasoning of the Appellate Division leads logically to the doctrine that wherever the state regulates in an area it permits whatever it does not prohibit, and any additional local legislation is automatically barred as inconsistent. But state legislative action is in general equally consistent with the interpretation that it is merely imposing a minimum restraint; that under no circumstances shall conduct in the state fall below the level so specified, without any implication that in some parts of the state or under special circumstances higher standards may not appropriately be imposed. Indeed, in the face of constitutional home rule powers

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72. N.Y. Const. art. XIII, § 3 (1924); N.Y. Const. art. IX, § 12 (1938).

73. Richland, *supra* note 60, at 17, 21; see also Redmond, *Restrictions on Local Law Powers*, Handbook, 59, 60.

74. 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1962).

75. 17 A.D.2d 327, 234 N.Y.S.2d 862 (1st Dep't 1962).

for the municipalities, this is exactly what state-wide regulation should presumptively be taken to mean. As the Court of Appeals had said in the *Kress* case: "A municipality which is empowered to adopt health regulations may, in spite of general regulations by the state, adopt additional regulations or requirements where there is a real distinction between the city and other parts of the state."<sup>76</sup> This argument becomes even more compelling in the light of the new constitutional direction to construe municipal powers liberally. Under such a mandate, it would be appropriate for the courts to find inconsistency only where there was a clash of express commands or authorizations (the state saying "you may" and the municipality saying "you shall not," or the state saying "you shall not" and the municipality saying "you may.") There may, of course, be some situations in which the state does not expressly say "you may," but in which the structure of the controls, and the reasons for limiting their scope may unequivocally point in that direction. And similarly, it would be appropriate to find occupation of the field, even in the absence of inconsistency, only where the state legislature expressly declared that there was to be no local legislation on the same subject matter. The experience in California is persuasive that wide latitude may safely be given to municipal police power regulations.<sup>77</sup>

The 1940 decision of the Court of Appeals in the previously mentioned *Kress* case<sup>78</sup> presented a close question, whether regarded as one of inconsistency or preclusion. With one dissent, the Court held that where a manufacturer of frozen desserts was individually licensed by the Commissioner of Agriculture under state statute with respect to a basement establishment in New York City, the City might not refuse a license under a New York City regulation which flatly prohibited the manufacture of frozen desserts in cellars, with exceptions under certain conditions, but only as to cellars so used before July 11, 1933. The Court relied upon the rule mentioned above: "A municipality which is empowered to adopt health regulations may, in spite of general regulations adopted by the State, adopt additional regulations or requirements where there is a real distinction between the city and other parts of the State."<sup>79</sup> Under this rule, the majority found no basis for city action, since the sanitary condition of the premises was found to be the standard for regulation by both state and city, and the state had found the premises to be wholly sanitary, as the city conceded. Judge Finch in dissent, found no conflict, because the state commission's action gave no affirmative grant, but merely removed the negative restriction prescribed by the state.<sup>80</sup> He relied upon the absence of any indication in the statute of a purpose or need to preclude additional regulations by the localities primarily interested. This position is quite close to what we sug-

76. *S. H. Kress & Co. v. Department of Health*, 283 N.Y. 55, 27 N.E.2d 431 (1940).

77. Peppin, *Municipal Home Rule in California III*, 32 Calif. L. Rev. 341 (1944).

78. *S. H. Kress & Co. v. Department of Health*, 283 N.Y. 55, 27 N.E.2d 431 (1940).

79. *Id.* at 59, 27 N.E.2d at 432.

80. *Id.* at 60-62, 27 N.E.2d at 433.

gest above as the proper one under the new requirement that immunities and powers be liberally construed. But even on the premise of the majority, the result is questionable; for the special difficulties of enforcement which exist in New York City would seem to provide a reasonable basis for its not undertaking continued surveillance over a host of cellar frozen dessert establishments which may initially meet all sanitary requirements. The dissent's finding in the granting of the state license, not a conclusive authorization to operate, but rather merely a certification that the minimum requirements sought to be imposed throughout the state had been met, seems to be in accordance with the purpose of such a regulatory statute. Marginal cases will not be entirely avoidable; but if the courts steadily require a clear showing of inconsistency or occupation before striking down local legislation, municipal attorneys should be able to anticipate potential trouble spots and not feel constrained to counsel against local legislation merely because there is some state legislation in the field.

C. *State Policy—The Good Humor Case*

One case remains to be considered in appraising the grounds upon which the courts might invalidate local legislation. In 1941, the City of New York adopted a local law to prohibit itinerant selling on the streets of the City except for war veterans or their widows, blind persons, newspaper vendors, farmers selling produce raised on their farms within the City, and those licensed to sell in open air markets. The Committee of the City Council which presented the bill stated that its purpose was "to prevent unfair competition by itinerant peddlers with storekeepers who pay rent and various taxes, and it is in the interest of the property of the City and its inhabitants." Good Humor Corporation, the operator of a large fleet of refrigerated carts and trucks selling ice cream products on the streets, sought to enjoin enforcement of the ordinance. Special Term,<sup>81</sup> weighing the arguments urged by the City in support of the regulation in the light of the evidence presented at the trial, found them deficient, and concluded that the local law "was designed, not to achieve a constitutional purpose, but to protect shopkeepers against competition, an object which cannot be accomplished under the police power." Testimony had been offered at the trial to show that the policing problems relied upon by the City were solvable by other enforcement methods, and that the traffic complications did not exist in many parts of the City. The trial court concluded that the City had failed to show that less restrictive regulation might not remedy the evils which the City claimed to exist, and therefore enjoined enforcement of the local law.

The Appellate Division affirmed unanimously in a long opinion.<sup>82</sup> The court first dealt with the constitutional validity of the regulation under tradi-

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81. *Good Humor Corp. v. City of New York*, 33 N.Y.S.2d 905, 909 (Sup Ct. 1942).

82. *Good Humor Corp. v. City of New York*, 264 App. Div. 620, 36 N.Y.S.2d 85 (2d Dep't 1942).



tional due process standards, and concluded that the prohibition of a business could be justified only upon a showing that the evils legitimately sought to be corrected were beyond the reach of regulatory, as distinguished from prohibitory, measures. The reasoning of this portion of the opinion would have been equally relevant to a state statute, and it is not at all clear that the court would have reached a different result had such a statute been involved.

The court then went on to what it described as "the more fundamental ground that the city did not have the power to enact the law."<sup>83</sup> Reference was made to the police power grant in the General City Law,<sup>84</sup> which antedated the constitutional grant of home rule power to cities. It cited the 1922 case of *McAneny v. Board of Estimate*<sup>85</sup> to the effect that "a municipal corporation has no power except such as is given to it by the legislature," and concluded that the legislative grant of power to regulate business did not include the power to prohibit. The court then referred to the grant of power to each city, in the City Home Rule Law, to pass laws in relation to "the use of its streets." It indicated that under some conditions this power might justify prohibition of the use of the streets, but declared that the immediate question was "whether the prohibition sought to be enforced . . . is inconsistent with the Constitution or other State laws."<sup>86</sup> Answering the question, the court said: "It is our opinion that the public policy of the State, as declared in its statutes dealing with peddling, is contravened by . . ." the local law, citing Dillon to the effect that a municipal corporation cannot "adopt by-laws which infringe the spirit or are repugnant to the policy of the State as declared in its general legislation."<sup>87</sup>

It has been suggested that this case establishes a further doctrine of limitation on local legislation: that it may not conflict with "state policy."<sup>88</sup> No other authority for the doctrine is cited, and the constitutional developments in New York rebut its applicability. Even in the case at hand, the Court of Appeals, in affirming the injunction, did not rest upon that ground, but rather upon the ground that the local law was "unreasonable:"

An ordinance which prohibits a business so conducted [with careful attention to all applicable regulations] because others conduct a similar business in manner which creates conditions which the public should not be compelled to tolerate, is patently unreasonable, at least where it does not appear that the discrimination between the harmful and the harmless is impractical. . . .<sup>89</sup>

83. *Id.* at 624, 36 N.Y.S.2d at 90.

84. N.Y. Gen. City Law § 20(13) (N.Y. Sess. Laws 1913, ch. 247); "To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto. . . ."

85. 232 N.Y. 377, 390, 134 N.E. 187, 191 (1922).

86. *Good Humor Corp. v. City of New York*, 264 App. Div. 620, 625, 36 N.Y.S.2d 85, 91 (2d Dep't 1942).

87. *Ibid.* See 1 Antieau, Municipal Corporation Law § 5.20 (1964).

88. Richland, *supra* note 60, at 22.

89. *Good Humor Corp. v. City of New York*, 290 N.Y. 312, 319, 49 N.E.2d 153, 156 (1943).

The Court went on to examine the City's contentions as to the impracticability of enforcement, and found them unpersuasive. No doubt this conclusion was more easily reached in view of the fact that the committee sponsoring the legislation had stated as its purpose the protection of store owners from peddler competition, not the protection of public health or safety on the streets. It is notable, however, that despite this confusion in the justification for the local law, three judges of the Court of Appeals dissented from its holding that the local law was invalid. Judge Finch, in the dissenting opinion, reviewed the development of home rule in New York and, applying the accepted due process standard, concluded that it could not be said that there was no reasonable basis for the legislation.<sup>90</sup>

Under a constitutional grant of power, local legislation ought to be measured by the same standards. On principle, the argument for the dissenters would appear to be sound. In the absence of a legislative statement of purpose to protect shop owners from the competition of street peddlers, it is most likely that the enactment in question would have been sustained if adopted by the state legislature rather than by the city. Barring slow-moving, attention-distracting, crowd-collecting peddlers' trucks from the choked streets which characterize most of New York City obviously tends toward the alleviation of congestion, a proper legislative objective. And this is enough to sustain the legislation under the accepted New York test, as it is under the federal test.<sup>91</sup> Normally in regulatory cases the courts do not search for a different and possibly impermissible motive, even though the circumstances suggest pressure behind the legislation from a group seeking competitive advantage.<sup>92</sup> However, the courts might be disposed to hold that if the legislature states its purpose explicitly, and the stated purpose is an improper one, the legislation must fall even if the same result might have been attained in the pursuit of other purposes.<sup>93</sup> It would have been preferable to strike down the local law on these

90. *Id.* at 324, 49 N.E.2d at 157.

91. See *Defiance Milk Products Co. v. Du Mond*, 309 N.Y. 537, 132 N.E.2d 829 (1956); *People v. Railway Express Agency*, 188 Misc. 342, 67 N.Y.S.2d 732, *aff'd* 297 N.Y. 703, 77 N.E.2d 13 (1947); *Fifth Avenue Coach Co. v. City of New York*, 194 N.Y. 19, 86 N.E. 824, 21 L.R.A. (n.s.) 744 (1909). In the *Defiance Milk* case, Judge Desmond, writing the prevailing opinion invalidating the legislation, stated: "All plaintiff had to show was that no reasonable basis existed for an absolute ban against evaporated skimmed milk. Since no one has been able to discover any such basis, requisite proof of unconstitutionality was present." 309 N.Y. 537, 541-42, 132 N.E.2d 829, 831 (1956). It should be noted that Judge Desmond with Judge Fuld and Chief Judge Loughran, dissented from the *Railway Express* decision "... on the ground that this regulation of the Police Commissioner, as interpreted to forbid these unobjectionable advertisements on defendant's trucks, is so entirely unrelated to traffic control as to be arbitrary as a matter of law." As the last phrase indicates, this was an administrative action, not a legislative action either of the city or the state, and therefore might involve a different test.

92. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949).

93. *Cf. Allied Stores Inc. v. Bowers*, 358 U.S. 522, 530 (1959): "Having themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence." The justification for such invalidation might be that the legislature lacks power to attempt to achieve the unauthorized purpose, and that it might not have enacted the law if its attention had been directed only to legitimate purposes.

grounds. The Court's opinion suggests a more rigorous test for the validity of local regulation, as opposed to state, although under a constitutional grant of local power the same standard would seem to be appropriate to both. This should be especially clear under the new constitutional requirement that home rule powers be liberally construed, and the declaration that "effective local self-government" is one of the purposes "of the people of the state."

D. *Are Tighter Standards Needed?*

Liberal interpretation of home rule police power is not without its risks; abuse of local power is a possibility. As indicated above, the extremes of municipal corruption in the last half of the 19th century in New York City have been in the minds of those concerned with revising New York's allocation of power. The check sought has been the power of the legislature to intervene, despite the fact that improper legislative intervention in the affairs of municipalities has led to attempts to curtail special legislation.<sup>94</sup> Insofar as corruption may be an element in the picture, it has been found in the past at the state capitol as well as in the cities.<sup>95</sup> And in the absence of corruption, particular interests may find political recognition to be less hampered by effective opposition of adverse interests either at the state or at the local level, depending upon circumstances. Concern has recently been expressed that local government may have a greater tendency than state government to disregard vital interests, and that accordingly the judiciary must be looked to for closer surveillance of the former than the latter.

Professor Sandalow has recently presented a thoughtful statement of this position.<sup>96</sup> Addressing himself generally to recent proposals for a complete devolution of legislative power on municipalities,<sup>97</sup> he concludes that the American courts in general have not been unduly restrictive of municipal initiative, and that the new proposals may go too far in broadening municipal power and removing judicial participation in the curbing of abuses. He finds the danger of local abuses to lie primarily in two areas: the extraterritorial impact of local legislation; and the protection of basic values both as they affect residents of the locality and those outside.<sup>98</sup> Other commentators have recently pointed out

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94. See, e.g., Peppin, *Municipal Home Rule in California: I*, 30 Calif. L. Rev. 1, 9-15 (1941).

95. See Steffens, *The Shame of the Cities* (1904); Lincoln Steffens, *Autobiography* (1931); Grant, *Trends in Urban Government and Administration*, 30 Law & Contemp. Prob. 38, 39, 42-43, 53-55 (1965).

96. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643 (1964).

97. *Id.* at 686. He refers specifically to the plan of the American Municipal Association, 44 Nat'l Munic. Rev. 132-42 (1955). A similar proposal was made in New York, Temporary Comm'n on the Revision and Simplification of the Constitution, *First Steps Toward a Modern Constitution*, Legis. Doc. No. 58 (1959).

98. Sandalow, *supra* note 96, at 700, 708. See also the illuminating examination by Professor Sato of the efforts of the California courts to protect business within the state against the restrictive impact of local occupation taxes, in the light of the attempts of the Supreme Court to deal with similar problems at the interstate level under the commerce

## HOME RULE

that, particularly in the smaller communities, the legislature may be inadequately representative of the conflicting interests affected by local legislative decisions.<sup>99</sup> In terms of longer-range developments, this last aspect may be the less serious. The rapidly increasing concentration of the population in urban centers tends to assure enough diversity of interests to maintain an active political process of shifting coalitions which generally gives some weight to all affected interests. But disregard for interests beyond the community does remain a real danger. With respect both to this aspect and to the protection of the basic values of regulated groups, the use of constitutional limitations by the courts, due process in particular, fosters the development of standards unduly restrictive of state legislative action, at least in connection with the regulation of economic affairs.<sup>100</sup> Professor Sandalow suggests that courts should be empowered to review municipal legislative action in terms of whether or not power to achieve a given result had been delegated to the municipality by the legislature, and, possibly, whether or not a substantial doubt existed as to the constitutional validity of the legislation.<sup>101</sup>

Professor Sandalow recognizes that the retention of something like the reasonableness standard of review which prevailed before home rule may collide with the idea that scope must be allowed for varied experiments in different communities looking toward effective solution of the extraordinarily baffling problem of governing effectively our urban communities.<sup>102</sup> Some may feel that this restraint would be greater than he suggests and would seriously impair the devising and testing of novel approaches. The demand for more judicial control in this context brings to mind the conflict in the United States Supreme Court in the 1920's as to whether or not the Court should, under the due process clause, screen carefully all regulatory interferences with economic activity. Justice Brandeis' plea, in the *New State Ice* case,<sup>103</sup> for judicial restraint in the face of state experimentation with economic arrangements is not without pertinence to the present problems in connection with urban government.

If we have read correctly the history of home rule in New York, the issue has been settled in favor of judicial restraint and legislative surveillance. Insofar as police power is concerned, the new amendment climaxes a growth of seventy years with a direction from the people to the courts to let the mu-

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clause. Sato, *Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce*, 53 Calif. L. Rev. 801, 821, 827 (1965).

99. Mishkin, *A Critical Look at Zoning Law*, 10 Munic. Law Serv. Letter, p. 5 (Jan. 1960); Sandalow, *supra* note 96, at 710; Recent Case, 75 Harv. L. Rev. 423 (1961); Note, 78 Harv. L. Rev. 1596 (1965). It has been suggested, Richland, Handbook, p. 25, that the inclusion of the towns in the new grant of home rule power will give the cities a powerful ally in pressing for more freedom of regulatory action. But because of the aggravation of the representational problem in the smallest units of government the inclusion may in practice work the other way.

100. Sandalow, *supra* note 96, at 712.

101. *Id.* at 689, 718.

102. *Id.* at 718.

103. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

municipalities work out their own solutions to local problems unless the field is to be subjected to state-wide comprehensive regulation or unless the legislature sees fit either to bar local action or to intervene in a particular local issue. It must be granted that specific legislative intervention cannot be as readily invoked as judicial intervention, and that political cross-currents at the state and local levels may be as much involved as legislative appraisal of the merits of the problems. But it cannot yet be said, on the basis of clear evidence, that this approach is too dangerous to be given a trial. And there are other potential protections against serious abuse. The increasing population of the units of government in the metropolitan areas strengthens the viability of the political processes. The broadening of the judicial protection for personal freedoms in the last thirty years, essentially through the development of doctrines which allow closer judicial scrutiny of the justification for impairment of such freedoms,<sup>104</sup> allows some room for differential treatment of state and local action. Even more significantly, the coming of age of administrative law at the state level<sup>105</sup> provides a strong foundation for the extension of its protective procedural requirements to the important, and increasingly numerous, points at which the citizen confronts local government in an administrative setting. The courts can play a significant role in fostering this development. Under all of these circumstances, it would seem to be hard to justify judicial disregard of the constitutional command that the municipalities of New York State should be given broad scope substantively in devising legislative solutions for local problems.

The question may nevertheless arise as to whether or not the courts will accept a consistently restrained role as the new constitutional provisions begin to operate. Justice Breitel's recent Cardozo address reveals, with a frankness calling to mind the epoch-making lectures by Judge Cardozo, that courts are often more aware of the realities than the doctrines that they apply appear to suggest. He stated:

Thus, there are rubrics in the law which provide that certain administrative regulations, municipal ordinances, and statutes, each have equal status as law, and are entitled to equal recognition before the courts. Yet no one is surprised to find that administrative regulations receive an uninhibited judicial going-over, that municipal ordinances receive a somewhat intermediate critical treatment, and that legislative statutes receive the most respectful acceptance. Nor is anyone surprised that an ordinance or local law adopted [by] a metropolitan municipality does not receive quite the hypercritical examination of form,

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104. See material cited in note 64, *supra*.

105. See N.Y. Sess. Laws 1962, Res. S. 103, authorizing the Law Revision Commission to study the advisability of uniform administrative procedures for departments and agencies; New York Law Revision Comm'n, Preliminary Report Relating to Administrative Procedure, Leg. Doc. No. 65(A) (1963); Cooper, *State Administrative Law* (1965); Heady, *Administrative Procedure Legislation in the States* (1952); Benjamin, *A Lawyer's View of Administrative Procedure—the American Bar Association Program*, 26 *Law & Contemp. Prob.* 203 (1961); Bloomenthal, *The Revised Model State Administrative Act—Reform or Retrogression*, 1963 *Duke L.J.* 593.

effect and purpose as would an ordinance adopted by a village board, comparable home rule provisions in the statutes notwithstanding. If this may shock some, so be it. But the question is not whether this ought to be, but whether it is so.<sup>106</sup>

As long as courts apply standards rather than rules, the leeway for such differential treatment of different parties exists.<sup>107</sup> And under the New York standard of inconsistency with the constitution and general laws, some such leeway may be found by the New York courts even if they formally respect the constitutional grant of complete municipal police power. It would be better, we suggest, if greater leeway is sought, to invoke the equal protection clause of the state constitution, rather than to work with undisclosed factors under the consistency standard or to curtail the state's legislative power by excessive rigor in applying the due process clause. In his concurring opinion in the *Railway Express* case,<sup>108</sup> Mr. Justice Jackson some fifteen years ago urged this

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106. 20 Record of N.Y.C.B.A. 180, 206 (1965). Cf. Professor Davis's contention that a court's reaction to the quality of an administrative agency's performance determines whether it will substitute its judgment for that of the agency on the application of the law to the particular situation or will determine merely that the decision has a rational basis in law. 4 Davis, *Administrative Law*, § 30.08 (1958). Where a statute delegates power to an administrative agency under a very broad standard, the courts may allow the agency considerable freedom in the initial development of the standard, but thereafter hold the agency close to the criteria which it has itself formulated, at least in the absence of a compelling showing of justification for change. See Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Tentative ed. 1958) 162, 168-70; Jaffe & Nathanson, *Administrative Law, Cases and Materials*, 91-93 (1961). This approach, while assuring some judicial control, may necessitate legislative intervention if the agency later concludes that its first approach was not the best one. The problem of broad standards for administrative action at the local level may be acutely raised if, as seems likely, land use planning takes on a more flexible form than the traditional zoning regulations. See Symposium: *Planned Unit Development*, 114 U. Pa. L. Rev. 3-170 (1965), esp. Krasnowiecki, *Planned Unit Development*, 47, 64, 66-78; Mandelker, *Reflections*, 98, 105. But, as Professor Mandelker points out, large scale developments often run beyond municipal boundaries, requiring regional or state controls. This factor may overcome some of the hesitancy about granting broad administrative powers to local government agencies. And, while close judicial scrutiny of administrative policy decisions may be at variance with current trends in administrative law, there is no reason why particular statutes may not specifically mandate closer judicial control in particular areas. See N.Y. Const. art. IX, § 1(d), requiring the courts to determine whether a proposed annexation "is in the over-all public interest" when the governing board of one of the local governments involved does not grant its consent. Cf. Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 1020, 1056 (1955).

107. Presumably it is the essence of unneutral principles that they be applied differently because of differences in the nature of the parties which are not overtly or rationally related to the standard of decision which is formally controlling. See Stone, *Result-Oriented and Appellate Judgment*, *Perspectives of Law: Essays for Austin Wakeman Scott* 347 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

108. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111-13 (1949): While claims of denial of equal protection are frequently asserted, they are rarely sustained. But the Court frequently uses the due process clause to strike down measures taken by municipalities to deal with activities in their streets and public places which the local authorities consider as creating hazards, annoyances or discomforts to their inhabitants. . . . Even its [the due process clause's] provident use against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. . . . Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the

course in connection with the fourteenth amendment. His words had little, if any, impact on federal constitutional doctrine, but they appear to be particularly apt with respect to judicial control of local government action under the state constitution.

#### V. THE PROBLEM OF OVERLAPPING POLICE POWER

One new complication is introduced into the problem of police power regulation by the recent amendment to article IX: full power has been given, not only to cities, towns, and villages, but also to the counties in which they are located. This inclusion is further evidence of the fact that counties, not long ago thought to be an obsolescent governmental form, have been undergoing a vigorous revival.<sup>109</sup> In New York this has been the result of politically strong resistance to the spread of cities by annexation of surrounding territory and of a deliberate effort for several decades to strengthen the integrity and efficiency of local government outside cities. This development has not reached the point where the county is given primacy in the exercise of regulatory powers; rather it is simply one among equal municipalities in terms of power. How, then, is the potential, and inevitable, conflict arising from the territorial overlap of the counties and the other municipalities resolved? The constitution merely provides: "Except in the case of a transfer of functions under an alternative form of county government, a local government shall not have power to adopt local laws which impair the powers of any other local government."<sup>110</sup> Here the courts are given almost *carte blanche* to devise a standard governing the inter-municipal relationships. In the broadest sense of the phrase used, any regulation of a city or town would "impair" the police power of the county if it were held to take precedence over it. And the converse is even more plainly true. There is no supremacy clause here, as there is to establish the relationship between federal and state action; no general "inconsistency" clause to govern as between state and municipalities. Section X(ii)(a)(11) of the Municipal Home Rule Law, which implements the amendment, gives the complete police

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prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonably government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

What appears to be a case in point is *Kemo, Inc. v. City of Long Beach*, 47 Misc. 2d 185, 261 N.Y.S.2d 922 (Sup. Ct. 1965).

109. The point has been made often in recent years. See, for example, Dixon, *New Constitutional Forms for Metropolis: Reapportioned County Boards; Local Councils of Government*, 30 Law & Contemp. Prob. 57, 73 (1965).

110. N.Y. Const. art. IX, § 2(d).

power to counties as well as to the other municipalities. It then proceeds to specify that the general grant includes the power to regulate or license occupations or businesses. Two qualifications are appended to this specific statutory affirmance of the constitutional grant. Subparagraph (a) limits the exercise of police power by a town in regulation and licensing to the area outside of the villages in the town. Subparagraph (b), still referring to the regulation and licensing of occupations and businesses, provides: "The exercise of such power by a county shall relate only to the area thereof outside any city, village or area of any town outside the village or villages therein, during such time as such city, village or town is regulating or licensing the occupation or the business in question." This gives a certain primacy to the included municipalities, yet requires that the primacy be protected by affirmative action, either before or after the county acts. Does this represent a legislative interpretation of the meaning of "impairs" in the constitution? Or does it represent a legislative restriction on county action which would otherwise be paramount? Complete primacy of county legislation (*i.e.*, county legislation superseding or precluding city or town legislation) would seem to "impair" the power of the cities and towns. Hence the latter alternative does not seem to be the likely one. But what of the case where it was not self-evident that the town or city was regulating the same occupation which the county sought to regulate? Does the statutory language suggest a presumptive primacy to the county regulation, requiring a clear showing of conflicting city or town regulation to preclude the operation therein of the county regulation?

As counties in the metropolitan areas become more actively involved in metropolitan government, these questions will become increasingly troublesome. Consider zoning and land use planning in a metropolitan area. County regulations presumably could be effective except insofar as cities or towns had zoning laws. If a conflict developed, could the state legislature by special law applicable to the one county authorize the county zoning to override the city zoning law? Would a county request without a city request be sufficient to support such a special law? If not, would the courts sustain special legislation without local request, holding the matter to be one of state concern and therefore not the property, affairs or government of the county or city? In either event, pursuant to its constitutional power to restrict local laws outside of property, affairs or government, the state legislature could ban conflicting municipal zoning laws. Would this be an unconstitutional impairment of the powers of the city by a local law of the county? In order to avoid this possibility, would it be necessary for the legislature, instead of authorizing the county zoning law to override the city zoning law, to itself adopt the zoning plan? But this would seriously restrict the flexibility of the plan. Without attempting to develop solutions for these problems, it may be stated that the entire background points toward the courts taking a position which will leave the door open for legislative solutions at the state level.



It is hoped that many of these difficulties of intrastate federalism may be avoided by increasing use of the newly confirmed power of the municipalities to engage in cooperative action. Section I(c) of the amendment, in the broadest possible terms, authorizes municipalities, "as authorized by the legislature, to provide cooperatively for any facility, service, activity or undertaking which each participating local government has the power to provide separately." Critics of the amendment have asserted that this adds nothing to existing powers, because, since 1960, every municipality has had power under article 5-G of the General Municipal Law,<sup>111</sup> to enter into agreements for the performance among themselves of a "joint service," which is there defined to mean "joint provision of any municipal facility, service, activity, project or undertaking or the joint performance of any function or power which each of the municipal corporations or districts has the power . . . to provide, perform or exercise separately." But the amendment strengthens that power in two ways. First, it gives an affirmative, express constitutional basis for such cooperation. Second, it expands enormously the possible scope of cooperative action in metropolitan areas by giving to counties and towns for the first time the full range of local government power to provide services and facilities.

## VI. TAXING POWERS AND HOME RULE

The discussion thus far has dealt generally with restraints on special legislative interference with municipalities and with municipal powers. It has not dealt at all with two of the most fundamental aspects of power: the levying of

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111. N.Y. Munic. Law §§ 119-m-o, as amended. Grad, *The New York Home Rule Amendment—A Bill of Rights for Local Government?*, 14 *Local Govt. Law Service Letter* p. 6 (June 1964). Professor Grad erroneously refers to Art. 14-G, which deals with Interlocal Agreements with Governmental Units of Other States. Professor Grad also states (p. 9): "The gain for intergovernmental cooperation is a spurious one, for even the limited constitutional grant of power to local governments to engage in intergovernmental cooperation was promptly revoked by the statute of local governments." The reference is to § 11 of the Statute of Local Governments which "excludes from the scope of the grants of powers to local governments in this statute . . . 6. Any law authorizing the voluntary exercise of a power by a local government in cooperation with another local government or governmental agency." Sec. 11 is far from clear. Its obscurity is especially unfortunate in that it is one of the major enactments implementing a constitutional amendment which was praised for bringing badly needed simplification to the organic documents in this field. Nevertheless, I believe that it must be read, not as cancelling any grant of powers made in the constitution or other laws, but merely as removing from the scope of the specially protected grants in the Statute of Local Governments (withdrawal of any of them requires passage by two sessions with the approval of the governor) any law authorizing cooperation. In other words, I take the provision to mean that if any specific cooperative action is authorized in the Statute of Local Governments the authorization may be withdrawn by a single enactment. Sec. 1(c) of art. IX of the Constitution does not make the power to cooperate self-executing, but grants it "as authorized by act of the legislature." This authorization, as previously given in the most general terms by art. 5-G of the General Municipal Law, remains in effect, now strengthened by two things as stated in the text: (1) explicit constitutional authorization; (2) full local law power in the towns and counties which did not previously exist.

It remains to be demonstrated that the much vaunted Statute of Local Governments will have any importance for local powers. Thus far it is nothing more than a series of safeguards against its possible future operation in restricting the withdrawal of powers which might be granted under it.

taxes and the incurring of debt. That it is possible to allow home rule cities a broad degree of freedom in taxation is demonstrated by the experience in California and Ohio, where the result was achieved largely by favorable judicial interpretation of indeterminate constitutional provisions,<sup>112</sup> and in Pennsylvania, where legislation conferred upon municipalities the power to tax almost everything not subject to state tax.<sup>113</sup> The situation in New York is far different. Municipalities may levy only such taxes as the legislature authorizes and under such restrictions as the legislature may impose. The power to withhold taxing authority gives the legislature an irresistible weapon with which to exact municipal compliance with other legislative demands. And these powers have been vigorously used against New York City. Their use in 1953, in order to force the city to yield control of its transit system has been characterized by Mr. Richland as demonstrating "the utter failure of a century of agitation for constitutional local self-government"; and as giving "the *coup de grace* to constitutional city home rule."<sup>114</sup> The short of the story which he tells<sup>115</sup> is that, in order to get relief from a desperate fiscal situation, the City was required to relinquish to a newly created transit authority control of its municipally developed and owned transit system, the indebtedness for which constituted more than one-third of the city's total funded debt.

The facts cannot be contested. Nor can it be denied that the operation and development of the transit system was intimately related to the growth of the city as well as its fiscal well-being. As Richland says:

The principal industrial, economic and mercantile activities of New York City are centered largely in Manhattan Island and some portions of Brooklyn. Transportation to and from these places is of vital importance. Of even greater importance is the fact that the construction and extension of transit facilities determines, to a very great extent, whether and how the city shall grow or decline. The kind, number and location of transit facilities have always been a primary determinant of the geographic and economic pattern of the city's life. Furthermore, the cost of transit construction and operation bears heavily upon all of the other activities carried on by the city: to the extent that it must extend and improve its transit facilities, to just such an extent must the City cut down the construction of schools, hospitals and other major undertakings. Undoubtedly, control of the extension or contraction of the New York City transit system, its operation, its management and the very rates of fare charged are of the utmost concern to the City.<sup>116</sup>

Certainly responsible home rule government for New York City is impossible without control over the transit system. And, in less dramatic fashion, lack of

<sup>112</sup> 112. Cohn, *Municipal Revenue Powers in the Context of Home Rule*, 51 Nw. U.L. Rev. 2 (1956).

<sup>113</sup> 113. *Id.* at 38.

<sup>114</sup> 114. Richland, *Constitutional City Home Rule in New York: II*, 55 Colum. L. Rev. 598, 610, 620 (1955).

<sup>115</sup> 115. *Id.* at 610-20.

<sup>116</sup> 116. *Id.* at 616-17.

fiscal power prevents the full exercise of responsibility by any municipality, although the problem is not acute for those which are operating well within the limits of constitutional or legislative restrictions on their real estate taxes and debt.

Yet, as Richland observes, "the result in the *Salzman* case<sup>117</sup> is a logical development of the case law and legislative practice which had evolved over the years."<sup>118</sup> Article VIII, section 9 of the constitution of 1846 provided: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations." That language was retained in all successive constitutions through that of 1938.<sup>119</sup> And in none of the home rule amendments was there the slightest suggestion that power over taxes was being conferred upon cities or counties by the constitution.

Whatever the merits of the issue of municipal control over taxes and debt, it can hardly be said that the courts are at fault for denying such power to the municipalities of New York State. While the latest amendment does not carry forward the century-old direction to the legislature to restrict the power of taxation and borrowing, the affirmative grants are carefully phrased to rebut any possibility of inclusion by implication.<sup>120</sup> The issue has been and remains a political one in the sense that the state legislative process determines the manner in which the resources of the state are to be tapped and allocated as between the state and the municipalities. Articles VII and VIII of the constitution are crowded with provisions, adopted from time to time over more than a century, designed to prevent the recurrence of experienced forms of fiscal irresponsibility and corruption at the state as well as at the local levels.

The latest recommendations for the modernization of article VIII would retain in substance the constitutional provisions which set a limit on the amount of taxes and debt, measured as a percentage of the full value of the real property in the municipality.<sup>121</sup> The inadequacy of the real property tax to meet the governmental costs of large cities is now commonplace. The entire state, now more than ever, has a vital stake in the fiscal condition of the cities. It has been esti-

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117. *Salzman v. Impellitteri*, 305 N.Y. 414, 113 N.E.2d 543 (1953).

118. Richland, *supra* note 114, at 618.

119. N.Y. Const. art. IX, § 9 (1938).

120. N.Y. Const. art. IX, § 2(c) reads that every local government shall have power to adopt local laws relating to "(8) The levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature."

121. New York Temporary Comm'n on Revision and Simplification of the Constitution; Simplifying a Complex Constitution, Leg. Doc. No. 14 (1961). Some experts concerned with urban fiscal problems believe that "Local governments should be given much wider control over their own taxing and borrowing powers than now prevail in most states. Most of us think all state limitations should be abolished. . . ." *Are Property Taxes Obsolete?* 3 *Nation's Cities* 17, 28 (March 1965). This statement relates to debt and tax limitations on the real property tax.

mated that in 1964 state aid represented more than 50 per cent of state government revenues and expenses and more than 20 per cent of local revenues and expenditures.<sup>122</sup> That the well-being of the state as a whole is largely dependent upon the economic contribution of the cities is just as evident, if less frequently mentioned. But calculations of benefit and cost are difficult to make even as between the central cities and suburbs of metropolitan areas.<sup>123</sup> Formulae for the allocation of state financial assistance among the municipalities regularly provoke the charge that towns are favored at the expense of the large cities, and particularly New York City.<sup>124</sup> The merits of these disagreements are not easy to appraise.<sup>125</sup> Yet the strains are almost certain to increase, rather than to lessen. City real estate tax bases are likely to continue to shrink and costs of city services are likely to rise steadily in the effort to cope with the enormously difficult social problems which confront the cities. To some observers, like Moody's Bond Survey, this appears to reflect a deficiency of fiscal responsibility. In reducing New York City's credit rating, Moody's declared: "There is increasing evidence that over the years the city government has tended to succumb to the pressure of special interest and minority groups thus permitting spending to get out of hand."<sup>126</sup> Others believe that the city's fiscal efforts and resources are wholly inadequate to cope with one of the major social problems of our day.

The resolution of these disagreements cannot be found by the courts in the application of the historical or current standards for constitutional home rule. Perhaps the constitutional convention to be held in the spring of 1967 will grapple with the tough problem of establishing constitutional principles for state-local fiscal relations, principles which will replace or at least guide the traditional annual battle between the governor, the legislature and the cities, especially New York City, about the provision of funds and the grant of means to raise them locally. But whatever fiscal solutions do evolve must be applied by municipalities which have adequate governmental structures and powers. Viewed against the legal developments of the past twenty-five years, the new home rule article of the constitution, it is submitted, brings us appreciably closer to achieving that structure and those powers.

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122. New York, First Report of the Temporary State Comm'n on Per Capita Aid, Leg. Doc. No. 9, p. 55, 61 (1963).

123. Advisory Commission on Intergovernmental Relations, Metropolitan Social and Economic Disparities: Implications for Intergovernmental Relations in Central Cities and Suburbs, A Commission Report, p. 56-57 and *passim* (1965).

124. New York, Second Report of the Temporary State Comm'n on Per Capita Aid, Leg. Doc. No. 9, p. 17 (1964).

125. See Swanson, *An Analysis of the Fiscal Problems of Large City School Systems*, 1 Urban Education 148, 162 (1965), concluding that state aid for education is biased against the big city school district. For a more complex analysis see the A.C.I.R. report, *supra* note 123. See also Davies, *Financing Urban Functions and Services*, 30 L. & Contemp. Prob. 127, 138-39, 141 (1965); Schueler, *Education in the Modern Urban Setting*, *id.* at 162. See also, New York Joint Legislative Comm. on School Financing, Final Report 152, 182, 184-85, Leg. Doc. No. 11 (1963); Supplementary Statement 158, 160.

126. N.Y. Times, July 19, 1965, p. 1 col. 8.